ARBITRAL AWARD

(BAT 0319/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Hector Romero

- Claimant 1 -

Assist Sports Management, Inc.
P.O. Box 458, 19514 Chappaqua, New York, USA

- Claimant 2 -

Both represented by Mr. Juan de Dios Crespo Perez, attorney at law,
Avenida Reino de Valencia 19, 4ª, 46005 Valencia, Spain

vs.

Indios de Mayaguez
P.O. Box 3338, 00681 Mayaguez, Puerto Rico

- Respondent -

1. The Parties

1.1 The Claimants

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

2. Assist Sports Management Inc. is the Player’s agent (hereinafter “the Agent” or “Claimant 2”).

3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. Indios de Mayaguez (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club in Puerto Rico.

2. The Arbitrator

5. On 5 September 2012, 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

6. The Player and the Club signed an employment contract on 8 March 2011 (the “Contract”), whereby the Player was engaged for the 2011 season.

7. According to article 2 of the Contract, the Player is guaranteed a total net salary of USD 60,000, to be paid by means of two installments of USD 2,500 on 15 and 23 March 2011 followed by weekly advance payments of USD 5,000 each from 1 April through 25 June 2011. Article 2 stipulates that the salary is guaranteed even in case of an injury incurred by the Player during the season or if the Club elects to replace the Player with another foreign player during the term of the Contract.

8. It also provides that:

> *"Any delay from the scheduled payment day of salary and bonuses will result in a $25.00 (twenty-five US dollars) per day payment starting on the 10th day from the date of delinquency. The Club accepts that in the case any payment described in this contract will be delayed for more than thirty (30) days the Player or his Agent may present written notice to the President of Club by fax or mail at the Club's address; upon presentation of this notice Club agrees here-in to grant to Player his release and makes him a unrestricted free-agent world wide. In addition all monies under this agreement are due and payable upon the 30th day of non-performance by way of acceleration and the $25.00 (twenty-five US Dollars) per day penalty as described here-in shall continue to accrue daily, as a penalty. […]".*

9. The Player contends that after he suffered an injury that required him to stop playing on 25 April 2011, the Club ceased paying his salaries and therefore now owes him USD 40,000 in outstanding weekly salary payments, plus the corresponding contractual penalties that have accrued.

10. The Club contests that it owes any monies to the Player, alleging that after being injured, he breached his contractual duties by failing to submit to the recommended medical treatment or to propose any other solution, and by not remaining at the Club's disposal for games and practices. Furthermore, the Club alleges that it made payments to the Player in a total amount USD 30,000, rather than USD 25,000 as contended by him.

11. According to article 10, the "*Club promises to pay the Agent fee to his agent above the net amount, free of taxes, of $ 6,000 (six thousand US Dollars), plus ten percent (10%) of Player's weekly salary (i.e. $ 500 weekly fee) from June 23, 2011 through the Club's last official game of the BSN season*", to be paid by means of two installments of USD

250 on 15 and 23 March 2011 followed thereafter by weekly advance payments of USD 500 each, until the Club's last official game.

12. Article 10 also provides for a daily penalty of $25.00, in the same terms as article 2 for the Player, if the Agent's fees are paid late.

13. The Agent argues that it is owed a total of USD 6,500 under the Contract and was only paid an amount of USD 3,000 – the weekly payments due from 6 May 2011 onwards having been retained without cause – meaning that an outstanding amount of USD 3,500 is due by the Club, plus the corresponding penalties.

14. More specifically, the chronology of events leading to the Parties' dispute in front of the BAT is as follows:

- After playing eight games for the Club (starting on 1 April 2011), during the ninth game on 20 April 2011 the Player was hit in _____ by another player.
- Despite being in pain, he played another two games on 23 and 25 April 2011.
- On 25 April 2011 he was diagnosed by Dr. Mark E. Trautmann to have sustained a _____. The doctor recommended and scheduled surgery to take place on 3 May 2011.
- From 29 April 2011 inclusive, the Club ceased paying the Player's weekly salary installments and alleges that it then put the Player on notice orally that he was in breach of his duties due to his refusal to undergo surgery as recommended by Dr. Trautmann.
- During the weekend of 30 April-1 May 2011, the Agent and the Club discussed the situation.
- Based on an opinion from Dr. Juan A. Letizia (the Venezuelan National Team doctor), which the Player obtained during a consultation by telephone on 3 May

2011, the Player decided he did not wish to undergo surgery by Dr. Trautmann but preferred more conservative therapy; Dr. Letiza having recommended that the Player's treatment begin by 4-weeks of rehabilitation followed by a re-evaluation and a possible _____ [surgery] at the end of the season. The Player therefore refused to undergo surgery.

