



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0162/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Brian Cusworth

Represented by Messrs. Guillermo López Arana and Mikel Abete Vecino,
c/ U1st Sports, Maestro Ripoll 9, E-28006 Madrid, Spain

- Claimant -

vs.

Club Basket Manresa SAD,
Pavelló Nou Congost s/n, Manresa, Spain

- Respondent -

1. The Parties

1.1. The Claimant

1. Mr. Brian Cusworth (hereinafter referred to as “the Player”) is a professional basketball player.

1.2. The Respondent

2. The Club Basket Manresa SAD (hereinafter referred to as “the Club”) is a professional basketball club in Spain.

2. The Arbitrator

3. On 13 March 2011, the President of the Basketball Arbitral Tribunal (hereinafter “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

3.1.1 The Parties’ Contracts

4. The Player and the Club entered into a first employment contract dated 10 June 2009 (the “First Contract”), whereby the latter engaged the Player for the 2009-2010 season.
5. The Player played with the Club for the entire 2009-2010 season.

6. The Club decided to re-engage the Player for another season (2010-2011), which led the parties to enter a new employment contract dated 12 July 2010 (the "Second Contract").
7. Clause 4 of the Second Contract contains the monthly schedule of payments to be made by the Club to the Player during the 2010-2011 season.
8. According to the schedule, the first payment was due on 5 September 2010 and the last payment on 5 June 2011.
9. The schedule comprises 14 payments during that period, amounting to a total amount of USD 170,000 net of tax.
10. Clause 7 of the Second Contract provides that:

"In regards to all salary monies payable to the Player, the termination or suspension of this contract by the Club on account of injury, illness, or disability suffered or sustained by the Player, or on account of the Player's failure to exhibit sufficient skills shall in no way affect the Player's right to receive the sums payable under this contract at such times as the sums become due".

11. Clause 11 addresses the issue of late payments and provides the following:

"If the Club does not make any payment due to the Player and/or Agent on the date called for under this contract, the Club shall pay the Player and/or Agent an additional 100€ per day until such amount due is received by the Player and/or his Agent. If such original amount owed is not paid within ten (10) days, Player will not be required to practice or play basketball for the team until the payment is received, but the obligations of the Club shall continue. In addition, if any scheduled payment is not received by the Player within 30 day of the due date, the Player's performance obligations shall cease, Player shall be free to leave Spain with his FIBA letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of the Club under this Agreement shall continue in full force and effect".

12. Before the signature line of the agreement, the Second Contract contains the following statement in capitals and bold character: **"THIS CONTRACT IS A FULL-GUARANTEED AGREEMENT"**.

3.1.2 The Player's _____ Problems and the Medical Examinations

13. The Parties agree on certain facts relating to the Player's _____ problems and corresponding medical examinations but disagree on others. Consequently, the following summary will serve to indicate, in chronological order, the main points of agreement and disagreement.
14. According to the Player, he "*... suffered _____ in the previous three seasons prior to joining the Club for the 2009-2010 season, none of which kept him from playing games. The _____ had not experienced any pain or issues in the three seasons prior to joining the Club for the 2009-2010 season.*"
15. It is undisputed that on 19 August 2009, before starting his first season with the Club, the Player underwent a medical examination by the Club during which he "*...indicated that he had experienced _____ in the past, but had never suffered a serious injury to _____*".
16. In that connection, the Player also submits that he "*... had no knowledge of any _____ problems with _____, and was therefore completely honest in his detailed medical history*" and that he "*... informed the Club that he wore _____ when playing and practicing with opposition, but practiced and passed the examination without _____.*"
17. It is also undisputed that the Player played for the Club throughout the 2009-2010 season without having any problems with _____, and that he used his _____ as well as _____.
18. According to the evidence filed by the Player, his _____ used during the 2009-2010 season were _____ which were _____ in the United States.
19. With respect to the period between the end of the 2009-2010 season with the Club and the beginning of the 2010-2011 season, the Player submits that he: "*... participated in the NBA Summer League in July 2010 in Las Vegas with the New Orleans Hornets.*"

Both the acting General Manager of the team and its Head Coach were in attendance at the 5 games played in this league. The Player did not suffer from any injuries to or pain with _____ during that period’.

