ARBITRAL AWARD

(BAT 0357/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Derrick Caracter
c/o Relativity Sports, 9242 Beverly Blvd, Suite 300
Beverly Hills, CA 90210

- Claimant 1 -

Mr. Happy Walters
Relativity Sports, 9242 Beverly Blvd, Suite 300
Beverly Hills, CA 90210

- Claimant 2 -

both represented by Mr. Happy Walters

vs.

Guangdong Winnerway Basketball Club Company Ltd.
c/o Mr. Zhiqiang Hu, Winnerway Hotel, No. 1 Hongyuan Road,
Nancheng District, 523087 Dongguan City, Guangdong, China

- Respondent -

represented by Messrs. Antonio Rigozzi and William McAuliffe,
attorneys at law, Lévy Kaufmann-Kohler, 3-5 Rue du Conseil Général,
c.p. 552, 1211 Geneva, Switzerland

1. The Parties

1.1 The Claimants

1. Mr. Derrick Caracter is a professional basketball player (hereinafter referred to as “the Player” or “Claimant 1”) from the United States of America.

2. Mr. Happy Walters (hereinafter referred to as “the Agent” or “Claimant 2”) is the Player’s agent.

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

1.2 The Respondent

4. Guangdong Winnerway Basketball Club Company Ltd. (hereinafter referred to as “the Club” or “the Respondent”) is a professional basketball club competing within the Chinese Basketball Association (“CBA”).

2. The Arbitrator

5. On 22 January 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. In September 2012, the Player informed the Agent that he was interested in seeking an

opportunity to play overseas.

7. Around the same period, the Club had decided to look for a high-level international player to strengthen its team for the coming season. According to the Club's submission: "*In September 2012, the Club engaged Mr. Wei Liu (the "Club Liaison"), to identify a suitable player*".

8. The Deputy General Manager of the Club, Mr. Zhiqiang Hu, explains in that respect that:

> *"When the Club signed Derrick Caracter …, I was responsible for negotiating with Mr. Caracter's agent, Mr. Happy Walters, about relevant clauses of the contract. Because of my limited English, I asked Mr. Wei Liu, to act as a liaison for all the details of the negotiation. It was Mr. Wei Liu and Mr. Alex Yam who approached Mr. Walters in September 2012 about having Mr. Caracter play for the Club".*

9. According to Mr. Wei Liu:

> *"Sometime between mid to late September 2012, at the request of the Club for an international player, Mr. Yam and I found Mr. Caracter. Mr. Yam contacted his agent, Mr. Walters, to see if Mr. Caracter would be interested in playing in China. Through his agent, Mr. Caracter expressed interest but brought up that he wanted a guaranteed contract if he passed the trial period".*

10. Mr. Wei Liu specified in his second affidavit filed by the Club in these proceedings:

> *"I am based in China where I am the legal representative of Beijing Elite Legend Sports Development Co. Ltd. This company's business licence is issued in Beijing and its registered name is only in Chinese, not English […] Mr. Yam is based in the United States where he is a licensed FIBA agent. He is employed by Elite Legend Sports which does not exist as a separate company in the U.S."*

11. Mr. Wei Liu also declares that:

> *"I never had any contact with Mr. Walters in relation to the negotiations surrounding Mr. Caracter's move to China but I expect that he was aware of my involvement through Mr. Yam […] As I am not officially registered as a Chinese agent, Mr. Peizhong Zhang, an acquaintance of mine, formally became Mr. Caracter's registered Chinese agent".*

12. Thus, when the Agent turned to various colleagues with contacts abroad he was told by Mr. Alex Yam that the Club would be interested in the Player and negotiations began

for the Club's engagement of the Player.

13. Regarding the lines of communication between the parties for the contract negotiation and thereafter during the life of the contract, Mr. Wei Liu summed them up as follows in his first affidavit:

> *"The Club told their requirements to me, and I in turn relayed the Club's messages to my colleague in the U.S., Mr. Alex Yam ("Mr. Yam") who speaks English more fluently than I, then Mr. Yam contacted Mr. Walters. All communication between the Club and Mr. Walters were carried out in this fashion. Most negotiations and communications between the Club and Mr. Walters were carried out by telephone".*

14. The Club's General Manager, Mr. Hongjiang Liu, affirms that because in the past the Club had had bad experiences with foreign players pretending to be injured or leaving in the middle of the season and because he

> *"… was informed by Mr. Wei Liu that Mr. Caracter had a reputation for poor discipline earlier in his career […] I asked Mr. Wei Liu to include a provision whereby the Club had the right to unilaterally terminate the agreement with the player if the player plays the game with an unprofessional attitude and refuses to practice and/or play in any games because he is faking injury".*

15. The Agent confirms that the Club made a request of such nature and that he accepted because he

> *"… was confident that this player would never fake an injury as that is not representative of his character".*

16. Mr. Wei Liu declares that on such basis "*I drafted a contract in English and Chinese*". Mr. Yam forwarded to the Agent this draft contract from the Club prepared by Mr. Wei Liu, which was commented on before a final version was signed the next day.

17. Thus, on 4 October 2012, a first contract ("Contract n°1") was entered into between the Club and the Player and also signed by Mr. Happy Walters as the Player's agent (Mr. Walters being referenced as such in the heading of the contract), whereby the Player was engaged for the 2012/2013 CBA season. Neither Mr. Yam nor Mr. Wei Liu signed Contract n°1 although it included a signature block for "*Elite Legend Sports*."

18. Article 1 consisted in a "Tryout Clause" providing that:

> *"Player will take tryout organized by the Cub from October 10th 2012, lasting for 5 days, including medical exam, physical and skill test […] Team will notify Player's agent on October 15, 2012 whether the player has passed the tryout. The contract is fully guaranteed when player pass the tryout".*

19. In fact, the tryout took place from 10 to 18 October 2012. It is uncontested that the Player did well during the tryout period in question.

20. In that relation, the Club submitted that:

> *"From 10 to 18 October, the Player took an active part in the trial period which included practice two times a day as well as fitness and technical training […] On 19 October 2012, as the Club was satisfied with the Player's performance during the trial period, the Club informed the Player and the Club Liaison [Mr. Wei Liu] that the Player had passed the trial".*

21. Article 4 of Contract n°1 stipulated that the Player was entitled to a total guaranteed salary of $500,000 for the 2012/2013 season, which would be paid in accordance with a listed schedule of installments, including a first payment of $50,000 "*5 days after passing medical exam (on Oct.15th 2012)*" and "[…] *that it is Player Agents responsibility to ensure that there are no issues with FIBA and/or letter of clearance*".

22. It also provided that:

> *"In the event of any injury suffered by the Player during the course of his duties with the Club, meaning practices, official CBA competitions, sanctioned exhibition games, and after the examination of the best sports hospital in China for the Player, the Player still need the second opinion from another doctor, he shall discuss with the Club, and with the permission of the Club, he is entitled to seek a 2nd opinion from a doctor of Players choosing in the event of any injuries suffered, and Club agrees FIBA will recognize the decisions (s) of Players whose medical professional, to deem the seriousness of Players injury. Club will pay cost associated with injury in China (hospitals, doctor bills, travel costs, etc.) But if Player chose to search for the second opinion from a doctor in the USA, Player will afford his own costs." (sic)*

23. Article 6 provided in various sub-clauses that:

> *"Player shall inform Club of any medical problems or conditions that he is currently suffering from. The player agrees to apply for and receive permission from Club and the*

> *Head coach before being absent from any team practices, games or other team functions. For any absence from practices or games without reason, Club reserves the right to fine Player accordingly […] For any absence from practices or games without reason, Club reserves the right to fine Player accordingly $5,000 for missing one game without reason and $1500 for missing one practice without reason …"*

24. Furthermore, article 6 stipulated that:

> *"Club has the unilateral right to terminate this contract with the player under such circumstances: i) if Player plays the game with unprofessional attitude, and refuses to practices and/or play in any games because he is faking an injury and/or illness; Notwithstanding a visit to a licensed doctor will be sufficient to prove the injury or illness is not being faked; ii) if the Player violates any reasonable rules of the Club and any rules of CBA League set by Chinese Basketball Association. With 2 circumstances mentioned above occur, the Player will be warned in written form through it representatives. If Player has been warned by the Club in writing to his representative on more than 2 occasions, the agreement becomes terminated, the salary of player will be paid up until the date that the contract is terminated."*

25. Article 7 provided that in the case of any payment being made by the Club more than 14 days late, "… *all monies due to Player during the entire Term of this Agreement shall immediately become due and payable*" and also that "*This agreement shall not be amended, modified, superseded, abandoned or terminated other than by a written instrument executed by each of the parties hereto* …" and "*Club agrees that any extension or modification of this Agreement, or future agreements between Player and Club must be negotiated through Happy Walther's as the Player's Representative*".

26. Article 8 stipulated that:

> *"In the event of any dispute in relation to this Agreement, Club agrees to contact Player's Representative in an attempt to negotiate the dispute prior to any action".*

27. Article 12 constituted an arbitration clause, providing jurisdiction to the BAT in relation to any dispute arising under the contract.

28. Although article 4 of Contract n°1 referred to various duties of the Agent, it did not contain any stipulation regarding an agency fee.

29. On 23 October 2012, the Agent signed a document titled "*Agreement for Agent Fee*",

which according to its preamble was between the Club and "*Happy Walters/Elite Legend Sports ("Representative")*" and "… *is meant to clarify the arrangement between the parties regarding the contract of Derrick Caracter ("player") to play for Club in the 2012-13 season*." That document primarily stipulates that the Club promises to pay "*Happy Walters/Elite Legend Sport*" a fee of $50,000 on or before 24 December 2012, as consideration for their assistance to the Club in locating and contracting with the Player. It is uncontested that the Club did not pay the foregoing fee.

30. On 26 October 2012, the Club signed a separate copy of the *Agreement for Agent Fee* and Mr. Wei Liu declares he signed and sealed it on the same occasion on behalf of Elite Legend Sport.

31. The Club contends that immediately after the Player had succeeded his tryout, he began changing his attitude, showing signs of laziness.

32. From 20 to 24 October 2012, the Player stayed in *Dongguan* while the rest of the team trained elsewhere, and during that time he was to prepare for the season by training and learning plays from the Club's assistant coach Mr. Jason Lamar Dixon. The latter affirms in an affidavit filed by the Club that:

> *" … During this time I found that Mr. Caracter became lazy during practice and only really practiced for a couple of days. Also, when he showed up for practice, he was late, once even an hour late. He even told me he would just watch while I practiced with another player who had recently arrived. During these 4-5 days that I was alone with Mr. Caracter, he used every excuse he could not to practice. During the trial period he was energetic but he became lazy after that".*

33. The Player contests those allegations declaring that: "*During the tryout period and all pre-season games I practiced hard and gave my best effort on the court at all times*." He also contends that after his arrival "… *The lack of translation resources made it quite difficult to communicate anything with the Club's coaches, trainers, doctors, and management*."

