



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0213/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Player,

- Claimant -

vs.

Club,

- Respondent -

1. The Parties

1.1 The Claimant

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

1.2 The Respondent

2. The Club (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club.

2. The Arbitrator

3. On 26 October 2011, 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"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

3.1.1 Background Facts

4. The Player was born on _____ [date of birth] and was aged ___ [age] at the time the dispute arose between him and the Club after his employment in October 2010.
5. In the year prior to being engaged by the Club, the Player played in the _____ [basketball league] league during the 2009-2010 season, which was his _____ [number of seasons] season as a professional. He began that season with _____ [Former Team No. 1] and then, after _____, was employed by _____ [Former Team No. 2].
6. The Player played a total of 28 games during the 2009-2010 _____ [Name of league] season, between November 2009 and February 2010.

7. He played his first game with _____ [Former Team No. 2] on 7 December 2009 and a total of 25 games with that club before leaving it in February 2010 for family reasons.
8. On 10 December 2009, the day after his second game with _____ [Former Team No. 2] (against _____ [Opponent]), the Player sought treatment from the team doctor _____ [Name of Team Doctor] for pain in his right leg.
9. A “Progress Note” dated 10 December 2009 signed by _____ [Name of Team Doctor] states the following:

“I examined Mr. Player in the _____ [location of office] office on Thursday, December 10, 2009. He is seen with a complaint of right leg discomfort/pain. He experienced a problem last night in the game against the _____ [Opponent], and he believes that he may have been kicked in the leg, or somehow had his leg struck [...] Examination today demonstrates no swelling in the leg. Compression of the calf causes discomfort a[s] opposed to pain. Neurovascular status is intact. There is no evidence of deep vein thrombosis. There are no increased temperature differences appreciated [...] I got an x-ray of the right tibia/fibula today, and it demonstrates a mass which appears to be arising of the mid shaft area of the tibia. I am going to have him get a CT scan and an MRI study, and we will arrange this to be done later on today at the _____ [Name and location of medical facility]”.

10. In another “Progress Note” of the same day (10 December 2009), _____ [Name of Team Doctor] reported as follows, on the basis of the results of the CT scan and MRI study:

“Mr. Player had the MRI study of the right leg and the CT scan of the right leg done, and these were interpreted by _____ [Name of Doctor who read the MRI and CT Scan]. Both the MRI of the right leg and the CT scan of the right leg demonstrated a tibiofibular synostosis with reactive stress changes [...] The plan is to rest him for a couple of days and see how he responds. He will receive treatment from _____ [Name of Team Trainer], our trainer. Additional recommendations will be made depending upon his response”.

11. In the MRI report of the right lower leg sent by _____ [Name of Doctor who read the MRI and CT scan] to _____ [Name of Team Doctor] on 10 December 2009, the heading “CLINICAL HISTORY” states: “Mid lower leg pain” and at

the end of the report under the heading “IMPRESSION” it is stated:

“There appears to be an incomplete tibiofibular synostosis of the mid lower leg, with stress reaction in and around the incomplete osseous bar, including mild stress reaction of the adjacent fibula”.

12. In _____ [Name of Team Doctor]’s sworn statement of 9 October 2012 filed by the Claimant in these proceedings, he confirms that he examined the Player in the past, refers to his progress note of 10 December 2009 to indicate when he first learned about the Player’s “right leg condition”, indicates that what he means by “right leg condition” is *“Ossification/myositis ossificans of right leg syndosmotic ligament with inflammation and stress reaction”* and states that *“As can be seen by previous notes from 12/10/09, Mr. Player had previous problems with his right leg. He missed about 1 week of games & practices”*.
13. In that connection, the Player’s submission in these proceedings is that: *“_____ [Name of Team Doctor] restricted Claimant’s activity for a short two-week period, missing only four games, and he promptly returned to full-time play and practice with the _____ [Former Club No. 2]”* and then *“Claimant continued to play through the end of February 2010 (when he left the _____ [Former Team No. 2] for family matters) without any pain in the right leg”*.
14. Two other progress reports filed by _____ [Name of Team Doctor] with his sworn statement indicate that at about the same point in time, in December 2009, the Player also suffered from a problem with his left knee.
15. In a first “Progress Note” dated 17 December 2009, i.e. one week after he was consulted by the Player about the pain in his right leg, _____ [Name of Team Doctor] states, among others, in that relation: *“Mr. Player is examined in the _____ [location of office] office Thursday, December 17, 2009, seen today **with a complaint of left knee pain and swelling** [bold characters added]. His right leg symptoms appear to have almost completely resolved just with some rest [...]”* and

adds under the heading “IMPRESSION”: “*Synovitis with exacerbation of underlying degenerative joint disease, and patellofemoral chondromalacia*”.

16. Upon receiving an MRI study the same day of the Player’s left knee, _____ [Name of Team Doctor] issued a second “Progress Note” on 17 December 2009, stating:

“Mr. Player had the MRI study of the left knee done later today, and it was reviewed by _____ [Name of Doctor who reviewed MRI and CT Scan]. It demonstrates a large synovial effusion, what appears to be a left-knee Baker’s cyst and some arthritic changes in the patellofemoral area. The menisci appear intact, and the ligaments are intact [...] We will treat him symptomatically with rest, restricted activity, and passive therapy and modalities”.

17. As indicated by the foregoing progress reports of 17 December 2009, when the Player consulted _____ [Name of Team Doctor] that day about pain in his left knee, “***His right leg symptoms*** [about which he had consulted the doctor one week earlier] ***appear to have almost completely resolved just with some rest*** [bold characters added]”.

3.1.2 Engagement by the Club, Medical Examination and Injury

18. On 29 October 2010, the Club and the Player entered into an employment contract for the 2010-2011 season (the “Contract”).
19. According to Clause 1 of the Contract,

“[...] The guaranteed salary payments within this Agreement are vested in and owing to the Player upon the completion of the execution of this Agreement and are not contingent upon anything other than the PLAYER passing a medical examination, which has to be completed within three (3) days starting from the arrival of the PLAYER to _____ [country of Club]”,

and according to Clause 2 the 20% of the agreed base salary would be paid

“... up front immediately upon passing of the physical examination”.

20. It is uncontested that on 9 November 2010, the Player completed the medical examination organized by the Club and then began practising and playing with the team.

21. With respect to the circumstances of this medical examination, the Player submits:

“The club doctor _____ [Name of Club Doctor] accompanied to the Player to _____ [Name of Hospital] in _____ [country of Club] on November 9, 2010, i.e. right after the Player arrived in _____ [country of Club]. In the hospital, the Player went through a series of tests and physical examinations which took approximately 4 hours”.

22. In that relation, the Player also submits that he: *“... was never asked any questions by the Club or the doctor as to any prior injury or health records”.*

23. The Player goes on to submit that:

*“As a natural outcome of being a professional athlete, the Player has had various injuries before **yet the Player has not suffered from any pain in his right calf or any other pain that could affect his performance before** [bold characters added]. The pain began after the Player got injured due to a hit he got to his knee during the game dated December 3, 2010 played between the Club and _____ [Opponent of Club]. After this game during which the Player was injured, he played one more game on December 7, 2010 played between the Club and _____ [Next Opponent of Club] [...] The fact that, between the dates of November 9, 2010 and December 7, 2010 the Player had played for the Club in four games without any problem verifies that he was not suffering from a pain which was affecting his performance”.*

24. However, the exhibits filed by the Player with a subsequent submission, in particular, the sworn statement by _____ [Name of Team Doctor] quoted above (see supra section 3.1.1) and the doctor’s attached progress reports dating from December 2009, evidence that the foregoing submission by the Player is not entirely precise since the year before (in December 2009) he had suffered from pain in his right calf and had consulted the doctor for that reason.

