BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0668/15 and 0693/15)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the consolidated arbitration proceedings between

(**case BAT 0668/15**)

Familia Basket Schio srl SSD
Viale Industria snc, 36015 Schio, Italy

- Claimant -

represented by Mr. Paolo Ronci,
Via Laghi 69/6, 48018 Faenza, Italy

vs.

Ms. Chinenye Joy Ogwumike

- Respondent and Counterclaimant -

represented by Mr. Ersü Oktay Huduti, attorney at law, Büyükdere Cad.
Maya Akar Center, 100-102 C Blok No: 4, Esentepe, Şişli, İstanbul, Turkey

and between

(**case BAT 0693/15**)

Sports International Group Inc.
267 Kentlands Blvd. Suite 105,
Gaithersburg, MD 20878, USA

- Claimant -

represented by Mr. Ersü Oktay Huduti, attorney at law, Büyükdere Cad.
Maya Akar Center, 100-102 C Blok No: 4, Esentepe Şişli, İstanbul, Turkey

vs.

Familia Basket Schio srl SSD
Viale Industria snc, 36015 Schio, Italy

- Respondent -

represented by Mr. Paolo Ronci,
Via Laghi 69/6, 48018 Faenza, Italy

1. The Parties

1.1 The Claimants

1. In case BAT 0668/15, the Claimant is Familia Basket Schio srl SSD, a professional basketball club in Italy (hereinafter referred to as “the Club”).

2. In case BAT 0693/15, the Claimant is Sports International Group Inc., a basketball agency (hereinafter referred to as “the Agent”).

1.2 The Respondents

3. In case BAT 0668/15, the Respondent and Counterclaimant is Ms. Chinenye Joy Ogwumike, a professional basketball player (hereinafter referred to as “the Player”).

4. In case BAT 0693/15, the Respondent is the Club.

2. The Arbitrator

5. On 20 March 2015, with respect to BAT 0668/15, and on 27 April 2015, with respect to BAT 0693/15, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the parties have 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. On 13 May 2014, the Club and the Player entered into an Agreement (the

"Agreement") for the 2014/2015 season, according to which the Player would receive a total net salary of USD 180,000 for the season and her Agent would receive a fee of USD 18,000, as stipulated in Exhibit 2 of the Agreement.

7. With respect to medical issues, the Agreement included sections 3.d, 4 and 12, which respectively provided the following:

> "[*3*] ***d. Medical and Dental Expenses***
>
> *The Club agrees to provide round the clock medical and dental insurance and or pay for all medical, hospital, surgical and dental expenses (excluding purely cosmetic dental work unless such dental work is required as a result of an injury or accident) incurred by the Player during the term of this Agreement at practice or game or eventually occurring during Player's travel between home and practice (unless such accident happened because of Player's fault or prohibited activity such as skiing, motorcycling, etc). All services will be provided at a local best-equipped clinic to facilitate Player's medical treatment and rehabilitation.*
>
> ***4. Medical exam, injuries.***
>
> ***a.*** *The Club agrees that the Player shall pass a standard medical examination for basketball players, and that the Club's obligations under this Agreement shall be contingent upon Player's passing such examination. Within three (3) days of Player's arrival in Italy, a physician selected by the Club shall conduct this standard medical examination. If Club fails to notify the Player and the Player's representative of a failed medical examination within seven (7) days of Player's arrival in Italy, the Player shall then be treated as having passed the medical exam. In the event that the physician selected by the Club determines that the Player is unable to pass the standard medical examination for basketball players, Club agrees that the Player and Player's representatives, Sports International Group, Inc., shall be allowed to select a physician of their choice to render a second medical opinion concerning the Player's ability to pass the standard medical examination. In the event that the Club disagrees with the second medical opinion, a third reviewing physician who is mutually acceptable by the Club and Player and player's representatives shall render a medical opinion concerning Player's ability to pass the standard medical examination and such opinion shall not be final and binding. Player shall not be required to participate in any Club practices or physical activities until such medical examination is conducted. Player hereby states that he has not suffered an injury that will affect his playing capacity except for any injury of which the Club is already aware. If Club believes that player is not healthy upon Player's arrival in Italy, Club shall immediately notify Player and Player's representative and shall not allow Player to participate in training camp.*
> *In addition, Player shall not be required to participate in any Club practices or physical activities until the results of such medical examination are given to Player.*
>
> ***b.*** *In the event that the Player sustains an incapacitating injury or illness during the term*

of this Agreement, as long as injury and illness are incurred due to agonistic activity made by the Player to the Club that renders the Player incapable of performing in some or all of the remaining games, the Club agrees to meet all payment obligations as though the Player had performed in all games. In the event of the Player's death during the term of the present Agreement the Club agrees to pay all remaining compensation due to the Player to her estate or beneficiary as though the Player had fully performed minus all compensation and bonuses earned by the Player prior to her death. Should the Club elect to replace the Player with another foreign player at any time during the term of this Agreement, 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 in Exibit 1. below, and the Player shall further be entitled the use of an apartment as specified in Paragraph 3.c. above for a minimum of thirty (30) days.