34. During that same period, Mr. Wei Liu prepared a new draft contract in relation to which

he declares: "*The Club communicated their requirements to me and I discussed all of them with Mr. Yam who provided me with elements that were to be included in the formal contract*" to constitute the CBA League contract whereby the Player's engagement pursuant to the successful tryout would be confirmed.

35. The Club submits that it felt the need to include therein additional wording that would reinforce its protection if the Player pretended to be injured, refused to play/practice or otherwise walked out on the Club, which led to negotiations between the parties and resulted in making "… *a number of changes to the 4 October Agreement specifically strengthening the position of the Club in the event of bad behaviour by the Player*", although this new contract "… *was generally in line with the agreement of 4 October 2012*".

36. The Club initially signed a copy of this new contract on 24 October 2012 ("Contract n° 2").

37. On 26 October 2012, the Player and the Club signed a separate copy of Contract n°2.

38. Contract n° 2, contrary to Contract n°1, does not include in its preamble any reference to an agent or contain a signature block at the end for the signature of an agent.

39. According to the Agent:

> *"There were no additional negotiations between the parties relating to this contract. The second contract may have been signed by the Player, but I was not provided with a copy prior thereto and I never signed the contract. I was unable to advise Mr. Caracter as to the content of the contract. As I later learned, the Club deceptively changed additional language in the contract from the original version without notifying me or Mr. Caracter."*

40. In that connection, the Player declares that:

> *"Mr. Walters and I never discussed the substance of the second contract prior to signing, since we were both under the impression that it contained the same terms as the original, except for the provision relating to the tryout period."*

41. The Club strongly contests the Claimant's foregoing submissions regarding the

absence of involvement of Mr. Walters.

42. In these proceedings, the Claimants filed a comparison of the two contracts, highlighting where changes were included in Contract n° 2.

43. In that relation, it needs noting that in Contract n° 2 the numbering is incorrect, since several provisions have the same number.

44. In Contract n° 2, the salary payments owed to the Player are substantially the same, however the first installment of $50,000 is stipulated to be due on "*25 October, 2012*", while article 4 provides that "*Both parties understand that Player shall not participate any games before he receives the first payment*…"

45. Article 4 also adds that: "*The Agent will work together to get the statement about the first refusal from his last CBA team. And the agent will help the club complete the registration for the player in CBA.*"

46. Article 7 (on pages 6-7) of Contract n° 2 contains a very similar clause as to the possible reasons and conditions for termination by the Club, which reads as follows (highlighting is included herein to indicate where wording was deleted or added):

> *"Club has the unilateral right to terminate this contract with the player under such circumstances: i) if Player plays the game with* ***a passive and*** *unprofessional attitude, and refuses to practices and/or play in any games because he is faking an injury and/or illness;* ~~*Notwithstanding a visit to a licensed doctor will be sufficient to prove the injury or illness is not being faked;*~~ ***ii) The player miss two or two more games by himself get the injury during the during the offseason*** *iii) if the Player violates any reasonable rules of the Club and any rules of CBA League set by Chinese Basketball Association. With 2 circumstances mentioned above occur, the Player will be warned in written form through it representatives. If Player has been warned by the Club in writing to his representative on more than 2 occasions, the agreement becomes terminated, the salary of player will be paid up until the date that the contract is terminated." (sic)*

47. Contract n° 2 contains the same duty for the Club to contact the Agent in an attempt to negotiate any dispute prior to any action, as well as an identical arbitration clause to Contract n°1 providing the BAT with jurisdiction.

48. Both contracts are in English and Chinese (bilingual) but stipulate that in case of any discrepancy "… *the English version will be the prevailing and controlling version above the Chinese version*".

49. The Player declares that: "*On October 24, 2012, I informed Mr. Walters that the Club had failed to pay me since passing my tryout*", i.e. despite the contractual terms providing that he was to be paid a first salary installment of $50,000, and the Agent states that: "*At the beginning of November, I also reiterated to Mr. Yam to communicate to the Club that they had not yet paid Mr. Caracter as required pursuant to the playing contract*". It is uncontested by the Club that the Player's first salary installment of $50,000 was never paid, however the Club affirms that the delay was initially due to a banking procedure and that thereafter the duty to pay was extinguished by the Player faking an injury.

50. The dispute forming the main subject matter of this arbitration primarily arose in relation to an event that occurred shortly thereafter.

51. The Player describes the event and surrounding circumstances as follows:

> *"On October 25, 2012* [this date contains a "typo" since according to the allegations of both parties the correct date of this event is actually 26 October]*, I made a baseline move during a preseason game and rolled my ankle. It is common in basketball to roll an ankle based on the nature of the moves made on the court. I was unable to play for the rest of the game and was in the locker room getting treatment. The Club gave me ice and I rested my ankle. It seemed that the Club's management pressured the team doctors to continuously ask me about my ankle, how I was feeling and whether I would be able to play the next day. They must have asked me over ten times in just two hours. I responded saying that the ankle seemed to be sprained and that it was worse than other sprains that I had suffered during my career. The team doctors expressed their concern that I was faking my injury. They conveyed to me that they believed that since I had gotten injured in a game watched by thousands of people that I had staged the injury. I immediately made it clear that I was not faking and actually in a lot of pain. Moreover, I was quite disheartened by the fact that my team thought that I would ever fake an injury. It is not my nature to do so as I take pride in being an honest person and team player".*

52. With respect to this same incident, the Club's General Manager declares:

> *"On the evening of 26 October 2012, during a pre-season game against Shanghai, in the*

third quarter of the game, Mr. Caracter complained that he had sprained his ankle, I had been watching the game from courtside. He bumped into another player and collapsed on the floor. I immediately went to check on him and did not see any injury. However, Mr. Caracter claimed that he had injured his foot so the team doctor immediately examined him. The team doctor said that he might have sprained his ankle but it was not a big problem. The team doctor gave him an ice pack and taped his ankle. Mr. Caracter did not participate in the rest of the game. After the game, Mr. Caracter took the bus back to the hotel with the team".

53. The team's assistant coach, Mr. Jason Lamar Dixon, describes the incident as follows:

"On 26 October 2012, during the first pre-game in Shenzhen against the Shanghai team, in the second quarter, Mr. Caracter went down. The way he fell, I thought he had injured his knee. He sat on the floor there for a second and then got up. At that time, there was no translator, so I had to translate to the others on the floor and I remember Mr. Caracter said he had "rolled it on someone's foot". At that time, there was no sign of swelling. Mr. Caracter was accompanied to the locker room where the doctor iced his ankle and elevated it. Later that evening, back at the hotel room, the team doctor rubbed Chinese herbal medicine to treat his foot".

54. The team's doctor, Zhida Lin, declares:

"On 26 October 2012, while Mr. Caracter took part in an exhibition game in Shenzhen, he said he sprained his left foot. He was helped off the court and I examined him. Although I did not see any apparent swelling, as a preventive measure, I gave him some painkillers, and I immediately gave him an ice pack and taped his ankle".

55. With respect to what happened thereafter, the parties partially agree as to the chronology of events, but disagree regarding the Player's motivations for his actions and concerning the reality and seriousness of his alleged ankle sprain.

56. In sum, at the time of the facts, the Club very rapidly took the position that the Player was faking his injury or at least grossly exaggerating the degree of discomfort/handicap it was causing, whereas the Player indicated he had a painful ankle sprain and as a result was unable to practice or play games for a while.

57. More specifically, regarding the Player's attitude and alleged injury, the parties' different viewpoints are the following:

- As already mentioned, the Club contends that before even suffering the alleged injury, the Player began adopting a passive and unprofessional attitude to practice

between 19-24 October after having been informed that he had passed the tryout.

- The Club's General Manager – who declared that "*During the time Mr. Caracter was with the Club I attended all team practices*" - implies that after signing the second contract and being certain of his engagement, the Player's attitude changed, even before allegedly spraining his ankle:

> *"On 25 October 2012, the day after the contract was signed, the Club held a fitness training session in the morning. When Mr. Caracter arrived at the training room, he claimed that he did not feel well and that he did not want to practice. I was disappointed but did not think too much of it at the time. Mr. Caracter did not practice the entire morning. The team doctor (Mr. Zhida Lin) examined Mr. Caracter and informed me there was no problem […] On the afternoon of 25 October 2012, a tactics training session was held. I asked Mr. Caracter to take part in the running and shooting drills but he refused. Mr. Caracter again said he was not feeling well. An hour later, it was the time for the team's scrimmage practice, and I had to ask Mr. Caracter to participate in it. On this occasion Mr. Caracter agreed".*

- Regarding the foregoing incident, the Player states:

> *"I remember having food poisoning. I was vomiting and had severe stomach pains and an overall sense of weakness from lack of nutrition and dehydration."*

- According to the General Manager

> *"On 25 October 2012, after the practices, I called Mr. Wei Liu to complain about Mr. Caracter refusal to practice and tell him to communicate our displeasure about Mr. Caracter's attitude to Mr. Walters …"*

and

> *"On the morning of 26 October 2012, the team held a practice to familiarize itself with the Shenzhen court to prepare for that evening's pre-season game. Mr. Caracter came to the court but refused to participate in the running and shooting drills. Mr. Caracter just sat at the courtside and only joined in the team's scrimmage training".*

- Concerning what happened after the game on 26 October, the Player states:

> *"I used crutches to assist with my mobility for a couple of days after the injury"*

and

"After my injury the Club staff treated me with a special cream that I was unfamiliar with and had never seen used as treatment in the United States. The cream did not heal the injury. Strangely, the Club never gave me ice (other than upon the initial injury during the game), never performed electrical stimulation, nor massaged the ankle – all treatments I was familiar with in the United States as treatment for sprained ankles".

- The team's doctor, Mr. Zhida Lin, declares that:

"On 26 October 2012, the night that Mr. Caracter claimed to have been hurt, I immediately provided Mr. Caracter with an ice pack, applied ointment which reduces pain and inflammation, then taped his ankle. I provided this treatment even though there was no apparent swelling".

- In the evening of 27 October (US time), i.e. shortly after the alleged injury occurred during the game of 26 October, Mr. Yam sent an email to the Agent summarizing as follows complaints from the Club:

"Sorry to keep bothering, so this DC issue is becoming very big, they took him to the hospital xrays are negative, no noticeable swelling, and he proceeded to ask to be wheel chaired out of the hospital, the team is FURIOUS … they said after the official contract has been signed now all of these problems, they want to know by am time our time tomorrow, night time there time, what does he want to do, […] A. does he want to obey the team rules and practice and contribute or B. They will release him, and void his contract. I don't know the kid like you do, but something needs to be said, I am not sure what the problem is and why he is acting like this? I am with family and will call you in a bit, the team is calling me non stop on this. […] They will cut him by tomorrow am, if we do not have some resolution to this".