- On 3 May 2011, the Agent put the Club on notice by email that its fees and the Player's contract were fully guaranteed, that the next day a further weekly installment of USD 5,000 would be due to the Player and that the 10-day deadline for triggering the USD 25 daily penalty was approaching. At the same time, the Agent warned the Club that deferred payment was no longer an option because it had heard that the Club had signed another player, Dwayne Jones, while withholding the Player's salary.

- On 5 May 2011, the Club certified to the National Basketball Superior League ("BSN") that due to an injury the Player would no longer be able to play in the BSN tournament that season, that he was free to contract with any team in Puerto Rico or abroad and that the Club was replacing him with another player named Dwayne Jones.

- On 6 May 2011, the Club ceased paying the Agent's weekly fee installments.

- On 10 May 2011, the Agent again put the Club on notice that it was late in its payments and that if the outstanding weekly salaries and corresponding penalties were not paid, the Player would be filing a request for arbitration "with FIBA".

- On 18 May 2011, the Agent put the Club on notice that it had continued to breach its payment obligations towards the Player and that therefore, in accordance with article 2 of the Contract, all the salary amounts provided until its term plus the corresponding penalties had become due, as well as the Agent's fees owed under article 10 of the Contract.

- On 24 May 2011, the Club wrote to the Player, with a copy to the Agent, stating that on 5 May 2011 it had submitted his letter of clearance to the BSN, quoting the reasons it had given to the BSN on that date. In the same letter, the Club also stated: "*De este modo, usted quedó relevado de sus obligaciones para con los Indios de Mayagüez, por lo que le exhortamos que entregue aquella propiedad perteneciente al equipo* … " (free translation by the Club: "For this reason, you were relieved of your obligations towards Indios de Mayagüez, which is why we appeal to you to return any property belonging to the team. […]").

- The Club's property referred to included the apartment the Player was lodged in and the car he was being loaned. The letter concluded: "*En adición, nos encontramos en posición de programar su regreso a Venezuela para el viernes 27 de mayo de 2011. De lo contrario, y muy a nuestro pesar, nos veremos en la obligación de proceder legalmente*" (free translation by the Club: "In addition, we are in a position to schedule your return to Venezuela on Friday, May 27, 2011. Otherwise, and much to our regret, we will be obliged to proceed legally").

- On 2 June 2011, the Player flew home to Venezuela.

- On 9 June 2011, Dr. Mark E. Trautmann confirmed to the Club in writing the diagnosis of the Player's injury the doctor had made in April 2011 and the surgery he had recommended.

- After his return to Venezuela, on 22 June 2011, the Player underwent with success _____ [surgery].

- The Player fully recovered from the treatment and began playing professional basketball again from August 2011 onwards.

15. According to the Claimants, when the Player left the Club its staff informed the Agent that there was a serious risk of the Club going bankrupt. For this reason and because it seemed more likely to be possible to reach a friendly settlement if the Club's situation

improved, the Claimants waited several months before requesting payment again. The Agent then made contact with the Club's lawyer about a possible friendly settlement and the latter stated he would make contact with the Player's lawyer but never did.

16. The Claimants state that it is for the above reasons that they did not file their Request for Arbitration until August 2012.

3.2 The Proceedings before the BAT

17. On 22 August 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 2,000 on 18 July 2012.

18. On 12 September 2012, 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 to be paid by the Parties as follows:

"Claimant 1 (Mr. Hector Romero)	*EUR 3,500*
Claimant 2 (Assist Sports Management, Inc.)	*EUR 1,000*
Respondent (Indios de Mayaguez)	*EUR 4,500"*

19. On 26 September 2012, the Claimants paid their shares of the advance on costs.

20. On 2 October 2012, the Respondent submitted its Answer.

21. On 29 October 2102, the Respondent paid its share of the advance on costs.

22. By Procedural Order of 27 November 2012, the Parties were requested to answer various questions from the Arbitrator.

23. On 12 December 2012, the Claimants filed their reply to the questions.

24. On 18 December 2012, the Respondent was invited to comment on the Claimants'

reply and was granted an extension to reply to the questions listed in the Procedural Order of 27 November.

25. On 28 December 2012, the Claimants filed a statement dated 18 December 2012 by Dr. Letiza which they had been unable to produce earlier.

