ARBITRAL AWARD

(BAT 1634/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Ms. Kyara Chantal Linskens

- Claimant -

represented by Mr. Sébastien Ledure & Mr. Wouter Janssens, attorneys at law

vs.

Magnolia Basket Campobasso, S.r.l.
Via L. Pirandello 43
86100 Campobasso, Italy

- Respondent -

represented by Mr. Gianni Spina, attorney at law

1. The Parties

1.1 The Claimant

1. Miss Kyara Chantal Linskens (also referred to as “the Player”) is a Belgian professional basketball player.

1.2 The Respondent

2. Magnolia Basket Campobasso, S.r.l. (also referred to as “the Club”, and together with the Claimant, “the Parties”) is a professional basketball club competing in the Italian female basketball first division.

2. The Arbitrator

3. On 16 December 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. The relevant facts and allegations presented in the Parties’ written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

5. Although the Arbitrator has considered all the facts, allegations and evidence submitted

by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Agreement

6. On 16 July 2020, the Player and the Club entered into an agreement, executed in the English language, whereby the latter engaged the Player for the season 2020-2021 (the "Agreement").

7. According to Article I of the Agreement, parapragh one:

> *"The Club hires the Player as basketball player, for the season 2020-2021".*

8. Article II of the Agreement provides for "*the obligations of the Club*", as follows:

> *"The Club will pay to the Player a net salary (after taxes) -or reimbursements- of 62,000 Euro for the season 2020-2021, to be paid according to the following payment schedule:*
>
> *September 30th, 2020 - 7,750 Euro*
>
> *October 30th, 2020 - 7,750 Euro*
>
> *November 30th, 2020 - 7,750 Euro*
>
> *December 30th, 2020 - 7,750 Euro*
>
> *January 30th, 2021 - 7,750 Euro*
>
> *February 28th, 2021 - 7,750 Euro*
>
> *March 30th, 2021 - 7,750 Euro*
>
> *April 30th, 2021 or, however, within 3 days after the last official game - 7,750 Euro*
>
> […]
>
> *The sums are net, and the Player has the right to receive a certification of the payment of taxes made by the Club in Italy on the amounts (U1 form). Under no circumstances shall the Player be obligated to pay any taxes in Italy on her salary.*

It is understood that the Club is paying in Euros and wiring the sums to Belgium. The Club also agrees to pay for any transfer fees that should be necessary.

2. The Club undertakes to guarantee to the Player a high-level medical and dentistry assistance, for every kind of exams, operations or therapies that could be necessary because of the sport activity.

3. The Club agrees that this agreement is no-cut guaranteed agreement and that the Club shall not have right to suspend or release the Player in the event that the Player does not exibit [sic] *skill or competitive ability, or in the event that an injury shall befall the Player. The Club shall continue to pay the Player her guaranteed salary payment for the full term of this Agreement at the times and amounts as specified above"*

9. Article 1 of the Addendum to the Agreement executed simultaneously with the Agreement complements the previous article as follows:

"1. In addition to what is agreed in the point II of the contract… the Club will pay or refund to the player the following benefits and reimbursements:

[…]

d) Without any delay, the Player will benefit of full and complete social security, medical and dental insurance coverage except estetic [sic] *(or however related with the agonistic activity) dental expenses.* […]*"*

10. Article IV of the Agreement reads as follows:

*"**THE PLAYER'S OBLIGATIONS**:*

1. As a professional basketball player for the Club, the Player will:

a) Behave in a manner compatible with the practice of sport at a high level of competition.

b) Participate in a serious and sportive manner in all practices, games and other activities scheduled by the Club.

c) Respect the coach's and the Club's Board of Director's instructions.

d) Respect the indications of the medical staff of the Club.

e) Respect the behaviour rules of the Club."

11. According to Article V of the Agreement:

> "***BREACH OR PREMATURE ENDING OF THE CONTRACT***.
>
> *1. Under no circumstances other than serious professional misconduct (if Player does not comply with rules and regulations of the Italian League Federation, fundamental team regulations, FIBA regulations and during testing and doping control) to be notified to the Player (and her agent) by registered mail within 48 hours, the Club can ask the termination of the contract. A copy of the team regulations (in English language) must be given to the Player and transmitted to her Fiba agent within 5 days from the Player's arrival to Campobasso for the beginning of the season 2020-2021. The agent has the right to read it and approve or to ask modifications.* […]"

3.1.2 Factual background of the dispute

12. According to Respondent's allegations, within 5 days of the Player's arrival in Campobasso, the Club delivered copies of its Disciplinary Code to both the Player and Stefano Luigini, the Player's agent (the "Agent").[1]

13. On 15 October 2020, Gianni Spina, the Club's Sports Director and counsel, who represents the Club in this arbitration, sent an email to the Agent attaching what appears to be a pdf copy of the Club's Disciplinary Code.[2] The email reads:

> *"Dear Stefano,*
>
> *I send you in attachment the disciplinary code prepared by the company both in Italian and English language that will be submitted to the attention of the Athletes* [sic] *who will sign it. I remain available for any eventuality.*
>
> *My best regards, Gianni"* (free translation by Respondent)

[1] Rejoinder, p. 3.

[2] Answer, Exhibits 4 and 5.

14. The Agent replied by email:[3]

> *"Thank you very much, Gianni.*
>
> *Received,*
>
> *Stefano"* (Free translation by Respondent)

15. On 18 October 2020, during a league game, the Player suffered an injury to her knee.[4]

16. On 21 October 2020, Claimant underwent an MRI-scan in Campobasso, under the supervision of Dr. Marcello Zappia.[5]

17. On 22 October 2020, after consultation with Dr. Raffaelle Cortina, Claimant was diagnosed with a broken meniscus:[6]

> *"Broken ME knee dx. Meniscal suture surgery with prognosis of 3-4 months is recommended. If selective meniscectomy is opted, the time taken to resume competitive activity would be 1-2 months"*

18. Both appointments (for the MRI and for the consultation with Dr. Cortina) were arranged by the Club.

19. A few hours later the same day, Claimant sent to the team's coach (the "Coach"), by WhatsApp, three email addresses that seem to be the contact details of the medical staff

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[3] Answer, Exhibit 5B.

[4] RfA, Exhibit 3.

[5] RfA, Exhibit 4; Answer, Exhibit 6.

