ARBITRAL AWARD

(BAT 1640/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Ms Brittany Janelle Denson

- Claimant 1 -

Gherdan Sports S.R.L.
str. Closca, nr. 92A, Dezmir, com. Apahida, jud. Cluj,
Romania

- Claimant 2 -

both represented by Mr. Alexandru Corpodean, attorney at law,

vs.

Clubul Sportiv Municipal Satu Mare
Satu Mare, P-ța 25 Octombrie nr. 1/M, jud. Satu Mare, Romania

- Respondent -

represented by Mr. Ioan-Petru Demeter, attorney at law

1. The Parties

1.1 The Claimants

1. Ms. Brittany Janelle Denson (hereinafter "Claimant 1") is a professional basketball player from the USA.

2. Gherdan Sports S.R.L. (hereinafter "Claimant 2") is a basketball agency from Romania, which represented Claimant 1 in her dealings with the Respondent.

1.2 The Respondent

3. Clubul Sportiv Municipal Satu Mare (also known as CSM Satu Mare and hereinafter the "Respondent") is a professional women's basketball club in Satu Mare, Romania, which competes in the Romanian Liga Națională.

2. The Arbitrator

4. On 15 January 2021, Prof. Ulrich Haas, President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Rhodri Thomas as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (hereinafter the "BAT Rules").

5. None 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

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

7. 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 Player Agreement

8. Claimant 1 joined the Respondent in March 2018. During her first full season in 2018/2019, Claimant 1 played 31 games for the Respondent and received a number of awards at the end of the season, including the Eurobasket.com All-Romanian League Player of the Year.

9. On 28 May 2019, the Respondent and Claimant 1 entered into a player agreement for the 2019/2020 and 2020/2021 seasons (hereinafter the "Player Agreement").[1] The Player Agreement contains, among others, the following provisions:

> "***II. Object of the contract***
>
> […]
>
> ***II.6.*** *At the start of each season, the club reserves the right to conduct a medical examination of the athlete. The exam will be held within 5 days of the player presenting to the team and a copy of the exam result will be given to the player within 24 hours of the date of the exam. The medical exam will be performed to check if the player is injured or has medical problems that objectively present her from practicing/playing basketball. The contract takes effect insofar as the player passes the medical examination. Insofar as the Club does not notify the player, within 48 hours from the date of the medical examination, that the player would not have passed the exam, the contract will take effect without being possible* [sic] *to invoke any aspect related to the medical examination. In the same way, to the extent that the player performs any sports action scheduled by the club or for the benefit of the club after the reunion of each season (e.g. practices, warm-ups, participation in friendly or official games, etc.) without the medical examination being performed or before being presented a* [sic] *decision of a negative result of the medical examination, it is understood that the club renounces the right to take the medical examination and the contract takes effect as if the player had successfully passed such an examination.*

[1] Despite a specific request from the BAT, the Claimants were unable to provide a copy of the Player Agreement where all parties' signatures were clearly visible. However, none of the Parties sought to challenge the validity of the Player Agreement on this basis, nor did any of the Parties challenge the jurisdiction of the BAT on this basis.

III. Duration of the contract

III.1. *This contract is valid for the entire duration of the 2019/2020 and 2020/2021 seasons.*

[…]

For the 2020/2021 season: *This contract will be effective from September 1, 2020 or if earlier, respectively, on the day the player is required to be present in Satu Mare and will be in force for the 2020/2021 season until April 30, 2021, or the date of the last official match in the regular reason or play-off / play-out, or in the European competitions in which the club would be involved, if such event is after that date.*

[…]

V. Compensation of the sport activity

"***V.1.*** *In compensation/return for the conclusion of this contract, the Player shall benefit from the following rights:*

a) financial rights

[…]

Season 2020/2021: *The Club obliges itself to pay to the player in compensation for the conclusion of this contract for the 2020/2021 season the total sum of the RON* ***equivalent of EUR 64.400 EUR net / 72.180 EUR gross*** *according to the following payment schedule:*
15 October 2020: 7.155 EUR net / 8.020 EUR gross
25 November 2020: 7.155 EUR net / 8.020 EUR gross
25 December 2020: 7.155 EUR net / 8.020 EUR gross
25 January 2021: 7.155 EUR net / 8.020 EUR gross
25 February 2021: 7.155 EUR net / 8.020 EUR gross
25 March 2021: 7.155 EUR net / 8.020 EUR gross
25 April 2021: 7.155 EUR net / 8.020 EUR gross
25 May 2021: 7.155 EUR net / 8.020 EUR gross
25 June 2021: 7.160 [sic] *EUR net / 8.020 EUR gross*

[…]

After and to the extent that the medical exam is carried on, in the case that the player successfully passes such medical exam in the conditions of art II.6 or in the case in which the club is considered as been waiving [sic] *such right, except if the contract states otherwise, this contract represents a guaranteed contract as such contract is defined in the interpretation of such notion by FIBA. Therefore and in this conditions* [sic]*, the player is guaranteed the full payments mentioned in art. V.1.a of this contract, even if she does not have a performance as the one expected by the club; in the situation in which the club's team would achieve lower performances than expected,* [sic] *in the event that the season would be shorter than the period mention in art. III.1 during which the contract was concluded,* [sic] *if the player was summoned to the national team of the federation of origin in a period that would overlap with the one stipulated in art. III.1 of the contract; if the player*

is incapable of performing sports activity because of his [sic] *injury status in relation to the sport activity carried out related to clubs' actions or in the case that the player would become ill for causes that are not beyond her control.*

[…]

b.2) The club will insure the player in full against injuries and / or sports-related illnesses. In this respect, this obligation can be achieved either by contracting an insurance policy from a company that would fully cover any costs associated with any medical treatment followed by the Player during the course of the present contract in connection with injuries or diseases related with sports activity during the period of validity of the present contract or by payment or reimbursement of any costs related to the medical treatments followed by the Player in the duration of the present contract in connection with injuries or diseases related to the sport activity; in all cases the player having the right to opt for the medical unit and the correspondent specialist doctor, with the obligation for such doctor or clinic to practice medicine on the territory of Romania. As far as the [sic] *diagnosing the player correctly, firstly the player is obliged to carry out this diagnosis with the doctor indicated by the club (if any), but having the right to consult a second opinion, and to the extent that the second opinion is in accordance with the first the club will not cover the medical expenses with* [sic] *the second opinion;* […]

V.2 Terms and Payment Methods:

a) Under the applicable legal provisions, the club remains liable to withhold / deduct / pay any tax / contribution provided for by the national legislation in force at the time of payment. The player will benefit monthly from the net amounts stipulated in the contract, [sic] *the correct calculation, retention and transfer of the amounts related to the taxes and tax contribution being the full and sole responsibility of the club, in relation to the net amounts stipulated in the contract* […]

b) To the extent that the amounts stated in the contract are denominated in foreign currency, the Club undertakes to pay these amounts in national currency (RON) at the rate applicable on the last day of the month preceding the maturity of the payment + 1%.

[…]

d) […] *In the event of a delay of more than 15 calendar days in any of the payments mentioned in this contract, the player has the right to decide to terminate the contract unilaterally, without delay, by simple written notification of* [sic] *the club, in which case the entire amount in the contract will become automatically due, the club being fallen out from the payment deadlines/schedule of the total amounts according to V.1. letter a), the player being entitled to request and immediately to be paid the entire outstanding amount of the total amount of unpaid sum of the amounts mentioned in V.1. letter a).*

VI. Major force

VI.1. *Force majeure, as defined by law, exonerates the parties of liability, in whole or in part, in the event of total or partial non-performance or inadequate or delayed performance*

of the obligations assumed in this sporting activity contract.
V.1.2. *The party invoking force majeure has the obligation to notify the other party within 5 days of the occurrence of the force majeure case and to take all possible measures to limit its consequences, otherwise it is unaffected by its exonerating liability.*

[…]

VIII. Termination of the contract

VIII.1 *This Sport* [sic] *activity contract ceases in the following cases:*

[…]

d.1.) through a notice of unilateral termination by the Player, in the situation regulated by Art. V.2. letter d) according to the procedure described, in case of delay in payment of the financial rights mentioned in art. V.1. letter a) exceeded by more than 15 calendar days' delay

[…]

g) if the participant does not promote [sic] *the medical examination according to the provisions of art. II.6.*

[…]