20. In that connection, the Club indicates that it is aware the Player took part in the foregoing summer league; and in this proceeding it has not reproached the Player for doing so.
21. With respect to the 2010-2011 season, it is uncontested that the Player arrived in Spain on 12 August 2010 and started training with the team following a medical examination by the Club.
22. In that relation, the Player submits that upon arriving in Manresa he did not indicate to anyone any suffering in _____ because he was not experiencing any.
23. According to the evidence filed by the Player he _____.
24. According to the Club, the Player _____.
25. The Parties disagree on the date on which, after his return to Spain for the 2010-2011 season, the Player first announced he was suffering from _____.
26. The Club recalls it having been on 16 August 2010, whereas the Player contends that: *“The first time the Player suffered from _____ while playing for Basquet Manresa was _____ on the 30th of August [2010]. _____*
27. In any event, it is undisputed that after the Player announced he was suffering from _____, an MRI _____ was conducted on 30 August 2010 by Dr. Josep Ramón Turano, upon referral from the team doctor Dr. Ramón Serra Fernández. Furthermore, it is undisputed that after a few days rest, the Club asked the Player to start using his _____ when continuing to practice.
28. The evidence on record also indicates that on 5 September 2010, an MRI was undertaken on _____, this time by Dr. Alex Quintela, again upon referral from the



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team doctor.

29. With respect to the chronology of events thereafter, the Player alleges the following:

“ _____ continued to bother the Player, and the team physician, Dr. Ramon Serra decided to inject _____ on Saturday, September 11. The player participated in the first official game October 3, 2010 and _____. Another MRI was _____ on October 4 and a local _____ specialist was seen by the Player October 6, 2010. On October 14th the Club authorized the player to travel to gather the medical opinion of different _____ specialists in the United States ... All of the three specialists asked agreed that _____. Then, on November 8, 2010, the Club authorized the player to undergo surgery by such _____ specialists in the United States”.

30. In connection with the Player’s foregoing allegations concerning what happened from 11 September 2010 onwards, the Club agrees (i) that he received a _____ injection – but contests the Player’s allegations regarding the manner of administration of the injection and its consequences (see below para. 31) – (ii) that *“... it was decided by common agreement that the player would participate for a few minutes in a game, during which, he reported acute pain _____ that prevented him from playing further”*, (iii) that on 4 October 2010, a second MRI _____ was then performed (as also established by the medical report of Dr. A. Salvadore Aznar) and (iv) that *“By consensus we agreed that the player should seek the opinion of a colleague (Dr. Antonio Dalmau Coll)”* which led to an examination on 6 October 2010 (as also established by a medical report).

31. As regards the _____ injection of 11 September 2010, the Club filed the following statement by the team doctor contesting that the _____ was injected into _____, and declaring that it cannot have been one of the causes of _____ during the game on 3 October 2010 (no English translation was filed):

“ _____ ”

32. More generally, with respect to the medical reports on record relating to the various medical examinations which took place in September-October 2010 before the Player’s departure to the United States, the Club submits that they revealed the existence of a condition of _____.

33. Dr. Antonio Dalmau concluded his report of 6 October 2010 as follows:

“ _____ ”.

34. Based on the various examinations and reports, the Club asked the team doctor to provide an opinion synthesizing the Player’s _____ condition, which the Club filed in this arbitration.