[6] Answer, Exhibit 7.

of the Belgian National team.[7]

20. On 23 October 2020, the Claimant asked the Coach if they could send the results of the MRI-scan -in particular, the scan photos- to the medical staff of the Belgian National team. The coach replied, "*ok ok*" and asked for their telephone number.[8]

21. That same day, the Agent sent an email to the Coach and to Mr. Spina. In his email, Mr. Luigini stated:[9]

> *"Hello Mimmo and hello Gianni,*
>
> *In order to know what decision to take, Kyara would like to consult also the doctors of the Belgian National team. Can you authorize me to organize the girl travel (obviously without any expense or organization burden for you)?"* (Free translation by Respondent)

22. There is no evidence on the record of any reply by the Coach, by Mr. Spina or by any other member of the Club.

23. On 27 October 2020, the Agent requested the local health authority in Campobasso, via email, to issue the so-called S1 form, in order to extend the Player's insurance coverage to the Belgian Health system:[10]

> *"The athlete has suffered an injury and needs to be operated on in her country. To this end, the Belgian Health Authority requests the issue of this form to allow coverage of the intervention."* (free translation by Claimant)

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[7] RfA, Exhibit 6.

[8] *Ibid*.

[9] Answer, Exhibit 8.

[10] RfA, Exhibit 7.

24. The Agent immediately forwarded such email to Mr. Spina, the Player and her father, among other persons[11] and a few minutes later, in a separate email addressed to the same persons, the Agent wrote:[12]

> *"Good evening everybody, this the registered official email that I have sent to Azienda Sanitaria del Molise to have the model S1 for Kyara. I have tried to call them not less than 20 times. They very often did not answer at all. And, when they answered, they connected me to an office where nobody answered. Public employers are not famous to work in normal conditions... You can imagine now that most of the offices are managed by home in smart-working. In addition, the Azienda Sanitaria is under big stress just because they must manage the emergency of Covid. So, honestly, I believe that their answer will be very very slow. Maybe I will have to write them again several times to have an answer (I will do that, and copy to you). My suggest is not to wait them for the moment, and to organize the travel to let Kyara to be visited in Belgium."*

25. There is no evidence on the record of any reply by Mr. Spina or by any other representative of the Club.

26. On 28 October 2020, the Claimant received an email from the medical staff of the Belgian national basketball team stating that, given the situation created in Belgian hospitals by the Covid-19 crisis, Dr. Declercq -the surgeon the Player had chosen to get a second opinion from- had suggested to bring the Player's examination forward from 2 November 2020 to 30 October 2020, and potentially to perform the appropriate surgery on the same day. The email added: "*the option suggested by the Italian doctors to remove the meniscus is not optimal. Evidently this is all subject to any further elements that could become clear during the surgery*" (Free translation by Claimant).[13]

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[11] RfA, Exhibit 7.

[12] Answer, Exhibit 9.

[13] RfA, Exhibit 8.

27. Later that day, the Player wrote to the Coach on WhatsApp, asking if he could arrange her transportation to the airport for her flight to Belgium the following day. The conversation was as follows:[14]

> "*[28.10.2020 22:05:00] Claimant: Hi Coach, I will have already flight tomorrow at 12h45, can somebody take me please?*
>
> *[28.10.2020 22:05:00] Claimant: Because they want to do surgery on Friday*
>
> *[28.10.2020 22:12:00] Respondent: Hello Kyara but what intervention do you do? We know nothing …*
>
> *[28.10.2020 22:28:00] Claimant: Do you mean about the surgery? I want to fix the meniscus and not remove it. But first I need to visit the doctor on Friday*
>
> *[28.10.2020 22:29:00] Claimant: The national team called me tonight that they already want to do surgery on Friday because in Belgium they will close all hospitals next week so it will not be possible to do the surgery next week*
>
> *[28.10.2020 23:50:00] Respondent: Tomorrow 9*
>
> *[28.10.2020 23:50:00] Respondent: Good night"* (Free translation by Claimant)

28. On 29 October 2020, the Agent sent an email to Mr. Spina, stating the following:[15]

> *"Dear Gianni,*
>
> *As anticipated by telephone, Kyara is requesting authorization from your company to be operated on tomorrow morning, October 30, 2020, at 8 a.m. by Prof. DeClercq, with the types of surgery that the surgeon deems appropriate based on objective clinical evaluation.*
>
> *I look forward to your feedback*
>
> *Stefano"* (Free translation by Claimant)

[14] RfA, Exhibits 9 and 10.

[15] RfA, Exhibit 11.

29. Mr. Spina replied by email later that same day:[16]

> *"Dear Stefano,*
>
> *I immediately heard from the Company's governing bodies to inform them of your communication where Kyara would require the Company's authorization to operate tomorrow morning. Frankly, this news leaves us astonished as well as perplexed. The Company takes note of the news but cannot assess any authorization because it does not know at this time the contents of the intervention and/or what type of intervention the athlete has decided independently to perform, as well as we do not know who is the medical team that has always autonomously chosen the athlete. We are happy if the athlete feels serene, however, the behavior integrates the extremes of a serious fault because the Club will not be able to decide anything about either rehabilitation time and / or any causes or causes that could intervene during both the intervention and post-operative. Understand well that this also affects the planning of the Club with regard to both the roaster and the possibility that it is thus denied to be able to make an assessment about the future in terms of budget and in terms of future prospects, with an immediate effect of total paralysis with regard to all the company choices that result from this. Surely the contractual effects arising from the conduct of the athlete negatively affect the entire contractual synallagma. The measure of this incidence certainly creates a contractual imbalance that leads to a clear resolution of the synallagma itself. The same contractual rule must be integrated with the company regulations that are clear on this point.*
>
> […]*"*

30. On 30 October 2020, Claimant underwent surgery in Belgium with Dr. Declercq, the operation performed being "*an arthroscopy of the right knee*".[17]

31. On 1 November 2020, the Agent informed Mr. Spina, by email, about the result of the operation:[18]

> *"Good morning Gianni,*
>
> *I receive and forward the report of the Kyara operation performed by Prof. Declercq.*

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[16] RfA, Exhibit 12.

[17] RfA, Exhibit 13.

[18] RfA, Exhibit 14.

I am of course available for any additional information and needs.

Thanks Stefano"

32. On 6 and 10 November 2020, Mr. Spina sent two versions (in Italian and in English) of the same letter to Claimant:[19]

"Dear Stefano,

We received the medical report issued by the team led by Prof. Declercq, who performed the surgery on Kyara.

I would still like to point out that the company was not aware of the surgery carried out, as it had only authorized a visit, in accordance with the contractual provisions, in order to obtain a further opinion over the athlete's clinical situation.

We learned, today, that the athlete will also has to respect a period of about 4 months of rehabilitation, in addition, the Company has submitted the report to the examination of its medical team, which has informed itself that the time for rehabilitation could be even worse and with reasonable probability exceed 4 months.

At this point, anybody could not see how the conduct of the athlete, who has acted arbitrarily and without authorizations in open violation of the contractual provisions, integrate the details of " gross negligence".

This kind of behavior has a negative impact on several aspects: at first, certainly resulting from the fact that the Company has not been able and / or has been taken away the power to agree with the player the kind of intervention and the related recovery time, it is understandable how this decision directly affects the organizational time of the entire team and the management of its own, with total paralysis in relation to all the company choices that result from this.