- It is uncontested that initially the Player was not keen to go to hospital to have a medical examination of his ankle as requested by the Club the day after the game, but, upon being prompted to do so by his Agent, he agreed to be taken to the hospital the next day, i.e. on 28 October 2012 (China time).

- Concerning the use of a wheelchair, the Player states the following:

"I required crutches upon being injured as I could not put pressure on my ankle. In order to travel to the hospital, the assistant coach, Jason Dixon, served as my crutch, but it was difficult for both of us to enter and move around the hospital. I simply attempted to move by leaning on him and hopping on my healthy ankle. Therefore, I figured it made sense for me to request a wheelchair upon my departure to facilitate my exit".

- According to the medical report issued by "*The Second People's Hospital of*

Shenzhen", the "*Diagnosis Opinion*" was:

> *"No lesion in bone and joint of left foot. No lesion in bone and joint of left ankle".*

- In that connection, the Player affirms:

> *"I had ex-rays taken, but the doctors said the tests came back negative. I was optimistic about the results, but still was unable to put pressure on my ankle and so I asked for a wheelchair to help me leave the hospital".*

- The Player contends as follows that over the next days he remained in pain and was unable to practice properly although he tried to at times:

> *"Even while I was injured, I made my best effort to attend and/or participate in team practices and activities as I wanted to show my support whenever possible. At times, I even tried practice, but it was quite noticeable that I was experiencing severe soreness and walking with a limp. I know from my experience that playing on an aggravated ankle would only make it worse. So, I conveyed this to the team and said that I needed to get better, and wanted to do everything possible to make that happen so that I could return to playing. Unfortunately, the Club did not provide me with much treatment for my injury so I was left on my own to care for it. The Club did not provide me with ice and I would have to go to my hotel to get some to properly care for my injury. The only regular treatment I received from the Club's doctors was that occasionally a Club representative would put a cream, which I was unfamiliar with, on my ankle […] On November 1, 2012, I still wasn't' fully recovered, but tried my best to practice with the team. I noticed that the Club was angry with me and as much as I tried to demonstrate my commitment, the Club did not seem to want to take the time or effort to assist me in caring for my injury so that I could return to the court…"*

- Regarding his attempt to practice, the Player states more specifically:

> *"I don't recall as to whether I actually did attempt to scrimmage on October 31st. I surely was not scrimmaging "normally", and only would have attempted to scrimmage if I felt pressured by the Club. I was clearly still injured and needed to rest my ankle, not make it worse by scrimmaging. I tried to test the strength of my ankle on November 1st in the afternoon practice, but was not able to play normally. I hobbled around the court as I was unable to fully put weight on my ankle and I was in a lot of pain. I knew that by practicing I would worsen the injury, but wanted to try to make a good impression on the Club. Mr. Walters and Mr. Yam repeatedly advised me to attend team activities to show my support for the Club".*

- Concerning that period, the team's doctor declares:

> *"I started to administer ultrasound treatment for Mr. Caracter on October 29th the day after*

Mr. Caracter's visit to the hospital. The Club had its own ultrasound equipment and this treatment was repeated on a daily basis until the end of October when Mr. Caracter took part in practice again […] After this date I believed that Mr. Caracter had completely recovered and stopped providing Mr. Caracter with ultrasound treatment […]".

- Concerning the days when the Player attempted to practice again, the doctor declares:

"On or about 31 October 2012, I examined Mr. Caracter. He had been walking normally and it was my professional opinion that he was physically fit to practice. I told Mr. Caracter this and also passed my diagnosis to the general manager and the coach […] After about a week of rest, on or about 1 November 2012, Mr. Caracter was persuaded into practicing. It is my professional opinion that he should have been able to return to practice much earlier, after 3 days of rest at most. I watched him very closely from courtside during the practice and he did not show any signs of discomfort. He did not request any treatment after practice and I did not treat him that day […] However, the next day, Mr. Caracter again refused to attend practice. Even though he had come to the gym he would not practice. When I asked him why he refused to practice, he said he felt a little bit of pain in his ankle. I asked him through a translator if I could treat him, but he did not reply and just shook his head".

- Regarding that period and the remaining days with the Club before the termination of his contract on 7 November, the Player declares:

"I was still unable to practice on November 2, 2012 […] On November 3, 2012, I still was unable to practice on my ankle and informed the Club's trainer through the translator that I needed to sit out […] On November 6, 2012, I again arrived at practice, this time in a sweat suit, to support the team, but was still unable to play on my ankle. I informed the Club through a translator that I probably only needed another day or two of rest, but the Club wouldn't listen as they had already decided that they no longer wanted me on their team. A Club representative asked me to leave the facility and said the Club would be sending me back to the United States […] I arrived back in the United States on November 8, 2012".

In a further statement, the Player added:

"On November 6th I arrived at a new training facility in a new city dressed in a sweat suit. A newly hired translator approached me. The new translator was quite standoffish and said that I shouldn't worry about changing or getting ready for practice, because my contract was terminated and I was to pack my bags and return home. He mentioned that the Club had informed Mr. Wei Liu of the termination. Mr. Wei Liu likely contacted Mr. Yam who attempted to reach Mr. Walters. I was instructed to return to my hotel where a car was going to pick me up and take me to the airport. The Club never permitted me to speak with Mr. Walters prior to my departure from China. I was quickly rushed out of the country by the Club, within only a matter of hours, without a practical way to return. This

quick departure left me unable to get the appropriate advice from my agents and my agents were never able to properly discuss the issue with the Club".

- Concerning the period between 27 October and 2 November 2012, the Club's General Manager states that the team got back to Dongguan from its pre-season games on 29 October [when the team had a rest day] and that:

"On 31 October 2012, Mr. Caracter still refused to participate in the fitness/strength training, running or shooting practice but agreed to participate in the team's scrimmage training. There did not appear to be any problem whatsoever with his feet which had no swelling and he was walking normally […] After taking part in training on 1 November 2012, on 2 November 2012, Mr. Caracter again refused to practice. While at the court, I asked him why he refused to practice and he replied that he did not feel well. When I asked where he was hurting, Mr. Caracter refused to answer. I asked him when he would be able to participate in the practices and he said that he would be fine after the league started […] After talking again with Mr. Caracter, I immediately called Mr. Wei Liu to say that Mr. Caracter was refusing to practice even though he was physically fit to do so and that this had become unbearable for the Club. I asked Mr. Wei Liu to contact Mr. Caracter's agent, Mr. Walters, to communicate our displeasure about Mr. Caracter's pretense to still be injured when he was not. Mr. Wei Liu agreed to contact Mr. Walters but asked me to give Mr. Caracter a few more days, and, if he still refused to practice that we could terminate the contract."

- In that connection, the team's doctor, Mr. Zhida Lin, states:

"On or about 4 November 2012, after we were back at the Club's training camp in Yangjiang for full training, Mr. Caracter said he was so uncomfortable that he could not attend practice. He agreed to be treated, so I treated him with ultrasound […] I recall that after Mr. Caracter stopped receiving treatment, I asked him through a translator whether he needed additional treatment. He did not say anything and just shook his head."

58. Regarding the following days and the circumstances in which Player's contract was terminated on 7 November, the Club's General Manager states in his affidavit that:

"On about 5 November 2012, I talked to Mr. Caracter again. I was very anxious about our situation because he refused to practice. I told him that if he did not practice again I would terminate his contract. Mr. Caracter did not say anything and just shook his head. After talking to him I called Mr. Wei Liu to say that he was still pretending to be injured so that he would not have to practice. I asked Mr. Liu to contact Mr. Walters to make Mr. Caracter attend practice/training. Mr. Wei Liu confirmed that he would […] On 6 November 2012, Mr. Caracter arrived at practice without proper clothes or shoes. It was clear he had no intention of practicing. I called Mr. Wei Liu to complain that Mr. Caracter was still refusing to practice. Mr. Wei Liu said there was nothing he could do and that he had not expected Mr. Caracter would act this way. Mr. Wei Liu indicated to me that if Mr. Caracter still refused to practice, the Club could terminate his contract […] On the

morning of 7 November 2012, Mr. Caracter still refused to practice. He came to the weights room but still refused to do the physical training. I told him that if he refused to participate in practice/training I would immediately terminate his contract. He said he did not feel well but might feel better in the afternoon. I responded that the CBA season would start soon and it was not possible for me to continue to accept his refusal to train. Mr. Caracter then replied that he expected to in the best playing condition when the CBA season started but still refused to train. After discussion, the Club determined that it had no other option but to terminate the contract […] At noon on 7 November 2012, I called Mr. Wei Liu to inform him that Club was about to terminate the agreement with Mr. Caracter. Mr. Wei Liu agreed that the Club had no other choice. On that afternoon, before the beginning of the practice, I talked with Mr. Caracter in the hallway and told him the Club was very disappointed with his performance because even though he always said he was injured or sick, examinations show that everything was normal. I informed him that the Club was terminating the contract with him according to the provision of the contract because he was refusing to practice even though he was fit to. Mr. Caracter indicated that he had nothing to say. The Club then sent a car to take him back to Dongguan […] On November 8, Mr. Caracter left for the U.S. from Hong Kong".

59. More generally, concerning the period between the signature of Contract n° 2 and its termination, the Club alleges that in addition to faking the existence or seriousness of his injury, the Player was often late coming down to the bus, which meant it had to wait, and that "*During the 14 days that the Player was with the Club after the signing of the 24 October Agreement, 45 training sessions were held. In total, the training sessions equated to 9 fitness sessions, 12 running sessions, 12 shooting practices and 12 scrimmages. The Player participated in 0 fitness sessions, 1 running session* [on 1 November], *1 shooting practice* [on 1 November] *and 5 scrimmages* [on 25, 26 and 31 October and on 1 and 3 November] ".

60. According to the table of practice/games filed by the Club, the team was in Shenzhen between 25-28 October, returned to Dongguan for a period between 29 October - 3 November and left to Yangjiang on 4 November in the morning where it was still on 7 November when the Player's contract was terminated. During that period, the team rested on 26 October (afternoon), 27 October (afternoon) 28 October (afternoon) and 29 October (all day).

61. After returning to the United States the Player did not consult a doctor, believing that he only needed to rest. In that connection, he states that: "*I attempted to begin training again about 10 days after my return, but was still unable to train at full speed. By the*

end of the following week I was fully recovered".

62. Subsequently, he travelled to Israel on 3 December 2012 to a new club, which had made contact with his agent the previous week about the opportunity for the Player to play there. He passed the new club's medical examination on 5 December.

63. According to the contract signed with the new club, the Player was guaranteed a base salary of US$ 70,000 for the 2012/2012 season.