25. Furthermore, in a progress report dated 14 December 2010, i.e. a year later,

_____ [Name of Team Doctor] makes reference to the prior consultation as follows:

“I got a phone call from _____ [Name of Mr. Player's agent], Mr. Player's agent, on Monday, December 13, 2010. Mr. Player injured his right calf in a game about two weeks ago, when he was apparently kicked in the calf. No diagnostic studies were done until yesterday, Monday, December 13, 2010, but the studies done included an MRI as well as a plain x-ray. These indicated a mass in the mid shaft area of the right tibia, between the tibia and the fibula. _____ [Name of Mr. Player's agent] called me to get my impressions on this. I referred to a previous injury that occurred about a year ago, similar location, which prompted us to get a CT scan and MRI of the area as well as a plain x-ray. This diagnostic workup indicated a developing synostosis between the tibia and fibula in the syndesmotoc ligament, which occurred in a somewhat more proximal location than is normally seen. Mr. Player was treated with rest and returned to play a short time later. [...] I asked _____ [Name of Mr. Player's Agent] to have the images of the most recent MRI sent to me, and I told him that I would look at them. I also spoke with _____ [Name of musculoskeletal radiologist], musculoskeletal radiologist in [city and country of Club]. I sent her representative images of the MRI and CT scan that were done December 10, 2009 [...] _____ [Name of musculoskeletal radiologist] sent me the images that were done in _____ [city and country of Club]. I looked at the images myself and had them reviewed by _____ [Name of orthopedic oncologist], orthopedic oncologist at _____ [Name of hospital that orthopedic oncologist works at], _____ [Name of musculoskeletal radiologist from the country of Mr. Player], musculoskeletal radiologist at the _____ [Name of hospital that musculoskeletal radiologist works at], and _____ [Name of Doctor who read the MRI and CT Scan], musculoskeletal radiologist at [Name of medical facility]. The new images done in _____ [city and country of Club] were compared to the old images done at the _____ [Name of medical facility], almost one year apart. There has been slight progression of ossification or maturation of the process, but consensus is unanimous in that this represents a benign lesion and is a post-traumatic injury occurring in the syndesmotoc ligament and likely will result in synostosis developing. This was communicated to _____ [Name of musculoskeletal radiologist] and _____ [Name of Club's physician], who is the team physician in _____ [city and country of Club]”.

26. Concerning the nature and content of the medical examination which the Player was subject to on 9 November 2010, the Club submits the following:

“The Player underwent sportsman health test in international standards in _____ [Name of hospital] in _____ [name of country] on 09.11.2010 as part of the procedures applied to each player after entering into a contract with our Club and he began to play in our Club afterwards. It mainly consisted of standard orthopaedics, ophthalmology, internal diseases, and cardiological examinations, effort ekg, echocardiography, lung x-ray, blood analyses, and blood count for cardiac and

hepatic enzymes [...] Since the abovementioned standard health controls were performed on the player, a written health record was not requested from the player but he was asked about previous diseases and injuries during the examination process in order to reveal his general health condition. The player did not give any information about the illness which was revealed in January 2011 and where that illness relates to”.

27. Upon filing additional documents in this relation, the Club made the following submissions:

“As it would be inferred from the “referring institutions physician’s [sic] examination information sheet” presented in the annex, there is a section titled as “personal and family history” among the questions asked to the player under which physicians ask if the player takes any medication regularly, if s/he had an operation in the past, and if s/he has any chronic disease in general terms. In case of any chronic disease or similar health problem, it is indicated in the report but no note is written down in the report if the player does not mention any disease or health problem [...] A review into the “referring institutions physician’s examination information sheet” would reveal that such questions were asked to the player by the physicians of _____ [Name of hospital] (_____ and _____ [Names of Doctors from _____ [Name of Hospital]]) [...] As it would be inferred from the attached documents, the player did not give any information about the disease that became evident in January 2011 nor about its background and locality in the medical examination or afterwards [...] The relevant deformity is somewhere between tibia and fibula bones in between the knee and ankle and it is not possible to detect the problem via a physical examination or check-up before becoming severe unless the player explains his problem himself [...] Still, an x-ray image of the area could have been taken if the player had disclosed this problem and it would have been possible to conduct a more detailed analysis on it”.

28. As far as the chronology of events surrounding the Player’s right-leg pain that developed in December 2010, the Parties concur that he first complained about this pain - which he believes resulted from a kick in the leg during a game - during the first fortnight in December and that, as a result, he underwent a medical examination at the hospital in _____ [city of Club] on 13 December 2010, which included an MRI. The medical reports quoted above also indicate that from 14 December 2010 onwards, the Player’s former doctor in the _____ [country of Player], _____ [Name of Team Doctor], and the _____ [nationality of doctors] doctors having done the MRI on 13 December 2010, exchanged information and views on the matter.
29. With respect to what happened thereafter, the Player submits that although the pain

began in early December 2010 he

“... continued to play for Respondent at Respondent’s urging through early January. The pain in his right leg continued to get worse, and Claimant, at times starting in late December 2010, could not walk after playing or practising due to the pain in his leg [...] Although the pain increased dramatically, Claimant continued to play through Respondent’s January 8, 2011 game”.

30. Because the Player’s pain had gotten so bad by the second week of January 2011 and in light of the first medical diagnostic in _____ [country of Club], the parties agreed that he would probably need to undergo surgery and that it would be preferable if it were undertaken in _____ [country of Player]

3.1.3 The Player’s Return to _____ [country of Player] for Treatment and the Club’s Suspension of the Contract

31. On 11 January 2011, the Club’s team doctor, _____ [Name of Club Doctor], wrote an email to the Player’s doctor in _____ [country of Player], _____ [Name of Team Doctor] (with a copy to the Player’s agent) stating:

“[...] According to our consultations we decided to take out the lesion by operation and examine it pathologically. Mr. Player was informed about situation. In our opinion, it’s better for him to have this operation in his own country in order to be followed in the long term controls. After you see the last results of the MRI and CT, if your opinion is same with us, we are expecting from you to start the organisation of the operation as quickly as possible”.

32. On 12 January 2011, _____ [Name of Team Doctor] indicated internally by email to the Player’s agent that he believed it was in the Player’s best interest to return to _____ [country of Player] for further evaluation of his right leg condition.
33. Accordingly, the Club purchased a ticket for the Player and he was accompanied to the airport for his flight on 14 January 2011.
34. The Club asked to be kept abreast of the further diagnosis and treatment of the Player

in _____ [country of Player].

35. The Player's agent _____ [Name of Player's agent] initially kept the club representatives and doctors well informed in a string of detailed emails that began on 18 January 2011.
36. After sending the Club an email on 26 January 2011, explaining that _____ [Name of highly reputed sports doctor and surgeon], a highly reputed sports doctor and surgeon, was taking the lead for the Player's treatment, the Player's agent also began forwarding copies of some of _____ [Name of highly reputed sports doctor and surgeon] medical reports in order to keep the Club updated.
37. Meanwhile by fax of 31 January 2011, the Club's lawyer sent a letter to the Player's agent complaining that despite promises to inform it

"[...] neither our Club nor our Club's medical board has been given any information about whether the player has already gone through surgical operation, about particulars of the operation and latest situation in this sickness [...] We hereby kindly ask you to give us information about latest situation of his sickness and about the particulars of his surgical operation and about intended place of operation and about would his treatment process come to an end if he does not eventually go through an operation, as well as about anticipated date of coming back to _____ [country of Club]"

38. On 1 February 2011 in the morning, the Player's agent informed the Club that the treatment procedure decided by _____ [Name of highly reputed sports doctor and surgeon] was scheduled to take place the next day, and in two further emails in the evening of the same day, he forwarded _____ [Name of highly reputed sports doctor and surgeon] medical report of the previous day explaining the reasons for and the nature of the anticipated procedure - which was to avoid a surgical incision because of the risk and instead undertake a fluoroscopically guided injection of a cortisone solution and a high volume PRP platelet rich plasma accommodation - and gave the Club an account of how the procedure had gone (since in fact it took place

that day).