35. In his report, Dr. Ramón Serra Fernández concludes as follows:

“Surgical treatment was recommended _____”

36. Regarding the Player’s allegations that he was entitled by the Club first to travel to the United States to be examined by other specialists and subsequently to undergo surgery, the documentary evidence filed by the Player establishes that, respectively on 14 October and 8 November 2010, the Club gave him permission in the following terms (English translation submitted by the Player):

“In Manresa, on October 14, 2010

Club Basquet Manresa, SAD (hereinafter “the Club”), entity domiciled in Pavello Nou Congost s/n, Manresa, with Tax Identity Number: _____, hereby represented by Mr. Josep Vives i Portell, as its President

AUTHORIZES

Mr. Brian Cusworth (hereinafter “The Player”), with a valid labour contract with the Club, signed on July 12, 2010:

To travel on Saturday October 16 to the United States to gather the opinion from doctors not related to the Club about his current injury, as well as to receive the corresponding treatment for his rehabilitation and recovery during the time such doctors consider necessary, even in case such period would last until the end of the 2010-2011 season. The Club undertakes the obligation to fulfill every agreement and commitment reflected in the Player’s labour contract. ”

and

“In Manresa, on November 8, 2010

Club Basquet Manresa, SAD (hereinafter “the Club”), entity domiciled in Pavello Nou Congost

s/n, Manresa, with Tax Identity Number: _____, hereby represented by Mr. Josep Vives i Portell, as its President

AUTHORIZES

Mr. Brian Cusworth (hereinafter "The Player"), with a valid labour contract with the Club, signed on July 12, 2010:

To undergo surgery for his current injury in the United States by doctors not related to the Club, as well as to receive the corresponding treatment for his rehabilitation and recovery during the time such doctors consider necessary, even in case such period would last until the end of the 2010-2011 season. The Club undertakes the obligation to fulfill every agreement and commitment reflected in the Player's labour contract."

3.1.3 The Club's Refusal to Pay and the End of the Relationship

37. It is undisputed that after paying the Player the amount of USD 10,000 contractually due for his September 2010 salary under the Second Contract, the Club refused to pay the Player any further remuneration relating to the 2010-2011 season and provided in the Second Contract.
38. The Club submits in substance that although for the 2010-2011 season, it had initially been planning to perform the Second Contract by paying the remuneration due, it modified its position after consulting with the doctors and taking legal advice, which led the Club to consider that: *"There are bad faith contractual (sic) of player because he knew that he had a _____ that prevented him from maintaining athletic performance necessary to compete in the ACB league"* and that *"All this determines that the player and his agent violated the principle of contractual good faith by failing to warn the Club Mr. Cusworth physical problem, which prevented the Club could assess (sic) the convenience of their employment"*.
39. Concerning the point in time when it changed its mind, the Club submits as follows that it happened after 14 October 2010: *"On 14 October the club said "we will respect all covenants and obligations contained in the contract with the player" but after that date, the medical and legal adequately argued, WE GET TO THE CONCLUSION the player could not fulfill CONTRACT FOR YOU could not meet the consideration as a professional IT firms immediately"*.

40. The Club alleges in substance that it informed the Player's agent of its position on the basis of a legal report and that he accepted the principle that the Player should have refrained from signing the Second Contract due to the poor condition of his _____. The Club also contends that the agent said he would confirm his response in writing but never did.
41. The Player contests the Club's foregoing position regarding how the relationship ended. According to the Player, "*The Club never communicated the termination of the contract, neither [to] the Player nor the Agent*".
42. Regarding the chronology of events which led him to filing his Request for Arbitration in February 2011, the Player contends the following:

"The Player's Agents reminded the Club multiple times to pay the late sums. As well, the Club still owed the Player 50,000 USD from the 2009-2010 season Player's outstanding salary amounts at that point. In late November, the Agents advised the Club that if they did not pay all the sums that were owed, the Player would seek legal action against the Club. The Club, after several claims in that regards, paid the 50,000 from the 2009-2010 season Player's outstanding salary amounts in two installments: one on December 17, and the other one a month later. The Club then, when asked for refused to answer why the payments corresponding to the 2010-2011 season Player's salary amounts were not being fulfilled. The Player waited another month but the Club still didn't respond. Finally, the Player decided on February 17, 2011 not to wait any longer, and to file for arbitration immediately for the 2010-2011 season player's salary amounts".