[…]

***12.** Club agrees that this Agreement is unconditionally guaranteed contractual Agreement and that Player's Guaranteed Compensation and bonuses and the Agent Fee are fully guaranteed, due and payable, including but not limited to in the event of Player's injury, illness, death, and/or lack of skill. The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club shall not have the right to suspend or release the Player in the event that the Player does not exhibit sufficient skill or competitive ability, or in the event that an injury, illness or death shall befall the Player. For the avoidance of doubt, in the event that the Player sustains an incapacitating injury or illness during the term of his Contract that renders the Player incapable of performing in some or all of the Club's remaining games or should the Club simply elect to replace Player with another player, Club agrees to meet all payment obligations to Player and Agent as though Player had performed in all games and met all obligations in this Agreement.*"

8. The Player is a basketball player in her first years of a professional basketball career; she was born in 1992.

9. Between May-August 2014, before joining the Club under the Agreement, the Player played in the WNBA for the "Connecticut Sun" and attended a camp of the USA National Team relating to its preparation for the 2014 women's Basketball World Championship.

10. On 17 August 2014, [doctor], issued an [medical report], in which he stated the following:

> "[medical information]"

11. During these proceedings, upon the Player's request, [doctor] provided the following written clarifications and details regarding his foregoing report:

"[medical information]"

12. On her arrival at the Club in October 2014, the Player successfully passed the medical examination.

13. Thereafter, she played ten games for the Club, seven within the Italian League and three Euroleague games, during which she performed well.

14. On 12 November 2014, after a Euroleague game against Bourges, her [body part] was swollen and she was suffering from pain. In a declaration made during these proceedings, she specified the following in that relation:

"[medical information]"

15. Upon examination on 14 November 2014 by the team doctor, [doctor], he issued a report with the following diagnosis:

"[medical information]"

16. The MRI done upon the request of [doctor] was performed on 18 November 2014 at the [medical institution], and was delivered with the following diagnosis by [doctor]:

"[medical information]"

17. On 20 November 2014, she played another Euroleague game and her [body part] swelled up again.

18. Upon a further examination on 21 November 2014 by the team doctor in light of the results of the MRI, he issued a second report with the following diagnosis:

"[medical information]"

19. Thereafter, the Club and the Player (via her Agent) started discussing whether she would undergo necessary [body part] surgery in Italy or the United States, while at the same time negotiations began about how much compensation she would receive from the Club under one and the other option, as salary remuneration and for medical costs, if for medical reasons she was unable to play again for the rest of the season.

20. On 11 December 2014, the Club sent a letter to the Agent, including the following content:

> "*Dear Boris, we have carefully analyzed the facts and the development of Ogwumike's situation from the day of her arrival until the present.*
>
> *From the first day of training, she used to bind her* [body parts] *and apply ice to them. After the game in Bourges she had a swollen* [body part]*, and she told us that the same thing had happened in Connecticut in the summer of 2014, and that after two weeks of rest she was able to resume playing.*
>
> *We let Ogwumike rest. Then she played in the Euroleague game against Brno, and the following day her* [body part] *was swollen once again. At that point we let her rest again and we had an MRI exam done. We also examined the MRI she had done in the United States in July 2014, in which the* [injury] *is evident.*
>
> *Our medical staff realized the gravity of the situation and sought the paid advice of* [doctor], *an internationally recognized expert in matters of cartilage. [Doctor] confirmed the damage to the* [body part], *and, after he saw the MRI of July 2014, said that this situation was pre-existent and had worsened during the following four months.*
>
> *We are sure that, if it were not for this previous injury, Ogwumike would have been physically fit to play with our Club for all the season. Unfortunately, the damage is disabling for the practice of our sport.*
>
> *We care about this girl a great deal because, aside from being an excellent sportswoman, she has shown herself to be correct and professional, polite and well integrated in the Club. You must, however, realize the enormous damage we have suffered and are still suffering because of this situation. During the month of November Chiney played only five games out of nine, and now we are obliged to find a substitute for her for all the*

competitive commitments in the 2014-15 season.

Such being the case, we feel the girl should return to the United States as soon as possible, and that any [surgery] *required should be performed there so that she can be adequately cared for after the operation.*

Under these circumstances, the natural continuation of the contract is simply impossible for us. However, in order to avoid useless and costly legal action, we wish to find an amicable solution that is satisfactory for all parties involved, and so we would like to make the following proposal:

As of today, Ogwumike has received $32,000 U.S. currency. Her contract would entitle her to receive another $148.000. We propose dividing the damage equally between us. In this case, the girl would receive 50% of this residual sum, that is $74,000. We could make an immediate payment of $24,000, and ten monthly payments of $5.000, which would permit her to have a regular income in case of prolonged disability […]".