39. The Player's agent stated among others

"[...] Mr. Player is very eager to recover and to return to his teammates as they have been in contact, both his teammates and his coaches and he really appreciated their concern and well wishes [...] I will continue to keep you informed of his progress and reports from _____ [Name of highly reputed sports doctor and surgeon] who will keep us all informed of his progress and when he will release Mr. Player to return to his team in _____ [country of Club] and continue his rehabilitation ...".

40. In addition to his medical reports, _____ [Name of highly reputed sports doctor and surgeon] signed two statements dated 31 January 2011 *"To whom it may concern"*, indicating in substance that the final decision had been made to avoid surgery on the Player's leg because it would have involved an incision in a precarious situation, and to choose instead a *"semi-conservative approach"* involving a fluoroscopically guided injection. In one statement he indicates: *"We have planned on seeing him on a bi-weekly basis; however, we anticipate this will take four to six weeks to get it settled down so he can resume practice and on the outside he may miss the entire rest of his basketball season which I understand in _____ [country of Club] is over with sometime in May. If he does not respond to this semi-conservative approach then the last resort would be a surgical excision and he would have to accept some risk of that particular invasive technique"*. In the other statement, _____ [Name of highly reputed sports doctor and surgeon] underlines that it had not been a good idea to try and play through the pain and concludes that after the planned fluoroscopically guided injection procedure *"... he will be re-evaluated on a bi-weekly basis and probably will not be able to return to professional basketball for some six to eight weeks or more this season. At this point it is certainly more important to get his calf healed and asymptomatic than it is to try to play with continued pain. We anticipate a full recovery and certainly anticipate him being able to resume a normal basketball career after a conservative period of time"*.

41. According to the documents submitted by the Club, it received a copy of one of the



BASKETBALL
ARBITRAL TRIBUNAL

foregoing statements issued at the time by _____ [Name of highly reputed sports doctor and surgeon].

42. By email of 7 February 2011, the Player's agent informed the Club that "*Mr. Player will be seen and evaluated by _____ [Name of highly reputed sports doctor and surgeon] in two-weeks to check the progress*" and also said "*If you need to speak with _____ [Name of highly reputed sports doctor and surgeon] at anytime please feel free to contact him*".

43. By email of 19 February 2011, the Player's agent informed the Club that:

"Mr. Player just completed his second week of physical therapy from the procedure on his leg. He is due to see _____ [Name of highly reputed sports doctor and surgeon] in _____ [location of highly reputed sports doctor and surgeon] for a follow-up visit and examination to determine if the healing process is on progressing as planned. If so, then we are expecting that he will be able to return to Club within the next few weeks to complete physical therapy. It is his desire to return to help his team in the playoffs. Thanks I will update you again following the visit with [Name of highly reputed sports doctor and surgeon]".

44. On 22 February 2011, _____ [Name of highly reputed sports doctor and surgeon] issued a medical report about the Player's follow-up visit that day in which he noted the following, among others:

"... He comes in today now 3 weeks postop and overall is doing fairly well. He says he is perhaps feeling a little bit better, really has not been doing a whole lot other than some stretching exercises. He does have some mild pain in the morning; it seems to get better throughout the day..."

and under the heading "*Assessment and Plan*":

"At this point in time, overall Mr. Player is doing a little bit better perhaps. He is going to go ahead and get a little bit more active with his physical therapy. _____ [Name of highly reputed sports doctor and surgeon] spoke to him today about doing some more gastrocnemius strengthening as well as some more active participation in his therapy. However, he does not want him to play any basketball at this point in time nor do any lunges. We are going to have him come back in at the 6-week mark, which will be in about 3 weeks from now, at which point we will get a repeat MRI of his right leg to

evaluate his welling and we are going to examine him at that time”.

45. By email of 28 February 2011, the Player’s agent updated the Club as follows:

“This past Thursday, Mr. Player returned to _____ [Name of highly reputed sports doctor and surgeon] in _____ [location of highly reputed sports doctor and surgeon] to a follow-up to his surgical procedure. He was informed by _____ [Name of highly reputed sports doctor and surgeon] that the procedure seems to be working. The aggravation around the lesion has calmed down along with the swelling and irritation. He was informed that this rehabilitation will be escalated over the next two weeks, however he was not allowed to return to running or any basketball related training. He ordered him to return to his office in a couple weeks at which time it will be determined when he is allowed to return to _____ [city of Club] to continue treatment and rehab and begin basketball training to prepare to rejoining his team for the playoffs. Mr. Player is really looking forward to returning to his team in _____ [location of Club] and hopefully helping them to compete in the playoffs”.

46. On 1 March 2011, in light of the medical situation of the Player, the Club notified the Player’s agent in writing that it deemed the Player’s condition to pre-date his entry medical examination by the Club, and to be unrelated to sports; and that therefore, the Contract and all payments stemming therefrom to the Player and the agent were being suspended until the medical board of the Club determined the Player fit to play again and he resumed training and playing games with the Club:

“ The Player has applied to the medical board of the team in the beginning of January 2011 declaring that an injury not related to sportive activities occurred in his right leg which enables him to play basketball. As a result of the medical examination, a formation which was not related to sportive activities was noticed in his leg, and the player went to _____ [country of Player] on January 14, 2011, declaring that he would get medical controls and treatments. By the healthcare tests that the player has sent from the _____ [country of Player], it is understood that his injury is not related to the sportive activities that he was conducting, was dated long before that it cannot be considered as a sportive injury, has become visible since January 2012 [sic] and directly affects the player’s life, that the player is not able to play at this stage due to his serious health problem and hence the player cannot fulfil his obligations under the agreement.

The Club values the player Mr. Player, however since the player will not be able to comply with the agreement dated 29.10.2010 for an unknown time-period due to his unfortunate injury, the aforesaid agreement is entirely suspended, and in this sense any and all payments to be made to Mr. Player, to you, the _____ [nationality of managers] Managers and to the _____ [nationality of agents] Agents _____ and _____ [name of agents] representing _____ [name of agency] are withheld by this notification because of the fact the services to be provided are not provided by the

parties of the agreement including the player. [...]

47. On 14 March 2011, the representative of _____ [name of agency], _____ [name of Player's agent], wrote again to the representatives of the Club that, following the Player's medical treatment in the _____ [country of Player],

"I am writing to inform you that Mr. Player has been working very hard to rehabilitate his leg, with hopes to return to his team Club. His progress over the past two weeks has been tremendous. In fact, he is going to _____ [Name of highly reputed sports doctor and surgeon] on Monday seeking to be released and return to _____ [city of Club] to rejoin his team and practice for the playoffs! Mr. Player is a future _____ [name of league] Hall of Fame player and international icon who quite frankly isn't used to this and it needs to be corrected now. I am look forward to hearing from you soon [sic]. The most important updated news is that Mr. Player is now ready to return".