Secondly, the Club's paralysis, in order to decide about it, has negatively affected its own entire economic planning, being, among other things, Kyara the most paid athlete of the roaster, as well as a further reflection on the image of the team, having the athlete, with her arbitrary conduct, provided a bad example and created a dangerous precedent of behavior, that goes beyond the sporting and / or disciplinary rules, also in violation of all regulatory and / or corporate rules signed by the athletes.

Surely, the athlete's conduct, integrates the extremes of a gross negligence whose effects negatively affect the entire contractual "synallagma" creating an imbalance opening the

[19] RfA, Exhibits 15 and 16.

door to a contractual termination with immediate effect, given the serious breach solely attributable to Kyara 's conduct.

These are the will of the Company expressed through me, but, as you know, given the good relations and fairness that have always distinguished us, I am the harbinger to intercept the athlete will and intentions, evaluating the contents in a considered way.

Unfortunately, the contractual effects shall take effect immediately, but I would like to underline, that any solution and/or position that should be represented by you and your own assistant, will be carefully evaluated by the Company. […]" (Free translation by Claimant)

33. The Agent replied by email on 10 November 2020:[20]

"Dear Gianni,

With reference to your letter of 09.11.2020, in relation to the position of Kyara Linskens, I report that the girl rejects in full the objections set out therein, as the operation carried out is considered necessary because of the injury occurred.

The girl emphasizes that it was her right to operate with a surgeon of her trust, without additional burden for the Company. And how the short and even sudden timing of the proposed operation did not allow, also because of the world pandemic situation, the possibility to postpone the decision.

On the contrary, the very tight timescale of the intervention is - on the contrary - an advantage also for the Society, which will see the functional recovery period of the athlete as limited as possible.

In the absence of a contractual termination on your part, which - to date has not been notified to the athlete - Kyara therefore considers itself, to all intents and purposes, an athlete bound to the Company, and is not interested in a contractual settlement agreement." (Free translation by Claimant).

34. On 13 November 2020, Mr Spina "in the name and on behalf" of Respondent, sent a letter by registered mail, dated 11 November 2020, to the Claimant, by means of which

[20] RfA, Exhibit 17.

the Club unilaterally terminated the Agreement (the "Termination Notice"):[21]

> *"…**NOTICE** the contract termination, with immediate effect, between Magnolia Basketball Campobasso Company S.r.l. and the athlete Linskens Kyara Chantal (F.C LNSKRC96S53Z103C), born in Brugge, Belgium, on 13.11.1996, pursuant to and for the effects of art. V of the 16th July 2020 contract, according to which "Under no circumstances except from a serious professional misconduct (if the player does not comply with the rules of the Italian Federation, Fiba rules, basic rules of the club or anti-doping regulations) to be notified to the player (and its agent) by registered letter within 48 hours, the Club may request the contract termination".*
>
> *In the present case, the athlete's conduct integrates the extremes of a serious professional misconduct that legitimizes the sport contract termination request, with immediate effect.*
>
> *In particular, the Club was not aware of the intervention carried out by the player, because the athlete herself just had authorized a visit, in accordance with the contractual provisions, in order to obtain a further opinion on her own clinical situation.*
>
> *In fact, the Club learned, only after the post-operative report evaluation, made by its medical team, that the athlete will also has to respect a period of about 4 months of rehabilitation. The Company's medical team, after evaluating the report, informed the Company's administrative that the rehabilitation time could be even worse and, with reasonable probability, exceed 4 months.*
>
> *At this point, there is no doubt about the athlete's conduct, who acted arbitrarily and without authorizations, in a situation of open violation of the contractual provisions, integrate the extremes of "gross negligence and / or serious professional misconduct". This behavior has a negative impact on several aspects: at first, certainly resulting from the fact that the Company could not and / or has been taken away the power to agree with the player the medical intervention type and the related recovery time, it is understandable how such a decision, directly affects the organizational time of the entire team and its own management, with total paralysis in relation to all the Company choices, that result from that situation.*
>
> *Secondly, the club impossibility to decide, has negatively affected the entire Club's economic planning, being, among other things, Kyara, the roaster's most paid athlete, as well as a further reflection on the team image, having the player with her arbitrary behavior, provided a bad example and created a dangerous "history case", that goes beyond the sporting and / or disciplinary rules, also in violation of all regulatory and / or corporate rules, signed by the athletes.*
>
> *The athlete's conduct, integrates, in fact, a serious fault extremes* [sic]*, whose effects negatively affect the entire contractual synallagma, creating an imbalance that lead directly*

[21] RfA, Exhibit 18.

to a contractual termination with immediate effect, given the serious default solely attributable to the Kyara's conduct."

35. The letter was received by Claimant at her Belgian address on 19 November 2020.[22]

36. According to Claimant's allegation, from her total salary due under the Agreement (EUR 62.000), Respondent had only disbursed the amount of EUR 15.500 at the date of the Termination Notice[23] and it therefore owes the Player EUR 4,900 net as overdue salary for the period in which the Agreement was in force, plus EUR 41,600 as compensation for the unilateral termination. Additionally, the Player claims that the Respondent did not reimburse her medical expenses in the amount of EUR 2,975.73.[24]

3.2 The Proceedings before the BAT

37. On 25 November 2020, the Claimant filed a Request for Arbitration, in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 1,500 on 26 November 2020.

38. On 17 December 2020, the BAT informed the parties that Mr. Clifford J. Hendel had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant (Ms Kyara Chantal Linskens) EUR 3,000.00
Respondent (Magnolia Basket Campobasso) EUR 3,000.00"

39. On 28 December 2020, Claimant's counsel informed the BAT that the Parties were

[22] RfA, Exhibit 19.

[23] See RfA, Exhibit 20.

[24] Reply, Exhibits 23, 24, 25.

discussing the possibility of an amicable solution and requested the Arbitrator, on behalf of both Parties, an extension of the time-limits for the payment of the Advance on Costs (the "AoC"), until 1 February 2021, and the filing of the Answer, until 14 February 2021.

40. On 29 December 2020, the Arbitrator granted the requested extension and invited the Parties to pay their shares of the AoC by 1 February 2021 and the Respondent to file its Answer by 15 February 2021.

41. On 1 February 2021, Claimant's counsel informed the BAT that the Parties were still discussing the possibility of an amicable solution and requested, on behalf of both Parties, a further one-week extension of the time limit to pay the AoC, until 8 February 2021.

42. On 2 February 2021, the Arbitrator granted a further extension for the Parties to pay the AoC until 8 February 2021. The time-limit for the Respondent to file its Answer remained unchanged (15 February 2021).

43. On 8 February 2021, Claimant's counsel informed the BAT that the settlement negotiations between the Parties had failed and requested the continuation of the proceedings. Both Parties paid their shares of the AoC.