21. The same day, the Agent sent an invoice for its fee of USD 18,000 to the Club.

22. On 12 December 2014, within the negotiation underway, the Club made another offer as follows:

"*Boris, it's quite clear that we have different points of view but it's quite clear that we want to avoid legal procedure. In Italy the surgery and rehab have, more or less, the same cost of USA and insurance doesn't cover the cost. If she will have* ***surgery in Italy*** *for us it's a big effort because we have to take care every day about Chiney. we need to keep the apartment and we need to take one person dedicated to her.*

So we can make 2 proposes:

We make surgery in Italy with [doctor] *and rehab in the best Physio Centre in this area (the same in which Anderson made rehab). In this case we are agree to give 80.000 usd. We have already paid 36.000 usd that means we have to pay 44.000 usd more, 24.000 next week and 8 monthly payments of 2.500 usd each one.*

If she wants to have ***surgery in the USA*** *we can improve our offer comparing to the last*

email I have sent. We are agree to pay 120.000 usd. We have already paid 36.000 usd so we pay 24.000 next week and 10 monthly payments of 6.000 usd each one. You can understand that we really want to take care of Chiney". (sic)

23. The same day, the Agent wrote:

"*Paolo, it's strange that your insurance company doesn't cover the costs of surgery and rehab, but in any case it is in her contract. So, if she had a surgery in Italy, ut (sic) is pointless to discuss money, cause then she'll just stay, and hopefully recovers quickly, and we go with existing contract. The minimum they just agreed to terminate the contract and for her to go home now is $144k which will make the full contract amount of $180k. In that case Chiney is responsible for all medical bills. Let me know if you agree to this final proposal*".

24. Later in December 2014, at the Christmas holiday break, the Player left for the United States and did not return to the Club thereafter.

25. On 23 December 2014, after further written exchanges between the Agent and the Club as well as another monthly salary payment by the latter, the Club wrote:

"*Our proposal is the following:*
Keeping in mind that we already paid Chiney 60.000 USD, we would like to cover the 50% of the full contract. It means a total of 90.000 USD, so another 30.000 USD.
We are also available to cove a bit more than 50% of medical costs (surgey [sic] *plus rehab) Chiney will my have in USA.*
As per the information we shared, the costs with high top Hospital and doctors should are around 50.000 USD and we are ready to offer 30.000 USD for Chiney being sure of that high top.
We agree also to leave her any insurance's reimbursement she will may have in USA.
In conclusion:

-60.000 USD already paid, plus
-30.000 USD plus
-30.000 USD for a total of
-120.000 USD".

26. On 25 December 2014, the Player's lawyer put the Club on notice that she would be filing a claim with the BAT if it did not pay her the full amount of her outstanding contractual salary, plus any bonuses owed and medical costs incurred. In the same letter, the lawyer put the Club on notice to pay the Agent's fees as per the Agreement.

27. On 22 January 2015, after having had her [body part] examined a week earlier, the Player underwent surgery in the United States by [doctor]. The procedure included [surgery].

28. On 23 February 2015, the Player had a follow-up [surgery], also undertaken by [doctor].

29. On 24 February 2015, the Agent put the Club on notice that she was terminating the Agreement due to the latter's non-fulfilment of its contractual obligations, and again requested payment.

30. It is undisputed between the Parties hereto that when their relationship ended in the circumstances summarized above, a total amount of USD 120,000 remained unpaid out of the Player's contractual salary and the Agent's entire fee of USD 18,000 remained outstanding.

3.2 The Proceedings before the BAT

31. The Club filed with the BAT a Request for Arbitration dated 25 February 2015 and paid the non-reimbursable handling fee of EUR 3,000.

32. On 14 April 2015, the Player and the Agent, respectively, filed an Answer/Counterclaim

and a request for intervention.

33. By Procedural Order of 27 April 2015, the proceedings in BAT 0668/15 and BAT 0693/15 were consolidated and the amounts of advances on costs to be paid adjusted accordingly.

34. Thereafter, in relation to the consolidated proceedings, all the Parties paid the additional non-reimbursable handling fees and their shares of the advances on costs, as follows: In addition to the non-reimbursable handling fee of EUR 3,000 already paid, the Club paid EUR 5,000 as its advance on costs as Claimant in BAT 0668/15 and EUR 1,000 as Respondent in BAT 0693/15; the Player paid EUR 5,000 as her advance on costs as Respondent in BAT 0668/15 as well as EUR 3,000 as a non-reimbursable handling fee for her counterclaim; in BAT 0693/15, the Agent paid a non-reimbursable handling fee of EUR 1,500 and EUR 1,000 as its advance on costs as Claimant.