48. In a written statement signed under oath on 8 October 2012 by _____ [Name of highly reputed sports doctor and surgeon] and filed by the Player in these proceedings, _____ [Name of highly reputed sports doctor and surgeon] states that the Player *"Did not come back for follow-up except at [approximately] 2 weeks post operative on 2-22-2011 [22 February 2011]"* and that he does not know when the Player was fit to return to _____ [country of Club] but that *"It was estimated to be 6 to 8 weeks from the surgical injection on 2-1-2011 [1 February 2011] which was just a estimation"*.
49. In the same statement and in reply to the Arbitrator's question *"In your opinion, it is possible that the Player suffered from a chronic condition of the type in question for a period of time without suffering acute pain, i.e. is it medically possible that, despite the condition, he had no pain or only mild pain in his right leg when training/playing and that the pain declared itself or became acute due to a hit in the leg (a strike under the knee) sustained during a game in December 2010?"*, _____ [Name of highly reputed sports doctor and surgeon] replied: *"Yes – Apparently from patient acute pain began in _____ [country of Club]. Otherwise History is vague!"*.
50. By means of a written notification dated 16 March 2011 sent to the Club on behalf of

the Player, one of the agents (_____ [name of agent]) contested the Club's position and declared "... we hereby notify you to pay to Mr. Player, contracted player of our Client, the underpaid amount of contractual fee of **USD 410,000** in total, which arises out of the agreement dated 29 October 2010, including USD 150,000 which became due and payable as of 15 March 2011".

51. By means of a second written notification dated 22 March 2011, the agent sent a reminder to the Club requesting once again that the contractually-due payments be made to the Player. The Club was further requested to "... organize player's plane tickets from _____ [country of Player] to _____ [country of Club]...".
52. On 23 March 2011, the Club responded by fax, indicating that it was refusing to pay the Player for the following reasons:

"Despite all this time going on; you are hereby informed that you have not given adequate notices giving such exact information about the player and his disease as particulars of his disease, his therapeutic process, exact date of completion of his treatment and about whether he would be capable of playing basketball again upon completion of his treatment or not, and that his specific diseases not associated with sports prevents from fulfilling his obligations imposed on him under the contract with our Club and that he was supposedly to come back to _____ [country of Club] by end of first half of February, 2011, but failed to do so since beginning of second half of said month, and that no claim might be made by the player and all his managers for payments prescribed in the contracts as he failed to fulfil his contractual obligations owing to a disease not associated with sports, or with our Club, and that, if you insist on making such claims for payment, our Club would be forced to make claims for compensation of damages we suffered as we did not get any benefit from the player owing to his disease coming from the past, as well as to give start to appropriate procedures for termination of the contract if and when necessary".

53. Thereafter, the Club made no contractual payments to the Player, whereupon the latter filed a Request for Arbitration with BAT on 15 September 2011 to claim his outstanding contractually-stipulated salary.

4. The Proceedings before the BAT

54. On 15 September 2011, the Player filed a Request for Arbitration in accordance with the BAT Rules and paid an amount of EUR 4,916 in non-reimbursable handling fees in two payments on 26 August and 21 September 2011.

55. On 26 October 2011, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs (and the small remaining portion of the handling fee) to be paid by the Parties as follows:

<i>“Claimant (Mr. Player)</i>	€ 7,083.29
<i>Respondent (Club)</i>	€ 7,000”

56. On 23 November 2011, the Club filed its Answer.

57. On 19 January and 30 January 2012, given the Respondent’s failure to pay its part of the advance on costs and after being granted several extensions, the Claimant paid the entire advance on costs in an amount of EUR 14,089.05.

58. By procedural order of 20 February 2012, both Parties were requested to answer various questions and file any related documentary evidence.

59. On 12 March 2012, the Claimant submitted his replies to the Arbitrator’s questions.

60. On 19 March 2012, the Respondent submitted its replies to the Arbitrator’s questions.

61. Between 27 March and 14 May 2012, a number of procedural orders were issued regarding the possible dates for a hearing in this matter and a request for an additional advance on costs. The Parties were also requested to answer further questions in anticipation of a hearing and to indicate whether they authorized the Arbitrator to attempt to bring about a settlement.

62. On 24 May 2012, the Claimant filed an application with the BAT requesting that the Arbitrator render an award without holding a hearing.
63. By procedural order of 4 June 2012, bearing in mind that both Parties had expressly confirmed their agreement that the Arbitrator attempt to help the Parties reach an amicable settlement, while at the same time the organization of a hearing was presenting difficulties, the Arbitrator invited the Parties to enter into direct settlement discussions and issued procedural instructions in that connection. The Arbitrator then fixed 30 July 2012 as the time limit within which the Parties should inform the BAT of the result of such discussions.
64. By various emails between 30 July and 9 August 2012, the Parties informed the BAT that no settlement had been reached.
65. By procedural order of 20 August 2012, the Parties were informed that the Arbitrator had taken note of the absence of any settlement and that a final decision as to whether the award would be rendered without any form of hearing would be taken once the Parties had answered the additional questions listed in the procedural order.
66. On 15 October 2012, further to extensions granted to them, both Parties filed their answers to the Arbitrator's questions as well as related exhibits. The Claimant's answers included a motion requesting that the award and proceedings be deemed confidential.
67. By procedural order of 29 October 2012, the Parties were informed that having examined the additional submissions and documents, the Arbitrator was sufficiently informed to render an award on the basis of the written record. Nevertheless, both Parties were given the opportunity to make observations on the other Party's submission and documents filed on 15 October.

68. On 14 and 15 November 2012, the Player and the Club filed their respective observations.
69. By procedural order of 16 November 2012, the parties were informed that “[...] *Having now received the final submissions, the proceedings will be closed and the award finalized ...*”; however given the length and complexity of the proceedings as well as the volume of written documents on record, each party was requested to pay an additional advance on costs in an amount of EUR 2,500.
70. On 29 November 2012, the Player paid his share of the additional advance on costs, and on 14 December 2012 substituted for the Respondent in paying its share.
71. By procedural order of 17 December 2012, the proceedings were closed and the parties requested to submit their statements of costs.
72. On 19 December 2012, the Player submitted his statement of costs. The Club did not file any.
73. On 20 December, the BAT invited the Club to submit any comments on the Player’s statement of costs. The Club did not make any comments.

5. The Positions of the Parties

5.1 The Claimant’s Position

74. The Player submits the following in substance:
- According to the terms of the Contract, his salary is fully guaranteed providing he successfully completes the so-called “physical examination” (clause 1 *in fine* of the Contract), which he did.

- During the physical examination he was not asked any particular questions regarding his medical history and/or past injuries but he did mention the existence of past surgery on his right elbow.
- In any event, although as the natural outcome of being a professional athlete, he has had various injuries in the past, he had nothing particular to signal about pain in his right calf, or any other previous pain that could have affected his performance. *“It would be impossible and impractical for any athlete in a medical examination to provide every minor bruise or little ache or pain he may have encountered during his career”.*
- Immediately after the physical examination on 9 November 2010, he was feeling fine during the initial practices and games with the Club and only began feeling pain in his right calf after a game in early December, which he believes was probably caused by receiving a kick in the leg.
- After he signalled to the Club’s team doctor, the pain in his right calf and was subject to a medical examination on 13 December in a hospital in _____ [city of Club], he continued practising and playing until the 8th of January 2011 and eventually did so on the insistence of the Club although the pain had got so bad that he could sometimes barely walk after practice or a game.
- Thereafter, Club’s doctors and his doctors in the _____ [country of Player] agreed that he should return to the _____ [country of Player] for medical treatment, which he did on 14 January 2011 upon agreement of the Parties.
- In keeping with the Club’s request to be kept informed, from mid-January 2011 until mid-March 2011, his agent kept the Club fully informed of the diagnosis of his doctors in _____ [country of Player] (in particular of _____ [Name of highly reputed sports doctor and surgeon]) and concerning their

decisions regarding the envisaged medical treatment, the surgical procedure he underwent and the scheduled post treatment rehabilitation/therapy.