64. Mr. Walters (with reference to a company named "Rogue Sports") negotiated the contract together with an agent in Israel. It was signed by Mr. Walters and provides that he would receive an agency fee of USD 3,500, representing 50% of the total agency fee (the other half going to the agent in Israel).

65. Meanwhile, the Agent - with the help of Mr. Yam - and the Club had engaged in settlement discussions but these were unsuccessful.

66. Consequently, in December, the Player and the Agent filed their request for arbitration with the BAT.

3.2 The Proceedings before the BAT

67. On 21 December 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,975 on 28 December 2012.

68. On 29 January 2013, 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. Derrick Caracter)	*EUR 6,000*
Claimant 2 (Mr. Happy Walters)	*EUR 1,000*

Respondent (Guangdong Winnerway BC) *EUR 7,000".*

69. On 5 February 2013, the Respondent paid its share of the advance on costs.

70. On 8 March 2013, the Claimants paid their respective shares of the advance on costs.

71. On 27 March 2013, the Respondent filed its Answer.

72. On 23 April 2013, the Claimants filed their Reply to the Respondent's Answer.

73. On 10 May 2013, the Arbitrator requested the parties answer various questions within the same deadline fixed for the Respondent to file its comments on the Claimants' Reply.

74. On 29 May 2013, the parties filed their answers to the Arbitrator's questions and the Respondent submitted its comments on the Claimants' Reply.

75. By Procedural Order of 3 June 2013, the proceedings on the merits were closed and the parties invited to submit their statements of costs.

76. On 13 June 2013, the Respondent submitted its statement of costs.

77. On 14 June 2013, the Claimants submitted their statement of costs.

78. On 14 June 2013, the Claimants filed an unsolicited submission on the merits, which was not admitted on record.

79. On 18 June 2013, the parties were invited to file any observations they might have on the other party's statement of costs.

80. On 25 June 2013, the Claimants submitted their comments on the Respondent's submission on costs.

81. The Respondent did not submit any comments on the Claimants' submission on costs.

4. The Positions of the Parties

4.1 The Claimants' Position

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

- Contract n°1 came into full force because he successfully passed the tryout in China after his arrival and he was informed thereof by the Club on 19 October 2012.
- Between 20-24 October 2012, the Club prepared a new version of the contract which it presented as a mirror image of Contract n° 1 and merely designed to formalize the fact that the tryout had been successful.
- Moreover, Contract n°2 was never provided by the Club to the Agent for approval and the Agent neither saw it nor signed it.
- He therefore signed Contract n° 2 with the understanding that it was the same as Contract n°1, minus the tryout provision.
- It subsequently became evident that a number of substantial changes had been introduced into Contract n°2, meaning that the Club had in fact duped him and his Agent by not providing them with any notice of the modifications.
- Thus, due to the Club acting improperly in this manner, Contract n° 2 cannot be deemed to have superseded and replaced Contract n° 1.
- This is all the more true that article 7 of Contract n° 1 stipulated that it could be modified only by written agreement of all the parties thereto, which included the Agent (as signatory), whereas the latter was not a party to Contract n° 2 and did not sign it.

- In any event, the Club failed to pay him his first salary instalment due at the latest by 25 October 2012 under either contract and thereby breached its contractual duties from the outset; such amount remaining due.

- Furthermore, under both contracts his total salary of US$ 500,000 for the 2012/2013 season was fully guaranteed even in case of an injury, whereas the Club has paid none of it, meaning that the entire amount is due.

- In that relation, the Club's unilateral termination of his contract on 7 November 2012 was unjustified and invalid because he had correctly performed all his duties until that date and the contractual conditions and formalities required to unilaterally terminate the contract were not fulfilled and met.

- Contrary to what the Club is alleging, the ankle sprain he incurred when playing the pre-season game on 26 October 2012 was not faked and the pain he suffered from – which handicapped him and prevented him from training properly over the following 10 days – was real.

- He was not being passive, unprofessional or acting badly in any manner. He participated in training to the extent he could, while making it clear that he would soon be on foot again – at least by the beginning of the CBA League championship - but needed to rest to prevent the injury deteriorating. Furthermore, he was truly feeling sick when he stated so.

- Upon becoming injured on 26 October 2012, he was immediately put under undue pressure by the Club to practice/play again and did not receive sufficient or appropriate treatment from the team doctor, while at the same time, communications were complicated by the Club's lack of sufficient interpreters creating a language barrier that prevented him from expressing his sentiments and views as necessary, including his good intentions towards the Club.

- The Club therefore had no material cause to terminate his contract.

- In addition, under both contracts the Club had the duty to put him on written notice twice prior to unilaterally terminating his contract and the obligation to precede termination with lighter sanctions in the form of fines, as specified in articles 6 and 7 of Contracts n° 1 and 2 respectively, i.e. to apply progressive disciplinary sanctions in case of misconduct.

- The Club failed to respect any of those contractual requirements since it did not start with lighter sanctions and did not provide him with any written notices prior to the unilateral termination. In fact, due to the time difference between China and the United States, he was sent home before even being able to inform his Agent of the situation and discuss it with him.

83. In a nutshell and in substance, the Agent contends that:

- Pursuant to the terms of the *Agreement for Agent Fee* signed on 23 October 2012, the Club was to pay him, by 24 December 2012, a fee of US$ 50,000 for putting the Player in contact with the Club and negotiating his playing contract, which he was successful in doing.

- That Agreement was in effect an addition to Contract n°1 and meant to clarify it as to the amount of the agency fee, as indicated by its terms and because Contract n°1 was silent regarding such fee, the payment of agency fees only being implied.

- That agency fee is contractually owed and was never paid by the Club.

- Mr. Wei Liu was not authorized to represent the Player. The Agent was aware that Mr. Yam was working with an intermediary but never communicated with Mr. Wei Liu directly and was not aware of the details of their relationship. The Agent never paid Mr. Wei Liu any commission.

- The BAT has jurisdiction to decide on the Agent's claim against the Club.

84. The Claimants' Request for Arbitration of 21 December 2012, contained the following

prayers for relief:

"2. Request for relief

…

$ 500,000 in salary due to the Player Derrick Caracter (USD, net of tax)

$ 50,000 in agent fee due to Happy Walters, Relativity Sports (USD, net of tax)

Including accrued interest, all costs, and legal fees."

4.2 Respondent's Position

85. In a nutshell and in substance, the Club contends that:

- Due to the Player having a public record of being undisciplined and antagonistic with coaches – as well as the Club having had problems with foreign players in the past – the Club insisted a contractual tryout period be included in Contract n°1, and in a particular, a clause proving that the contract could be terminated unilaterally by the Club if the Player displayed an unprofessional attitude, faked an injury or missed practices/games. The Player and his Agent accepted these particular conditions.

- The Player took an active part in training and had a positive approach during the tryout period but once the Club informed him on 19 October 2012 that he had passed the tryout, he very soon began changing his attitude.

- Upon completing the tryout and whilst training from 20-24 October 2012 with the Club's assistant coach, he started showing signs of laziness – sometimes even going so far as to just watch the coach practice with another player – and arriving late at training (once as much as one hour late), while seeking every excuse not to practice.

- This led the Club to worry even more about his antecedents and include in Contract n°2 (which was designed to confirm the entry into force of the contract further to the successful tryout) wording that strengthened the Club's protection, e.g. by including a "*passive attitude*" as one of the reasons which could lead to the unilateral termination of the contract for cause by the Club.

- Contract n°2, which included a provision stipulating that it contained the parties' whole agreement, was shown to and negotiated by the Agent before being accepted by the Player who signed it on 26 October 2012.

- Attitude problems nevertheless quickly rose to a new level when on 25 October 2012, the Player refused to practice the whole morning with the excuse he was not feeling well, although the team doctor could identify no ailment. Then in the afternoon, it was only upon the insistence of the team manager that the Player agreed to take part in the scrimmage practice after refusing to take part in the drills.

- The next morning, on 26 October, while the team was practising for a preseason game to take place that evening, the Player displayed the same attitude – sitting by the court except for the scrimmage training.

- Then, during the evening game, the Player fell over and alleged he had sprained his ankle, although there was no sign of swelling. The media coverage of the game underlined that the Player had not done well and that his injury did not seem serious.

- Those events led the Club to suspect the Player was faking or at least grossly exaggerating the seriousness of the alleged ankle sprain; its suspicions being confirmed by a series of actions and attitudes of the Player over the next few days.

- The aforementioned series of poor actions and attitude began by the Player refusing to attend a medical check up at the hospital the next day, until the Club asked the Agent to intervene, and by the Player giving the impression the alleged

injury was very serious, e.g. by lying on the floor in his bedroom and dragging himself to the door and by asking for a wheelchair to be wheeled out of the hospital on 28 October after the medical check-up (x-rays), although the check-up had revealed no broken bones in his feet or ankles and no swelling was visible.

- The Club therefore asked its liaison, Mr. Wei Liu, to inform the Agent that the Club was very unsatisfied and expected a change of attitude otherwise the contract would be terminated.

- However, and despite the team doctor concluding that the Player was walking normally, the Player refused to train on 30 October (the day after the team's rest day after its return from the preseason game) and on 31 October only accepted to take part in the team's scrimmage training.

- On 1 November 2012, the Player took part in practice (but not in fitness training) and the team doctor saw no signs of a limp or any unusual gait.

- However, on 2 November the Player again refused to practice, telling the General Manager that he was not feeling well while refusing to specify what the problem was. The Player simply stated that he would be fine by the time the CBA League games began for the Club.

- The General Manager asked the assistant coach to intervene and to attempt talking to the Player but the assistant coach reported back that the Player was acting like a child.

- The General Manager then asked the Club's liaison, Mr. Wei Liu, to inform the Agent that the Player's attitude had become unbearable for the Club, who considered him to be faking. The General Manager again threatened to terminate the Player's contract.

- On 3 November, the Player said that because he had read the bible the night

before, he suddenly felt much better but he nonetheless only accepted to participate in the afternoon scrimmage training and nothing else.

- Thereafter, on 4-5 November, the Player said he was feeling so uncomfortable he could not train and the team doctor gave him some more ultrasound treatment. The General Manager told the Player that if he did not train again, his contract would be terminated but the Player said nothing and just shook his head, so the General Manager called the Club's liaison to ask him to get the Agent to intervene and make the Player attend practice.

- Nevertheless, on 6 November, the Player turned up without proper training gear and refused to practice. The General Manager talked to the Club's liaison but the latter replied that he could do no more and that "*if the Player still refused to practice, the Club could terminate the contract in accordance with the contract terms*".

- By then, the Club had lost patience also because the Player had been undisciplined in other ways, e.g. by regularly coming down late to the team bus and delaying the whole team, while only offering feeble excuses such as he had overslept or was not feeling well.

- On the morning of 7 November, and despite a final warning from the General Manager, who told the Player his contract would be terminated if he refused to practice, the Player continued to refuse to practice saying he expected to be in the best playing condition when the CBA season started.