26. Successively, on 3 and 14 January 2013, the Respondent was granted extensions to comment on the Claimants' reply and on the doctor's statement.

27. On 18 January 2013, the Respondent filed a submission dated 12 December 2012 replying to the questions listed in the Procedural Order of 27 November.

28. By Procedural Order of 28 January 2013, the Claimants were requested to answer various additional questions from the Arbitrator.

29. On 4 February 2013, the Claimants solicited an extension to file their answers, invoking the fact that the Parties were in settlement discussions. The Respondent did not contest the Claimants' assertion that settlement discussions were taking place and did not object to the extension. Accordingly the extension was granted.

30. On 28 February 2013, the Claimants solicited a second extension on the grounds that the settlement discussions were still underway and that they were on the point of receiving a communication in that relation from the Respondent's lawyer.

31. On 15 March 2013, the Claimants filed their answer to the questions listed in the Procedural Order of 28 January 2013, while stating that the communication from the Respondent's lawyer, which was being awaited within the settlement discussions, had not been received.

32. By Procedural Order of 19 March 2013, the Claimants were requested to clarify one point of alleged fact.

33. On 25 March 2013, the Claimants submitted their answer and filed a corresponding

document as evidence.

34. By procedural instructions of 27 March 2013, the Respondent was invited to comment on the Claimants' answers. The Respondent failed to do so within the fixed deadline.

35. By Procedural Order of 8 April 2013, the proceedings were closed and the Parties invited to submit their statements of costs.

36. On 15 April 2013, the Claimants submitted their statement of costs. The Respondent did not file a statement of costs.

37. On 16 April 2013, the Respondent was invited to file any observations it might have on the Claimants' statement of costs.

38. The Respondent did not file any such observations.

4. The Positions of the Parties

4.1 The Claimants' Position

39. In a nutshell and in substance, the Player contends that:

- According to the provisions of his fully guaranteed Contract signed on 8 March 2011, he was entitled to be paid fully for the 2011 season despite having injured his _____ and unable to play in April 2011.

- The Club unduly withheld the payment of his weekly salary instalments from that point onwards, with the result that the Club today owes him a principal amount of USD 40,000 for the outstanding contractual salaries for the season.

- Upon examining him on 25 April 2011, the Club's doctor (Dr. Mark E. Trautmann) proposed a nearly immediate surgical intervention (to take place on 3 May), while, based on the second opinion of another doctor (Dr. Juan A. Letizia), the player

considered a less invasive therapy including rest/rehabilitation was preferable.

- He therefore refused the surgery by Dr. Trautmann, as he was entitled to do under article 3 (d) of the Contract, providing that: "*The Player shall be free to select the physician or dentist of their choice between the Club's doctors or the doctors of the insurance plan that is provided by the Club. The Player may choose who will perform any surgery, if needed*".

- Furthermore, given the required period of subsequent rehabilitation, even if he had undergone the _____ [surgery] recommended by Dr. Trautmann, it is unlikely that he would have been fit to play with the team again before the end of the season on 24 June 2011.

- Although he was contractually entitled to act as he did and was remaining in Puerto Rico at the Club's disposal, on 5 May 2011, the latter unilaterally decided to submit, in his name, to the National League authority, his letter of clearance stating in substance that he could no longer play in the League due to an injury and that as a consequence, he had become a free agent and was being replaced by the new player Dwayne Jones; thereby excluding him from the team and ceasing to pay his salary and breaching his rights.

- His Agent put the Club on written notice on 3 May (having then already heard that a replacement player had been signed), 10 May and 18 May 2011, that it had the duty to pay him his outstanding contractually salaries plus penalties.

- However, the Club disregarded the notices and did not comply.

- Instead, the Club wrote to the Player on 24 May 2011, with a copy to the Agent, stating that the Player's clearance had been successfully solicited from the BSN by the Club on 5 May 2011 and that he was free to leave the Club and was requested to do so and to return the Club's property (including the apartment he was lodged in) or the Club would have to seek legal action.

- The foregoing letter in effect constituted an unjustified unilateral termination of the Contract.

- Consequently, he left Puerto Rico on 2 June 2011 to return to Venezuela.

- By acting unilaterally in the manner it did and ceasing to pay him, the Club breached his contractual rights and became liable to pay him his fully guaranteed salary as well as the penalties stipulated under article 2 of the Contract.

40. The Agent contends that the Club simultaneously breached the Agent's contractual rights by not paying its outstanding agency fees, in an amount of USD 3,500, owed under article 10 of the Contract.