X. Settlement of disputes

X.1. *Conflicts in connection with the conclusion, execution, modification, suspension or termination of this contract shall be settled by domestic and/or by international sports arbitration panels/courts or, as the case may be, by the competent courts and tribunals, according to the law or convention of the parties. Thus, in interpreting this article, the parties understand how to regulate the legal regime and the jurisdiction to resolve any disputes that arise between them, respectively:*

X.2. *In the event of a litigation between the parties, the player can address herself to the competent courts on the Romanian territory, respectively material competent court from a territorial perspective based in Satu-Mare.*
X.3. *Also, in addition to the competent courts in Romania, the player and the club (for the latter this arbitral jurisdiction representing the exclusive jurisdiction in the matter) can defer any dispute relating to or deriving from this agreement to the Basketball Arbitral Tribunal (BAT), located in Geneva, Switzerland. In this case where parties* [sic] *choose to address BAT, the arbitration dispute will be settled in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration will be Geneva, Switzerland. Arbitration* [sic] *will be governed by Chapter no. 12 of the Swiss Act on Private Law, whatever the domicile of the parties. The language of the arbitration will be English. The arbitrator will settle the dispute ex aequo et bono.*

XI. Final provisions

> ***XI.1*** *The Contracting parties may, during the performance of this contract, agree to amend its clauses by an addendum only in the event of occurrence of circumstances prejudicial to their legitimate interests which could not be foreseen at the date of conclusion of this contract; according to and based on the mutual consent of both parties.*
>
> […]
>
> ***XI.3.*** *This Agreement shall by interpreted in accordance with the laws of Romania. In the case of BAT arbitration, the law applicable to arbitration* [sic] *shall be represented by the principle of ex aequo et bono*.
>
> (Emphasis as in the original.)

3.1.2 The Agency Agreement

10. On 21 June 2018, Claimant 2 and the Respondent entered into an agency agreement in connection with the Player Agreement (hereinafter the "Agency Agreement", together with the Player Agreement, the "Agreements").

11. The Agency Agreement contains, among others, the following provisions:

> "***III. REMUNERATION AND PAYMENT CLAUSES:***
> *3.1 In execution of this contract and of its object of the contract described in point II, the club contracted player DENSON BRITTANY JANELLE for the seasons 2019/2020 and (conditional) 2020/2021, through the intermediation of the sport service provider.*
> *As such, in accordance with the FIBA regulations, the parties agree that the remuneration of GHERDAN SPORTS S.R.L. shall be:*
> […]
> *For the 2020/2021 season, subject to the fact that the player's contract for the 2020/2021 season will be activated: EUR 7,218 net*
> *3.2 These amounts will be paid no later than April 15, 2020 (for the 2019/2020 season) and April 15, 2021 (for the 2020/2021 season), based on an invoice that shall be issued on March 15, 2020 and respectively March 15, 2021.*
> *3.3. The club of CSM Satu Mare duly understands that the payment of these remunerations are guaranteed,* [sic] *any event subsequent to the signing of this contract (e.g. injury of the sports participants referred to in art. 3.1, illness, premature termination of the contract, etc.) shall not be able to affect the certainty, liquid and due character of these amounts, the remuneration being due as a result of the signing of the sports activity contracts by the participants in the sports activity mentioned in art. 3.1.*
> […]
>
> ***IV. Litigation***
> *IV.1. In case of litigation, the parties will be able to address the competent courts on the*

territory of Romania, the parties being able to validly lodge applications to the materially competent court from the Satu-Mare Municipality.
IV.2. Also, apart from the competent courts in Romania, any part of [sic] *this contract has the right to refer any dispute in connection with or arising from this agreement to the Basketball Arbitration Tribunal (BAT), based in Geneva, Switzerland. In this* [sic] *event that the parties choose to address the BAT, the arbitration dispute will be settled in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration will be Geneva, Switzerland. The arbitration will be governed by Chapter no. 12 of the Swiss Law on Private International Law, whatever the domicile of the litigating parties. The language of the arbitration will be English. The arbitrator will settle the dispute ex aequo et bono. The parties declare that they waive their right to appeal the BAT arbitral award to the Swiss Supreme Court.*

[…]

V.8. This contract and its effects are governed by Romanian law."

(Emphasis as in the original.)

3.1.3 Factual background to the dispute

12. Shortly after the start of the 2019/2020 season, Claimant 1 injured her _____ and eventually _____ in December 2019. After the surgery, Claimant 1 returned to the Respondent to rehabilitate her injury in a clinic in Satu Mare. Claimant 1 did not play any further games during the 2019/2020 season.

13. In March 2020, the 2019/2020 season was suspended following the outbreak of the COVID-19 pandemic. Claimant 1 and the Respondent subsequently agreed that Claimant 1 would be allowed to return to the USA early in exchange for a partial waiver of her outstanding salary payments in relation to the 2019/2020 season.

14. Over the following months, Claimant 1 continued her rehab in the USA. Between early June 2020 and 30 August 2020, Claimant 1 trained with Ms. Angie Lawrence, a former physical trainer at the University of Miami, USA. Ms. Lawrence has provided a written statement for the purposes of these proceedings that she trained Claimant 1 "*at least 2 (two) days per week during this period*".

15. Between 1 September 2020 and 4 October 2020, Claimant 1 trained with Mr. Marlon Brown, the athletic director of Southland Christian School in Kissimmee, Florida, USA.

Mr. Brown has given written evidence that he trained Claimant 1 three times per week during this period. Mr. Brown explained that the training sessions comprised "*shooting drills, post moves, footwork agilities drills and running exercises of varying intensities, including sprints and maximum intensity running as well*". Mr. Brown noted that "[d]*uring all these activities* [Claimant 1] *has not complained about any pain or incapacity*".

16. According to the Claimants, Claimant 1 completed a fourth training session unsupervised at home which involved cardio and weight exercises.

17. The contractual start date for the 2020/2021 season under the Player Agreement was 1 September 2020. However, the Respondent waited until 16 September 2020 before it booked a flight for Claimant 1 to return to Satu Mare. According to the Respondent, there was no reason to ask Claimant 1 to return earlier given the uncertainty as to when and how the 2020/2021 season would commence in Romania.

18. The flight booked by the Respondent was due to depart from the USA on 20 September 2020. However, when Claimant 1 arrived at the airport, she was denied boarding because she did not have the necessary documents to show that she was allowed to enter Romania notwithstanding the travel restrictions in place due to the COVID-19 pandemic. The Respondent subsequently provided Claimant 1 with the relevant documents and booked a new flight for 3 October 2020. Claimant 1 accordingly returned to Satu Mare on 4 October 2020.

19. On 5 October 2020, Claimant 1 participated in her first training session with the Respondent. At this point Claimant 1 had not attended a medical examination nor had the Respondent arranged one. The Respondent explained in these proceedings that it was initially prepared "*not to do the medical examinations due to the restrictions inflicted by Covid-19*".

20. Between 5 and 7 October 2020, Claimant 1 continued to participate in the pre-season training of the Respondent but was told to stop after she reported _____ that she had injured in the previous season.

21. While this much is common ground, the Parties have submitted different accounts regarding the number and nature of the training sessions in which Claimant 1 participated, the level and extent of her participation, and the date when she first reported the _____:

    a) The Claimants have submitted that: (i) Claimant 1 attended five training sessions during this period (two on 5 October 2020, one on 6 October 2020 and two on 7 October 2020); (ii) the sessions were "*intense*" and involved "*full contact 5 x 5 play*"; (iii) and, after the fifth session, in the evening of 7 October 2020, "*the player informed the head coach of the Respondent that she has felt _____*.

    b) The Respondent has submitted that: (i) Claimant 1 attended six training sessions during this period (two on 5 October 2020, two on 6 October 2020 and two on 7 October 2020); (ii) Claimant 1 "*did not participate in any physically intensive training*" – instead, her sessions involved light stretches and shooting drills; and (iii) Claimant 1 already reported _____ after the third or fourth session on 6 October 2020.

22. The Respondent subsequently arranged for Claimant 1 to attend an MRI scan at the local hospital in Satu Mare on 12 October 2020. The hospital has confirmed that this was the earliest available date for a scan.

23. On 16 October 2020, the Respondent provided the results of the MRI scan to the team doctor, Dr. Razvan Melinte. At around the same time, the Respondent also arranged for Claimant 1 to attend a medical examination with Dr. Melinte on 26 October 2020. According to the Respondent, this was the earliest available date because Dr. Melinte was self-isolating until 25 October 2020.