4. The Proceedings before the BAT

43. On 17 February 2011, the Player filed a Request for Arbitration in accordance with the BAT Rules, together with proof of payment of the non-refundable administrative fee of EUR 3,000.
44. On 13 March 2011, the BAT informed Mr. Quentin Byrne-Sutton that he had been appointed as Arbitrator in this matter.
45. On 22 March 2011, the Player paid his advance on costs in a total amount of EUR 4,500.
46. On 30 March 2011, the Club paid its advance on costs in a total amount of EUR 4,500.

47. On 7 April 2011, the Club filed its Answer to the Request for Arbitration.
48. By Procedural Order of 11 May 2011, the parties were invited to simultaneously reply to various questions addressed to them by the Arbitrator.
49. On 25 May 2011, the Player filed his answers to the questions.
50. On 25 May 2011, the Club filed its answers to the questions.
51. On 25 May 2011, each party was invited to respond to the other party's answers and to submit its statement of costs.
52. On 31 May 2011, the Player filed his response, together with his statement of costs.
53. On 31 May 2011, the Club filed its response, together with its statement of costs.
54. By Procedural Order of 1 June 2011, the exchange of documents was declared completed and the parties were given leave to comment on the other party's statement of costs.

5. The Positions of the Parties

5.1. The Claimant's Position

55. The Player submits the following in substance:
 - The Club breached the Second Contract by not paying the guaranteed remuneration provided thereunder. It must therefore pay all the amounts that have become contractually due and are outstanding up to the date of filing of the Request for Arbitration.
 - Moreover, the Club is contractually liable to pay penalties on all the unpaid amounts due, as provided in clause 11 of the Second Contract.

56. In his Request for Arbitration, the Claimant requested the following prayers for relief:

*“To award the Claimant with amount of **102,500 USD net plus 55,700 Euros net** plus interest at the applicable Swiss statutory rate, starting from the 5th of October 2010.*

[...]

To award the claimant with the full covered the costs of this arbitration.” (sic)

5.2. The Respondent’s Position

57. The Club summarized its arguments as follows:

“Six are the issues on which MANRESA BASKETBALL CLUB, SAD, justified this response:

- a) The lack of arbitrability of the issue submitted to arbitration for breach of Article 177 of the Federal Law of 18 December 1987*
- b) The nullity of a clause referring to BAT of legal disputes related to employment.*
- c) The player's contract in bad faith who knew that he had a _____ injury that prevented him from maintaining athletic performance necessary to compete in the ACB league.*
- d) The inability of our club to know the existence of that injury through the normal medical examination before contract signing.*
- e) The disproportion of the penalty clause built into the contract, breach of good faith, and the balance of benefits that should govern a contractual relationship.*
- f) The sentence to pay interest on late payments with penalties, calculating that interest as well, also on the amount of the penalty.”*

58. In its Answer, the Club submits the following prayer for relief: *“REQUESTS TO BAT formalized opposition to request for arbitration by Brian Cusworth, and dismissed, with imposition of arbitration costs that this part fixed at 5,000 Euros.” (sic)*

6. Jurisdiction

59. The dispute between the Parties arises out of the Second Contract dated 12 July 2010,

which under clause 13 contains the following arbitration clause in favour of the BAT:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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.”

60. 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).
61. Under the provisions of Chapter 12 of the PILA, the jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
62. In this proceeding the Club is challenging the arbitrability of the Player’s claim on the ground that it is not financial in nature due to its object being the validity of the termination and also on the ground that, under mandatory rules of Spanish law, labour claims of this nature are not arbitrable.
63. Consequently, the Arbitrator shall begin by examining the question of the arbitrability of the claims.
64. In that relation, the Arbitrator finds that since the arbitrability of the dispute is governed by Article 177(1) PILA¹ (and not by Spanish law as argued by the Club) and according to that provision it is sufficient for the dispute to be of financial nature for it to be deemed arbitrable, it is irrelevant whether or not labour disputes are deemed arbitrable under Spanish law.
65. Furthermore, the Arbitrator finds that the Player’s claim is clearly financial in nature,

since although he is implicitly contesting the Club's right to deem the Second Contract terminated, he is above all, requesting financial compensation for non-performance and delays in payment by the Club.