41. Furthermore, as a result of the delays in payment, a daily contractual penalty of USD 25.00 is due on all the outstanding salaries and fees from their due dates until final payment.

42. In their Request for Arbitration, the Claimants requested the following relief:

"(i) To condemn the Respondent to pay to the Player Mr. HECTOR ROMERCO:

- *40.000 USD outstanding salaries payments;*

- *57.000 USD as penalties owed to the date of the Request for Arbitration submission related to scheduled payments (29 April, 6,13,20 and 27 May);*

- *11.300 USD as penalty owed to the date of the Request for Arbitration submission related to the 452 days passed since the 30th day of non-performance in connection with the three payments owed since 29 May 2011 (3,10 and 17 June) and that became payable by way of acceleration.*

- *The further penalties that the Club would incur since such submission until the fully payment of every payment indicated ut supra in points 2.4 and 2.5, in an amount of 25 USD per day x 6 payments*

(ii) To condemn the Respondent to pay ASSIST SPORTS:

- *3.500 USD as net outstanding fee;*

- *11.125 USD as the penalty incurred by the Respondent to the date of the submission*

of the Request for Arbitration;

- *The further penalties that the Club would incur since that submission until the fully payment of the amounts owed to the Player's Agent, in an amount of 25 USD per day*

(iii) To condemn the Club to pay all the whole arbitration costs and arbitrators fees.

(iv) To condemn the Club to pay legal fees and expenses incurred by the Claimant in connection with the proceeding in a range of a minimum of EUR 20.000 ".

4.2 Respondent's Position

43. In a nutshell and in substance, the Respondent contends that:

- Contrary to the Claimants' allegations, the Player was paid a total of USD 30,000 during the 2010/2011 season and not USD 25,000 as contended by them.

- On the basis of his diagnosis, Dr. Trautmann recommended that the Player undergo minor surgery in the form of _____ and then follow rehabilitation, which would allow him to return to the team before the end of the season.

- However, the Player notified the Club that he would be seeking a second medical opinion, but did not inform the Club of the chosen doctor's name or of the rendered diagnosis.

- At the same time, the Player refused to undergo the treatment/surgery recommended by Dr. Trautmann, thereby in effect ruling out the possibility of playing for the team again that season, while ceasing to attend the Club's practices and games despite having been put on notice orally by the Club that he was in breach of his contractual duties.

- By acting in this manner, the Player breached his contractual obligations and was simply trying to unfairly take advantage of the guaranteed contract despite not having fulfilled his duties towards the team. He is therefore not entitled to any compensation.

5. The Jurisdiction of the BAT

44. 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).

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

46. 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]

47. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under article 13 of the Contract, which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball 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. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

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

49. The arbitration agreement leaves no doubt that the Parties intended their contractual disputes to be resolved under the aegis of the "*FIBA Arbitral Tribunal*" created by the

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

Fédération International de Basketball ("FIBA"), which is now referred to with the acronym "BAT" but under the previous version of its procedural rules was named the "FAT".

50. The modified name and acronym for the arbitral tribunal were adopted in 2011, however the institution remains the same, as do its procedural rules except for their updating on various points. The standard BAT (previously FAT) arbitration clause was amended accordingly.

51. Moreover, article 18.1 of the updated applicable BAT (previously FAT) Arbitration Rules stipulates that "*These Rules enter into force on 1 April 2011 and are applicable to Requests for Arbitration received by the BAT Secretariat or by FIBA on or after such date*", while article 18.2 specifies that "*Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT*".

52. Consequently and given the fact that the Request for Arbitration was filed in August 2012, the reference to the "FAT" and its arbitration rules under article 13 of the Contract must have been intended by the parties thereto as a reference to the arbitral tribunal currently named the "BAT".

53. With respect to its 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).

54. Moreover, the arbitration agreement covers all aspects of the dispute being raised in this proceeding and all the Parties to this proceeding are bound by it, while none of them have challenged the jurisdiction of the BAT in their submissions.

55. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Player and the Agent against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

56. 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".*

57. 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."*

58. Article 13 of the Contract provides that if and when any dispute between the Parties hereto is submitted to arbitration: "*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*".

59. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

60. The concept of "équité" (or ex aequo et bono) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under

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

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

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]

61. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

62. 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*".

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

6.2 Findings

64. The first question to be addressed is whether or not the Player breached his contractual obligations by deciding to follow the medical advice and initial therapy proposed by Dr. Letizia on 3 May 2011 rather than the prior advice of Dr. Trautmann on 25 April to undergo surgery very quickly (the latter having scheduled the surgery for 3 May).