24. The Claimants alleged in these proceedings that Claimant 1 was not provided with the MRI results during this period. However, it appears that this is not entirely correct. The evidence on the record shows that Claimant 1 shared her MRI results with the

Respondent's head coach on 17 October 2020. Claimant 1 informed the head coach in this context that she had been advised by the Respondent's physio that the results indicated a _____ and that she wanted to see a doctor "*early next week*".

25. The Parties have submitted different accounts regarding the extent to which Claimant 1 continued to participate in training sessions of the Respondent between the date of her MRI scan on 12 October 2020 and her medical examination on 26 October 2020:

    a) The Claimants submitted that Claimant 1 "*has been in and out of practices, alternating participation in practices with recovery and treatment sessions*", while acknowledging at the same time that Claimant 1 was unable "*to recall exactly*".

    b) The Respondent submitted that Claimant 1 did not participate in any training sessions during this period.

26. While Claimant 1 was waiting to attend her medical examination with Dr. Melinte, the Respondent failed to pay Claimant 1 her first salary instalment under the Player Agreement on the contractual due date of 15 October 2020.

27. On 16 October 2020, Claimant 2 was informed by the Respondent's general manager, Mr. Florin Muresan, that international players, such as Claimant 1, were only going to be paid from the date of their arrival in Satu Mare rather than from their contractual start date. In the case of Claimant 1, this meant that her first instalment would cover the period from 4 October 2020 to 15 October 2020, rather than 1 September 2020 to 15 October 2020. Mr. Muresan explained that the shortfall in the agreed salary would be included in future salary payments so that the total salary payments for the season remained the same. However, Mr. Muresan made it clear that all of this was subject to "*Melinte's final verdict*" in relation to the physical condition of Claimant 1.

28. Claimant 2 replied immediately that the proposed arrangement was unlikely to be acceptable to Claimant 1 "*because the problem is that in the proposed version, if the pandemic comes, you will end up reducing them from the salary for September*".

Claimant 2 confirmed later that day that Claimant 1 was not going to agree to the proposed arrangement. He also indicated that Claimant 1 would avail herself of her termination rights under the Player Agreement if the 15 October 2020 instalment was delayed by more than 15 days: "*so regarding denson* [sic] *when November 2 arrives, she takes her luggage, sending a termination* [sic] *and will fly to the States and addressed* [sic] *this matter to the BAT*".

29. On 26 October 2020, Claimant 1 attended her medical examination with Dr. Melinte. Following the examination, Dr. Melinte confirmed in a written report that Claimant 1 was experiencing _____ Dr. Melinte further noted that Claimant was _____.

30. On 27 October 2020, the Respondent informed Claimant 1 during a meeting that she had failed her medical examination and that her Player Agreement was therefore terminated with immediate effect pursuant to Article II.6 of the Player Agreement.

31. The Respondent confirmed its decision in writing on 28 October 2020. The termination letter noted that "*due to the covid-19 pandemic and the special situation we had needed to delay the medical testing, the player not participating at the request of the club at no whatsoever practice until the date of performing such speciality consultation*". A copy of Dr. Melinte's written report was enclosed with the letter.

32. Claimant 2 immediately wrote to the Respondent that the purported termination of the Player Agreement was unlawful "*both in terms of the fact that the player did not train with the club (she trained almost 2 weeks after her arrival, the statement in the document being nothing more than a blatantly false allegation), as well as on the term of the medical visit (being performed much, much more than 5 days allowed per the contract) and on the findings retained in the medical documents*".

33. Claimant 2 further noted that "*considering that the athlete did not agree with the modification of the contract by additional act (proposed by the club), that she was*

informed that she will not be paid the remuneration due on 15.10.2020 and that in return to this we had communicated to the club that once the term in which she can terminate this contract will lapse, we shall duly terminate such agreement, this decision of the club comes against the fact that in any [sic] *very very short time the player would have terminated the sports activity contract anyway due to non-payment of remuneration due on of* [sic] *15.10.2020, which we believe that by this 'termination' the club wanted to avoid such and try to mask the situation with an unlawful termination of the sports activity contract which has been performed".*

34. Shortly after this exchange, the Respondent arranged for Claimant 1 to return to the USA. Claimant 1 did not receive any salary payments from the Respondent for the 2020/2021 season, nor did Claimant 2 receive an agency fee for the 2020/2021 season.

35. On 15 December 2020, and as further explained below in Section 3.2 below, the Claimants filed a Request for Arbitration with the BAT.

36. A couple of weeks later, a Romanian basketball team, CS Phoenix CSU Simona Halep Constanta (hereinafter "Constanta"), expressed interest in signing Claimant 1 for a monthly salary of USD 1,500.00 until the end of the 2020/2021 season. However, when Constanta asked whether Claimant 1 could attend a trial practice given her recent medical history, Claimant 2 explained that this was not possible and the negotiations were discontinued.

37. On 24 February 2020, a few days before the closing of the domestic transfer window, another Romanian basketball team, CSTBv CSU Olimpia Brasov (hereinafter "Brasov"), offered Claimant 1 a monthly salary of USD 2,000.00 (net) until the end of the 2020/2021 season.

38. Claimant 2 immediately wrote to the Respondent requesting the Respondent to issue a letter of clearance as soon as possible.

39. Mr. Muresan responded on 24 February 2020 noting that the Respondent would be prepared to sign Claimant 1 "*for the rest of the 2020-2021 season starting with February 26, 2021 under the same contractual conditions plus signing a contract valid for the 2021-2022 season agreed by both sides. Our request is for the player to pass the medical tests (at the doctor approved by the sportswoman and agent) upon arrival in Romania*".

40. This offer was considerably more lucrative than the one made by Brasov and the Claimants were clearly willing to entertain it. Claimant 2 responded on the same day that the Respondent should confirm with the Romanian Basketball Federation that it would be allowed to sign Claimant 1 given that it already had "*the maximum number of three non-Europeans … and you can not* [sic] *register another one*". Claimant 2 also requested that the Respondent pay Claimant 1: (i) her salary under the Player Agreement from 1 September 2020 until the date when the agreement was terminated; and (ii) her legal costs for commencing the BAT arbitration.

41. It appears that over the next few days the Respondent went silent. Given that the domestic transfer window was due to close on 28 February 2020, and absent any indication from the Respondent that it would issue a letter of clearance, it appears that Brasov decided to withdraw its offer for Claimant 1 and signed another US player on 26 February 2020.

42. On 1 March 2021, one day after the domestic transfer window had closed, the Respondent informed Claimant 2 that the Romanian Basketball Federation had confirmed that the Respondent did not have a roster spot for Claimant 1 after all and that "*unfortunately our proposal to bring her back to the team now for the rest of the season* […] *can no longer stand*".

43. Further settlement negotiations were unsuccessful.

3.2 The Proceedings before the BAT

44. On 16 December 2020, the BAT received a Request for Arbitration dated 15 December 2020 filed by the Claimants in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000.00 was received by the BAT on 18 December 2020.

45. On 22 January 2021, the BAT fixed a deadline of 12 February 2021 to file an Answer to the Request for Arbitration. The BAT also fixed the following amounts as the Advance on Costs with a deadline of 3 February 2021 for payment:

"*Claimant 1 (Ms. Denson Brittany Janelle)*	*EUR 3,000.00*
Claimant 2 (Gherdan Sports S.R.L.)	*EUR 1,000.00*
Respondent (Club Sportiv Municipal Satu Mare)	*EUR 4,000.00*"

46. On 5 February 2021, the BAT received EUR 3,000.42 from Claimant 1 and EUR 1,000.00 from Claimant 2 in relation to the Claimants' share of the Advance on Costs. The Respondent did not pay its share of the Advance on Costs.

47. On 12 February 2021, the Respondent filed its Answer.

48. On 15 February 2021, the BAT notified the Parties that the Respondent had failed to pay its share of the Advance on Costs. The BAT therefore invited the Claimants to pay the Respondent's share under Article 9.3 of the BAT Arbitration Rules and fixed a deadline of 24 February 2021 for payment.

49. On 24 February 2021, the Claimants informed the BAT that the Parties were engaged in settlement negotiations. The Claimants therefore requested an extension until 1 March 2021 to pay the Respondent's share of the Advance on Costs.

50. On 25 February 2021, the Arbitrator granted the extension as requested.

51. On 2 March 2021, the Claimants notified the BAT that the settlement negotiations remained ongoing. The Claimants therefore requested a further extension until 7 March 2021 to pay the Respondent's share of the Advance on Costs.