- During that period, his agent kept the Club abreast of the progress of the rehabilitation process while simultaneously indicating and confirming to the Club on several occasions that he intended to return to _____ [country of Club] as soon as possible to finish the season with the Club/team and to help it in the play offs; and on 14 March 2011 the Club was informed that he was ready to return.
- Despite him having passed the physical examination and being under treatment in _____ [country of Player] with the Club's agreement, as well as his plans to return to _____ [country of Club] as soon as possible to finish the season with the team, the Club suspended his Contract and his salary payments without any forewarning by notice of 1 March 2011, thereby breaching their obligations under the fully-guaranteed Contract.
- The Club has falsely contended that it was not kept informed of his treatment and rehabilitation in _____ [country of Player] and that he was not suffering from a sports/play-related injury but from an existing sickness/condition that is not covered by the Contract guarantees.
- Being struck in the right leg during a game with the Club early in December 2010 was what triggered his injury, i.e. it was sports/play-related, and it deteriorated due to the Club's insistence that he continue playing though December 2010 and early January 2011.
- Furthermore, the Club was kept informed and fully abreast of his treatment/rehabilitation in _____ [country of Player] and knew he was intending to return to the Club to finish the season.

- Thus, he respected his contractual duties, whereas the Club breached its obligations and unjustly suspended the Contract/its salary payments, meaning that he is contractually entitled to request payment from the Club of all outstanding amounts owed to him under the fully-guaranteed Contract.
- On 1 March 2011, when the Club notified him that it was suspending the Contract, it had already begun withholding salary payments.
- *“The Player has received the payments pertaining to November and December 2010 fully and in compliance with the Agreement. January 2010 [sic] payment was partially made by the Club after the due date (which is the 15th of each month at the latest): the Player received only USD 90.000.00.- out of the USD 150.000.00.- for January 2010 and had not received any further payment up to this date”.*

75. Accordingly, in his Request for Arbitration dated 15 September 2011, the Player requested the following:

"Relief Sought by Claimants

1. *Claimants have material and procedural right under the Agreement to seek relief from FAT to order Respondent to pay in full the salary of the Player and agency fees of the Agents.*
2. *In this regard, Claimants seek, in reservation of any further rights, relief and request an award in the following terms:*
 - a. *Respondent, i.e. the Club, be ordered to immediately pay USD 879,500.00 (= [non-paid salary amount amounting to USD 860,000.00 + accrued default interest as of due dates amounting to USD 19,500.00]) to the Player;*
 - b. *Respondent be ordered to pay all FAT application fee plus additional costs of arbitration, legal fees, and/or expenses related to this BAT case.”*

5.2 Respondent's Position

76. The Club submits the following in substance:

- In accordance with the Contract, the Club organized a standard physical examination of the Player on 9 November 2010 before he began practising/playing with the team.
- The examination, which lasted a number of hours, took place at a hospital in _____ [city of Club] and was undertaken by a team of doctors, who, in addition to their various tests/analyses and physical examinations of the Player, asked him a series of questions, corresponding to a standard written form/questionnaire, relating to his personal health, medical condition and family antecedents, including about any former illnesses/injuries he had suffered from.
- During that process the Player did not mention any existing or prior illnesses/injuries (except regarding an operation on his right elbow), as confirmed by the absence of any indications under the entries of the relevant headings/questions in the forms completed and signed by the doctors during the examination.
- During this type of physical examination, it is impossible to examine/test a player for every form of existing injury/illness, not only because overly-broad examinations (such as x-rays) could be too invasive and create health risks, but also because to be able to verify the existence and state of more complex and unusual types of injuries/illnesses, it is necessary to be alerted by the player regarding the possibility of a problem.
- The evidence on record demonstrates that at the time of the physical examination, the Player was suffering from a pre-existing non-sports related

illness or degenerative/chronic medical condition, in an unusually-placed position in his right calf, that is typically the type of condition that could not be investigated and spotted during a standard physical examination, unless the player mentioned the existence of the problem or at least the symptoms previously suffered (type of pain and measures taken/treatment given).

- On 9 November 2010, the Player did not mention to the doctors questioning him, as he should have, that he had suffered and been treated for pains in his right calf the previous season which had caused him to miss some practice and several games.
- However, after the Player first complained of the pain in his right calf after a game in December 2010 and during his corresponding medical examination on 13 December 2010, the "... *Player has reported himself to medical board of the team declaring that "he is sick and that a disorder not associated with sports has developed on his right leg and that this situation prevents him from playing basketball"*" and "*Team's medical board has examined the player's ailing leg and found that some disorder not associated with sports has developed on it*".
- Because the situation had not improved by the beginning of January 2011, the Club agreed to the Player being treated in _____ [country of Player], on the belief that he would probably need to undergo surgery and under the condition that it be kept fully informed by the Player regarding the treatment/rehabilitation.
- The Player did not keep the Club properly and fully informed after he left for _____ [country of Player].
- Nevertheless, based on the information received and in particular on the copy of a medical report "To Whom It May Concern" of _____ [Name of highly

reputed sports doctor and surgeon] dated 31 January 2011, it was then “... *understood from results of medical tests sent by the player from _____ [country of Player] that his disorder is not attributable to his sports life and that it is a sickness which goes far back in time to such an extent that one might not consider it a sports disorder and that a sickness has become visible as from January, 2011 and that it is likely to have direct impact on his life and that he is unable to play basketball at this stage owing to his heavy medical problem and that, therefore, it is impossible for him to fulfil his contractual obligations*”.

- In other words: “*It seems that the Player Mr. Player and/or its _____ [nationality of managers] or foreign managers have concealed such injuries from our Club; that the Player has not disclosed such injuries in order to sign a contract with the Club, e.g. he has deceived our Club. It is clear that such conduct should not find protection for itself under legal order, and it is a clear breach of the rules of good faith*”.
- Moreover, it was unclear from the information received after his departure to _____ [country of Player] if and when the Player would be able to return to the Club, and this created uncertainty for the team including for its organization. It was initially understood that the Player would come back after mid-February 2011 but the situation evolved and became less clear and more uncertain.
- As the Player did not inform the Club clearly that he had recovered completely, he was not sent a written invitation to return.
- In this respect, “*Although statements delivered by the Claimant’s attorney allege that _____ [name of Player’s agent], e.g. the Player’s manager, sent a mail to the Club on 14.03.2011 to indicate that the Player was ready to return to _____ [country of Club], this mail contains statements indicating that _____ [Name of highly reputed sports doctor and surgeon] would see*

Mr. Player again, but it does not indicate any precise date on which the Player would return to _____ [country of Club] [...] [T]he Club received no notification from the Claimant and/or his foreign manager and/or _____ [nationality of manager] manager about the fact that the Player's injury was cured completely, and that he would return to _____ [country of Club] on any exact date".

- Furthermore, *"It is a well-known fact that the player has not played for any Club since he returned to his country".*
- In such circumstances, the Club was not contractually, or in fairness, bound to continue paying the Player. The Club was therefore entitled to suspend the Contract and all payments thereunder.
- The claims being made by the Claimants are baseless and unfair, and the interest being claimed is excessive in any event.
- More specifically, *"The contract executed by and between the Player and our Club stipulates that the amount of US\$ 1.500.000 would be paid to the Player for a season of ten (10) months. The Player arrived in our country on 09.11.2010, and left on 13.01.2011. An aggregate amount of US\$ 750.477.20 has been paid to the Player [including costs allegedly paid for the Player and salary payments]. The Player spent only two months in _____ [country of Club], and could play basketball only for one and half month out of such period. The Player is thus entitled to the maximum amount of US\$ 300.000 for two months when consideration is paid to the contract period. Consequently, the Player is required to refund a sum of US\$ 450.477,20 to our Club".*

77. In its Answer, the Club submitted the following conclusion and prayer for relief:

“Based on the foregoing reasons as well as such reasons as might be determined by your Messrs. Tribunal, we hereby kindly request that a decision be made for dismissal of the claimant’s unfair and unfounded claims and for imposition of attorney’s fees and trial costs on the claimant.”