66. Accordingly, the Arbitrator considers that the claims submitted to him in this arbitration are arbitrable in the meaning of Article 177 (1) PILA.
67. As to its validity, the above-quoted (para. 59) agreement to arbitrate is in written form and thus fulfills the formal requirements of Article 178(1) PILA, while at the same time the Arbitrator finds that there are no allegations and/or evidence on record that could cast doubt on the substantive validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
68. Consequently, the arbitration agreement binding the Club to the Player must be deemed valid as to its form and content.
69. For the above reasons, the Arbitrator has jurisdiction to decide the present dispute.

7. Discussion

7.1. Applicable Law – *ex aequo et bono*

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

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

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

71. 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."

72. Clause 13 of the Second Contract stipulates that: *"The arbitrator shall decide the dispute ex aequo et bono"*.

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

74. The concept of *"équité"* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage² (Concordat)³, 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."*⁴

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

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

7.2. Findings

77. The three main questions which need resolving in this case and which will be examined

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

³ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁴ JdT 1981 III, p. 93 (free translation).

in turn are whether:

- (i) the Player accepted that the Club terminate the Second Contract and withhold any further payments from October 2010 onwards when it was determined that he would no longer be able to play for the rest of the season;
- (ii) the Club was nevertheless entitled to terminate the Second Contract for cause and withhold any further payments due to the _____ problems the Player had with his _____; and
- (iii) the penalty payments and interest being requested by the Player can be claimed in the circumstances and are appropriately calculated.

7.2.1 The Existence of a Termination by Mutual Consent

78. The Arbitrator finds that the Club has not established the existence of any consent by the Player to terminate his Second Contract or any renouncement to being paid the remuneration due for the 2010-2011 season under the Second Contract.
79. There is no documentary evidence of any such consent or renouncement by the Player. Indeed, in addition to him contesting the Club's position, the documents on record tend to evidence the opposite: the signed declarations by the Club of 14 October and 8 November 2010 (giving him the permission to undertake further medical examinations in the United States and then the permission to undergo surgery there) both state that *"...even in case such period would last until the end of the 2010-2011 season. The Club undertakes the obligation to fulfill every agreement and commitment reflected in the Player's labour contract."*
80. Furthermore, the explanations provided by the Player regarding the chronology of events between November 2010 and February 2011, which led him to filing his Request for Arbitration only in February 2011, are credible.
81. For the above reasons, the Arbitrators finds that it is not proven that the Second

Contract was terminated by mutual consent or that the Player renounced being paid the remuneration due by the Club under the Second Contract.

7.2.2 The Club's Right to Terminate for Cause

82. As a preliminary matter, it is important to note that according to the express terms of the Second Contract, the Player was normally entitled to be paid his full remuneration for the 2010-2011 season even if he was injured or disabled and incapable to play for that reason.
83. Indeed, in addition to the Second Contract stipulating that it is "fully guaranteed", clause 7 provides:

"In regards to all salary monies payable to the Player, the termination or suspension of this contract by the Club on account of injury, illness, or disability suffered or sustained by the Player, or on account of the Player's failure to exhibit sufficient skills shall in no way affect the Player's right to receive the sums payable under this contract at such times as the sums become due".

84. Consequently, the only question is whether the Player concealed a pre-existing medical condition (_____ problems with his _____ and prior injuries) in bad faith, i.e. in a manner which would make it unfair and unjust to apply clause 7 of the Second Contract; thereby allowing the Club to terminate the contract and withhold paying the Player's remuneration despite the clear terms of the Second Contract.
85. The Arbitrator finds that, for a combination of the following reasons, there is no evidence that the Player acted in bad faith:
- At the initial medical examination by the Club in 2009, the Player spontaneously indicated he had had some problems _____ with _____ but no major injuries.
 - There is no evidence on record that the Player suffered any serious injuries to his _____ in years prior to his engagement by the Club in 2009.
 - The Player was using _____ when he was engaged by the Club and the Club was

informed thereof.