65. Both Dr. Trautmann and Dr. Letizia submitted signed statements after-the-fact confirming what advice they had given the Player and on what dates, which the Arbitrator finds to be credible evidence of the circumstances in which each of them

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

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

recommended treatment.

66. In light of the evidence adduced, the Arbitrator finds that for a combination of the following reasons, the Player did not violate his contractual obligations or act unfairly in deciding to prefer the advice of Dr. Letizia and to refuse surgery by Dr. Trautmann:

- Article 3 (d) of the Contract provides in the following terms that the Player is entitled to choose his surgeon: "*The Player shall be free to select the physician or dentist of their choice between the Club's doctors or the doctors of the insurance plan that is provided by the Club.* ***The Player may choose who will perform any surgery, if needed***" (emphasis added).

- That provision does not entitle the Player to act unreasonably at his whim in choosing what surgeon he prefers to consult and be operated by if necessary, i.e. one could imagine circumstances where a player might be deemed to have unfairly abused such a right.

- However, at the same time, the right to choose his/her surgeon is obviously a very important right for a professional athlete, since beyond his/her general health, an athlete's career or part of it can be at stake when medical treatment – and in particular surgery – is involved, in addition to the fact that the relationship of trust with a surgeon is understandably important for any patient.

- It would therefore be for the Club to prove that the Player somehow abused his contractual right when deciding to follow the advice of a surgeon of his choice (in this case Dr. Letizia) rather than to undergo surgery by the Club's elected doctor (Dr. Trautmann).

- The Club has adduced no evidence that the Player abused of his contractual right while at the same time the circumstances tend to indicate that he acted reasonably.

- In that respect, it is noteworthy that, on the one hand, the Player did not know Dr.

Trautmann and the latter proposed surgery on short notice (he examined the Player on 25 April 2011 and reserved 3 May for surgery), while on the other hand, Dr. Letizia – who, being one of the Venezuelan National Team doctors, could legitimately, even if only for subjective reasons, inspire more confidence in a professional Venezuelan player – recommended a less invasive approach including _____ therapy and rehabilitation before making a re-evaluation on the need or not to operate.

- Furthermore, since the end of the season was quite near, the Player had a legitimate interest in not risking his career and health by acting too hastily when even surgery would not necessarily guarantee he could be back on the court and playing normally again before the end of the season.

67. The second question to address is whether the Club violated its contractual obligations and *de facto* terminated the Contract without cause further to the Player's refusal to be operated by Dr. Trautmann.

68. The Arbitrator finds for the following reasons that the evidence adduced establishes that the Club began by breaching its payment duties and thereafter acted in a manner which *de facto* amounted to an unjustified termination of the Contract:

- The Player was entitled to follow the advice of Dr. Letizia (for the reasons indicated above) and therefore the Club had no cause to suspend any of the Player's contractual rights.

- Nevertheless, the Club suspended the Player's salary payments within days of Dr. Trautmann recommending surgery and even before the date (3 May) for which surgery had been scheduled, i.e. it did not even give the Player a fair period of notice/warning that it was insisting on surgery by Dr. Trautmann and would suspend his salary if he disagreed.

- Within another few days and without even consulting the Player, on 5 May 2011,

the Club certified to the National Basketball Superior League ("BSN") that due to an injury, the Player would no longer be able to play in the BSN tournament that season, that he was free to contract with any team in Puerto Rico or abroad and that the Club was replacing him with another player named Dwayne Jones.

- Thereafter, the Club did not preoccupy itself with the Player but instead continued to withhold his salary and on 24 May 2011 requested him to return the Club's property within three days, including the apartment he was lodged in, under the threat that the Club would otherwise have to seek legal action

69. Furthermore, it is obvious that under the foregoing circumstances, the Player cannot in fairness or contractually be blamed for not being at the Club's disposal from the beginning of May 2011 onwards (article 2 of the Contract stipulates that the Player is freed from his duty to perform if the Club is over 5 days late in a salary payment).

70. As far as the Agent is concerned, the Club has not established or even alleged any reason for which it was entitled to suspend the payment of its fees.

71. For the above reasons, the Arbitrator finds that the Club breached its contractual duties towards both the Player and the Agent, and that it terminated the Contract without cause.

72. The final question to address is the consequences of those breaches and more particularly, what amount of compensation for outstanding salaries and fees is owed to the Player and the Agent respectively; and whether any contractual penalties for late payment are owed in addition.