78. As indicated above, in its final submission the Club partially amended its foregoing prayer for relief by stating: “... The Player is thus entitled to the maximum amount of US\$ 300.000 for two months when consideration is paid to the contract period. Consequently, the Player is required to refund a sum of US\$ 450.477,20 to our Club”.

6. The Jurisdiction of the BAT

79. 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).
80. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
81. 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
82. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Clause 14 of the Contract, which reads as follows:

“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

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

Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English."

83. The foregoing arbitration agreement is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.
84. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
85. In addition, the Club did not challenge the jurisdiction of the BAT.
86. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claims against the Club.

7. Discussion

7.1 Applicable Law – ex aequo et bono

87. 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*".
88. 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."

89. The Contract does not contain a choice-of-law clause.
90. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Player against the Club in this arbitration in front of the BAT.
91. 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

92. 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*”.
93. In light of the foregoing considerations, the Arbitrator makes the findings below.

7.2 Findings

94. Given the facts alleged and evidence adduced by the Parties, this case raises a number of questions which are linked and which will be examined together:

- When the Player underwent the entry physical examination by the Club on 9

² 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).

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

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

November 2010, was the Player aware of a pre-existing chronic medical condition and/or prior injuries of his that might develop into a physical handicap in performing his duties towards the Club as a professional basketball player?

- If so, did the Player have a duty to divulge the existence of these prior medical problems to the Club during the examination?
- If the Player had such a duty and he failed to discharge it, were there any failings in the Club's physical examination procedures and/or any other actions of the Club that contributed to the prior medical problems not being divulged or detected?
- Independently from the answers to the above questions, after the Player's pain in his right calf developed during a game in early December 2011, did either party act in a manner which affected its rights and obligations towards the other?
- In particular, can the Club be deemed to have accepted the Player's medical condition and thereby be contractually estopped from subsequently invoking it to suspend the Contract and salary payments, and
- Did the Player forego any of his rights to a salary by not returning to the Club during or after his rehabilitation?

95. Before answering these questions and for the better understanding of the findings below, it is helpful to make a few preliminary observations regarding the general nature and contractual relevance of the entry physical/medical examination in this type of no-cut fully guaranteed employment contract for a professional basketball player.

96. In this case, Clause 1 of the Contract stipulates:

“This is no cut contract and the CLUB shall guarantee all terms of this Agreement against skill, injury, and illness or any reason whatsoever for the full term of this Agreement. The guaranteed salary payments within this Agreement are vested in and owing to the PLAYER upon the completion of the execution of this Agreement and are not contingent upon anything other than the PLAYER passing a physical examination, which has to be completed within three (3) days starting from the arrival of the PLAYER to _____”.

97. Obviously, the foregoing type of clause is very far-reaching and taxing on a club with respect to a player’s medical problems that arise during the life of the contract, it being clear from the wording that both injury and illness are covered, i.e. even medical problems that are not sports/play related. This implies that a club needs to be very diligent in undertaking the physical/medical examination and that there is a certain onus on the club in that respect.
98. Furthermore, it is not necessarily easy to distinguish between what is an injury and what is an illness, e.g. in relation to chronic or recurring problems with muscles, tendons, cartilage and articulations which athletes often suffer from; this being partly a question of medical/legal definition and of semantics. For sake of convenience, hereunder the term “medical condition” will be used to cover both types of ailment, i.e. illness and injury.
99. With this type of fully guaranteed contract, an important question is whether a club can be deemed to remain bound by the same guarantees if a player’s capacity to practice/play and/or his/her performance is affected by a pre-existing medical condition which is not divulged or detected during the medical examination.
100. Here a parallel can be made with warranty issues that arise when goods are sold insofar as the respective duties and rights of the seller and the buyer. For example, what does it mean/contractually imply if a product is sold in the condition “as is”, what is the responsibility of the seller for so-called “hidden defects”, is the degree of responsibility different if the defect was known to the seller, what are the duties of the seller to inspect the goods upon delivery and what are the consequences if no inspection is made or if detected defects are not immediately invoked?

101. Generally speaking and given the far-reaching guarantees given by a club in no-cut fully-guaranteed contracts of this type and the risk that they imply, it would seem difficult with respect to principles of good faith, fairness and justice not to consider that the Player has the implicit duty to (i) arrive in a medically fit condition sufficient to perform as a professional basketball player and therefore (ii) to divulge to the Club during the physical examination, the existence of any pre-existing medical condition that he is aware of and that might impair his capacity to perform at that level.
102. At the same time, when assessing and characterising a player's attitude with respect to the foregoing duty, it needs to be born in mind that what constitutes medical and physical fitness is not always a clear-cut matter or a state of form which is easy for the player him/herself to assess as an athlete.
103. In a sport such as basketball – as in many other sports – over the years, an athlete may have many benign and some serious problems with muscles, tendons, cartilage and/or articulations, which may cause pains and physical problems of a variety of types. Some may re-occur and at various intervals, others not. An ailment may seem chronic and then never reappear, and vice versa, an ailment that appears temporary and benign may last and/or become acute. On some occasions, the treatment undergone may be light and conservative, in others it may be heavy and invasive.
104. In addition, in certain instances and to some degree, the impression of seriousness of a physical ailment is a subjective matter linked to personal resistance to suffering; and even the assessment of how likely it is that a prior ailment will reappear one day depends partly on the more or less optimistic or pessimistic outlook and frame of mind of the athlete. Of course, doctors' opinions will help to make more objective the diagnosis and the assessment of the degree to which an ailment is likely to be overcome and within what timeframe.
105. Thus, a number of factors need to be accounted for when determining whether an

athlete has been sufficiently transparent during an entry medical examination regarding the duty to divulge prior injuries and ailments.

106. Furthermore, the player's duty to be candid about past injuries/ailments does not exist in a vacuum but is affected by the seriousness and manner with which questions are asked and recorded by the club's medical examining body.
107. Broad questions about the medical history of the player may be useful because they encompass a lot, however at the same time, more precise questions will jog the player's memory and oblige him/her to be more specific in the answers; therefore a combination of both types of question is more likely to lead to potential problems and pre-existing medical conditions being revealed. Similarly, if the player is requested to countersign the answers to the questions as a form of undertaking, there is a higher chance that he/she will think twice about the answers.
108. Therefore, it is fair and just to consider that linked to a player's duty of disclosure, the club has a concurrent duty to take reasonable measures to reduce the risk that pre-existing medical conditions remain undetected during an entry physical examination.
109. Among such precautionary actions, there is e.g. the possibility for the club to undertake basic research in advance regarding the player's playing history, particularly that of the prior season, to try and determine if the player has missed games, and, if so, whether it was for reasons of injury/illness, as well as to put precise oral and written questions to the player in that respect during the medical examination. Those questions can very easily be formulated to include soliciting information about any chronic or even isolated problems with muscles, tendons, and more generally articulations. A club may need to be even more cautious in this respect if a player has been on the circuit for many years and is of a certain age because that would tend to increase the risk of pre-existing medical conditions.