52. On 4 March 2021, the Arbitrator granted the further extension as requested.

53. On 9 March 2021, the Claimants informed the BAT that the settlement negotiations had failed and that the proceedings should now continue. On the same day, the Claimants paid the Respondent's share of the Advance on Costs as follows: Claimant 1 paid EUR 3,000.42 and Claimant 2 paid EUR 1,000.00.

54. By Procedural Order dated 18 March 2021 (hereinafter "Procedural Order 1"), the Arbitrator requested the Parties to provide further information by 1 April 2021. The Arbitrator also requested the Respondent to provide English translations of certain documents exhibited with its Answer.

55. On 30 March 2021 and 31 March 2021, respectively, the Parties informed the BAT that they had resumed settlement negotiations. The Parties therefore requested an extension until 8 April 2021 to respond to Procedural Order 1.

56. On 31 March 2021, the Arbitrator granted the extension as requested.

57. On 6 April 2021, the Respondent provided the BAT with the requested English translations of certain documents exhibited with the Answer.

58. The Parties responded to Procedural Order 1 on 8 April 2021.

59. On the same day, the Claimants requested a short extension to submit one additional document. The Arbitrator subsequently granted an extension until 12 April 2021. The Claimants submitted the additional document on 12 April 2021.

60. By Procedural Order dated 6 May 2021 (hereinafter "Procedural Order 2"), the Arbitrator requested the Parties to provide further information by 20 May 2021. The

BAT also fixed the following amounts as a further Advance on Costs with a deadline of 20 May 2021 for payment:

"*Claimant 1 (Ms. Denson Brittany Janelle)*	*EUR 750.00*
Claimant 2 (Gherdan Sports S.R.L.)	*EUR 250.00*
Respondent (Club Sportiv Municipal Satu Mare)	*EUR 1,000.00*"

61. The Claimants responded to Procedural Order 2 on 20 May 2021. The Respondent did not respond to Procedural Order 2.

62. On 20 May 2021, the Claimants paid the Respondent's share of the further Advance on Costs as follows: Claimant 1 paid EUR 1,500.39 and Claimant 2 paid EUR 500.00.

63. By Procedural Order dated 27 May 2021 (hereinafter "Procedural Order 3"), the Arbitrator requested the Respondent to respond to Procedural Order 2 by 10 June 2021. Procedural Order 3 was dispatched by e-mail and courier to the Respondent.

64. While the Respondent acknowledged receipt of Procedural Order 3, it did not submit a response to Procedural Order 2.

65. By Procedural Order sent on 28 June 2021 (but dated "*27 May 2021*"), the Arbitrator declared the exchange of submissions complete, and requested that the Parties submit detailed accounts of their costs.

66. On 2 July 2021, the Respondent informed the BAT that they had incurred legal costs of EUR 1,625.00.

67. On 5 July 2021, the Claimants informed the BAT that Claimant 1 had incurred legal fees and costs of EUR 7,500.00 and Claimant 2 had incurred legal fees and costs of EUR 3,000.00 (in each case excluding their respective share of the Advance on Costs and the non-reimbursable handling fee).

68. Since none of the Parties filed an application for a hearing, and the Arbitrator did not deem a hearing necessary, the Arbitrator 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 Position of the Parties

4.1 Claimant 1

69. Claimant 1 takes the position that the Respondent was not entitled to rely on the results of the medical examination performed by Dr. Melinte on 26 October 2020 to terminate the Player Agreement pursuant to Article II.6.

70. In particular, Claimant 1 has argued that the Respondent was not entitled to terminate in circumstances where (i) Claimant 1 had already participated in several training sessions with the Respondent prior to the medical exam, (ii) the Respondent had failed to complete the medical examination within five days from the arrival of Claimant 1 in Satu Mare on 4 October 2020, (iii) the Respondent had failed to submit the results of the medical examination to Claimant 1 within 24 hours of the examination, and (iv) it is "*debatable*" whether the Respondent terminated the Player Agreement within 48 hours of the medical examination.

71. Claimant 1 has emphasised in this context that (i) she did not hide any pre-existing injuries from the Respondent when she arrived in Satu Mare at the start of the 2020/2021 season, and (ii) the Respondent was in any event well aware that she was returning from injury but nonetheless allowed Claimant 1 to participate in training sessions without conducting a medical examination, thereby accepting the possibility that the Player Agreement would become guaranteed for the 2020/2021 season.

72. Claimant 1 has also alleged that Dr. Melinte was "*biased*" and presented as "*firm conclusions*" matters which "*he would not be able to discover/observe/detect to his own sense*". Claimant 1 appears to have taken particular umbrage at the conclusion by

Dr. Melinte that Claimant 1 "*DID NOT WORK AT ALL*" during the off-season. According to Claimant 1, Dr. Melinte was in no position to reach this opinion given that he did not supervise Claimant 1 during this period. Claimant 1 also submitted that Dr. Melinte was unable to diagnose Claimant 1 with _____, absent "*paranormal psychic powers*" or, somewhat more mundanely, the MRI results. (As noted above, Dr. Melinte had, of course, been provided with the MRI results in advance of the medical examination.)

73. Claimant 1 has also alleged that the purported termination by the Respondent on the basis of Article II.6 of the Player Agreement was made in bad faith. Claimant 1 alleges that this is because the Respondent only sought to terminate the agreement when it became apparent that Claimant 1 might otherwise terminate the agreement in early November 2020 if the Respondent did not pay her the 15 October 2020 salary instalment in full and within 15 days of the contractual deadline.

74. As a consequence, Claimant 1 considers that her entire salary for the 2020/2021 season under the Player Agreement became due and payable on 28 October 2020.

75. Regarding the calculation of the relevant amount due, Claimant 1 has argued that Articles V.1.a, V.2.a and V.2.b of the Player Agreement provide for an annual salary of EUR 64,400.00 (net) for the 2020/2021 season, payable in RON at the exchange rate applicable "*on the last day of the month preceding the maturity of the payment + 1%*". According to Claimant 1, the last day of the month preceding the maturity of the payment was 30 September 2020 on the basis that the unlawful termination (and, therefore, the acceleration of the outstanding payments) occurred on 28 October 2020. Claimant 1 has calculated that the applicable EUR/RON exchange rate was therefore EUR 1.00 to RON 4.918498, resulting in an overall claim under the Player Agreement for RON 316,751.27, i.e. EUR 64.400.00 multiplied by 4.918498. Claimant 1 also claims interest of 5% per annum from 28 October 2020 until payment.

76. While Claimant 1 has not been able to obtain employment with a new club during the 2020/2021 season, Claimant 1 has taken the position that she has nonetheless complied with her duty to mitigate.

77. Claimant 1 invoked number of factors in this context that allegedly prevented her from signing with a new club, including (i) her lack of playing time and poor performance during the 2019/2020 season, (ii) her medical history, (iii) her age (33 years) and position (centre), (iv) alleged statements by the Respondent to other clubs that her career was "*finished*" and that she "*presented herself to the team with _____ problems*", (v) the timing of the termination of the Player Agreement after the start of the 2020/2021 season, and (vi) the difficulty for a US player to find employment in the current market due to (a) the general restrictions in place for signing US players, and (b) the specific restrictions that were put in place for the 2020/2021 season following the outbreak of the COVID-19 pandemic (with certain leagues preventing the registration of international players altogether).

78. While Claimant 1 did attract interest from Constanta in late December 2020, Claimant 2 did not agree for Claimant 1 to attend a trial practice with Constanta and the negotiations were discontinued, as noted above. The Claimants justified the conduct of Claimant 2 on the basis that "[t]*he policy of the agency of Claimant #2 is not to ever sign tryout contracts that allows* [sic] *the club to bring in a player and then hardball such person into negotiating a lower price than the one agreed under the pressure of the tryout clause (which by Claimant's #2* [sic] *experience, happens in exactly 100% of cases) and ultimately puts the player in question into a hard decision of accepting even lower salary than the projected one or going into such 'tryout' contracts*".

79. Regarding the offer made by Brasov in late February 2021, it was submitted that Claimant 1 was unable to sign with Brasov because the Respondent did not issue a letter of clearance in time. The Claimants' submissions in this regard are supported by a written statement made by a representative of Brasov.