44. On 15 February 2021, the Respondent submitted its Answer to the Request for Arbitration.

45. On 18 February 2021, the Arbitrator granted the Parties the opportunity of a second round of submissions. Claimant was invited to submit a brief reply to the Answer by 4 March 2021, with Respondent to have a similar period thereafter to respond to Claimant's submission.

46. On 4 March 2021, the Claimant filed her Reply. The Respondent was invited to file its

Rejoinder by 18 March 2021.

47. On 18 March 2021, the Respondent filed its Rejoinder.

48. On 31 March 2021, the Arbitrator noted that the exhibits included in the Claimant's Reply were not submitted in English and invited the Claimant to provide English translations by 12 April 2021. Upon expiry of such time-limit, the Arbitrator declared the exchange of submissions be completed. The Parties were invited to set out (by no later than 14 April 2021) how much of the applicable maximum contribution to costs should be awarded to them and why. The parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto.

49. On 12 April 2021, the Claimant submitted the requested translations.

50. On 14 April 2021, both Parties filed their costs submissions.

51. On 15 April 2021, the BAT Secretariat distributed the Parties' costs submissions and informed the Parties that the award would be rendered in due course.

52. While the amount in dispute in this proceeding falls below the threshold of EUR 50,000 established in Article 16.2 of the BAT Rules for the issuance of an award with reasons, the BAT President has determined, pursuant to the discretion afforded to him by Article 16.3 (b) of the Rules, that certain of the issues that the case raises and the interest of the basketball community on having a sufficient body of publicly-available awards with reasons merit a reasoned award.

4. The Positions of the Parties

53. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to summarise the Parties' main arguments. In considering and deciding

upon the Parties' claims, the Arbitrator has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the findings below.

4.1 The Claimant's Position

54. The Claimant submits the following in substance:

- According to the Agreement, the Club's obligation to pay the entire amount of the Player's net salary for the 2020-2021 is fully-guaranteed and therefore, the Player is entitled to receive it in the event of an injury.
- Respondent's unilateral termination of the Agreement was wrongful. Not only was the Termination Notice not duly notified to Claimant but also, and more importantly, the Club's exceptional and unilateral termination of the Agreement was made without any just cause.
- The Claimant did not breach the Agreement, let alone incurr in "gross professional negligence" or "serious professional misconduct".
- The Agreement does not provide for any procedure that the Player should comply with in case of an injury. In particular, the Player does not require the Club's authorization prior to her undergoing surgery. On the contrary, the Player has the right to choose "*(i) the identity of her surgeon, (ii) the type of surgery to be performed and (iii) the timing of her surgery*".
- Even if prior authorization by the Club was required for Claimant to undergo surgery, the absence of such authorization would not constitute just cause for the unilateral termination of the Agreement by the Club.
- Additionally, the Player and her Agent informed Respondent about the intentions of the Player to undergo surgery in Belgium with a doctor of her choice, the type of surgery, the timing and the results of the operation, and sent the Club a copy of the post-operative report.

55. The Claimant requested the following relief:

" Claimant requests an award to be rendered, per which Respondent shall:

▪ pay Claimant:

▪ an amount of forty-one thousand six hundred Euro (€ 41.600) net in principle as termination indemnity;

▪ an amount of four thousand nine hundred Euro (€ 4.900) net in principle as overdue payables;

▪ all -past and future due- costs incurred by Claimant related to her surgery d.d. October 30, 2020 and the subsequent rehabilitation process, at present established at a provisional amount of one Euro (€ 1); and

▪ late payment interest at a rate of five percent (5%) per annum on the aggregate principle amount of forty-six thousand five hundred Euro (€ 46.500) net, as from November 20, 2020, until the date of full payment, at the date of filing present Request for Arbitration determined at an amount of thirty-two Euro (€ 32).

▪ provide Claimant with a tax certificate indicating that all required income tax due in Italy has been paid on Claimant's behalf by Respondent on all past payments under the Employment Agreement as well as all future payments to be made by Respondent following the award to be rendered by the BAT;

▪ reimburse Claimant all BAT expenses and procedural costs, including:

▪ reimbursement of the BAT Handling Fee ex article 17.1 of the BAT Rules in the amount of one thousand five hundred Euro (€ 1.500);

▪ reimbursement of Claimant's share of the advance on costs; and

▪ in case Claimant would have to substitute for (part of) Respondent's share on the advance of costs, the reimbursement hereof.

▪ indemnify Claimant for all incurred legal and advisory expenses up to an amount to be determined during the BAT proceedings, at present estimated at seven thousand five hundred Euro (€ 7.500)

Total amount in dispute: forty-six thousand five hundred thirty three Euro (€ 46.533) net"

4.2 Respondent's Position

56. The Respondent submits the following in substance:

- The Club was entitled to unilaterally terminate the Agreement under Article V (1) on the grounds of the Player's "gross negligence" and "serious professional misconduct".
- The Club did not authorize Claimant's surgery with the Belgian Doctor and was not aware of the type of intervention the Player underwent. The Club had just authorized a visit in order to obtain a further opinion on the Player's clinical situation.
- The Club was not aware of the length of the Player's rehabilitation period before the operation and only became aware after receipt of the post-operative medical report.
- Both the Agreement and the Disciplinary Code of the team, that the Player had duly received and accepted, imposed on the Player the obligation to comply with the instructions of the Club's medical staff.
- The Club's Sports Director and the Coach were not authorized to express the Club's consent or to represent the Club.

57. The Respondent requested the following relief:

> *"The Respondent requests an award to be rendered, per which the Honorable Arbitrator would:*
>
> - *Ascertain the serious contract breach made by the claimant who acted with gross negligence and/or serious professional misconduct, violating contractual (art. V) and regulatory rules and the Disciplinary Code rules as well as the general principles of good faith and fairness in the performance of the employment relationship established between the sports club and the athlete, irreparably prejudicing the rights and interests of the sports club and causing financial damage and damage to the image of the club, for the reasons above mentioned;*
>
> - *Ascertain and declare the correctness and good faith of the material conduct of the Respondent Magnolia Basket Campobasso s.r.l. with reference to the facts put forward by the Claimant as the basis of its claim;*
>
> - *Declare the contract lawfully terminated with just cause with immediate effect for serious professional misconduct of the athlete and/or for serious contract breach by*

the athlete, for the reasons above mentioned;

- *Consequentially reject the request to order the Respondent, Magnolia Basket Campobasso s.r.l., to pay the total sum claimed by the Claimant in the amount of € 46,533.00 as compensation for unlawful termination of employment (€ 41,600.00), as well as for overdue debts (€ 4,900.00) and interest on arrears (€ 32.00) for the reasons above indicated;*