35. By Procedural Orders of 27 April and 13 May 2015, the Parties were requested to answer clarifying questions put by the Arbitrator, and the Club was requested to file its Answer to the Player's Counterclaim and to the Agent's Claim.

36. On 8 June 2015, the BAT acknowledged receipt of Parties' replies to the Arbitrator's questions and of the Club's Answer to the Player's Counterclaim and to the Agent's Claim.

37. By Procedural Order of 15 June 2015, the exchange of written submissions was closed, subject to the Player answering additional questions from the Arbitrator.

38. On 23 June 2015, the Player filed her answers to the additional questions and objected to the proceedings being closed without having the opportunity to submit observations on the Club's documents filed as evidence with its last submission.

39. By Procedural Order of 3 July 2015, the Player was given leave to comment on the written evidence filed by the Club, and the Parties were invited to make any final

observations on each other's latest submission.

40. On 13 July 2015, the Parties made their final comments and the Player filed her observations on the Club's latest evidence. In those observations the Player requested that all the medical reports and doctors opinions/declarations filed by the Club with its latest submission be deemed inadmissible, due to having been filed late and outside the scope of the questions put to the Club by the Arbitrator.

41. By Procedural Order of 21 July 2015, the Arbitrator took note of the Player's procedural application and decided it would be addressed in the final award. Accordingly, the exchange of documents was declared completed and the Parties were invited to file their accounts of costs, which they did.

42. By Procedural Order of 29 July 2015, the Parties were invited to make any comments on each other's accounts of costs. Neither Party made any such comments.

4. The Positions of the Parties

4.1 The Club's Position

43. In **case BAT 0668/15**, the Club submits in substance that when the Player arrived and passed the standard medical examination she had a pre-existing [body part] injury which she did not disclose, nor did she mention the Connecticut Sun medical report of 17 August 2014 issued for the Player by that team's doctor, despite having the obligation to do so under the terms of section 4a. of the Agreement, stipulating: […] "*Player hereby states that he (sic) has not suffered an injury that will affect his (sic) playing capacity except for any injury of which the Club is already aware*". In that connection, the Club contends that she must have been aware of this injury, since, as it only found out subsequently, she had missed three games and been subject to an MRI for a twisted [body part] while playing in the WNBA for the Connecticut Sun before joining the Club; whereas at the time of her engagement, upon being questioned by the

Club, her *"… Agent referred only about* [body part] *problems as reason of the missed games*".

44. Furthermore, the Club argues that because she was a very young professional player, it had less reason to suspect she might already be having medical issues with her joints and, in any event, its standard medical examination does not include making an MRI, since, unless joint issues are signalled by players, it cannot be expected to do MRIs of the [body parts] of each player, which would amount to six MRIs per player and 72 for an entire roster. Here, the Club had no reason to over-investigate.

45. It also underlines that the Player was regularly icing and wrapping her [body part] after the games but upon being questioned in that respect she answered "… *that ice and wrap were not referred to a single event but part of constant and preventive therapy due to the particular* [body part's anatomy]". In that relation, the Club also contends that: "*Her* [body part] *required specific treatment from the beginning and from both team's Doctor and other therapists. In specific, ice and painkillers after games and treatment during the week*".

46. Thus, and as confirmed by the medical opinions and reports filed by the Club, when her [body part] began swelling after the Euroleague game of 12 November 2014 against Bourges and she subsequently became incapable of playing any longer and was subject to an examination and MRI – revealing her [body part] problems – it was a consequence of her pre-existing injury and weak [body part] being [injury] during the games played with the Club when in fact, unknown to it, she was not truly fit to play.

47. The Club argues that given the foregoing situation it was not contractually bound to pay the Player's entire medical costs and remaining salaries, but was entitled to seek a reasonable compromise. In that relation, the Club contends it negotiated fairly, trying to account for the Player's needs, including by continuing to pay her salary, but she nevertheless left to the United States during the negotiation and underwent surgery there without informing it and never returned to the Club in breach of her contractual

obligations. Thus, when in late December 2014 she put the Club on notice and subsequently in February 2015 terminated the Agreement, she was not entitled to do so and caused damage to the Club. In that connection, the Club underlines that its main sponsor for the season had been convinced by the Player's presence in the roster as a high-profile player, with the result that the sponsor put the Club on notice when she left and it found itself in a delicate position, having also to find and remunerate a replacement player.