4.2 Claimant 2

80. Claimant 2 takes the position that the Player Agreement was "*activated*" for the 2020/2021 season within the meaning of Article 3.1 of the Agency Agreement once Claimant 1 declined to "*opt out from the 2020/2021 season of contract, by notifying the club in maximum 15 days after the end of the 2019/2020 season*" pursuant to Article III.1 of the Player Agreement. As such, Claimant 2 became entitled to the agency fee in relation to the 2020/2021 season at the end of the 2019/2020 season.

81. Claimant 2 further submitted that the Respondent had failed to give proper notice of its "*objections*" to its claim pursuant to Article V.7 of the Agency Agreement, which requires the Respondent "*under penalty of forfeiture, to formulate in writing and communicate, by registered post letter* [sic] *with acknowledgment of receipt and declared content, to the player and her agency, the objections of the Club regarding any of the aspects listed above, within 15 days from their occurrence, unless this contract does not provide another term*".

82. The agency fee for the 2020/2021 season only became due under the Agency Agreement on 15 April 2021. However, for the purposes of calculating interest, Claimant 2 submitted that the unlawful termination of the Player Agreement "*automatically accelerates the due character of the total amounts unpaid from such terminated agreement and, additionally, their auxiliary agreements (such as the agency fee provisions within such contract and/or contained into separate agreements in which the agent represented such persons, as in the case of this matter with the player being duly represented by the Claimant)*".

83. Accordingly, Claimant 2 has claimed the outstanding agency fee in relation to the 2020/2021 season under the Agency Agreement in the amount of EUR 7,218.00 net, plus interest of 5% per annum from the date of 28 October 2020 until payment.

4.3 The Claimants

84. The Claimants have requested to be reimbursed for their legal costs (comprising the costs of the arbitration and their legal fees and expenses), plus interest of 5% per annum from the date of the award until payment.

85. The Claimants submitted that the request for interest on their legal costs "*may introduce a potential novelty in the BAT case-law*" as they have not been able to identify any BAT decision that has awarded such interest.

86. However, the Claimants have argued that there is "*no legal reason or basis to refuse the right of the Claimant to be indemnified with interest at the rate of 5% per annum on such awarded amounts with the title of arbitration costs and legal fees and expenses, from the moment of issuing the award, as ultimately such amounts are still pecuniary obligations of the Respondent, amounts related to which the Claimant was deprived of their use (and should therefore deserve to be indemnified with interest in relation to such amounts) by the unlawful conduct of the Respondent which has neglected its'* [sic] *payment obligations which had led to the Claimant filing the request for arbitration in this matter and incurring pecuniary damages awarded by the BAT (arbitration costs/legal fees and expenses) which the Claimant should be legally indemnified with interest until the date in which the Respondent would pay such amounts.*"

4.4 The Claimants' Request for Relief

87. In the Request for Arbitration, the Claimants accordingly submitted the following request for relief:

> "*Claimant requests that the Respondent to be* [sic] *obliged to pay:*
>
> ***a) The amount of 316.751,27 RON net towards DENSON BRITTANY JANELLE representing unpaid salary related to the 2020/2021 season alongside with default interest in amount of 5% per annum (Swiss statutory rate) on such amount from the date of 28th of October 2020 until the date in*** [sic] ***which the amount would be fully paid (interest in*** [sic] ***amount of 2.126,14 RON until the date of lodging this***

arbitration request)
b) The amount of 7.218 EUR net towards GHERDAN SPORTS S.R.L. representing agency fee in relation to the 2020/2021 season related to the player DENSON BRITTANY JANELLE alongside with default interest in amount of 5% per annum (Swiss statutory rate) on such amount from the date of 28th of October 2020 until the date in [sic] ***which the amount would be fully paid (interest in*** [sic] ***amount of 48,45 EUR until the date of lodging this arbitration request)***
c) All arbitration proceedings costs of the Claimants alongside with default interest in amount of 5% per annum (Swiss statutory rate) on such amount from the day in [sic] ***which the award would be issued until the date in*** [sic] ***which such amounts would be fully paid***
d) All legal fees and expenses of [sic] ***accrued from these arbitration proceedings of*** [sic] ***the Claimants alongside with default interest in the amount of 5% per annum (Swiss statutory rate) on such amount from the day in*** [sic] ***which the award would be issued until the date in*** [sic] ***which such amounts would be fully paid***

Total amount in dispute: 72.774,13 EUR**"**

(Emphasis as in the original)

4.5 The Respondent

88. The Respondent takes the position that Claimant 1 failed her medical examination and the Respondent was therefore entitled to terminate the Player Agreement pursuant to Article II.6.

89. The Respondent has acknowledged in this regard that Claimant 1 did participate in training sessions before her medical examination on 26 October 2020. However, the Respondent submitted that Claimant 1 "*was indeed present at training but as the main coach of the team Miguel de Jesus Lopez Alonso explained she started a very light stretching training at her own request, but after accusing _____, she was immediately stopped by the same coach and was told to make medical investigations*".

90. In support of its submission, the Respondent has provided (i) "*four sheets supplied by the technical staff of the basketball team containing the practices schedule of the team for October 2020*", and (ii) "*the monthly report of the physical trainer of the club*".

91. The attendance record of the technical staff shows that Claimant 1 attended six training sessions between 5 and 7 October 2020. One of the attendance sheets includes the following note: "*Denson Brittany just easy streach+shooting(_____)* [sic]*, MRI test*".

The monthly report of the physical trainer includes an attendance record for two circuit sessions during the relevant period (one on 5 October 2020 and one on 7 October 2020). The report shows that nine players attended the sessions, but not Claimant 1.

92. Regardless of the number and intensity of the practices in which Claimant 1 participated, the Respondent submitted that it did not waive its right to seek a medical examination of Claimant 1 because "*in the contract it is stated clearly that this clause is valid only* ***if full rooster*** [sic] ***is assembled and during the official program,*** *aspect that was not observed by the Claimants, the club having its full rooster* [sic] *only at first* [sic] *official game, at the end of October*" (emphasis as in the original).

93. Regarding the scheduling of the medical examination, the Respondent has acknowledged that the examination did not take place within five days of Claimant 1's arrival in Satu Mare. However, the Respondent has argued that the outbreak of the COVID-19 pandemic gave rise to a force majeure event and, as a consequence, "*the periods stated in contract for concluding the medical examination are postponed*". In response to a question by the Arbitrator, the Respondent accepted that it did not notify Claimant 1 that the medical examination was delayed on the basis of force majeure in accordance with the contractual force majeure provision in Article V.1.2. of the Player Agreement because "*from our point of view there was no need to notify the other parties about the effects of a global pandemic as it had it's* [sic] *effects on everybody*".

94. The Respondent also denied that Claimant 1 was not provided with her medical results within 24 hours of her medical exam with Dr. Melinte. According to the Respondent, Claimant 1 was "*given the results*" on 27 October 2021 when she was informed that she had failed the exam and the Player Agreement was accordingly being terminated.

95. The Respondent further submitted that Claimant 1 was already injured when she returned to Satu Mare at the start of the 2020/2021 season but "*insisted that she is well, so she lied about her condition*".

96. The Respondent has rejected the allegations that Dr. Melinte was biased. The Respondent submitted in this regard that Dr. Melinte is "*being considered as the best*

medic in Romania in this field" and had access to the MRI results in advance of his examination of Claimant 1. The Respondent also noted that Claimant 1 had the option under the Player Agreement to seek a second medical opinion, which she failed to do "*thus accepting the opinion of Dr. Melinte*".

97. In its Answer, the Respondent accordingly submitted the following request for relief:

> *"Asking respectfully to reject all claims requested by the Claimants as being unfounded, also asking to charge all costs to the Claimant.*
>
> […]
>
> *Having in consideration* [sic] *all these aspects,* ***we respectfully ask the BAT to reject the claims filed against us*** *as being completely unfounded and formulated with obvious ill-faith.*"

5. The Jurisdiction of the BAT

98. 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).