- The Club therefore took the decision to terminate the contract for cause – the Club's liaison, Mr. Wei Liu, agreeing that the Club had no other option – and that afternoon, the General Manager talked to the Player in the hallway, informing him that the Club was very disappointed and was terminating his contract as a result of him refusing to practice despite being fit to do so. The Player indicated he had

nothing to say.

- The next day, on 8 November, the Player left for the United States from Hong Kong.

- Thereafter, the Player neither challenged the Club's decision nor requested that the grounds for termination be stated in writing, and he began playing for a new club in Israel in the beginning of December.

- The above events and related evidence adduced by the Club establish that, in accordance with the terms of Contract n°2, notably its article 7, the conditions were met for the Club to terminate the contract unilaterally for cause and to withhold any payments (due to the Player's refusal to perform), since the Player was obviously faking his injury or at least grossly exaggerating its seriousness, made no effort to prove that he was suffering from an injury (e.g. by requiring another medical examination), continuously refused to practice without real cause (only taking part in a total of 7 training events out of 45 over a period of 14 days) and adopted a passive and unprofessional attitude on a number of occasions as well as at times refusing treatment.

- The Claimants' attempt to ground their claims on Contract n°1 is without merit and challenged because the Player accepted and signed Contract n°2 which replaced and superseded the first contract as explicitly confirmed by its article 7; meaning that only the terms of Contract n° 2 are applicable in determining the parties' respective rights and obligations.

- In addition to being violations of Contract n°2, those attitudes/actions of the Player constituted severe breaches of contract which would justify termination for cause in accordance with general principles of law, e.g. by analogy with article 337 of the Swiss code of obligations.

- The termination was all the more justified that the Player ignored numerous

warnings/notices that his contract would be terminated; neither he nor his Agent taking any effective actions to remedy the situation.

- Furthermore, the Player waived any right to challenge the validity of the termination since he did not raise any objections, and his attitude must be deemed *ex aequo et bono*, an implicit acceptance of the Club's rightful termination.

- In any event, the entire salary earned by the Player under the Israeli contract would have to be deducted from any salary compensation granted to the Player.

- More generally, the Claimants' allegations as to the facts are denied and contradicted by the affidavits and other evidence adduced by the Club, among others regarding the alleged lack of medical treatment or possible access to a doctor of his choice since the Player received continuous, complete and appropriate treatment and could have obtained independent medical advice in China without any difficulty. Similarly and contrary to the Player's contentions, he was welcomed at his arrival in China and well looked after throughout the life of the contract; and, in addition to being able to use interpreters whenever necessary, could communicate in English with the head coach and the assistant head coach who were both American.

- Finally, the Arbitrator lacks jurisdiction to decide the Agent's claim for payment of US$ 50,000 because such payment is only provided for in the *Agreement for Agent Fee* of 26 October 2012 which contains no arbitration clause in favour of the BAT. Contract n° 1 contains no clause providing for the agency fee being claimed and was superseded by Contract n° 2 to which the Agent is not a party and which does not provide for any fee in favour of the Agent. Contract n° 1 does not provide for an agency fee because it was understood that any fee would be subject to the Player succeeding the Try-Out and signing a CBA League contract; and the *Agency Fee Agreement* was only signed by the Club when Contract 2 had been signed. Any agency fee could therefore not be linked to Contract n° 1.

- Furthermore, Mr. Wei Liu, who never received any remuneration from the Club, was *de facto* the Player's agent in China; and the *Agreement for Agent Fee* – which was prepared by Mr. Wei Liu and also signed by him on behalf of his company "*Elite Legend Sports*" – explicitly provided that the agency fee was owed to both Mr. Walters and Elite Legend Sports, meaning that the Agent has no right to claim the fee alone and for himself.

- With respect to legal fees and other expenses, the Claimants should be ordered to reimburse the entirety of the legal fees and other expenses that the Club has incurred in defending these proceedings.

- Moreover – due to the unacceptable procedural conduct of the Claimants during the proceedings and them requesting unjustifiable relief based on untenable and often misleading claims – regardless of whether the Club is the prevailing party or not, the Claimants ought not receive any contribution to their costs from the Club and it ought to be granted a contribution to its costs commensurate with the significant amount it had to spend on defending itself.

- In that relation, although the Club's procedural conduct has been fair and diligent, the Claimants' conduct has been unjustifiably deficient and not in conformity with what one would expect in an *ex aequo et bono* BAT arbitration; and, as a direct result of this, the Club incurred considerably exacerbated costs. Indeed, the procedural conduct of the Claimants has required unnecessary and costly submissions and evidence from the Club at every juncture.

- Furthermore, there is no evidenced difference in financial resources of the parties that should influence the Arbitrator's findings as to the apportionment of the legal fees.

- Finally, the limit/cap provided by Article 17.4 of the BAT Arbitration Rules on the amount of legal fees awarded to a party should not apply in this case to the legal

fees being requested by the Club, since such cap was established in view of ordinary fast-track BAT proceedings and not to apply in cases such as this where a party (the Claimants) has abused of the BAT process by adopting erratic procedural conduct.

86. The Club's Answer of 27 March 2013 contains the following prayers for relief:

"*Based on the foregoing developments, the Respondent respectfully requests the sole arbitrator to issue an award:*

- *Rejecting Derrick Caracter's prayers for relief in the Request for Arbitration dated 21 December 2012.*
- *Rejecting Happy Walters' prayers for relief in the Request for Arbitration dated 21 December 2012*
- *Solidarily condemning Derrick Caracter and Happy Walters to pay all arbitration costs in accordance with Article 17 of the BAT Arbitration Rules.*
- *Solidarily condemning Derrick Caracter and Happy Walters to pay Guangdong Winnerway Basketball Club Co., Ltd a contribution towards its legal fees and other expenses incurred in connection with the proceedings of EUR 20,000.*
- *Award any other remedy the Arbitrator deems fair and equitable under the circumstances when deciding ex* aequo et bono*.*"

5. The Jurisdiction of the BAT

87. 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).

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

89. 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]

90. Articles 12 and 9 of Contract n°1 and Contract n° 2, respectively, contain an identical arbitration clause in favour of the BAT, which reads as follows:

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

91. The foregoing arbitration agreements are in written form and thus fulfil the formal requirements of Article 178(1) PILA.

92. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).

93. However, the issue arises which is the arbitration clause that is applicable between the parties, if any, since the foregoing arbitration agreements form part of distinct contracts, whereas the *Agreement for Agent Fee* contains no arbitration clause.

94. This raises the preliminary question of which contract, if any, governs the parties' relationship and their respective claims.

95. Concerning the claims of the Player against the Club, the Arbitrator finds they may only be based on Contract n°2 because by signing that contract the Player accepted that with respect to his relationship with the Club such contract would supersede and replace Contract n° 1, and that, in accordance with article 7 of Contract n°2, only its

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

terms remained applicable between them as their "*entire Agreement*".

96. In that relation, the Arbitrator finds the evidence adduced to be insufficiently clear as to the Claimants' allegation that the Agent was not informed adequately of the modified content of Contract n° 2 (compared to Contract n° 1) and was unable to discuss it with the Player before the latter signed it, i.e. that the Club duped the Player into accepting modified clauses he was unaware of.

97. In any event, the Arbitrator notes that, in his view, even if Contract n° 1 had been deemed applicable rather than Contract n° 2, his conclusions below as to the merits of the claims would have been the same because the differences in content of the first contract were not of a nature that would have led him to different findings based on his assessment of the facts and evidence.

98. Considering, thus, that Contract n° 2 is the only contract applicable between the Player and the Club, its article 9 validly gives jurisdiction to the BAT and to the Arbitrator.

99. Moreover, the Club accepted the Arbitrator's jurisdiction to decide the Player's claims on the basis of the arbitration agreement contained in Contract n° 2 and it covers all disputes arising between those parties under that contract.

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

101. Concerning the claims of the Agent against the Club, to determine whether the BAT has jurisdiction, the issue also arises as to which contract, if any, governs the relationship between those two parties'.

102. There is no doubt that the Agent was a party to Contract n° 1 (which was executed on 4 October 2012), since he was defined as the agent in the preamble and was a signatory of that contract, while at the same time, its article 4 sets out various duties of the Agent and its article 8 requires the Club to first address itself to the Agent in an

attempt to resolve any disputes arising under the contract. Neither Messrs. Yam and Wei Liu nor Elite Legend Sports were referenced in the preamble and no representative of Elite Legend Sports signed the contract, but there was a signature block referencing that company's name and Mr. Wei Liu had drafted the first version.

103. Furthermore, there is no doubt that the Club and the Agent entered into another contract entitled the *Agency Fee Agreement* (also drafted by Mr. Wei Liu), which stipulated the amount of fee the Club would pay the Agent for his intermediation. That document was signed by each party respectively on 23 and 26 October 2012 in two separate copies. The preamble of this agreement, its text defining the fee, and the signature blocks, all refer to both the Agent and Elite Legend Sports as "*Happy Walters/Elite Legend Sports*" and Mr. Wei Liu declares that he signed it on 26 October (although the document in question is not entirely clear in that respect because a signature is not clearly visible below the stamp and there is no translation of the wording on the stamp).

104. The question is, what was the relationship between those two agreements, i.e. between Contract n° 1 and the *Agency Fee Agreement*, if any.

105. Given the wording of those agreements as well as the context and chronology of their execution, the Arbitrator finds that the *Agency Fee Agreement* was not intended to replace or supersede Contract n° 1 in the relationship between the Agent and the Club, but was to serve only to supplement Contract n°1 by defining the fee which the Agent would receive in consideration for its services.

106. This is clear from the preamble of the Agency Fee Agreement – wherein the connection with Contract n° 1 is spelled out as follows: "*This Agreement … is meant to clarify the arrangement between the parties regarding the contract of Derrick Caracter* [i.e. regarding Contract n° 1 which the Agent also signed and was obliged by] – and the fact that Contract n° 2 did not include the Agent as a signatory. Furthermore, it is irrelevant that Contract n° 2 replaced Contract n° 1 as far as the Club and Player's

relationship was involved because, as argued by the Club itself: "… *the Agent's claim cannot be founded on the 24 October Agreement as he is clearly not a party to this agreement and no provision therein exists which provides for the payment of the agent fees*".

107. Furthermore, the Arbitrator finds that although a representative of Elite Legend Sports did not sign Contract n°1, the fact that the company was referenced in the signature blocks of that contract and that Mr. Wei Liu drafted both contracts and included a reference to Contract n°1 in the Agency Fee Agreement, reinforces the finding that the intention of all the parties to the Agency Fee Agreement was to fill the gap in Contract n°1 as to the amount of agency fees owed by the Club under that contract, given that by such time the Player had succeeded the Try Out. It is relevant in that respect that the Club confirmed on 19 October that the Player had succeeded the Try Out, meaning he would be staying with the Club, and that Mr. Wei Liu provided the Agency Fee Agreement to the Agent for signature on 23 October (or earlier), when Mr. Walters signed it, several days before Contract n°2 was finalized and signed.