73. With regard to the Player's salary and possible penalties for late payment, article 2 of the Contract expressly stipulates that the salary is guaranteed even in case of an injury incurred by the Player during the season or if the Club elects to replace the Player with another foreign player during the term of the Contract. It also provides that:

> *"Any delay from the scheduled payment day of salary and bonuses will result in a $25.00 (twenty-five US dollars) per day payment starting on the 10th day from the date of delinquency. The Club accepts that in the case any payment described in this contract will be delayed for more than thirty (30) days the Player or his Agent may present written notice to the President of Club by fax or mail at the Club's address; upon presentation of this notice Club agrees here-in to grant to Player his release and makes him a unrestricted free-agent world wide. In addition all monies under this agreement are due and payable upon the 30th day of non-performance by way of acceleration and the $25.00 (twenty-five US Dollars) per day penalty as described here-in shall continue to accrue daily, as a penalty. […]".*

74. Accordingly, the Player's entire outstanding salary is owed to him by the Club as a consequence of the latter's breach of contract and its unjustified termination thereof noted above.

75. The Player alleges that the total amount of salary thus owed to him amounts to USD 40,000, which corresponds to eight unpaid weekly instalments contractually scheduled to be paid on 29 April, 6 May, 13 May, 20 May, 27 May, 3 June, 10 June and 17 June 2011.

76. The Club states on the other hand that it: "…*does not agree in the amounts paid to Player. Total amounts paid to Mr. Romero were $30,000.00 instead of $25,000*". As evidence therefore it filed an internal document named "*Vendor # 2028 Transaction History, Payer Hector Romero. For Period From Jan 1, 2011 to Dec 31, 2011*", listing payments for the first seven weeks and including a payment of USD 5,000 on 27 April 2011 (week 7). In effect, the Club is thereby alleging that, contrary to the Player's contention, the last weekly salary of $5,000 that the Club paid was on 27 April 2011 (whereas the Player is contending that the weekly payment in question was not made).

77. The emails and notices that are contemporary to the late payments and which were sent by the Agent to the Club, tend to confirm that the latter had not made the end of April 2011 payment (which the Club refers to as the payment of 27 April), i.e. had by then suspended its payments, since on 3 May 2011 the Agent sent an email to Club stating among others: *"… Tomorrow will be due **another** payment of $5,000 and your club is fast approaching the penalty deadline of 10 days or more resulting in an*

additional $25 per day which is payable to Hector …" (emphasis added). Furthermore, in a notice letter dated 10 May 2011 sent to the Club, the Agent stated: "… *Pursuant to paragraph 2 of said contract Mr. Romero was to be paid by your club $5,000 on April 27, 2011 and $5,000 on May 4, 2011. To date, neither of these payments had been paid by your club*…".

78. In light of the foregoing documents that are contemporary to the facts and given that the Club did not file any document, such as a bank statement, establishing that the payment of USD 5,000 which was due was wired to the Player, the Arbitrators finds that the latter has proven that the total outstanding salary owed under the Contract is USD 40,000. Consequently, the Club will be ordered to pay such amount.

79. With respect to the Agent's fees, article 10 of the Contract stipulates that:

> *"Club promises to pay the Agent Fee to his agent above the net amount, free of taxes, of $6,000 (six thousand US Dollars), plus ten percent (10%) of Player's weekly salary (i.e. $500 weekly fee) from June 23, 2011 through the Club's last official game of the BSN season. The Agent fee is to be paid by the Club to Assist Sports Management, Inc. weekly in advance in the amount of $250 on 15 March, 2011, $250 on March 23, 2011 and $500 each week until the Club's last official game of the BSN".*

80. In view of the foregoing provision of the Contract and the fact that the Club played its last official game of the BSN on 24 June 2011, the Claimants contend that the Agent was due a total contractual amount of USD 6,500 but that he was only paid an amount of USD 3,000 (between March and 29 April 2011), meaning that the Club owes him an amount of USD 3,500 in outstanding fees corresponding to seven weekly payments of USD 500 due between the beginning of May and 17 June 2011 (inclusive).

81. Contrary to what it did with respect to the amount claimed by the Player, the Club has not contested the Claimants' foregoing calculation of the total amount of outstanding fees of USD 3,500 the latter allege to be owed to the Agent.

82. Furthermore, article 10 provides that the Agent's contractual salary is fully guaranteed and becomes due in its totality if any part thereof is paid more than 30 days late.