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

100. 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.[2]

101. Article X of the Player Agreement states:

> *"**X.1.** Conflicts in connection with the conclusion, execution, modification, suspension or termination of this contract shall be settled by domestic and/or by international sports arbitration panels/courts or, as the case may be, by the competent courts and tribunals, according to the law or convention of the parties. Thus, in interpreting this article, the parties*

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

understand how to regulate the legal regime and the jurisdiction to resolve any disputes that arise between them, respectively:

***X.2**. In the event of a litigation between the parties, the player can address herself to the competent courts on the Romanian territory, respectively material competent court from a territorial perspective based in Satu-Mare.*

***X.3.** Also, in addition to the competent courts in Romania, the player and the club (for the latter this arbitral jurisdiction representing the exclusive jurisdiction in the matter) can defer any dispute relating to or deriving from this agreement to the Basketball Arbitral Tribunal (BAT), located in Geneva, Switzerland. In this case where parties* [*sic*] *choose to address BAT, the arbitration dispute will be settled in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration will be Geneva, Switzerland. Arbitration* [sic] *will be governed by Chapter no. 12 of the Swiss Act on Private Law, whatever the domicile of the parties. The language of the arbitration will be English. The arbitrator will settle the dispute ex aequo et bono.*"

102. Article IV of the Agency Agreement states:

"*IV.1. In case of litigation, the parties will be able to address the competent courts on the territory of Romania, the parties being able to validly lodge applications to the materially competent court from the Satu-Mare Municipality.*

IV.2. Also, apart from the competent courts in Romania, any part of [sic] this contract has the right to refer any dispute in connection with or arising from this agreement to the Basketball Arbitration Tribunal (BAT), based in Geneva, Switzerland. In this [sic] *event that the parties choose to address the BAT, the arbitration dispute will be settled in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration will be Geneva Switzerland. The arbitration will be governed by Chapter no. 12 of the Swiss Law on Private International Law, whatever the domicile of the litigating parties. The language of the arbitration will be English. The arbitrator will settle the dispute ex aequo et bono. The parties declare that they waive their right to appeal the BAT arbitral award to the Swiss Supreme Court.*"

103. Both the Player Agreement and the Agency Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.

104. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements contained in the Agreements under Swiss law (referred to by Article 178(2) of the PILA). While the dispute resolution provisions of the Agreements provide the Claimants (and, in the case of the Agency Agreement, also the Respondent) with the choice to submit any dispute under the Agreements to the municipal courts in Romania, the existence

of that choice does not impugn the agreement to arbitrate. The Parties clearly envisaged that once a dispute had been submitted to arbitration before the BAT, the BAT would assume exclusive jurisdiction over that dispute. The Arbitrator notes in this regard that the Respondent did not dispute his jurisdiction to adjudicate the dispute.

105. For these reasons, the Arbitrator has jurisdiction to adjudicate the claims against the Respondent.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

106. 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 rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

> "[*T*]*he parties may authorise the arbitral tribunal to decide ex aequo et bono.*"

107. Under the heading "*Law Applicable to the Merits*", 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.*"

108. Article XI.3 of the Player Agreement states that "[t]*his Agreement shall be interpreted in accordance with the laws of Romania. In the case of BAT arbitration, the law applicable to arbitration* [sic] *shall be represented by the principle of ex aequo et bono*". Article X.3 further states that any dispute that is submitted to the BAT will be settled by the arbitrator "*ex aequo et bono*".

109. Article V.8. of the Agency Agreement states that "[t]*his contract and its effects are governed by Romanian law"*. Unlike Article XI.3 of the Player Agreement, Article V.8 of the Agency Agreement does not expressly stipulate the governing law for disputes that are submitted to the BAT. However, the Arbitrator notes from the surrounding provisions that the Parties clearly envisaged that any such disputes should be decided *ex aequo et bono*. In particular, Article IV.2 of the Agency Agreement states that any dispute that is submitted to the BAT will be settled by the arbitrator "*ex aequo et bono*" and in accordance with the BAT Rules. The preamble to the BAT Rules states that "*the parties recognise* […] *that the BAT arbitrators decide ex aequo et bono*" and Article 15.2 of the BAT Rules provides that the Arbitrator shall decide the dispute *ex aequo et bono* unless the parties have expressly and specifically agreed that he is not authorised to do so.

110. The Arbitrator also notes that the Respondent did not dispute that he should decide the issues in this case *ex aequo et bono*.

111. For these reasons, the Arbitrator will decide the issues submitted to him in these proceedings *ex aequo et bono*.

112. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from

Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[3] (Concordat),[4] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit*:

> "*When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.*"[5]

113. 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*".

6.2 BAT COVID-19 Guidelines

114. The BAT COVID-19 Guidelines (hereinafter the "Covid Guidelines") are aimed at addressing "*the consequences of the COVID-19 crisis on contracts in basketball, in particular those consequences arising out of domestic championships being suspended or terminated early as a result of the pandemic*".[6] While some of the contemporaneous correspondence indicates that the Respondent's ability to pay the 15 October 2020 salary instalment might have been affected by the COVID-19 pandemic, the Respondent provides no definitive evidence that this was indeed the case nor does it invoke the Covid Guidelines in its submissions. Furthermore, the evidence on the record suggests that in mid-October 2020 the Respondent felt confident enough in its financial position to pay Claimant 1 her full salary over the course of the 2020/2021 season, subject to Claimant 1 passing her medical

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3 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).

4 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

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

6 BAT Covid-19 Guidelines, p.1.

examination. As such it does not appear that the COVID-19 pandemic impacted the ability of the Respondent to honour its overall financial commitments for the 2020/2021 season. In light of this, the Arbitrator considers that it would not be appropriate to draw on the principles in the Covid Guidelines for the purposes of determining the present case.

115. In light of the foregoing matters, the Arbitrator makes the following findings.

6.3 Findings

6.3.1 The purported termination of the Player Agreement by the Respondent

116. The key issue in this dispute is whether the Respondent was entitled to rely on the medical examination of Claimant 1 on 26 October 2020 to terminate the Player Agreement pursuant to Article II.6.

117. Article II.6 provides *inter alia* that (i) the Respondent "*reserves the right to conduct a medical examination*" at the start of each season, (ii) the examination "*will be held within 5 days of the player presenting to the team*", and (iii) "*to the extent that the player performs any sports action scheduled by the club or for the benefit of the club after the reunion of each season (e.g. practices, warm-ups, participation in friendly or official games, etc.) without the medical examination being performed or before being presented a decision of a negative result of the medical examination, it is understood that the club renounces the right to take the medical examination and the contract takes effect as if the player had successfully passed such an examination*".

118. While the Parties disagree on a wide range of factual issues, it is common ground that (i) Claimant 1 arrived in Satu Mare on 4 October 2020, (ii) participated in five or six training sessions of the Respondent between 5 and 7 October 2020, (iii) attended her medical examination on 26 October 2020, i.e. 22 days after her arrival in Satu Mare, and (iv) was presented with the results of her medical examination on 27 or 28 October 2020.

119. Given that Claimant 1 participated in at least five or six training sessions of the Respondent before attending her medical examination on 26 October 2020, the Arbitrator considers that the Respondent had waived its right to rely on the results of the examination to argue that the Player Agreement had not become effective for the 2020/2021 season and/or was terminated with immediate effect.

120. To reach that conclusion, it is not necessary to determine whether or not the training sessions in which Claimant 1 participated were "*intense*" (as alleged by the Claimants) or only involved "*easy streach+shooting* [sic]" (as noted on the training records submitted by the Respondent). Article II.6 of the Player Agreement is drafted broadly and provides that Clamant 1 is deemed to have passed her medical examination as soon as she participated in "*any sports action scheduled by the club*" including "*practices*" and "*warm-ups*". The Arbitrator finds that the purpose behind this provision is at least three-fold: first, it protects Claimant 1 from the risk of suffering an injury during physical activities mandated by the Respondent which would then cause Claimant 1 to fail a subsequent medical examination and lose her contract; secondly, it acknowledges that such an injury can be suffered during any physical activity, regardless of its intensity; and, thirdly, it seeks to prevent the type of factual dispute that has arisen in the present case.

121. In light of the clear contractual wording of Article II.6 of the Player Agreement the Respondent should have prevented Claimant 1 from engaging in <u>any</u> physical activity if it had any doubt as to the physical condition of Claimant 1 when she returned to Satu Mare. That was particularly so given that the Respondent was aware that Claimant 1 was just returning from a long and serious injury. However, the Respondent instead decided "*not to do the medical examinations due to the restrictions inflicted by Covid-19*" (as acknowledged in the context of these proceedings). The Arbitrator has some sympathy with the Respondent that the arrangement of a medical examination was complicated by the fact that Dr. Melinte was self-isolating until 25 October 2020 and it would have been undesirable to keep Claimant 1 out of practice for three weeks after her arrival. However, the Arbitrator also notes that Dr. Melinte probably only self-

isolated for 14 days and might have therefore been available for a medical examination in the first week of October 2020 if the Respondent had planned ahead. In the end, the Respondent decided "*not to do the medical examinations*" until Claimant 1 had already practised with the Respondent for several days. The Respondent was of course entitled to take that course of action but, in doing so, must accept the consequences clearly set out in Article II.6 of the Player Agreement.