- He played the entire first season (2009-2010) with the Club without suffering any serious injuries to _____ or having any debilitating problems with _____.
- He was not requested by the Club to refrain from playing in the NBA Summer League in July 2010 in Las Vegas with the New Orleans Hornets between his two seasons with the Club, and he did not suffer from any particular problems with his _____ during those NBA games that prevented him from performing.
- When during the 2010-2011 pre-season practices he began suffering from pains with _____, he immediately informed the Club and then fully cooperated in seeking the causes by undergoing various medical tests organized by the Club (MRIs, etc.) before soliciting permission to undergo further tests in the United States.

86. All the foregoing factors indicate that even if the Player did have a pre-existing condition with _____, _____ it did not impair him from playing professional basketball at a high level for complete seasons – prior to joining the Club and during the first season after joining the Club – meaning that he had no particular reason to suspect that seriously debilitating problems with _____ would suddenly arise during the 2010-2011 pre-season which might have obligated him to warn the Club in that respect.
87. Furthermore, although the Player wore _____ during the entire 2009-2010 season with the Club – which was an obvious sign that he suffered from some weakness of _____ – and despite the fact that the Club’s medical team (doctor, physiotherapist, etc.) had a full season to investigate any signs they could have believed were preoccupying, there is no evidence on record that the Club was in any manner worried by the Player’s _____, or that it took the precaution to undertake more detailed medical examinations.
88. For the above reasons, the Arbitrator finds that the Player cannot be deemed to have

acted in bad faith or to have purposely withheld any medical information from the Club regarding his _____. The Arbitrator further finds that the Club itself undertook the risk of re-engaging a Player who had some obvious _____ problems without deeming it necessary to investigate further.

89. Consequently, the _____ problems, and the injury that the Player suffered during the 2010-2011 pre-season, i.e. after entering into the Second Contract, must be deemed to fall within the category of injury/disability covered by clause 7 of the Second Contract, and it would be unfair and unjust to allow the Club to avoid its express contractual undertaking to pay the Player his full remuneration even in the case of an injury.
90. The Club will therefore be ordered to pay the Player the amount of outstanding salary due under the Second Contract which he is claiming in this arbitral proceeding, i.e. an amount of USD 102,500, corresponding to seven payments which became due contractually between 5 October 2010 and 5 February 2011.

7.2.3 The Player's right to Claim Penalties and Interest

91. In addition to the foregoing principal amount being claimed, the Player is invoking the payment of a penalty on the basis of clause 11 of the Second Contract, whereby:

"If the Club does not make any payment due to the Player and/or Agent on the date called for under this contract, the Club shall pay the Player and/or Agent an additional 100€ per day until such amount due is received by the Player and/or his Agent. If such original amount owed is not paid within ten (10) days, Player will not be required to practice or play basketball for the team until the payment is received, but the obligations of the Club shall continue. In addition, if any scheduled payment is not received by the Player within 30 day of the due date, the Player's performance obligations shall cease, Player shall be free to leave Spain with his FIBA letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of the Club under this Agreement shall continue in full force and effect".

92. The Club argues that this penalty clause is disproportionate.
93. The principle "*pacta sunt servanda*" and considerations of fairness require that in principle a contractual penalty clause be honoured within its scope of application, providing it is not wholly disproportionate and it is applied in a reasonable manner in

view of the circumstances of the case.