48. The Club's Request for Arbitration of 25 February 2015 included the following Prayers for relief:

> *"With reference to all the factors mentioned above, the Claimant asks:*
>
> - *to consider as first the contract not valid*
> - *to consider anyway the contract ended*
> - *to have BAT please consider to fine Respondent with the sum of 120.000 USD (salaries from January 2015 until May 2015) as per she (sic) broken contract in December 2014 and so stating in same way but opposite of how Respondent's agent is asking for same breach of contract.*
> - *reimbursement of all the legal fees and expenses which will be paid by the Claimant."*

49. In **case BAT 0693/15**, the Club's submission included the following main arguments:

> "*About Agent's request to be paid 18.000 USD as 10% of Player's salary, Club answers as follow:*
>
> *- Since Club's request is to first consider the contract void, no Agent's fee has to be paid.*
>
> *- Agent is involved in the original problem of not having correctly informed the club, even if requested during contract's negotiation, about Player's real physical condition.*
>
> *- Since Player left anyway the Club without written authorization and without written agreement between the parties, Player breaks the contract and no Agent's fee has to be paid.*
>
> *- Since Agent's fee is 10% of Player's salary should anyway may be more ethic to first*

have a final statement on the Player's salary and than ask for the relative 10% and not opposite […]."

50. The Club's Answer to the Counterclaim and to the Agent's claim did not contain explicit Prayers for relief. However, it is clear from the submission that the Club is requesting that the Player's and Agent's claims be dismissed in full.

4.2 The Player's Position

51. In her Answer and Counterclaim (in case BAT 0668/15), the Player submits in substance that her Agreement was fully guaranteed, including in case of an injury, meaning that her entire salary for the 2014/2015 season as well as any medical costs were contractually due by the Club if she suffered an injury during the season, as occurred.

52. In that connection, the Player submits that she was in perfect health when joining the Club, that she passed its entrance medical examination during which no particular questions were raised and that her [body part] injury occurred as a result of a hard hit/foul she suffered towards the end of the Euroleague game against Bourges on 12 November 2014, after having successfully played and performed at a high level during the previous official games for the Club.

53. She contests having held back any medical information regarding pre-existing injuries when joining the Club and passing its medical examination, and contends in that relation that the only two games she missed during the 2014 WNBA season with the Connecticut Sun were linked to [body part] problems (an abscess) and that she finished the season in very good form as was confirmed to her by the end-of-season medical examination and corresponding positive report issued by Connecticut Sun team doctor on 17 August 2014.

54. She underlines that after she got injured on 12 November 2014 during the game against Bourges and discussions began regarding where she would undergo any

necessary surgery, it was the Club which was more favourable to treatment in the United States (rather than Italy), and that therefore she was not in breach of any duties when she undertook to remain in the United States and be operated there after the Christmas break, in particular also because by then the Club was in breach of its contractual obligations because it was refusing to pay her entire salary and medical costs and was instead requesting a compromise based on the incorrect allegation that her [body part] injury was pre-existing.

55. For the foregoing reasons, she contends that she was justified in putting the Club on written notice on 25 December 2014 and in terminating the Agreement in February 2015, when the Club owed her outstanding contractual salaries despite the prior notice.

56. The Player's Answer and Counterclaim of 14 April 2015 included the following Prayers for relief:

> "*a) Rejecting the claim filed by the Claimants,*
>
> *b) Declaring that the Claimant breached the Employment Agreement*
>
> *c) Ordering the Claimant to pay $ 24.000, - with an interest of 5 % starting from 10 January 2015 and $ 24.000, - with an interest of 5 % per annum starting from 5 February 2015 as unpaid salaries,*
>
> *d) Ordering the Claimant to pay $ 72.000, - with interest at 5 % per annum starting from 24 February 2015 as damages suffered due to the justified termination,*
>
> *e) Ordering the Claimant to pay $ 37.152,71 with interest at 5 % per annum starting from 24 March 2015 for medical treatment fees she incurred.*"

4.3 The Agent's Position

57. The Agent submits in substance that it entirely fulfilled its contractual obligations under the Agreement and therefore is contractually due the fee being claimed.

58. The Agent's request for intervention dated 14 April 2015 included the following Prayers for relief:

"*a) Declaring that the Claimant breached the Employment Agreement*

b) Ordering the Claimant to pay $ 18.000, - with an interest of 5 % starting from 10 January 2015 for the unpaid agents fees."

5. The Jurisdiction of the BAT

59. 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).

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

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

62. In both cases BAT 0668/15 and 0693/15, all the claiming Parties are invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clause contained under section 6 of the Agreement, which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the Arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

64. With respect to its substantive validity, the Arbitrator considers there is no indication in

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

the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

65. Furthermore, in both cases BAT 0668/15 and BAT 0693/15, the subject matter of the dispute between the Parties falls within the scope of the arbitration agreement and all the Parties are signatories of the Agreement of which its Exhibits 1 and 2 form an integral part.