108. Consequently, the Arbitrator finds that the Club, the Agent and Elite Legend Sports all intended the *Agency Fee Agreement* to become a part of the pre-existing Contract n° 1, i.e. that those two agreements combined formed their contract.

109. For the above reasons, the Arbitrator considers that – as a part of their contract formed from the combination of Contract n° 1 and the Agency Fee Agreement – the arbitration agreement constituted by article 12 of Contract n° 1 binds the Cub, the Agent and Elite Legend Sports with respect to any dispute between them regarding the fee stipulated in the Agency Fee Agreement, and that, although the Club is today objecting to the jurisdiction of the BAT, at the time it entered into those two agreements with the Agent in October 2012, its real intent was to submit any disputes that arose between them regarding agency fees to the jurisdiction of the BAT.

110. It also stems from the foregoing conclusion that a representative of Elite Legend Sports

could have filed a claim for agency fees based on the arbitration agreement constituted by article 12 of Contract 1; however that entity chose not to and Mr. Wei Liu even declared in his affidavit that "*I never expected to receive any payment due to the behaviour of the Player and the fast termination of his contract*".

111. Accordingly, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Agent alone against the Club for the payment of the agency fees stipulated in the Agency Fee Agreement.

6. Discussion

6.1 Applicable Law – ex aequo et bono

112. 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".*

113. 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."*

114. Articles 12 and 9 of Contract n°1 and Contract n° 2, respectively, both provide that: "*The arbitrator shall decide the dispute ex aequo et bono*".

115. Consequently, and because the Arbitrator has found that Contract n°1 (combined with the *Agency Fee Agreement* as one contract) governs the Agent's claims and Contract

n°2 the Player's claims, the Arbitrator shall decide *ex aequo et bono* all the claims brought by the Claimants against the Club.

116. 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 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]

117. 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]

118. 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*".

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

6.2 Findings on the Merits

120. With respect to the Player's claim, the main legal questions in light of the parties'

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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.

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

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

arguments are whether his contract (Contract n° 2) was validly terminated by the Club, and, whether such was the case or not, if the Player is entitled to any compensation for any unpaid salaries.

121. In determining whether the contract was validly terminated by the Club one issue is whether, materially, it had a good cause to do so, another is whether any existing procedural requirements for termination were respected and more generally whether the procedure applied was fair.

122. In the context of this case, before answering the above questions, a few preliminary observations are useful for the understanding of the findings below.

123. In essence, the main motives for termination invoked by the Club are the Player's alleged faking, or at least gross exaggeration, of an injury, passive/unprofessional attitudes and unwarranted refusals to practice.

124. Those different motives relied on by the Club have various points in common.

125. They are essentially based on the implicit contention that the player deliberately refused to perform, or at least properly perform, his essential duty as a professional player, which was to practice and play the best he could.

126. Those motives go to the very essence of a professional player's contractual duties and the reason for which he/she is engaged to be a member of a team in exchange for the consideration offered by a club (remuneration and fringe benefits).

127. The duty for a player to do his/her best and therefore not to fake or exaggerate any form of handicap or incapacity is no doubt implicit in the playing contract of any professional player, i.e. even if not expressly stipulated therein and even if a contract is fully guaranteed.

128. Indeed, without the good faith undertaking (express or implicit) of a professional player to do his/her best, a playing contract loses its *raison d'être*.

129. The motives for termination being invoked by the Club also have in common their relative difficulty to prove, given that it is impossible to enter a player's mind to establish his/her intentions and related actions, such as the choice to fake an injury or exaggerate its symptoms in order to avoid practices and/or games or more generally deliberate passiveness. Consequently, one is mainly reduced to assessing such intentions on the basis of possible visible signs and attitudes, which themselves are not always simple to interpret.

130. This difficulty of proof is partially alleviated if a contract defines various objective events/attitudes that are deemed or presumed to be evidence of a frame of mind or by requiring a party to undertake an action in certain circumstances – such as a visit to a doctor.

131. In deciding this case, the Arbitrator shall bear in mind the above factors and principles.

132. Given the context of this case, the Arbitrator also finds it important to note that players, clubs and agents should not underestimate the additional difficulties and misunderstandings that may arise due to notable language barriers and (legitimate) cultural differences in approaching issues, which may lead to miscommunication (literal and cultural) as well as to psychological/emotional problems (such as feelings of isolation or being misunderstood or frustration or anger) and misrepresentations of what purpose is truly driving an attitude or an action.

133. Those difficulties, and the conflicts they may provoke, potentially concern all the parties in different ways, be it the player, the club and/or the agent. In addition, while in principle, parties bear no initial responsibility for differences in language and culture, all must address and cope with them in the fairest and most reasonable/efficient manner possible, sometimes guided by corresponding contractual requirements such as the duty to provide interpreters or the right to consult a foreign doctor.

134. In a case such as this – where the Player apparently did not speak a word of the very different local language and found himself in a culturally foreign environment with little

outside contact and living in a hotel, while the Club had legitimate perceptions of its own linked to its cultural environment and practices – the language and cultural component of the problem must be borne in mind when assessing what happened and seeking the fairest solution to the dispute *ex aequo et bono*.

135. As a final preliminary comment, the Arbitrator notes that in its final submission in these proceedings, the Club has filed a current/new translation from Chinese to English of part of article 7 of Contract n° 2 to rely on in construing the contractual terms.

136. The Arbitrator finds that – for contractual motives and reasons of fairness – that current translation cannot be taken into account when deciding the case because: (i) the contract was bilingual (English/Chinese) from the outset and provided that in case of any "*discrepancy between the two versions of the agreement, the English version will be the prevailing and controlling version*"; and (ii) neither of the Claimants could read Chinese, meaning that in effect, when negotiating and performing the contract they could only rely on the English wording contained therein, i.e. they had no duty to compare the English and Chinese versions and were in any event, not capable of doing so.

137. Consequently, to the extent the Arbitrator's findings refer to and account for the content of Contract n° 2, it shall be with reference to the English text contained therein. That said, as shall be clear from the reasons below, the findings and conclusions in this case do not turn on an interpretation of article 7 of Contract n° 2 that the Club wished to avoid by filing the current translation in question.

138. In light of those preliminary observations and findings, the facts, evidence and arguments will now be examined.

139. Concerning the grounds entitling the Club to unilaterally terminate the Player's contract, it has invoked: (i) a "*faked injury*"; (ii) "*refusal to practice*": (iii) a "*passive attitude*"; and (iv) various "*additional grounds for termination*" including "*ignoring numerous warnings*", "*refusal of treatment*", not providing "*his best services to the Club*" and in

effect interrupting his performance without any justified reasons. The central provision of Contract n° 2 that the Club is invoking in relation to those grounds for termination is article 7, however other provisions are relied on as well as general principles of law and considerations of fairness.

140. In principle, the Club has the burden of proving the existence of those grounds of termination it is relying on.

141. Although all those grounds will be borne in mind in the reasoning below, the Arbitrator finds that in relation to the facts of this case, a number of them overlap.

142. Thus a "refusal to practice" or a "passive attitude" or the fact of not performing as best as possible, are all attitudes that beg the question of what is causing or motivating such behaviour, since the behaviour may or may not be legitimate or justifiable in a given situation. Similarly, actions such as "*ignoring numerous warnings*" or a "*refusal of treatment*" do not necessarily amount to a breach of contract.

143. In this case, the Club is arguing in essence that to a large extent, the Player's actions were the result of him faking or at least grossly exaggerating an injury and on occasion, an illness, i.e. were motivated by the intention to mislead the Club as to his physical condition and capacity to practice/play.

144. Therefore, of relevance here are the reasons for which the Player acted as he did, which the parties disagree upon, the Player arguing that he always had a legitimate motive for acting as he did and the Club contending that was not the case.

145. More specifically, the main question is whether the Club has proven that the Player either had no injury or illness, i.e. was faking, or was grossly exaggerating an ankle sprain and on occasion, alleged feelings of illness, in a manner which entitled the Club to terminate his contract; and in that connection whether any given event or the sum of different events relied on by the Club as evidence of the Player's alleged deceitful behaviour is sufficient to prove it.

146. Accordingly, the different elements will now be examined.

147. The Arbitrator finds that the total number of instances invoked by the Club in which the Player refused to practice – which is indeed a very high proportion during the period of 14 days referred to by the Club which elapsed between 24 October (date of signature of Contract n° 2 and 7 November (date of termination) – is not, in itself, of great significance in this case because two weeks is a relatively short period of time and because the question of whether it should have been sufficient for a complete recovery depends on the seriousness of the injury, which begs the question of how serious the Player's ankle sprain was, if indeed there was a sprain, and how much suffering it was causing (which is partly subjective). In addition, that period of practice was partly reduced by the team's travel time to and from three different locations and some rest periods (although not very many).

148. Thus, although the repetition of the Player's refusals to practice remains a factor for consideration, more important are the circumstances of each refusal in light of the related evidence adduced by the Club and the Player, respectively, to prove or disprove the legitimacy of the refusal, as well as the chronology of events to the extent they reveal any inconsistent behaviour.

149. The Club's allegation that the Player suddenly changed his attitude between 19 October and 24 October – from being very active during the trial period (before 19 October) to becoming passive and lazy thereafter (by changing his approach to practices and his punctuality) – could be a relevant circumstantial factor in demonstrating a frame of mind that might lead to faking or exaggerating ailments.

150. However, given the lack of any contemporaneous evidence of complaints or reprimands having been made to the Player during those four days and given that the testimony adduced in such relation is primarily that of the Club's assistant coach, the Arbitrator considers the Club's allegations in that connection to be insufficiently proven.

151. Regarding the Player's acknowledged refusal to take part in the first part of the practice

on 25 October due to allegedly feeling ill, the Arbitrator finds that, in itself, this is not a very significant occurrence because there is no evidence that the Player was actually pretending to feel ill, and, in addition, it is perfectly possible for any player to feel sick on one or another occasion during practice and it is acknowledged that he did practice later the same day. The Player contends he felt sick and felt like vomiting due to food poisoning.

152. Apparently, the Player again refused to participate in part of the practice the next morning, the day of the first pre-season game, but very little is explained in that relation by the Club and the chronological chart of events produced by it does not even mention the cause of alleged refusal on that date.

153. The main controversial events began to occur when the following day, on 26 October, the Player allegedly injured himself by rolling his ankle during the first pre-season game and subsequently invoked this injury to refuse to practise.

154. Between the lines, the Club has implied that the Player may have entirely faked the injury since the assistant coach's testimony is that: "… *The way he fell, I thought he had injured his knee [i.e. not his ankle]. He sat on the floor there for a second and then got up. At the time there was no translator, so I had to translate to the others on the floor and I remember Mr. Caracter said he had "rolled it on someone's foot* …"".