- *Consequentially reject also the request to order the Respondent to pay the passive and future costs for medical expenses incurred by the Claimant following the surgery on October 30, 2020, for the reasons above mentioned;*

- *Also to the effect, to reject the request for an order to pay the legal costs arbitrarily [sic] quantified by the counterparty in € 7,500.00 both for the reimbursement of the advance payment of the costs of the BAT (€ 3,000.00), as well as the other titles indicated in the application;*

- *Reimburse the Respondent for all the BAT procedural costs paid;*

- *Reimburse the Respondent for all legal and consulting expenses incurred up to an amount determined directly during the proceedings, currently estimated at eight thousand euros (€ 8,000.00);*

- *Should the Arbitrator, in assessing the seriousness of the breach, consider that the athlete's conduct is not of a serious nature, with the consequent total exemption from payment of the entire sum claimed as indicated by the claimant in the arbitration, but assess the player's conduct as less serious, the Respondent requires that the BAT reduce the amount of the total sum due by the Club, fixing it, on an equitable basis, at no more than 1 month's salary of the player.*

In the latter case, the Respondent require that the legal costs be set off for the all the reasons given in the narrative"

5. The jurisdiction of the BAT

58. 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).

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

60. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[25].

61. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article VII of the Agreement and Article 3 of its Addendum (both identically drafted), which read as follows:

> *"The parties declare unanimously to know the content of the regulations and statutes of the Italian Basketball Federation and the FIBA rules and therefore agree that any dispute concerning the interpretation and execution of this contract [/addendum] will be subject to the system of dispute resolution as described and regulated by Part II of Title IX Articles 103 and ff. Justice of the Regulations of the FIP or, alternatively, in accordance with the free will of the parties, to the dispute settlement system of the BAT of FIBA and in this case any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and will be resolved on the basis of Arbitration Rules by a single arbitrator appointed by the Chairman of BAT and the arbitrator will decide the dispute ex aequo et bono.*
>
> *The choice made by one of the parties to the dispute resolution will be binding for the other"*

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

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

64. While the arbitration clause allows the Parties to choose between two different forums where they can submit their disputes (the BAT or the Dispute Resolution System of the FIP), such alternative is fully permissible, particularly where both Parties are given the right to invoke BAT arbitration or the FIP Dispute Resolution System in equal terms.

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

Additionally, the Respondent participated in the proceedings but did not raise any objection to BAT's jurisdiction.

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

6. Procedural Issues

66. Neither of the Parties requested a hearing to be held in this proceeding, thus the Arbitrator decides the matter on the basis of the Parties' written submissions and the evidence on file.

67. In her Reply, the Claimant states that in the course of the Parties' settlement negotiations she provided Respondent with certain "*medical documents with respect to her rehabilitation*". The Claimant argues that "[d]*espite the fact that such settlement negotiations were strictly confidential*" Respondent's counsel submitted one of those medical documents as Exhibit 14 to its Answer and requests the Arbitrator not to consider such document. However, the Claimant does not allege a particular violation of any applicable law, nor shows that the document was marked as "*privileged and confidential*" or otherwise subject to an express confidentiality agreement.[26]

68. The Respondent rejects Claimant's request arguing that "*such documents contain relevant and indispensable evidence… necessary to demonstrate the validity of the reasons of the Respondent and from which the lack of professional diligence on the part of the athlete and the violation of contractual, regulatory and disciplinary rules, etc., by the player is evident, both during the term of the contract and after termination*".[27]

[26] Reply, para. 14.

[27] Rejoinder, p. 10.

69. The Arbitrator concludes, irrespective of its confidential (or non-confidential) nature, that the document in question should not be considered in this proceeding for the following reasons:

- Exhibit 14 of the Answer consists of 7 pages. Pages 1 and 2 of the pdf document seem to be some pictures taken during or after the Player's knee operation. Pages 3 and 4 reproduce the post-operative medical report by Dr. Delercq, in English, exhibited by Claimant as Ex. 13 to the RfA. Pages 5, 6 and 7 seem to be some attachments to said medical report, drafted in what appears to be Flemish.
- The post-operative medical report, written in English, has been duly considered as Exhibit 13 to the RfA, while the pictures are not relevant for the purposes of the Arbitrator's decision.
- The rest of the document is not drafted in English, the working language of the BAT (Art. 4.1 of the BAT Rules), nor accompanied by a certified translation as required by Art. 4.2 of the BAT Rules.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

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

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

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

> *"15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

72. Article VII of the Agreement and Article 3 of its Addendum (both identically drafted) expressly provide that the Arbitrator shall decide the dispute ex *aequo et bono*.

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

74. 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[28] (Concordat)[29], 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."*[30]

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

[29] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

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

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

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

7.2 Findings

77. It is undisputed between the Parties that the amounts claimed have not been paid to the Player by the Club.

78. The Club unilaterally terminated the Agreement under Article V (1), alleging that it had just cause to do so, on the grounds of the Player's "*gross negligence*" and "*serious professional misconduct*", and accordingly that the Club is not obliged to pay any compensation, remuneration or expenses to the Player.

7.2.1 Compensation for the unilateral termination of the Agreement

79. The main issue in dispute in the present arbitration is whether Respondent was entitled to unilaterally terminate the Agreement for cause (Subsection C, below).

80. However, prior to the analysis of this main issue, two other related allegations of the Parties need to be dealt with (Subsections A and B):

A. The representation of the Club – validity of the communications/notifications sent by the Player and her Agent to the Coach and Mr. Spina

81. Respondent repeatedly alleges that Mr. Spina (counsel for the Club in these BAT proceedings) is not the Club's General Manager, "*but the Sports Director of the Club, without the power of representation*", "*whose activity concerns… only the management*

of contractual relationships between clubs and players or coaches and the conduct of negotiations with other sports clubs".

82. Additionally, Respondent alleges that Mr. Spina also acts as a lawyer for the Club and has occasionally "*expressed the Club's will… as a mere intermediary*" where he "*was specifically authorized to do so by the sports club*", by virtue of a specific mandate or a power of attorney.

83. For these reasons, Respondent contends that, absent a specific mandate, Mr. Spina does not have the authority to represent the Club, to express consents or authorizations, or to receive communications or correspondence on behalf of the Club. Such functions are reserved to the Club's President, Vice-President, and General Manager.

84. The same applies to the Coach, "*who is extraneous to the Club Management, and has no power of representation*".

85. Respondent adds that the Player should have known "*the well-defined roles of the staff of the Club*", as described in Article 14 of the Club's Disciplinary Code (including Domenico Sabatelli as "*coach*", and Gianni Spina as "*sport director and team attaché*").