66. Finally, none of the Parties in cases BAT 0668/15 and 0693/15 have objected to the jurisdiction of the BAT.

67. For the foregoing reasons, the Arbitrator finds that he has jurisdiction to adjudicate all the claims made in cases BAT 0668 and 0693.

6. Discussion

6.1 Applicable Law – ex aequo et bono

68. 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.

69. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise 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."*

70. Furthermore, section 6 of the Agreement includes a sentence providing that if and when a dispute between the parties is submitted to the BAT: *"The arbitrator shall decide the dispute ex aequo et bono*".

71. Consequently, in keeping with the Parties' foregoing choice, the Arbitrator shall decide

ex aequo et bono all the claims brought in cases BAT 0668/15 and 0693/15.

72. 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 of 1969[2] (Concordat),[3] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage 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.*[4]

73. It is generally considered that the arbitrator deciding *ex aequo et bono* receives:

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[5]

74. 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*."

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

6.2 Findings

6.2.1 Preliminary Procedural Issue

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

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

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

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

76. As already mentioned, the Player has requested that all the medical reports and doctors opinions/declarations filed by the Club with its latest submission be deemed inadmissible due to having been filed late and outside the scope of the questions put to the Club by the Arbitrator.

77. In that respect, the Arbitrator finds that the opinions/declarations of [doctor] of 19 May 2015, of [doctor] of 20 May 2015 and of [doctor] of 21 May 2015, filed as exhibits by the Club with its answer to the Arbitrator's questions, fall outside the scope of the additional evidence the Club was given leave to produce by Procedural Order of 27 April 2015, since they do not constitute contemporary reports issued by those doctors at the time of the facts (which is what the Club was given leave to adduce) but rather post-factum expert opinions which should have been filed with the Request for Arbitration in order to enable the Player to file counter-expert evidence of her own. Consequently, they are not admitted on record.

78. However, the statement by [doctor] filed as exhibit 1 with the Club's answers to the Arbitrator's question, is admitted on record because it includes the questionnaire allegedly used and completed during the Player's entrance medical examination, i.e. allegedly contemporary factual evidence, and because the comments by [doctor] contained therein are not those of an expert witness, but those of the Club's team doctor, which will be assessed and weighed as such. Furthermore, the Player has had the opportunity to file observations on this factual statement of [doctor]. Similarly, [doctor's] MRI report of 18 November 2014 is admitted on record because it constitutes contemporary factual evidence and the Player had had the opportunity to comment on it.

6.2.2 Case BAT 0668/15

79. For reasons which will be explained below and deciding *ex aequo et bono*, the Arbitrator finds that, in the particular circumstances of this case, the question of whether, medically speaking, a pre-existing injury to the Player's [body part] existed

and was one of the main causes or the essential cause (in a chain of causality) for the Player's [body part] giving in during the Club's Euroleague game of 12 November 2014 against Bourges, can be left open.

80. The main reason for the foregoing finding is that despite the Club being confronted with the fact that, from the beginning of the official games in the Italian League and Euroleague, the Player was bandaging and icing her [body part] and was requiring treatment from the team doctor and therapist, it undertook no further investigations at the time and continued to field her in all the official games. In that connection, the Club itself has stated that: "*Her* [body part] *required specific treatment from the beginning and from both team's Doctor and other therapists. In specific, ice and painkillers after games and treatment during the week*".

81. Since, according to the Club's own foregoing allegation, a [body part] problem became apparent and specific treatment began immediately after the standard medical examination that the Club contends did not require it to examine in detail any of the Player's [body part] – due to her being young and having signalled no problems – this clear clinical indication that she in fact had issues with a [body part] should logically (unless it was willing to take a risk and to take on responsibility) have led the Club to investigate medically in more depth, e.g. by doing an MRI of the [body part] in question, and to research in more detail the recent history of her playing record in the WNBA.

82. Indeed – given how simple it would have been to research her playing history and undertake a more in-depth medical examination in light of the clinical symptoms that appeared during the very first games – the Cub's medical staff could not in good faith ignore the symptoms of a possibly serious underlying problem because the Club wished to benefit from the Player's skills on the court and at the same time deem the contractual guarantees in case of injury to have become inapplicable. Nor could the Club blindly rely on the Player's explanations, except by being negligent.

83. The evidence adduced and the Club's own allegations establish that it could have

sought and quickly obtained at the outset (when clinical symptoms appeared) [medical information], since when the Player's [body part] gave in about 5-6 weeks later during the game against Bourges on 12 November 2014, it took the initiative to ask the Connecticut Sun for information and obtained a copy of the July 2014 MRI without any particular difficulty.

84. In other words, the Club had the means to be informed, but renounced undertaking the research and/or was negligent in that respect.