155. In any event, the Club's allegation is that on this occasion, the Player suffered, at most, a light ankle sprain akin to a so-called "grade 1" sprain, which did not even cause any swelling to the ankle (swelling being commonly recognized as one of the main initial signs of more severe sprains), meaning that he could have continued training nearly normally, and if not normally just about immediately, whereas the Player said he could not and refused to practice while deceitfully invoking pain and discomfort and often providing vague or no explanations.

156. In that connection, the team's doctor has declared that he noted no swelling of the Player's ankle, that he nevertheless immediately and fully treated the ankle as if it were

sprained and that on or around 31 October 2012, he believed that the Player was physically fit to practice and informed him as such. In his second affidavit submitted in these proceedings, the doctor declared: "*Recovery times for athletes who suffer from ankle sprains always vary according to the severity of the sprain. It is not possible to estimate the recovery time of a particular incident without personally examining the injury. It is my opinion that when the injury is of the minor rolled ankle nature allegedly suffered by Mr. Caracter, and in line with my own contemporaneous examinations of his ankle, he should have been able to attend to functional exercise after three days.*"

157. It is noteworthy that this impression of the Club that the Player was pretending to be injured or exaggerating an injury – combined with its pre-existing wariness concerning the Player's character in light of his alleged history as a player and problems the Club had apparently had with other foreign players in the past – led the Club to reacting very strongly and nearly immediately, in a manner which left little doubt regarding the fact that the Club and in particular its General Manager believed the Player was being deceitful.

158. The prior day, on 25 October, when the Player indicated for the first time that he was feeling ill before practice, the General Manager testifies that: "*On 25 October 2012, after the practices, I called Mr. Wei Liu to complain about Mr. Caracter refusal to practice and to tell him to communicate our displeasure about Mr. Caracter to Mr. Walters*".

159. Furthermore, the affidavit of Mr. Wei Liu submitted by the Club includes an appendix which is the copy of an email from Mr. Yam dated 27 October (US time) in which the Agent is informed that the Club is "*FURIOUS*" about the Player having requested to use a wheelchair when leaving the hospital after his check up subsequent to the incident and that "*They will cut him by tomorrow am, if we do not have some resolution to this.*"

160. In assessing the evidence regarding the existence or not of a debilitating ankle sprain

and the Player's alleged deceitful behaviour in that regard, the Arbitrator finds that overall, the evidence adduced establishes that the Player did not suffer from any noticeable swelling to his ankle. The foregoing was testified to by a number of witnesses, including the team doctor, and the Player has not directly contested the Club's allegation regarding the absence of any serious swelling, apart from claiming that he needed to ice his ankle. In addition, the medical report from the hospital establishes that there was no bone lesion in the left foot or ankle.

161. However, the absence of important swelling is not sufficient, in itself, to establish that the Player was faking or exaggerating his difficulty to practice only a few days after sustaining the injury invoked, even if according to the medical evidence on record swelling is an important sign of a more serious sprain. Indeed, according to that same evidence and common knowledge – degrees of swelling can vary from one person to another for a given type of lesion, recovery times vary and resistance to pain is partly subjective. Furthermore, the degree of concern a person/player may have regarding the consequences of starting to exercise too soon depends on circumstances and also on personality due to some persons being by nature more cautious than others.

162. That said, the Arbitrator finds the fact that the Player asked to be taken out of the hospital on 28 October in a wheelchair – despite the absence of anything more than minor swelling of the ankle, if any, and despite the fact that he was diagnosed at the hospital as having no bone lesion in his feet or ankles – could legitimately have caused the Club to be perplexed and become suspicious, especially since the Player had initially refused to go to the hospital yet had not requested to see a doctor of his own choice (as entitled to do under his contract).

163. Indeed, given that even for a non-athletic individual of youthful age to ask for a wheelchair in such circumstances might appear unusual depending on circumstances, the fact of a professional athlete doing so could, in good faith, engender surprise, suspicion and even indignation or anger for the athlete's employer depending on exactly what occurred at the time.

164. If suspicion does arise, it may of course engender or at least increase subsequent suspicions of deceitful behaviour and stronger reactions, in a sort of viscous cycle of mistrust.

165. On the other hand, the Player contends he was already using crutches at that point in time because he could not put full weight on his foot without it being very painful and that he had, as a result, entered the hospital using the assistant coach's shoulder for support and hopping instead of using the crutches, and simply asked for a wheelchair to exit the hospital more easily and practically. That is a plausible statement and there is no evidence directly contradicting it.

166. The Player also contends that the Club had already demonstrated quite radical mistrust, from the outset, by asking him immediately on repeated occasions on the evening of the incident, (ankle roll) during the game, whether he would be ready to play the following day and implying that he was faking. In that relation, he states: "*It seemed that the Club's management pressured the team doctors to continuously ask me about my ankle, how I was feeling, and whether I would be able to play the next day. They must have asked me over ten times in just two hours … The team doctors expressed their concern that I was faking my injury. They conveyed to me that they believed that since I had gotton [sic] injured in a game watched by thousands of people that I had staged the injury. I immediately made it clear that I was not faking and actually in a lot of pain. Moreover, I was quite disheartened by the fact that my team thought that I would ever fake an injury …".*

167. In light of the evidence adduced, the Arbitrator finds that it is possible if not likely, that the Club was quite aggressive in that respect, as evidenced by the content of Mr. Yam's email of 27 October (US time) to the Agent and by the declarations of the Club's coaches, doctor and General Manager, who demonstrate a degree of dubiousness regarding the existence/seriousness of the Player's injury when the incident occurred. Furthermore, the General Manager does not hide the fact that he believed from the beginning that the Player was being deceitful.

168. In addition, the evidence demonstrates that the General Manager had a very "hands on" attitude to the team and the Player, being present at most if not all of the practice sessions and the games during the period in question, talking directly to the Player and intervening in the presence of the team coaches and doctor.

169. This legitimately would not have made the Player comfortable. Moreover, it may have made it more difficult for the coaches and doctor to make independent and calm assessments of the situation at each practice session and may have led to a faster deterioration of the trust and breakdown in communication, particularly since, according to the evidence, the same interpreters were not always available; all of which would lead to a radicalisation of positions.

170. Regarding the condition in which the Player practiced on 31 October and on 1 November, the evidence is unclear. The Player contends he was still in some pain and was visibly limping, while several of the Club's representatives state that the Player appeared to be perfectly fine and mobile. The team doctor has declared that: "*I watched him very closely form courtside during practice and he did not show any signs of discomfort*", whereas the Player states: "*I tried to test the strength of my ankle on November 1st in the afternoon practice, but was not able to play normally. I hobbled around the court as I was unable to fully put my weight on my ankle and I was in a lot of pain*".

171. Since it is essentially the word of one party against the other, without testimony from any independent witness or other striking circumstantial evidence supporting one or the other allegation, the Arbitrator finds that it is not established that the Player was not limping and more generally that the evidence is unclear regarding what state he was in and what degree of pain he was feeling.

172. Beyond that, the Arbitrator would be reduced to speculation regarding how the Player was feeling.

173. On the one hand, it could seem strange that the Player was able to participate in a

scrimmage on 31 October and in a full practice session on 1 November before refusing again to practice – if only 5 days earlier he was using crutches (and even a wheelchair in the circumstances described above). That would particularly be the case if he was running around and jumping normally, i.e. was not limping or looking restrained in his movements at all, but the evidence in that connection is unclear.

174. On the other hand, the fact that the Player attempted to practice on 31 October and 1 November could tend to demonstrate that he was not trying to exaggerate his injury and was making an effort – especially if he was limping or restrained in his movements in any manner (but the evidence is unclear in that respect). At the same time, he could legitimately have been worried about making any sprain (even relatively minor) worse and preferred to be a little more patent to be properly on foot only a few weeks later for the beginning of the CBA League games.

175. Furthermore, it is possible that the training session he took part in did make a pre-existing pain flame up again.

176. It might also appear improbable that he would risk such a lucrative contract just because he felt like being lazy during a few weeks of pre-season practice, given that it is uncontested he stated at the time that he was confident he would be properly on foot again by the beginning of the CBA League games.

177. However, given the conflicting statements made by the Club and the Player and the lack of declarations by an independent third party, the Arbitrator finds it would be speculative in the circumstances of this case, to give more weight to the assertions of one or another party or to reach conclusions based on what the Player might or might not have been thinking. The circumstantial evidence of his motivations is too thin to be reliable in that respect.

178. Furthermore, the Arbitrator finds the fact that, according to the Player himself, he was able to start progressively training again 10 days after returning to the United States and to pass a medical examination with a new Club only about four weeks from the

beginning of November 2012 when he last practised in China allegedly with pain, is not sufficient in itself or in combination with the other events to constitute post-factual evidence that the Player was faking or grossly exaggerating an ankle injury, bearing in mind that before resuming practice in the beginning of November, he had only rested for five days and had said at the time that he thought he would be able to play normally again by the time of the CBA League game began towards the end of November.

179. Thus, although, the Arbitrator finds it to be established that the sprain was not very serious and was most probably something akin to a so-called “grade 1” sprain, he considers the evidence insufficient to establish the Player was faking or exaggerating pain when decided to walk on crutches for a few days after rolling his ankle and when saying he was suffering from pain when practising on 31 October/1 November and needed to rest again after that.

180. The Arbitrator also finds the evidence is insufficient that the Player was faking sickness on the couple of occasions he decided not to practice for that reason – bearing in mind that one can feel unwell and without energy for a number of benign reasons with more or less obvious symptoms – or that he was regularly and seriously undisciplined with regard to timeliness in getting to the bus or to a practice session. Here again, there is no contemporary evidence of what happened or of complaints and it is today basically the word of one party against the other.

181. Furthermore, the Arbitrator finds that – whether or not, contractually speaking, applying fines as punishment for perceived breaches of discipline or unacceptable attitudes was a required preliminary measure of progressive sanction before termination, or merely a contractual option for the Club – in circumstances such as those invoked by the Club in this case, it could and should have begun by formally reprimanding and fining the Player because faking an injury or more generally repeated refusals to practice without good reason is a serious disciplinary breach and because sanctions of such type (formal reprimands and fines) would have helped the Player himself take stock of how strongly the Club was feeling and incited him to either modify his behaviour or

communicate more effectively.

182. In this case, the same applies to notices of termination.

183. Beyond complaints (sometimes quite virulent) being made orally and in the majority being communicated via three intermediaries in succession (Messrs. Wei Liu, Yam and the Agent), there is no evidence that any formal reprimands regarding his attitudes were ever made to the Player by the Club in a manner comprehensible and striking for him or that any written notice – including some explanation of the reasons and a reasonable deadline within which to comply – was ever provided to the Player (or his Agent). Neither is there any clear evidence regarding what precisely the Player was told by the intermediaries or could understand from their summaries of the situation.