83. For the foregoing reasons and because the amount thus being claimed is well grounded in the terms of the Contract, the Arbitrator finds that the Club owes the Agent USD 3,500 in outstanding fees and the Club will be ordered to pay such amount.

84. With respect to contractual penalties, both articles 2 and 10 of the Contract provide in substance that, beyond a delay of 10 days, any late payments made to the Player and/or the Agent shall give rise to a daily penalty of USD 25.00, which shall "*continue to accrue*" until final payment.

85. On such basis, for the different contractual instalments owed to them the Claimants have calculated and are claiming penalties running up to the date of the filing of their Request for Arbitration (22 August 2012). With respect to the instalments that were owed before the 30th day of the Club's initial non performance, the Claimants have calculated the penalty from a date starting 10 days beyond the contractual due date of each instalment. For the subsequent payments, i.e. all those that became due more than 30 days after the Club's initial non performance, the Claimants have calculated the penalty from the 30th day after the initial non-performance based on the contention that upon such date all the remaining payments became contractually due "*by way of acceleration*".

86. Grounded on the foregoing manner of calculating the contractual penalty period, the Player is claiming a total amount of USD 68,250 (57,250 + 11,300) in penalties for late payment, plus a daily penalty of USD 25.00 for the period elapsed since the submission of the Request for Arbitration; and the Agent a total sum of USD 11,125, plus a daily penalty of USD 25.00 for the period elapsed since the submission of the Request for Arbitration

87. Although the Contract expressly provides that the daily penalty of 25.00 will continue to accrue until full and final payment of the principal contractual amounts due, the Arbitrator finds that for a combination of reasons, it would be unfair and unjust in the circumstances of this case, to calculate the penalty in the manner invoked by the

Claimants.

88. First and foremost, it is noteworthy that although the Claimants sent the Respondent four notice letters in May 2011 and in the last one dated 24 May 2011 stated that, "*Given that your Club has not abided by the contract, despite my numerous attempts to amicably resolve this matter, you are leaving me no choice but to **immediately** contact FIBA **and** file an arbitration*" (emphasis added), the Claimants did not file their Request for Arbitration until over a year later (on 22 August 2012). In an email of 31 May 2011, the Agent confirmed to the Club that: "*After talking with FIBA and Hector we have decided to file an arbitration*".

89. The Claimants allege that they delayed making their claims for the following reasons:

> *"When the player was released by the Club, the staff of the Club itself informed to Mr. Romero's agent that there was a serious risk of bankruptcy. Due to this reason the Claimants waited several months expecting that the economic and sporting situation of the Club appeared stable and the chance of a friendly agreement was increased. In fact INDIOS DE MAYAGUEZ finished the 2011 season and stayed in the League and went on the next season to win the Championship clearly indicating the club was on sound financial ground. Mr. Eric Fleischer got in contact with the Club's Lawyer in order to achieve an amicably solution. In fact, the said Lawyer informed Mr. Fleischer that he would phone the Claimants' Lawyer, Mr. Juan de Dios Crespo. But the time passed and no contact was made by the Lawyer of the Club or other person on behalf of the Respondent".*

90. The Respondent however contends that: "*From June 2011 onwards, there were no further communications between Club and Player*".

91. The Arbitrator finds that whether or not the Claimants initially had reason to believe that an amicable solution might be possible, there is no evidence that they ever put the Respondent on notice again between the end of May 2011 and 22 August 2012 when their Request for Arbitration was filed with the BAT, i.e. during a period of 15 months, and no convincing documented explanation of why they thus waited for more than a year before filing their claims.

92. Furthermore, during a large part of that year, the Player played with new clubs, as

explained as follows by the Claimants, and must have earned salaries in the process:

> *"… in late July Mr. Romero began on court practicing again and in mid-August he joined the Venezuelan National Team in practices in preparation for the FIBA Americas Tournament. He played "friendly" games vs. Uruguay and Argentina around August 20-25 and then played 8 games at the FIBA Americas Tournament from August 30-September 8. On September 1, 2011 he signed a contract with Centauros Apure BBC (LNB-Venezuela) and played approximately 35-38 games in the LNB and S. America League from mid-September until November 27, 2011. His club won the Championship and Romero was named Forward of the Year, All Domestic First Team, All Defensive First Team, First Team All LNB. On January 16, 2012 Romero signed with Trotamundos de Carabobo (LPB Venezuela) where he played 50 games and averaged 16.4 PPG and 5 RPG from February 2, 2012 through June 6, 2012".*

93. The Arbitrator finds that given this delay in filing the Request for Arbitration, and the fact that the Player was playing professionally for new clubs during a large part of that period, it would be unfair and unjust that the Claimants be able to reap the benefit of a daily contractual penalty during that entire period. Also, it would be unfair and unjust if the daily penalty continued to run during the arbitration proceedings, since the Respondent is contesting the claims and had no control over the duration of the proceedings, which in addition were suspended for a period of time at the request of the Claimants to explore settlement discussions.