86. The Arbitrator finds Respondent's arguments are overly formalistic and run against basic notions of legal certainty and good faith. In view of the circumstances of the case it would seem reasonable and consistent with legitimate expectations that the Player and her Agent believed that Mr. Spina and the Coach were authorized to speak on behalf of the Club and that they could validly receive communications:

- There is no express provision in the Agreement regulating the communications between the Parties.
- The theory of "apparent authority", invoked by Claimant, may well be applicable to the case. According to Respondent, Mr. Spina was in charge of negotiating and

concluding the players' contracts on behalf of the Club; he effectively sent and received communications between the Club and the Player or her Agent.[31] Similarly, the Coach spoke for the Club in several informal conversations with the Player (note the use of "we").[32] On such grounds it seems reasonable for Claimant to assume that both Mr. Spina and the Coach had the authority to speak for the Club.

- Even if no actual or apparent authority was recognised, Mr. Spina and the Coach must be considered as valid channels of communication between the Player or her Agent and the Club's management. The Club cannot in good faith ignore the communications exchanged by them and the Player or her Agent, or consider they were not validly made.
- The alleged duties of the Player to know the roles of the Club's staff under the Disciplinary Code cannot amount to an obligation to understand legal technicalities such as authority/representation. Particularly where, according to Respondent's allegations, Mr. Spina acted both in his capacity as Sports Director and as the Club's lawyer, subject to specific mandates. Additionally, Article 14 of the Disciplinary Code provides that Mr. Spina is the Sports Director of the Club; however, it does not detail his functions or powers as such within the Club.[33]
- Lastly, Respondent's argument is somehow contradictory. In effect, referring to the Player's Agent and his role, Respondent, in what seems to be an invocation of the theory of apparent authority and the principles of good faith and legitimate expectations, states: "*The Company and the undersigned lawyer, also as sports director, have always believed, for the principle of legitimate expectations, that Dr. Luigini was the player's agent/procurator in Italy, so much that both negotiations and the contracts stipulated by Magnolia for the 2020/2021 season, as well as all the communications also concerning Linskens took place only with Mr. Luigini as the*

[31] RfA, Exhibit 12; Answer, Exhibit 4.

[32] RfA, Exhibits 6 and 10.

[33] Answer, Exhibit 5.

player's Italian representative, and to whom the Club has regularly paid the required agent/procurator fees".

87. For all of these reasons, Respondent's arguments about alleged lack of representation are rejected.

B. The Disciplinary Code

88. It is disputed between the Parties whether the Disciplinary Code was received and signed by the Player and is therefore binding on her.

89. Although the Club claims that the Player received a copy of the Disciplinary Code "*within 5 days of her arrival in Campobasso*", the only evidence on the record about this fact shows that the Disciplinary Code was sent by Mr. Spina to the Agent by email of 15 October 2020.[34] Claimant acknowledges that the Agent received this email but argues that he did not forward it to the Player, who ultimately did not sign it.

90. For essentially the same principles established in the previous subsection, the Arbitrator finds that the sending of the Disciplinary Code to the Agent has the same value as if it had been sent or delivered directly to the Player. The Player cannot, in good faith, claim that "*Respondent does not evidence that Claimant has effectively received the Disciplinary Code*". Particularly where Article V (1) of the Agreement provides:

> *"A copy of the team regulations (in English language) must be given to the Player and transmitted to her Fiba agent within 5 days from the Player's arrival to Campobasso for the beginning of the season 2020-2021. The agent has the right to read it and approve or to ask modifications."*

[34] Answer, Exhibit 4.

91. As per its applicability to the Player, the Arbitrator observes that there is no evidence of the Agent asking for modifications of the Disciplinary Code or expressing any sort of disapproval. There is no doubt that the Player freely entered into the Agreement and signed both the main document and its addendum. Article V of the Agreement expressly refers to the Disciplinary Code. Article 1 of the Disciplinary Code, for its part, states that it is "*an integral part*" of the Agreement.[35]

92. Additionally, it would be illogical for a Player to enter into a contract with a Club but at the same time reject the Club's internal regulations. In this context, the signature by the Player of the Disciplinary Code would amount to an acknowledgment of receipt more than to an actual acceptance of the rules included in it.

93. For these reasons, the Arbitrator concludes that the Disciplinary Code is applicable and binding to the Player.

C. Unilateral termination of the Agreement by the Club

94. The principle by which the Arbitrator will examine this issue is that, in accordance with well-established BAT jurisprudence, the termination of an employment contract serves as the *ultima ratio* in solving problems within the parties' contractual relationship.[36] Only conduct of a player that fundamentally breaches the contract between the parties can be sanctioned with termination.

95. The Club's Termination Notice identified two main alleged breaches of the Agreement ("*violation*[s] *of the contractual provisions*") imputable to the Player that, in the Club's

[35] Answer, Exhibit 5.

[36] See, e.g., BAT 0357/12, para. 190; BAT 0815/16, para. 94; BAT 0957/16, para. 77.

view, amount to "*serious professional misconduct*":

- The Club did not authorize Claimant's surgery with the Belgian doctor and was not aware of the type of intervention the Player underwent ("… *the Club was not aware of the intervention carried out by the player, because the athlete herself just had authorized a visit, in accordance with the contractual provisions, in order to obtain a further opinion on her own clinical situation*").

- The Club was not aware of the length of the Player's rehabilitation period before the operation and only became aware after receipt of the post-operative medical report ("… *the Club learned, only after the post-operative report evaluation, made by its medical team, that the athlete will also has to respect a period of about 4 months of rehabilitation*").

96. In its Answer, the Club refers to several other alleged breaches additional to these two.[37] However, all the Player's conducts listed by Respondent occurred only after the Termination Notice so they could hardly be the reason for the Club's decision to unilaterally terminate the Agreement.

97. Claimant raises several defences:

- The Termination Notice was not sent within the 48-hour term set in Article V (1) of the Agreement so the unilateral termination by Respondent is not valid and "*Respondent has waived its alleged right to exceptionally and unilaterally terminate the Employment Agreement*".

[37] The Player allegedly did not return to Italy until 3 December 2020; the Player did not inform the Club about the post-operative course and only in the context of the settlement negotiations sent the Club a full report; the Player did not contest the Termination Notice (Answer, p. 25).

- The Agreement "*does not provide for any medical procedure that Claimant should comply with in case of an injury*" (in relation to Claimant's allegation that the Disciplinary Code is not binding).

- The Player has the right to choose "*(i) the identity of her surgeon, (ii) the type of surgery to be performed and (iii) the timing of her surgery*".

- Alternatively, even if a prior authorization by the Club was required for Claimant to undergo surgery, "*the absence of such authorization would not constitute just cause for the exceptional and unilateral termination of the Employment Agreement by Respondent*".

98. The Arbitrator's analysis of the previous issues follows:

1. <u>Is there a contractual obligation for the Player to obtain prior authorization of the Club to undergo surgery with the doctor of her choice?</u>

99. The analysis of the Agreement and the Disciplinary Code leads to the conclusion that the Parties did not agree on an obligation by the Player to obtain the prior permission or authorization from the Club to undergo surgery with the doctor of her choice.