110. If the club does not do its “homework” in advance in that respect and/or fails to undertake a thorough medical examination and within a procedure that obliges the player to carefully reflect upon prior injuries/illnesses, to make any corresponding disclosures and to sign his/her declaration in that connection, this may amount to a form of contributory fault/negligence which impacts the club’s right to criticize the player’s lack of candidness and characterise it as a breach of duty.
111. Finally, it goes without saying that if a club discovers during the entry medical examination what it deems to be a problematic pre-existing medical condition, or at a later stage, i.e. after that examination, what it deems to be an unfairly undisclosed pre-existing medical condition of the player, the club must invoke this without delay to prevent being estopped from doing so; since it would be unfair to rely, on the one hand, on the possibility that the player may nevertheless be able to perform or become apt to play, and, on the other hand, reserve the possibility of invoking at a later stage the known medical problem.
112. The facts of the present case, the Parties’ arguments and the questions they raise shall now be examined in light of the foregoing framework of principles that the Arbitrator deems to reflect fairness and justice.
113. As a starting point, the Arbitrator finds that it is clear from the evidence and in particular the medical reports and the declarations of _____ [Name of Team Doctor] that the medical problem the Player suffered from and complained about in terms of pain in his right calf after a game with the Club’s team in early December 2010 corresponds to a pre-existing medical condition that _____ [Name of Team Doctor] had diagnosed one year earlier, in December 2009, when the Player complained about a similar pain in his right calf after a game with _____ [Former Team No. 2]. Furthermore, in both cases the Player apparently thought that the pain had been induced by a kick in the leg.

114. That said, after carefully considering the very detailed evidence on record in this relation, and in particular the numerous medical reports, including the doctors' statements filed in these proceedings, the Arbitrator finds that in the specific factual circumstances of this case, the Player cannot be deemed to have been able to assess the significance of that pre-existing medical condition and the need to disclose it, or perhaps even to have been aware of it; while at the same time the evidence on record tends to indicate that the Club did not entirely discharge its duty to undertake precautionary investigations about the Player's previous season and to put questions to the Player during the entry physical examination in a manner which would have increased the likelihood of a disclosure of this medical condition or at least of the related prior symptoms constituted by the pain in the right calf.
115. According to the record, the Player only suffered once from his right calf during the prior year/season, i.e. one year earlier in December 2009, for a short period of about one or two weeks when he missed some practice and games. In addition, according to _____ [Name of Team Doctor] contemporaneous medical reports (dating from December 2009), it appears that the Player simultaneously suffered from an injury of his left knee, which he complained about one week later and which may have disabled him as much as or more than the right calf pain. Indeed, in his progress report of 10 December 2009 first signalling and diagnosing the right calf pain, _____ [Name of Team Doctor] notes "*The plan is to rest him for a couple of days and see how he responds*", while one week later, in two successive progress reports of 17 December 2009 relating to the left knee complaint, he notes, respectively: [First report of that day] "*Mr. Player is ... seen today with a complaint of left knee pain and swelling. **His right leg symptoms appear to have almost completely resolved just with some rest** ... [bold characters added]*" and [Second report of that day] "*Mr. Player had the MRI of the left knee done later today [...] We will treat him symptomatically with rest, restricted activity, and passive therapy and modalities*".
116. In addition, the Player then continued the 2009-2010 season and played quite a large

number of games with _____ [Former Team No. 2] without there being any record of him complaining about or suffering from pain in his right calf, and the subsequent medical reports of 2011 (of _____ [Name of Team Doctor] and _____ [Name of highly reputed sports doctor and surgeon]) indicate that the medical condition which caused the ailment in his right calf is relatively complex condition which is not simple to diagnose and which could exist chronically without necessarily causing acute pain (statement of _____ [Name of highly reputed sports doctor and surgeon]).

117. In other words, the record demonstrates that although the medical condition existed in December 2009, the Player probably was not aware of, or at least not interested in, the medical nature/definition of the condition, being mainly preoccupied by the symptoms (the pain in the right calf); and because those symptoms did not last long, overlapped in time with a pain in his other leg (the left knee), did not give rise to heavy treatment and did not re-appear for the rest of the season, he probably did not even have this prior ailment in mind, or at least did not consider it needed to be mentioned, when he underwent the Club's physical examination one year later in November 2010; whereas if the Club had asked him specific questions about any practices/games missed during the prior season due to any ailments in his legs, back, arms, etc. and had required him to sign off on his declarations, the existence of the prior ailment might have come to light and been discussed by the Parties.
118. For the above reasons, the Arbitrator finds that the Player did not act in bad faith or fail in his duty of disclosure during the 9 November 2010 physical examination by the Club, and that the latter's lack of precautionary investigations (which were all the more warranted due to the Player's age/number of seasons played and the salary being offered) and the insufficiently specific procedure for questioning the Player contributed to the existence of the pre-existing medical condition or at least its symptoms not being disclosed or coming to light during the examination.

119. Consequently, in the particular circumstances of this case, the prior existence of the medical condition (which is undisputable) and its non-disclosure by the Player (which is also undisputable) cannot in themselves and in fairness be deemed a breach of duty/contract which justified the suspension of the Contract and of the salary payments, even if at the time of such suspension the Club may have had doubts about the Player's good faith and candidness in this relation.
120. In addition, the Arbitrator finds that the evidence adduced demonstrates that – after the symptoms of the Player's pre-existing medical condition reappeared, i.e. the pain in his right calf, in early December 2010, and he complained to the Club – based on its own medical tests (on 13 December 2010), on the dialogue and exchange of information/reports between its doctors (including the specialists in the hospital of _____ [city of Club] who had done the MRI) and _____ [Name of Team Doctor] from 14 December 2010 onwards and copies of the medical reports of _____ [Name of highly reputed sports doctor and surgeon] dating from the end of January 2011, the Club learned very quickly (before the end of the year) and received further confirmation (in January 2011) that the pains in the Player's right calf were caused by a medical condition from which he had already suffered one year earlier.
121. Of particular relevance in this respect is the progress note of _____ [Name of Team Doctor] of 14 December 2010 evidencing how on that day he exchanged information with the Club's medical team that had undertaken the Player's examination in _____ [city of Club] the day before:

"I got a phone call from _____ [Name of Mr. Player's agent], Mr. Player's agent, on Monday, December 13, 2010. Mr. Player injured his right calf in a game about two weeks ago, when he was apparently kicked in the calf. No diagnostic studies were done until yesterday, Monday, December 13, 2010, but the studies done included an MRI as well as a plain x-ray. These indicated a mass in the mid shaft area of the right tibia, between the tibia and the fibula. _____ [Name of Mr. Player's agent] called me to get my impressions on this. I referred to a previous injury that occurred about a year ago, similar location, which prompted us to get a CT scan and MRI of the area as

*well as a plain x-ray. This diagnostic workup indicated a developing synostosis between the tibia and fibula in the syndesmotic ligament, which occurred in a somewhat more proximal location than is normally seen. Mr. Player was treated with rest and returned to play a short time later. [...] I asked _____ [Name of Mr. Player's Agent] to have the images of the most recent MRI sent to me, and I told him that I would look at them. I also spoke with _____ [Name of musculoskeletal radiologist], musculoskeletal radiologist in [city and country of Club]. I sent her representative images of the MRI and CT scan that were done December 10, 2009 [...] _____ [Name of musculoskeletal radiologist] sent me the images that were done in _____ [city and country of Club]. I looked at the images myself and had them reviewed by _____ [Name of orthopedic oncologist], orthopedic oncologist at _____ [Name of hospital that orthopedic oncologist works at], _____ [Name of musculoskeletal radiologist from the country of Mr. Player], musculoskeletal radiologist at the _____ [Name of hospital that musculoskeletal radiologist works at], and _____ [Name of Doctor who read the MRI and CT Scan], musculoskeletal radiologist at [Name of medical facility]. **The new images done in _____ [city and country of Club] were compared to the old images done at the _____ [Name of medical facility], almost one year apart. There has been slight progression of ossification or maturation of the process, but consensus is unanimous in that this represents a benign lesion and is a post-traumatic injury occurring in the syndesmotic ligament and likely will result in synostosis developing. This was communicated to _____ [Name of musculoskeletal radiologist] and _____ [Name of Club's physician], who is the team physician in _____ [city and country of Club]**". (bold characters added).*