122. The Respondent has argued that it did not waive its right to conduct a medical examination because "*in the contract it is stated clearly that this clause is valid only* ***if full rooster*** [sic] ***is assembled and during the official program,*** *aspect that was not observed by the Claimants, the club having its full rooster* [sic] *only at first* [sic] *official game, at the end of October*". The Respondent has failed to identify any provisions of the Player Agreement that support this interpretation. To the extent that the Respondent is relying on the fact that Article II.6 of the Player Agreement refers to the performance of "*any sports action scheduled by the club* […] *after the reunion of each season*", the Arbitrator considers that the "*reunion of each season*" refers to the contractual start date of the season pursuant to Article III.1 of the Player Agreement, i.e. 1 September 2020. The Arbitrator notes in this regard that Claimant 1 first reported _____ on 6 or 7 October 2020 after she had already participated in a number of training sessions scheduled by the Respondent.

123. The Respondent has also alleged that Claimant 1 "*insisted that she is well, so she lied about her condition*". That allegation presupposes that Claimant 1 was aware when she arrived in Satu Mare that she was not fit enough to join team practices. However, there is no evidence that this was the case. Claimant 1 has submitted evidence that she trained regularly in the USA from early June 2020 until her departure to Satu Mare on 3 October 2020. Mr. Brown, who trained Claimant 1 during the month of September 2020, has explained that Claimant 1 participated in regular and physically demanding workouts and did not complain of any _____. Against this background, it is entirely plausible that Claimant 1 might have "*insisted that she is well*" when she returned to the Respondent.

124. In summary, the Arbitrator finds, *ex aequo et bono*, that the Player Agreement became effective as soon as Claimant 1 participated in training sessions of the Respondent on 5 October 2020 without completing a prior medical examination. The Respondent was therefore not entitled to terminate the Player Agreement in reliance on the medical examination of Claimant 1 on 26 October 2020.

125. In light of these findings, it is not necessary for the Arbitrator to consider the other arguments made by Claimant 1 and the Respondent regarding the timing and conduct of the medical examination on 26 October 2020 and the presentation of the results of the examination to Claimant 1.

6.3.2 The amount owed to Claimant 1 under the Player Agreement

126. The consequences of finding that the Player Agreement took effect in relation to the 2020/2021 season are spelt out in Article V.1.a of the Player Agreement and are not disputed by the Respondent: "*in the case that the player successfully passes such medical exam in the conditions of art. II.6 or in the case in which the club is considered as been* [sic] *waiving such right* […] *this contract represents a guaranteed contract*" (emphasis added).

127. Accordingly, the Arbitrator finds that Claimant 1 is entitled, in principle, to her entire outstanding salary in relation to the 2020/2021 season, consistent with BAT jurisprudence.

128. The Arbitrator notes that the Player Agreement provides that any salary payments should be made net and in RON. The Arbitrator agrees with Claimant 1 that this results in an overall claim of RON 316,751.27 (net). The Arbitrator notes that the Respondent has not disputed the legal principles underpinning the calculation or the calculation itself.

129. The Arbitrator has considered whether the amount that Claimant 1 is seeking for the unlawful termination of the Player Agreement should be reduced in light of the

mitigation principles developed by BAT arbitrators. As to this, the Arbitrator accepts that Claimant 1 would have likely experienced some difficulty in finding a new agreement for the reasons set out by the Claimants in their submissions (see paragraph 77 above). However, it is clear from the evidence on the record that Clamant 1 nonetheless attracted serious interest from at least two clubs in Romania, Constanta and Brasov.

130. Regarding the negotiations with Constanta in late December 2020, the Arbitrator considers that Constanta was clearly interested in reaching a deal subject to satisfying itself that Claimant 1 was fit to play. According to the Claimants, Claimant 1 did not suffer from any injuries at this point and the salary on offer might have been acceptable to Claimant 1 in the circumstances. The Arbitrator therefore considers it likely that Claimant 1 would have signed a new contract with Constanta if she had attended the trial practice. While Claimant 2 alleges that Constanta would have sought to negotiate down Claimant 1 after her trial practice, that allegation is not supported by any evidence. To the contrary, the representative of Constanta clearly explained that the purpose of the trial practice was to assess the physical condition of Claimant 1, "[n]*ot because of value* […] *there is nothing to clarify regarding the value and what I can offer her".* The Arbitrator therefore finds that Claimant 1 failed to fulfil her duty to mitigate when she refused to attend the trial practice with Constanta.

131. Regarding the offer made by Brasov on 24 February 2021, the Arbitrator considers that Claimant 1 acted reasonably in seeking to obtain a release from the Respondent as soon as possible, subject to the Respondent not being able to make a better offer. The Arbitrator considers that Claimant 1 should not be held responsible for the deal falling apart at the last minute, particularly given the (quite possibly deliberate) delays by the Respondent in engaging with the Claimants before the expiry of the domestic transfer window on 28 February 2021.

132. In summary, the Arbitrator considers that the amount that Claimant 1 is seeking for the unlawful termination of the Player Agreement should be reduced by the salary that

Constanta would have likely offered to Claimant 1 if she had attended the trial practice and secured a contract, namely USD 1,500.00. While not entirely clear from the correspondence, the Arbitrator considers that this salary would have likely been offered net. The Arbitrator further notes that the final game of the 2020/2021 season was played on 11 May 2021. The Arbitrator therefore finds that Claimant 1 would have likely earned a total salary of USD 6,000.00 (net) for the remainder of the season if she had signed with Constanta, equivalent to RON 24,333.60 based on the USD/RON exchange rate of USD 1.00 to RON 4.0556 on 11 May 2021.

133. In light of the above, the Arbitrator finds, *ex aequo et bono*, that Claimant 1 should be awarded the sum of RON 292,417.67 (net) for the unlawful termination of the Player Agreement, comprising the outstanding salary under the Player Agreement in relation to the 2020/2021 season (RON 316,751.27) minus the amount that Claimant 1 would have likely earned if she had signed with Constanta in early January 2021 (RON 24,333.60).

6.3.3 The amount owed to Claimant 2 under the Agency Agreement

134. The Arbitrator notes that Article 3.1 of the Agency Agreement provides that (i) the Respondent had engaged Claimant 1 "*for the seasons 2019/2020 and (conditional) 2020/2021*" under the Player Agreement, and (ii) Claimant 2 is entitled to an agency fee of EUR 7,218.00 (net) in relation to the 2020/2021 season "*subject to the fact that the player's contract for the 2020/2021 season will be activated*".

135. In the view of the Arbitrator, Article 3.1 of the Agency Agreement provides that the Player Agreement is "*activated*" in relation to the 2020/2021 season as soon as Claimant 1 declines "*to opt out from the 2020/2021 season of contract, by notifying the club in maximum 15 days after the end of the 2019/2020 season*" pursuant to Article III.1 of the Player Agreement.

136. Contrary to the submissions by the Respondent, the 'activation' of the Player Agreement is therefore not subject to the right of the Respondent to conduct a medical examination at the start of the season pursuant to Article II.6 of the Player Agreement. This is because (i) the Respondent had this right under the Player Agreement in relation to both the 2019/2020 and 2020/2021 seasons and yet only the 2020/2021 season is described as "*conditional*" in the Agency Agreement, and (ii) Article 3.3 of the Agency Agreement provides that "*the payment of these remunerations are guaranteed, any event subsequent to the signing of this contract (e.g. injury of the sports participants referred to in art. 3.1, illness, premature termination of contract, etc.) shall not be able to affect the certainty, liquid and due character of these amounts, the remuneration being due as a result of the signing of the sports activity contracts by the participants in the sports activity mentioned in art. 3.1*".

137. Accordingly, the Arbitrator finds that the Agency Agreement was "*activated*" within the meaning of Article 3.1 when Claimant 1 declined to exercise her player option in relation to the 2020/2021 season within 15 days after the end of the 2019/2020 season. It was at this point that the Respondent became liable for the agency fee in relation to that season.