100. The Agreement is silent on this issue. The only relevant provision in this respect is Article 6 of the Disciplinary Code:

> *"**Art.6 Health and nutrition***
>
> *Athletes are required to comply with the health regulations issued by the Club's doctors and to follow the treatment prescribed by them. They are also required to follow the diet guidelines suggested.*
>
> *The Athlete who is injured or temporarily not able for various reasons (fever, flu, etc.) is required to notify to the Club and arrange a visit from the doctor or physiotherapist to have a consultation about state of health. If they find it impossible to train or to participate in one or more competitions, they must notify to the head coach or his assistant.*

> *In any case, the exonerated Athlete, where is possible, must go to the 'Arena' for the time set for training or for the match and attend it in order to provide his own contribution to the team.*
>
> *If the medical staff wants to consult specialists, this opportunity must be examined and authorized by the Company.*
>
> *Before taking any drug or equivalent substance, the Athlete is advised to listen and consult with the Social Doctor."*

101. According to this provision:

- The Player is subject to a general obligation to follow the treatment prescribed by the Club's doctors.
- In case of an injury, the Player is required to arrange a visit with the Club's doctor or physiotherapist for a "*consultation about* [her] *state of health*".
- If the Club's medical staff considers that consultation with a specialist is required, "*this opportunity must be examined and authorized by the Company*".

102. The Arbitrator finds that apart from a general obligation to follow the treatment prescribed by the Club's doctors (that could be extended to those specialists chosen by the Club) the Disciplinary Code does not include a particular duty of the Player or her Agent to obtain prior consent from the Club in order to undergo surgery with a doctor of her choice. Particularly where, as explained below, the Player underwent the same type of surgery recommended by the Italian specialist consulted by the Club. The only reference to an authorization ("*by the Company*") in Article 6 applies to the medical staff of the Club, prior to consulting an external specialist, and not to the Player.

103. Lastly, the Arbitrator does not give particular significance to the fact that the Agent informed the Club and sought its authorization, on the eve of the operation in Belgium, for the Player "*to be operated… with the types of surgery that the surgeon deems*

appropriate based on objective clinical evaluation".[38] Such request does not alter the contractual obligations of the Parties under the Agreement. The Agent might have sent his email merely out of courtesy and good faith.

2. Did the Player incur in "serious professional misconduct"?

104. The Arbitrator finds that, in light of the circumstances of the case and the evidence adduced, the Player did not violate her contractual obligations or incurr in "*serious professional misconduct*" for a combination of the following reasons:

- The Player and her Agent informed the Club, by way of their formal and informal communications with the Coach and Mr. Spina, and prior to the date of the operation, of the Player's intention to travel to Belgium for a consultation and eventually to undergo surgery with Dr. Declercq.[39]
- The Club only manifested its opposition to the Player's intentions at the very last minute (29 October 2020, in the eve of the day the surgery was planned). However, the Club did not reply to the Agent's communications of 23 and 27 October 2020 regarding the Player's plans to travel to Belgium.[40] Additionally, the Club acknowledges that it had authorized a visit to Belgium for a second medical opinion.
- All the events surrounding the Player's injury, travel and surgery in Belgium occurred in the context of the beginning of the Covid-19 crisis in Europe. The Player and her Agent were forced to take quick decisions to make sure that the surgery could be performed before the situation in Belgian hospitals became critical.
- As established in BAT Award 0319/12, "*the right to choose his/her surgeon is obviously a very important right for a professional athlete, since beyond his/her*

[38] RfA, Exhibit 11.

[39] See RfA, Exhibits 6, 7, 9, 10 and 11; Answer, Exhibit 8.

[40] See RfA, Exhibits 8, 9 and 12.

general health, an athlete's career or part of it can be at stake when medical treatment – and in particular surgery – is involved, in addition to the fact that the relationship of trust with a surgeon is understandably important for any patient".

- The Club has not proven that the Player has somehow abused her rights or infringed her obligations under the Agreement by choosing her surgeon, the type of surgery to be performed and the timing of her surgery. Particularly where, as concluded in the previous subsection, Respondent did not have express authority to approve or veto Claimant's decisions in this respect. As rightly pointed out by Claimant, the Player "*sought comfort with her surgeon of trust, who confirmed one of the possible solutions identified by Respondent's doctor on October 22, 2020 and who, given the particular circumstances related to COVID-19 decided that it was in the best interest of Claimant to immediately undergo surgery*".
- What is more, the surgery that Claimant underwent with Dr. Declercq was exactly the same that the Italian doctor consulted by the Club had recommended. In effect, Dr. Cortina diagnosed "*broken ME knee dx. Meniscal suture surgery with prognosis of 3-4 months is recommended. If selective meniscectomy is opted, the time taken to resume competitive activity would be 1-2 months*".[41] Therefore, Dr. Cortina's preferred treatment -suture of the meniscus- was indeed followed by the Player under the supervision and intervention of Dr. Declercq.[42] In both cases, the doctors recommended the Player to undergo rehabilitation for about 4 months.
- The Club cannot in good faith allege that it was not aware of the type of surgery performed by Dr. Declercq or the length of the required rehabilitation period.

105. In light of the foregoing determinations, i.e., that the Agreement did not obligate Player to obtain prior authorization from the Club for the surgery with Dr. Declerq, and that Player did not engage in "serious professional misconduct" in connection with such

[41] Answer, Exhibit 7 (emphasis added).

[42] See RfA, Exhibit 13.

surgery, it is not necessary to consider Claimant's argument – which may run contrary to established BAT jurisprudence (see BAT 768/15, BAT 535/14, BAT 571/14) – that the Club's failure to issue the Termination Notice strictly within the time frame provided for the same under Article V(1) of the Agreement forfeits or waives it right to terminate.

106. In sum, absent a contractual obligation for the Player to obtain prior authorization from the Club to undergo surgery and considering the rest of the circumstances of the case, no breach of the Agreement that could support Respondent's unilateral termination has been proven; instead, the Club appears to have acted in a precipitous and heavy-handed way in the face of Claimant's situation, inconsistent both with its contractual rights and obligations and with basic notions of good faith and equity.

107. Therefore, the Arbitrator can only conclude that the unilateral termination of the Agreement by Respondent was effected without just cause and, consequently, given that the Agreement is fully guaranteed, that the Club shall compensate the Player for her unpaid salaries for the remainder of the 2020-2021 season in the amount of EUR 41,600 net.

108. Finally, as Claimant rightly acknowledges, BAT jurisprudence establishes unequivocally the concept of mitigation of damages. However, under the particular circumstances of the case (Player's injury and the outbreak of the Covid-19 pandemic), the Arbitrator considers that the Player's recovery need not be reduced by reasons of mitigation. Under such circumstances it is fair to conclude that the Player's chances to find a new contract for the remainder of the 2020-2021 season were minimal, if not indeed non-existent.