85. At the same time, according to the Club's own admission, it did benefit from an excellent performance of the Player on court during the ten games she played before her [body part] gave in, and in that sense the risk taken by the Club "paid off" for a relatively significant period albeit not as long as the Club would have expected or hoped.

86. Furthermore, the Arbitrator finds that the Club has not adduced convincing evidence that the Player's entrance medical examination was very thorough and considers that the summary list of medical questions/answers produced by the Club together with the statement of [doctor]is not sufficient, in itself, to establish what the Player said at the time, since it is not co-signed by her and the original date of the document is not apparent.

87. Finally, it is relevant that although the [medical information] 2014 referred to a prior [injury], it was overall very positive, not only stating that she had entirely recovered from the [injury] but also that she was cleared to attend a camp with the US National Team and to play overseas.

88. Thus, on the basis of this encouraging report and related end-of-season medical examination, the Player was entitled to believe that she was entirely fit (including her [body parts]) to start the forthcoming season with the Club, and was no doubt in good faith, i.e. did not have the intention to withhold relevant medical information, when she failed to disclose the existence of that report and the July 2014 MRI during her

entrance medical examination with the Club in October 2014; especially if she felt in good shape and was having no difficulty playing (as confirmed by her performance during the first games with the Club). Similarly, in view of a medical report of such content, a player would not naturally focus on or even perhaps remember offhand having undergone an MRI several months earlier.

89. That being said, according to the terms of her Agreement, the Player was bound by the representation under section 4a., whereby : "*Player hereby states she has not suffered an injury that will affect his (sic) playing capacity except for any injury of which the Club is already aware*".

90. Thus, even if she deemed she had not suffered from an injury that affected her playing capacity (which was true in the sense that she was able to play excellently for the Club, apparently without hindrance during games), she could and should have been more careful upon determining at the time of the Club's medical examination whether she had relevant medical information to disclose, the existence of a [injury] a few months earlier and a corresponding MRI clearly being relevant. In this sense, the standard of care/diligence required of a player in terms of recalling and disclosing relevant medical information is similar and co-existent with the standard of care/diligence of a club to seriously investigate a player's recent basketball history, to put precise written questions to the player and protocol the answers in a document signed by both parties and to undertake a thorough medical examination.

91. Therefore, the Arbitrator finds that, in the circumstances of this case, the Player was in good faith but also was somewhat negligent in not recalling and pointing out (whether or not a relevant question was put to her) that she had suffered from a [injury] over the summer and undergone an MRI in that connection, given that if the Club had had that knowledge it might have investigated further before fielding her or upon discovering that her [body part] needed attention after each game.

92. For the above reasons, the Arbitrator finds that by its behaviour the Club consciously or

negligently accepted the risk that the Player had a medical issue with her [body part] and, as a result, obtained the benefit of her very good performance on court for a period of 5-6 weeks; and therefore for motives of fairness is barred from invoking a pre-existing injury after her [body part] gave in during the game on 12 November 2014 against Bourges. However, also for reasons for fairness, the Player's negligence in overlooking the need to signal potentially relevant medical information shall be accounted for when determining the amount of any compensation owed to her by the Club.

93. In that connection, the Arbitrator also finds that the Player did not breach any contractual duties when finally deciding to remain in the United States after the Christmas break, because the evidence adduced establishes that the Club itself favoured that scenario (compared to possible surgery in Italy and the cost implications of her remaining with the Club) and the negotiation of a final settlement had not occurred before Christmas, meaning that while Player was in limbo as to her contractual situation she imperatively needed to undergo surgery somewhere.

94. Similarly, the Arbitrator finds it clear from the evidence that by the beginning of February 2015 the settlement discussion had broken down entirely, i.e. neither party was offering any further concessions, and both parties understood and accepted that the Player would not be in a position to play for the Club again that season, with the result that the Club had stopped paying the Player any further salaries while she deemed this to be a breach of contract and terminated the Agreement.

95. In conclusion and in view of the above findings, deciding *ex aequo et bono*, the Club's claim for damages in an amount of USD 120,000 and its claim for declaratory relief shall be dismissed; and the Arbitrator finds it fair and just that the Club be required to pay as compensation to the Player a sum equal to the outstanding part of her contractual salary for the 2014/2105 season, but that she be required to cover the entire costs of the medical treatment she underwent in the United States.

96. Accordingly, the Player's counterclaim for compensation in a total amount of USD 120,000, corresponding to the amount of five monthly salary instalments of USD 24,000 each, which according to the contract were to become due between 10 January and 10 June 2015, shall be admitted, and her counterclaim for medical costs in amount of USD 37,152.71 shall be dismissed. Given this compensatory relief, the Player's request for declaratory relief has no object, i.e. it has become moot and therefore is dismissed.