94. Consequently, and since it has been determined that the Club had no valid reason to withhold paying the remuneration due to the Player under the Second Contract, the foregoing penalty clause can, in fairness, be invoked by the Player.
95. The formulation of clause 11 of the Second Contract makes it clear that the penalty of EUR 100 per day was intended to apply until the principal amount due is paid (“... *until such amount due is received by the Player and/or his Agent*”). Nevertheless, the Player has limited his claim for penalty payments to the date of filing of his Request for Arbitration (17 February 2011).
96. The Arbitrator finds that although a penalty of EUR 100 a day is quite high, the fact that the Player has only requested its application for the period running between the contractual due date of each outstanding monthly payment (between October 2010 and February 2011) and the date of filing of his Request for Arbitration – combined with the fact that the Request for Arbitration was filed without delay once the Player clearly understood the Club would not be paying any more of the principal amounts due – renders its application fair in the circumstances of this dispute.
97. Consequently, the total penalty of EUR 55,700 being claimed will be granted, corresponding to the following calculations submitted by the Player:
 - EUR 13,500 (corresponding to 135 days of delay between the payment due on 5 October 2010 and 17 February 2011).
 - EUR 12,500 (corresponding to 125 days of delay between the payment due on 15 October 2010 and 17 February 2011).
 - EUR 10,400 (corresponding to 104 days of delay between the payment due on 5 November 2010 and 17 February 2011).
 - EUR 7,400 (corresponding to 74 days of delay between the payment due on 5 December 2010 and 17 February 2011).

- EUR 6,400 (corresponding to 64 days of delay between the payment due on 15 December 2010 and 17 February 2011).
 - EUR 4,300 (corresponding to 43 days of delay between the payment due on 5 January 2011 and 17 February 2011).
 - EUR 1,200 (corresponding to 12 days of delay between the payment due on 5 February 2011 and 17 February 2011).
98. The Player is also requesting interest at the Swiss statutory rate on all the amounts claimed, starting from the date when the first outstanding payment became due (5 October 2010), whereas the Club submits that it would be unjust to allow interest in addition to a penalty for late payments.
99. Although the Second Contract does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.
100. Therefore and despite the Second Contract not specifying an interest rate, it is normal and fair that interest is due on the late payments. In the circumstances of this case, the Arbitrator finds it fair and reasonable to award interest at a rate of 5% per annum.
101. However, in the circumstances of this case, in which a relatively high daily contractual penalty is already being applied for each late payment, the Arbitrator finds that it would be unfair to add interest for the period during which the penalties have run. Consequently, interest at the rate of 5% per annum will only be granted from date of this award.
102. Accordingly, the Club shall be requested to pay the Player the principal amounts of USD 102,500 and EUR 55,700, with interest at 5% from the date of this award onwards.

8. Costs

103. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.
104. On 6 July 2011 - considering that pursuant to Article 17.2 of the BAT Rules “*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*”, and that “*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 9,000.
105. Considering the Player prevailed nearly entirely in his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to contribute to the Player’s legal fees and other expenses. Considering the content of the proceedings. that the amount of the Player’s statement of costs (EUR 3,915) is reasonable and that the Player paid a handling fee of EUR 3,000, the arbitrator finds it fair that such contribution should be in an amount of EUR 6,915 (EUR 3,915 + 3,000).
106. Given that the Player paid his share of the advance on costs in the amount of EUR 4,500.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) The Club shall pay EUR 4,500 to the Player for arbitration costs;
 - (ii) The Club shall pay to the Player EUR 6,915 as a contribution to his legal fees and other expenses.

9. AWARD

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

- 1. Club Basket Manresa SAD shall pay Mr. Brian Cusworth an amount of USD 102,500, as compensation for remuneration due under the contract of 12 July 2010, plus interest at 5% per annum on such amount from the date of this award onwards.**
- 2. Club Basket Manresa SAD shall pay Mr. Brian Cusworth an amount of EUR 55,700, as a penalty for late payments, plus interest at 5% per annum on such amount from the date of this award onwards.**
- 3. Club Basket Manresa SAD shall pay Mr. Brian Cusworth an amount of EUR 4,500 as reimbursement for the advance on arbitration costs paid by him.**
- 4. Club Basket Manresa SAD shall pay Mr. Brian Cusworth an amount of EUR 6,915 as a contribution to his legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 01 August 2011

Quentin Byrne-Sutton
(Arbitrator)