7.2.2 Outstanding salary

109. The Player further claims EUR 4,900 net as "overdue payables", representing the difference between the amounts paid by the Club for the Player's salaries during the time

the Agreement was in force (EUR 15,500 net)[43] and her agreed salary for such period (EUR 20,400 for the months of September, October, and part of November).

110. The Club contests such claim "*as the player has acted with such gravity as to alter the contractual synallagma, failing in her duties, therefore, consequently resulting in the lapse of the company´s duties toward the player*".

111. However, the Arbitrator has found that the Player did not incur in a breach of the Agreement and, in any case, the amounts claimed refer to the period where the Player was actually providing her services to the Club, prior to the unilateral termination of the Agreement, so the outstanding salary is due irrespectively.

112. The evidence on the record shows that Club paid the Player's entire salaries for September and October.[44] Therefore, the Club shall pay EUR 4,900 net to the Player for her outstanding salary for the month of November (until November 19, date of the Termination Notice).

7.2.3 Medical expenses

113. The Claimant further requests "*the full reimbursement of all -past and future due- costs incurred related to her surgery d. d. October 30, 2020, as well as for the subsequent rehabilitation process*" in the amount of EUR 2,975.73.[45]

114. The Respondent rejects this request "*for the reasons above mentioned*" regarding the

[43] See RfA, Exhibit 20.

[44] *Ibid*.

[45] Reply, Exhibits 23, 24, 25.

Player´s alleged breach of the Agreement and her "*serious professional misconduct*".

115. Article II (2) of the Agreement provides that "[t]*he Club undertakes to guarantee to the Player a high-level medical and dentistry assistance, for every kind of exams, operations or therapies that could be necessary because of the sport activity*".

116. The medical costs claimed by the Player regarding her surgery and rehabilitation are evidently covered by this contractual clause. Therefore, the Club shall pay EUR 2,975.73 to the Claimant.

7.2.4 Tax certificate

117. Claimant further requests the Respondent to provide "*a tax certificate indicating that all required income tax due in Italy has been paid on Claimant's behalf by Respondent on all past payments under the Employment Agreement as well as all future payments to be made by Respondent following the award to be rendered by the BAT*".

118. As set out above, under Article II (1) of the Agreement "[t]*he sums are net, and the Player has the right to receive a certification of the payment of taxes made by the Club in Italy on the amounts (U1 form). Under no circumstances shall the Player be obligated to pay any taxes in Italy on her salary*."

119. Therefore, the Club shall provide to the Player with a tax certificate (U1 form) stating all the required income tax due in Italy that has been paid on her behalf (i) on all past payments made under the Agreement, as well as (ii) on all future payments to be made by the Club following the present award.

7.2.5 Interest

120. As a final matter, the Claimant has requested interest on the amounts claimed as

compensation and outstanding salary (EUR 46,500 in total) at "*a rate of five percent (5%) per annum*", in application of Article 104 if the Swiss Code of Obligations, from 20 November 2020 (the day after the receipt of the Termination Notice) until complete payment.

121. Respondent has disputed Claimant´s request for interest alleging that "*the arbitration clause included in the contract does not provide for the application of Swiss law, the arbitration having to be decided solely by applying the principles ex aequo et bono*".

122. The Agreement does not provide for interest. However, in accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest on the total amount of EUR 46,500 (EUR 41.600 for compensation and EUR 4,900 for outstanding salary) at the rate of 5% per annum, starting from 20 November 2020, until complete payment.

8. Costs

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

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

124. On 8 June 2021, the BAT President determined the arbitration costs in the present matter to be EUR 9,000.

125. Moreover, in accordance with Article 18.2 of the BAT Rules, a contribution has been determined to be paid from the BAT Fund towards the arbitration costs in this case. As per the Information Notice accompanying the 2019 edition of the BAT Rules, this amount

is EUR 3,000.

126. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

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

127. Considering that the Player was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by Club alone. Given that both Parties paid EUR 3,000 for their respective shares of the Advance on Costs, the Club shall reimburse EUR 3,000 to the Player.

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

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

129. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (for a dispute of this value is EUR 7,500 for each party, excluding the NRHF).

130. The Claimant has claimed legal fees in the amount of EUR 7,500. She also claims for the expense of the non-reimbursable handling fee.

131. Taking into account that the Claimant has succeeded in full with her claims, the duration

and complexity of the case, including two rounds of submissions on the merits and over 50 documents exhibited, and that the Claimants' cost submission is sufficiently detailed and prudent, the Arbitrator considers it fair and reasonable to award the amount of EUR 7,500 in legal fees, as well as the payment of the NRHF in the amount of EUR 1,500.

132. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

(i) The Club shall pay costs in the amount of EUR 3,000 to the Claimant;

(ii) The Club shall pay to the Claimant EUR 9,000 (1,500 for the non-reimbursable fee plus 7,500 for legal fees), representing the amount of her legal fees and expenses.

9. AWARD

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

1. **Magnolia Basket Campobasso, S.r.l., is ordered to pay Ms. Kyara Chantal Linskens EUR 41,600, net of taxes, as compensation for her unpaid salaries for the remainder of the 2020-2021 season, plus interest on such amount at 5% per annum, from 20 November 2020, until complete payment.**

2. **Magnolia Basket Campobasso, S.r.l., is ordered to pay Ms. Kyara Chantal Linskens EUR 4,900, net of taxes, for her outstanding salaries for the month of November 2020, plus interest on such amount at 5% per annum, from 20 November 2020, until complete payment.**

3. **Magnolia Basket Campobasso, S.r.l., is ordered to pay Ms. Kyara Chantal Linskens EUR 2,975.73, as reimbursement for her medical expenses.**

4. **Magnolia Basket Campobasso, S.r.l., is ordered to provide Ms. Kyara Chantal Linskens with a tax certificate (U1 form) stating all the required income tax due in Italy that has been paid by Magnolia Basket Campobasso, S.r.l., on her behalf (i) on all past payments made under the Agreement, as well as (ii) on all future payments to be made by Magnolia Basket Campobasso, S.r.l., following the present award.**

5. **Magnolia Basket Campobasso, S.r.l., shall bear the costs of this arbitration until the present Award. Accordingly, Magnolia Basket Campobasso, S.r.l., shall pay EUR 3,000 to Ms. Kyara Chantal Linskens.**

6. **Magnolia Basket Campobasso, S.r.l., shall pay EUR 9,000 to Ms. Kyara Chantal Linskens, as a contribution to her legal fees and expenses (including the non-reimbursable handling fee).**

7. **Any other or further-reaching requests for relief are dismissed.**

BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 14 June 2021

Clifford J. Hendel
(Arbitrator)