97. In keeping with BAT jurisprudence, the compensation allowed shall bear interest at 5% per annum, from the day after each salary instalment of USD 24,000 was contractually due, which according to Exhibit 1 of the Agreement was the last day of each month.

6.2.2 Case BAT 0693/15

98. Based on the evidence adduced, the Arbitrator finds that the amount of fees of USD 18,000 being claimed by the Agent was contractually stipulated in Exhibit 2 of the Agreement, and that it is established that such amount was invoiced by the Agent to the Club in December 2014 and never paid despite it having been put on written notice.

99. Furthermore, the Agent fulfilled its contractual duty to obtain the engagement of the Player, and there is no clause in the Agreement which stipulates or implies that the payment of its fee would in any manner be contingent on the Player remaining under contract with the Club and/or effectively playing for the Club until the end of the season, or condition whereby the payment of the Agency fee would be contingent on the Player meeting her contractual duties.

100. Accordingly, the Agent's claim for compensation in the amount of USD 18,000 shall be admitted and shall bear interest at 5% per annum from the date of 10 January 2015 as requested in its corresponding prayer for relief.

101. Given this compensatory relief, the Agent's request for declaratory relief has no object, i.e. has become moot and therefore is dismissed.

7. Costs

102. Article 17.2 of the BAT Rules provides that the BAT President shall determine the final amount of the costs of the arbitration. Accordingly, – taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in cases BAT 0668/15 and BAT 0693/15, respectively, to be EUR 11,980.50.

103. Article 17.3 of the BAT Rules stipulates that:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion. In addition, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When deciding on the arbitration costs and on 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".*

104. Given the foregoing rule and the fact that

(i) the Club's claim was entirely dismissed and the Player prevailed in approximately 4/5 of her counterclaim; and

(ii) the Agent entirely prevailed in its claim;

the Arbitrator finds that the Club shall bear its own legal fees and expenses, as well as 80% of the costs of the arbitration and of the Player's reasonable fees and expenses and 100% of the Agent's reasonable fees and expenses.

105. Given that the Club and the Player each paid EUR 5,000.00 in advances on arbitration costs, as well as a non-reimbursable handling fee of EUR 3,000.00 each (which will be

taken into account when determining the Player's legal fees and expenses) and that the Agent paid EUR 1,000 in advance on arbitration costs, as well as a non-reimbursable handling fee of EUR 1,500 (which will also be taken into account when determining the Agent's legal fees and expenses), the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

(i) The Club shall pay jointly to the Player and Agent EUR 3,603.90 as reimbursement of the arbitration costs advanced by them.

(ii) The Club shall pay jointly to the Player and the Agent EUR 7,650.00, representing a contribution to their legal fees and expenses other than the non-reimbursable handling fees. With respect to the latter, the Club shall pay EUR 2,400.00 to the Player (80% of the handling fee paid by the Player) and EUR 1,500.00 to the Agent. The total amount awarded as a contribution to legal fees and expenses does not exceed the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

8. AWARD

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

1. **Familia Basket Schio srl SSD shall pay Ms. Chinenye Joy Ogwumike, as compensation for unpaid salaries, the following amounts, net of tax:**

   - **USD 24,000.00, plus interest at 5% per annum on such amount from 1 February 2015 onwards.**
   - **USD 24,000.00, plus interest at 5% per annum on such amount from 1 March 2015 onwards.**
   - **USD 24,000.00, plus interest at 5% per annum on such amount from 1 April 2015 onwards.**
   - **USD 24,000.00, plus interest at 5% per annum on such amount from 1 May 2015 onwards.**
   - **USD 24,000.00, plus interest at 5% per annum on such amount from 1 June 2015 onwards.**

2. **Familia Basket Schio srl SSD shall pay Sports International Group Inc. an amount of USD 18,000.00 as compensation for agency fees, plus interest at 5% per annum on such amount from 10 January 2015 onwards.**

3. **Familia Basket Schio srl SSD shall pay jointly to Ms. Chinenye Joy Ogwumike and to Sports International Group Inc. an amount of EUR 3,603.90 as reimbursement of its arbitration costs.**

4. **Familia Basket Schio srl SSD shall pay jointly to Ms. Chinenye Joy Ogwumike and to Sports International Group Inc. an amount of EUR 7,650.00 as a contribution to their legal fees and expenses.**

5. **Familia Basket Schio srl SSD shall pay to Ms. Chinenye Joy Ogwumike an amount of EUR 2,400.00 as a further contribution to her expenses.**

6. **Familia Basket Schio srl SSD shall pay to Sports International Group Inc. an amount of EUR 1,500.00 as a further contribution to its expenses.**

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

Geneva, seat of the arbitration, 26 August 2015

Quentin Byrne-Sutton
(Arbitrator)