184. Here again, whether or not Contract n° 2 explicitly required such formal reprimands and notices, they certainly would have helped the Player understand the situation and evaluate his position – and in addition, it is a requirement of good faith and general principle that, except in certain exceptional situations, the termination of a contract should be preceded by at least one formal written notice providing clear reasons and a deadline within which to remedy the alleged breach.

185. It is uncontested in this case, that a formal written notice of such nature was not given by the Club and communicated to the Player before the termination of his contract.

186. Only oral complaints were made to the intermediaries and the evidence indicates the Player was only directly warned a few times orally and via an interpreter during the few days preceding the termination, before being asked to leave the team and country within less than 24 hours with a ticket purchased by the Club for that purpose and without having had the opportunity to properly communicate with his Agent.

187. In addition, based on the evidence adduced, including by the Club, the Arbitrator finds that within the chain of intermediaries which served as the Player's and the Club's mutual channel of communication, Mr. Wei Liu played an ambiguous role and no doubt

had a form of conflict of interest that contributed to the breakdown of the relationship.

188. In that relation, the Arbitrator finds that Mr. Wei Liu cannot have been and did not act as a *de facto* agent of the Player in China since according to the Club's own submissions, he was engaged by it to help identify a suitable player and according to the declarations of the Club's highest officials, as well as evidence of Mr. Wei Liu's own behaviour, he not only took instructions from the Club and prepared the initial drafts of contracts based on its requirements (that were then submitted to the Player's Agent for comment), but also took some very surprising positions without there being any trace of evidence that he was entitled to or had the authority to do so, e.g. when stating to the General Manager that "*if he* [the Player] *still refused to practice that we could terminate the contract*" or agreeing with the General Manager on 7 November "*that the Club had no choice*" but to terminate the Player's contract. Furthermore, the Arbitrator notes that according to the Club's General Manager, it was Mr. Wei Liu that informed him before the contract negotiations began that allegedly "… *Mr. Caracter had a reputation for poor discipline earlier in his career*" – which again denotes that Mr. Wei Liu had a conflict of interest – and that according to Mr. Wei Liu's own declarations, he was not even a qualified/official Chinese agent and was using the name of an acquaintance that undoubtedly was entirely unknown to the Player or the Agent.

189. In the Arbitrator's view, the evidence thus establishes that, at the very least, Mr. Wei Liu had a serious conflict of interest – trying to represent both the interests of the Club and those of the Player – which is not acceptable for an agent and which in this case, participated in causing the Club to decide to terminate the Player's contract when it did.

190. For the above reasons, the Arbitrator finds that the grounds for termination the Club is invoking have not been established, and that the procedure it followed and lines of communication it used to complain to the Player and finally terminate the Contract were not appropriate, fair or conducive to avoiding termination as the *ultima ratio*.

191. At the same time, the Arbitrator finds that the evidence demonstrates that the Club

really believed the Player was faking or grossly exaggerating an ankle injury – i.e. that it did not terminate for any other dissimulated reason – and that various of the Player's attitudes were in part responsible for leading the Club to that impression, although it jumped to conclusions and acted too hastily, perhaps due to pre-conceived ideas about the Player it developed based on accounts of the past in the media.

192. In particular, the fact that the Player initially refused to go for a medical examination and then requested to be wheeled out of the hospital on a wheelchair, combined with the fact that the hospital found no bone injury and the fact that the Club's doctor had found no swelling and believed it was a benign ankle sprain, obviously had a big impact on making the Club very suspicious and even angry early on.

193. The fact that the Player apparently offered little explanation for his behaviour when refusing to practice and did not try to communicate more often with the American coaches for that purpose rather than relying on interpreters – there being no evidence or allegations that he did seek the coaches' support – no doubt contributed to his gradual isolation and enhanced the Club's impression that the Player was being deceitful.

194. The fact that the Player was contractually entitled to seek a second medical opinion but never even suggested doing so, also creates some responsibility on his side, since it is a mechanism logically designed to allow him to evidence at the time of the facts the reality of his assertions but also to alleviate the Club's difficulty in proving a negative fact, i.e. that he reasonably could not be considered to be injured or at least to be suffering so much pain. That said, there is no evidence on file that the Club suggested or prompted him to seek an independent medical opinion, which it could have done in both parties' interest, and in addition the line in article 6 of Contract n° 1 which expressly allowed the Player to seek a medical opinion to prove an injury or illness was eliminated by the Club in Contract n° 2 (the removed line stipulated the following in favour of the Player: "*Notwithstanding, a visit to a licensed doctor will be sufficient to prove the injury or illness is not being faked*").

195. Furthermore, there is no evidence that the Player contested the termination when it was communicated to him or showed any resistance to the Club's request that he leave the team and country immediately.

196. In the circumstances, that absence of reaction is not sufficient in itself to deem that the Player implicitly accepted the termination, and of course he was relatively isolated in China and may have felt a lot of contempt from the Club by then (as he contends) meaning that he may have lacked the resourcefulness or the moral strength to react. Nonetheless, in practice, the lack of reaction and the lack of resistance to the Club's request that he depart immediately prevented any possibility of provoking a dialogue that might have led to a different outcome.

197. For all above reasons, the Arbitrator finds that the evidence establishes a joint responsibility for a breakdown in communications that prevented the parties from communicating between 26 October and 7 November in a constructive and useful manner about the situation, i.e. in such fashion that the Club might have been reassured as to the Player's integrity and he would have felt more trusted and supported by the Club, meaning that the relationship would not have deteriorated to the point of causing a unilateral termination.

198. In other words, in the chain of causality, the Arbitrator finds that the parties' poor communication for which they share responsibility is the main cause that led to the breakdown of the relationship and unilateral termination of the Player's contract by the Club, even if the Player's alleged breaches of contract (faking and other negative attitudes and disciplinary breaches) are not deemed to be established and the formal conditions were not met for the Club to unilaterally terminate the Player's contract when it did.

199. For all the above reasons, the Arbitrator finds *ex aequo et bono* that the Club and the Player must share the financial consequences of the termination and the relationship discontinuing, and therefore the Player should be entitled to only 50% of the

outstanding salaries owed under the terms of Contract n° 2 minus the sum he has been able to earn in Israel, i.e. a net amount of USD 180,000 (USD 500,000/2 – USD 70,000 = 180,000).

200. Finally, regarding the Agent's claim, the Arbitrator finds that the Agent also bears some responsibility for the breakdown of the relationship between the Club and the Player, although he performed his main duty of intermediation in conformity with his contract (formed by a combination of Contract n° 1 and of the *Agency Agreement Fee*) and it does not make the fee payment contingent on the continuation or proper performance by the Club and Player of their contractual obligations.

201. Indeed, the Arbitrator finds that in the circumstances of this case, where there were important language/cultural barriers to address and the Club quickly began showing strong signs of nervousness and mistrust, the Agent delegated too much authority to Mr. Yam and should have intervened more firmly and communicated more directly himself to help clarify the situation with the Player and provide explanations to the Club.

202. Consequently, *ex aequo et bono* the Arbitrator finds it fair to reduce the basic agency fee owed by the Club from USD 50,000 to USD 35,000.

203. Also, because the early termination of the Player's contract in effect allowed the Agent to negotiate another contract for the Player for the same season (2012/2013) with an Israeli club, the Arbitrator finds it fair in the circumstances of this case to limit the Agent's compensation to the difference between the foregoing amount (USD 35,000) and the agency fee Mr. Happy Walters was entitled to receive (USD 3,500) under clause 11.1 of the Israeli contract.

204. Thus, *ex aequo et bono*, the Agent's compensation shall be fixed in a total amount of USD 31,500.

205. In that relation – and aside from the fact that neither Mr. Yam nor Mr. Wei Liu have attempted to intervene in these proceedings to claim any part of the agency fee and the

latter has even testified that he believes no fee is owed by the Club – the Arbitrator finds that nothing in the contract or any other consideration leads to the conclusion that the Agent is not entitled to claim the agency fee alone from the Club, irrespective of how it may or may not be shared internally between him and the representatives of *Elite Legend Sports* (the other party to the agreement formed by Contract n°1 and the *Agency Fee Agreement* combined). In other words, the Arbitrator finds that the Agent has the standing to sue the Club for the agency fee stipulated in their contract.

206. Although the Contracts n° 1 and n° 2 provide that the payments due to the Player shall be net of all taxes, the Agency Fee agreement does not provide for a similar arrangement. Thus, the Agent's request that the amount awarded to him be "net" shall be dismissed for lack of proof.

207. Given the manner in which the amounts due to the Claimants have been calculated and the circumstances of this case, in which the parties are found by the Arbitrator to have a shared responsibility in the breakdown of their contractual relationship, no interest shall be awarded on the compensation allowed.

7. Costs

208. 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.

209. On 20 September 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 13,953.00.

210. Considering the Claimants only prevailed in part of their claims and given that the Arbitrator found that the Club and Player have a shared responsibility for the breakdown of their relationship leading to the termination of Contract n°2, the Arbitrator finds it fair that the costs of the arbitration be borne in equal parts by the parties and that they each bear their own legal fees and expenses, with the exception of the handling fee discussed below. In that relation, the Arbitrator finds that none of the parties acted in an abusive or unfair manner in these proceedings and that therefore there is no reason to modify the apportionment of fees and/or costs on the basis of the parties' procedural conduct.

211. Given that the Claimants paid advances on costs of EUR 7,000 as well as a non-reimbursable handling fee of EUR 4,000, while the Club paid EUR 7,000 in advances on costs, the Arbitrator decides that, in application of article 17.3 of the BAT Rules, the Club shall pay EUR 2,000 to the Claimants, being 50% of the non-reimbursable fee paid by the latter.

8. AWARD

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

1. **Guangdong Winnerway Basketball Club Company Ltd.'s challenge to the Arbitrator's jurisdiction to decide the claim submitted by Mr. Happy Walters is dismissed.**

2. **Guangdong Winnerway Basketball Club Company Ltd. shall pay Mr. Derrick Caracter, as compensation for unpaid salaries, an amount of USD 180,000 net of all taxes.**

3. **Guangdong Winnerway Basketball Club Company Ltd. shall pay Mr. Happy Walters, as compensation for unpaid agency fees, an amount of USD 31,500.**

4. **The parties shall bear the arbitration costs in equal shares.**

5. **Each party shall bear its own legal fees and expenses, with the exception of the non-reimbursable handling fee disbursed by the Claimants, for which Guangdong Winnerway Basketball Club Company Ltd. shall pay jointly the Claimants, as a contribution, an amount of EUR 2,000.**

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

Geneva, seat of the arbitration, 26 September 2013.

Quentin Byrne-Sutton
(Arbitrator)