138. As indicated above, the Arbitrator considers that Claimant 2 would have been entitled to the agency fee regardless of whether Claimant 1 had passed, or was deemed to have passed, her medical examination at the start of the 2020/2021 season. (The Arbitrator notes that this issue is in any event moot as the Arbitrator has found that Claimant 1 passed the medical examination within the meaning of Article II.6 of the Player Agreement.)

139. In light of the above, the Arbitrator finds, *ex aequo et bono*, that Claimant 2 should be awarded the sum of EUR 7,218.00 (net) in relation to the unpaid agency fee for the 2020/2021 season under the Agency Agreement.

6.3.4 Interest

(a) Interest on the outstanding salary and agency fee

140. The Claimants have claimed interest at 5% per annum on:

a) the outstanding salary for the 2020/2021 season from the date of the termination of the Player Agreement on 28 October 2020 until the date of payment; and

b) the outstanding agency fee for the 2020/2021 season from the date of the termination of the Player Agreement on 28 October 2020 until the date of payment.

141. Consistent with BAT jurisprudence, the Arbitrator considers that an interest rate at 5% per annum is reasonable in the circumstances, even though neither of the Agreements provide for default interest.

142. Regarding the date from which interest should run, the Arbitrator notes that the Respondent unlawfully terminated the Player Agreement at a meeting with Claimant 1 on 27 October 2020, followed by a written notice on 28 October 2020.

143. The Arbitrator therefore finds, *ex aequo et bono*, that interest on the outstanding salary payments should run from 28 October 2020 (i.e. the day after termination and therefore the day after which the outstanding salary fell due), as requested by Claimant 1.

144. In respect of the outstanding agency fee, the Arbitrator notes that Article 3.2 of the Agency Agreement provides for a due date of 15 April 2021. In its submissions, Claimant 2 has argued that interest should nonetheless run from 28 October 2020 because the unlawful termination of the Player Agreement "*automatically accelerates the due character of the total amounts unpaid from such terminated agreement and, additionally, their auxiliary agreements (such as the agency fee provisions within such*

contract and/or contained into separate agreements in which the agent represented such persons, as in the case of this matter with the player being duly represented by the Claimant".

145. In support of this submission, Claimant 2 relies on the decision in BAT 0487/13. However, this decision only confirmed a player's right to demand payments on an accelerated basis. It does not support the contention by Claimant 2 that the unlawful termination of a player agreement would accelerate any payments under a related agency agreement.

146. The Arbitrator considers that there is no principled reason, at least on the facts of the present case, why Claimant 2 should be entitled to receive the agency fee on an accelerated basis. The Arbitrator notes in this regard that Article 3.3 of the Agency Agreement expressly provides that a "*premature termination*" of the Player Agreement shall not affect the "*due character*" of the agency fee. The Arbitrator considers that the "*due character*" of the agency fee includes the contractual due date.

147. In light of the above, the Arbitrator finds that interest is payable:

a) to Claimant 1 at 5% per annum on the sum of RON 292,417.67 from 28 October 2020 until payment; and

b) to Claimant 2 at 5% per annum on the sum of EUR 7,218.00 from 16 April 2021 (i.e. the day after its due date) until payment.

(b) Interest on legal costs

148. The Claimants have requested interest at 5% per annum on their legal costs (comprising the costs of the arbitration and their legal fees and expenses) from the date of the award until payment.

149. As noted above, the Claimants have not identified any decisions by the BAT that have awarded interest on legal costs.

150. The Arbitrator notes that it is possible to conceive of a scenario where it might be appropriate to award interest on legal costs from the date of the award or from a date shortly after the award, particularly if the previous conduct of the respondent suggests that it might not comply with the award within a reasonable period of time. However, the Arbitrator considers that this is not such a case. Moreover, the Claimants have not proven that they have incurred any special losses as a result of being required to pay legal costs to date. The Arbitrator therefore finds that the Claimants are not entitled to interest on their legal costs.

7. Costs

151. 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).* […]*"*

152. On 25 October 2021, the BAT President determined the arbitration costs in the present matter to be EUR 10,001.23.

153. 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."*

154. Broadly speaking, the Claimants were the prevailing parties, given that they recovered over 90% of the sums claimed from the Respondent. The Arbitrator also notes that the

Respondent failed to pay its share of the Advance on Costs and did not engage with Procedural Order 2 requiring the Arbitrator to issue Procedural Order 3.

155. On the other hand, the Arbitrator notes that a reasonable portion of the costs of the arbitration were directly caused by the conduct of the counsel for the Claimants who throughout these proceedings provided voluminous submissions and material, much of which was unfocused, repetitive, irrelevant and, on occasion, prejudicial.

156. In light of the above, the Arbitrator considers it is fair in the circumstances and in application of Article 17.3 of the BAT Rules, that 70% of the costs of the arbitration be borne by the Respondent and 30% be borne by the Claimants.

157. Given that Claimant 1 paid EUR 7,501.23 of the Advance on Costs, and Claimant 1 paid EUR 2,500.00, the Respondent shall reimburse EUR 5,250.86 to Claimant 1 and EUR 1,750.00 to Claimant 2.

158. 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."*

159. 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 (including a maximum contribution of EUR 7,500.00 to a party's legal fees where the sum in dispute is between EUR 30,001.00 and EUR 100,000.00 and a maximum contribution of EUR 5,000.00 to a party's legal fees where the sum in dispute is less than EUR 30,000.00).

160. Claimant 1 claimed EUR 7,500.00 in legal fees and expenses and Claimant 2 claimed EUR 3,000.00 in legal fees and expenses (in each case excluding their respective share of the non-reimbursable handling fee of EUR 3,000.00).

161. The Respondent claimed EUR 1,625.00 in legal fees and expenses.

162. The Claimants were the prevailing parties and are therefore entitled to a contribution to their legal fees in principle. The Arbitrator acknowledges in this context that the present claim was not entirely straightforward on the facts and required several rounds of further submissions. That being said, the Arbitrator considers that the legal fees incurred by the Claimants were excessive in the circumstances. As noted above, the legal submissions prepared by counsel for the Claimants should have been much shorter and more concise. They also contained prejudicial allegations that the Claimants must have known to be incorrect (e.g. that Dr. Melinte or Claimant 1 were allegedly not provided with a copy of the MRI results) which then required further factual inquiries by the Arbitrator. The Arbitrator is alarmed that counsel for the Claimants claims to have spent more than 100 hours on this case. This is disproportionate.

163. The Arbitrator therefore finds that it would be fair and reasonable for the Respondent to pay Claimant 1 EUR 5,500.00, and Claimant 2 EUR 1,500.00, as a contribution towards their legal fees and expenses (including their respective share of the non-reimbursable handling fee).

164. Therefore, the Arbitrator decides:

a) the Respondent shall pay to Claimant 1 EUR 5,250.86 being 70% of her costs of the arbitration;

b) the Respondent shall pay to the Claimant 2 EUR 1,750.00 being 70% of its costs of the arbitration;

c) the Respondent shall pay to Claimant 1 EUR 5,500.00, as a contribution towards her legal fees and expenses; and

d) the Respondent shall pay to Claimant 2 EUR 1,500.00, as a contribution towards its legal fees and expenses.

8. AWARD

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

1. **Clubul Sportiv Municipal Satu-Mare shall pay Ms. Brittany Janelle Denson the amount of RON 292,417.67 net as compensation for unpaid salary for the 2020/2021 season, plus interest at a rate of 5% per annum from 28 October 2020 until the date of payment.**

2. **Clubul Sportiv Municipal Satu-Mare shall pay Gherdan Sports S.R.L. the amount of EUR 7,218.00 net as agency fees, plus interest at a rate of 5% per annum from 16 April 2021 until the date of payment.**

3. **Clubul Sportiv Municipal Satu-Mare shall pay Ms. Brittany Janelle Denson the amount of EUR 5,250.86, as reimbursement for arbitration costs.**

4. **Clubul Sportiv Municipal Satu-Mare shall pay Gherdan Sports S.R.L. the amount of EUR 1,750.00, as reimbursement for arbitration costs.**

5. **Clubul Sportiv Municipal Satu-Mare shall pay Ms. Brittany Janelle Denson EUR 5,500.00, as a contribution towards her legal fees and expenses.**

6. **Clubul Sportiv Municipal Satu-Mare shall pay Gherdan Sports S.R.L. EUR 1,500.00, as a contribution towards its legal fees and expenses.**

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

Geneva, seat of the arbitration, 8 November 2021

Rhodri Thomas

(Arbitrator)