94. For all the above motives, the Arbitrator considers that *ex aequo et bono* the penalty period should run only from the dates identified by the Claimants (which the Arbitrator deems contractually correct) until 30 days beyond the date (31 May 2011), when the Claimants confirmed they would be filing an arbitration immediately, i.e. until 30 June 2011 inclusive. Thus, the penalties allowed are determined on the basis of the calculations below.

a) For the Player, a total penalty of **USD 8,400** calculated as follows:

- With regard to the payment scheduled for 29 April 2011: 62 days x USD 25 = USD 1,550.

- With regard to the payment scheduled for 6 May 2011: 55 days x USD 25 = USD

1,375.

- With regard to the payment scheduled for 13 May 2011: 48 days x USD 25 = USD 1,200.
- With regard to the payment scheduled for 20 May 2011: 41 days x USD 25 = USD 1,025.
- With regard to the payment scheduled for 27 May 2011: 34 days x USD 25 = USD 850.
- With regard to the three payments that became due on 29 May 2011 by means of acceleration: 32 days x 3 x USD 25 = USD 2,400.

b) For the Agent, the Arbitrator notes that the total penalty would, in principle, amount to USD 6,375 calculated as follows:

- With regard to the payment scheduled for 6 May 2011: 55 days x USD 25 = USD 1,375.
- With regard to the payment scheduled for 13 May 2011: 48 days x USD 25 = USD 1,200.
- With regard to the payment scheduled for 20 May 2011: 41 days x USD 25 = USD 1,025.
- With regard to the payment scheduled for 27 May 2011: 34 days x USD 25 = USD 850.
- With regard to the payment scheduled for 3 June 2011: 27 days x USD 25 = USD 675.
- With regard to the two payments that became due on 5 June 2011 by means of acceleration: 25 days x 2 x USD 25 = USD 1,250.

However, in line with BAT's consistent jurisprudence regarding late payment penalties, after calculating the amount of the penalty the Arbitrator may reduce it if he considers the penalty to be excessive in light of the circumstances of the case[6]. In addition, the total penalty amount may not exceed the principal amount owed, the payment of which it was designed to protect. For these reasons, in the present matter the Arbitrator decides *ex aequo et bono* that the Club owes the Agent the amount of **USD 3,500** as late payment penalties.

7. Costs

95. 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.

96. On 11 June 2013 – 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.

97. Considering the Claimants prevailed in a fairly large part of their claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to make a contribution to those of the Claimants in an amount of EUR 7,000.

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6 See *ex multis* FAT 0036/09; FAT 0100/10; FAT 109/10; and more recently BAT 0329/12.

98. Given that the Claimants paid advances on costs of EUR 4,500 as well as a non-reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the Claimants' legal fees and expenses), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) The Respondent shall pay EUR 4,500 to the Claimants, being the amount of the costs advanced by them;

    (ii) The Respondent shall pay to the Claimants EUR 9,000 (2,000 for the non-reimbursable fee + 7,000 for legal fees) representing the amount of the Respondent's contribution to the Claimants' legal fees and other expenses. This amount does not exceed the maximum amount stipulated in Article 17.4 of the BAT Rules.

8. AWARD

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

1. **Indios de Mayaguez shall pay Mr. Hector Romero USD 40,000 as compensation for unpaid salaries.**

2. **Indios de Mayaguez shall pay Mr. Hector Romero USD 8,400 as compensation for contractual penalties.**

3. **Indios de Mayaguez shall pay Assist Sports Management USD 3,500 as compensation for unpaid agency fees.**

4. **Indios de Mayaguez shall pay Assist Sports Management, Inc. USD 3,500 as compensation for contractual penalties.**

5. **Indios de Mayaguez shall pay jointly to Mr Hector Romero and Assist Sports Management, Inc. EUR 4,500 as reimbursement for their arbitration costs.**

6. **Indios de Mayaguez shall pay jointly to Mr Hector Romero and Assist Sports Management, Inc. EUR 9,000 as a contribution to their legal fees and expenses.**

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

Geneva, seat of the arbitration, 17 June 2013

Quentin Byrne-Sutton
(Arbitrator)