122. Also, contrary to what is asserted by the Club, the evidence adduced convincingly establishes that from mid-January until the end of February 2011, the Player's agent kept the Club fully informed about the diagnosis/Player's treatment in _____ [country of Player] and was completely transparent, even indicating that the Club should contact _____ [Name of highly reputed sports doctor and surgeon] directly if it wished to.
123. Despite the knowledge that the Club acquired during the second half of December 2010 that the Players had suffered in the past from a similar injury/ailment, it did not invoke a breach of duty or contract by the Player or complain or put the Player on notice in any manner.
124. Instead, the Club's medical team suggested and agreed before mid-January 2011 that the Player return to _____ [country of Player] for a final diagnosis and treatment

before coming back to the Club for the remaining part of the season. Although on 31 January 2011, the Club complained about not having enough feedback from _____ [country of Player] and requested to be more fully informed, it did not change its implicit position of principle, i.e. that the Club wanted to maintain the Player on the team and preserve the possibility of him finishing the season despite the nature of the injury he was suffering from. Also the Club paid a main part of the Player's January 2011 salary.

125. Given this attitude of the Club after the nature of the Player's injury and his pre-existing medical condition became known to it, the Player must have believed in good faith during that period of time (between mid-December 2011- early February 2011) that he was being offered the opportunity and even being requested to return to play with the team as soon as possible and that his contractual rights were not being questioned in any manner.
126. Consequently, the Club must be deemed to have foregone in January 2011, any rights it might have believed it had to suspend or terminate the Player's Contract or to reduce his salary due to the discovery of a non-disclosed pre-existing condition that prevented him from performing; and principles of fairness and justice estop the Club from requesting today the retrocession of the salaries already paid to the Player or the payment of an equivalent amount in damages.
127. The foregoing finding is supported by the fact that for another month the Club did not suspend the Player's contract, i.e. until 1 March 2011.
128. Nevertheless, the Club's suspension of the Contract on 1 March 2011 does raise the question of whether the Player fully kept his promise to return as soon as possible and met his contractual duty to undertake the post-treatment rehabilitation seriously and diligently to that end.

129. The Arbitrator finds that such is not the case.

130. The evidence on record tends to indicate that the Player was not being particularly active with his rehabilitation programme during the first half of February 2011.

131. Indeed, in a clinic note of 22 February 2011, _____ [Name of highly reputed sports doctor and surgeon] states, among other things, that the Player:

“... comes in today now 3 weeks postop [...] He says he is perhaps feeling a little better, really not been doing a whole lot other than some stretching exercises [...] overall Mr. Player is doing a little better perhaps. He is going to go ahead and get a little bit more active with his physical therapy. _____ [Name of highly reputed sports doctor and surgeon] spoke to him today about doing some more gastrocnemius (sic) strengthening as well as some more active participation in therapy. However, he does not want him to play any basketball at this point in time nor do any lunges. We are going to have him come back in at the 6-week mark, which will be in about 3 weeks from now, at which point we will get a repeat MRI of his right leg to evaluate his swelling and we are going to examine him at that time”.

132. Furthermore, in his statement of 8 October 2012 filed in these proceedings, _____ [Name of highly reputed sports doctor and surgeon] declared that after the foregoing medical examination of 22 February 2011 the Player did not return for any other post-operative follow-up.

133. At the same time, from the end of February 2011 onwards, the indications of the Player’s agent to the Club regarding the schedule of rehabilitation and expected date of return to _____ [country of Club] become less clear and speculative.

134. In particular, in light of _____ [Name of highly reputed sports doctor and surgeon] clinic note of 22 February 2011 - indicating that the Player had not been particularly active in his rehabilitation and implying that it remained to be seen how much more time would be needed for recovery - and given the Player’s failure to turn up at the second post-operative examination scheduled for mid-March 2011, the indications of the Player’s agent to the Club are speculative when he states in an email

of 14 March 2011:

*"I am writing to inform you that Mr. Player has been working very hard to rehabilitate his leg, with hopes to return to his team _____ [Name of Club]. His progress over the past two weeks has been tremendous. **In fact, he is going to _____ [Name of highly reputed sports doctor and surgeon] on Monday seeking to be released and return to _____ [city of Club] to rejoin his team and practice for the playoffs!** [Bold characters added]. Mr. Player _____ quite frankly isn't used to this and it needs to be corrected now. I am look forward to hearing from you soon. **The most important updated news is that Mr. Player is now ready to return**". (bold characters added)*

135. For the foregoing reasons, the Arbitrator finds that the evidence adduced does not convincingly establish that beyond 22 February 2011 - when _____ [Name of highly reputed sports doctor and surgeon] underlined the need for the Player to become more active in the rehabilitation therapy and to return for a second post-operative medical examination - the Player began working hard on his rehabilitation and was really willing and intent to make his best efforts to recover and return as quickly as possible to _____ [country of Club], or that in mid-March he was in fact ready to return, despite the above affirmation of his agent.
136. Consequently, the Arbitrator finds that it would be unfair and unjust if the Club were required to pay the Player any compensation for salaries due beyond the end of February 2011.
137. Based on all of the foregoing considerations, on the Player's submission that he was entirely paid in November-December 2010, on the Parties' common submission that an amount of USD 90,000 was paid by the Club for the Player's salary in January 2011 and on the Arbitrator's view that the Parties share some responsibility for their dispute having arisen and for it having to go all the way to arbitration to be resolved, the Arbitrator finds it fair that: (i) the Club be required to pay the Player an amount of USD 210,000 as contractual damages, with interest at 5% per annum from 1 March 2011 onwards, (ii) the Player shall not be required to reimburse to the Club any salary payments he received before the end of February 2011 or expenses paid for him by the

Club before that date, and (iii) each party shall bear half of the arbitration costs and its own legal fees and expenses.

138. The interest of 5% for late payment is being awarded in keeping with the BAT jurisprudence according to which, in principle, it is fair to award interest for late payment at a reasonable rate, even if no rate of interest is stipulated in the applicable contract.

8. Costs

139. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

140. On 17 December 2012 - 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 19,074.05.

141. As already stated above, the Arbitrator deems it fair in the circumstances of this case that each party is required to cover 50% of the costs of arbitration, including the non-reimbursable handling fee as well as its own legal fees and expenses.

142. Given that the Claimant paid advances on costs of EUR 19,074.05 as well as a non-reimbursable handling fee of EUR 4,916.71 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- The Club shall pay EUR 9,537.02 to the Claimant, being 50% of the arbitration costs advanced by him;
- The Club shall pay to the Claimant EUR 2,458.00, representing 50% of the non-reimbursable fee he paid to the BAT.

9. AWARD

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

- 1. Club shall pay Mr. Player an amount of USD 210,000 as contractual damages, plus interest at 5% per annum on such amount from 1 March 2011 onwards.**
- 2. Club shall pay Mr. Player an amount of EUR 11,995.02 as reimbursement of 50% of his arbitration costs and of 50% of the non-reimbursable fee he paid to the BAT.**
- 3. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 30 January 2013.

Quentin Byrne-Sutton
(Arbitrator)