ARBITRAL AWARD

(BAT 1363/19)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Elijah Holman

- Claimant -

represented by Mr. Benjamin Pensack

vs.

Tianjin Ronggang Basketball Club
Ronggang Basketball Club, 9 Fukang Road, Nankai District, Tianjin, China

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Elijah Holman (the “Player” or “Claimant”) is a professional basketball player of U.S. nationality.

1.2 The Respondent

2. Tianjin Ronggang Basketball Club (the “Club” or “Respondent”, and together with Claimant the “Parties”) is a professional basketball club located in Tianjin, China.

2. The Arbitrator

3. On 21 March 2019, Prof. Dr. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the Basketball Arbitral Tribunal in force as at 1 January 2017 (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. Claimant is a professional basketball player who played for Respondent in China during the 2017-18 basketball season. On 22 December 2017, during an official league game of the Chinese Basketball Association (“CBA”), the Player suffered an injury, which would later be diagnosed as a _____. In January 2018, the Player started rehabilitation of his injury in the United States. In May 2018, discussions began between the Club and the Player about re-hiring the Player for the 2018-19 season.

5. Upon Respondent's inquiry, on 4 June 2018, Claimant's representative, Mr. Alex Olin, forwarded a letter to Respondent signed by Claimant's athletic trainer, Mr. Michael Miller, an Associate Athletic Director of Sports Medicine in Detroit. In the accompanying message with which he forwarded the letter, Mr. Olin informed the Club as follows:

> *"I'd like to share Holman's current situation with you. He has been working very hard in rehabilitation and has not suffered any major _____, and there are no long-term medical problems associated _____."*

6. Mr. Miller's letter provided the following in regard of the Player's rehabilitation progress:

> *"A thorough medical examination was performed on Eli* [Holman] *and there was no significant _____. Eli continues to work diligently on his recovery and overall health and we anticipate a full recovery. He is currently ahead of schedule and will be 100% medically cleared in the near future. Eli will being ready to compete this coming season, and without question, will be able to compete at the same, if not higher, level as he did the season prior."*

7. After several weeks of negotiation, Respondent, on 17 July 2018, sent an offer to Claimant for the 2018-19 season. Claimant accepted the offer, and on 8 August 2018, the Player and the Club entered into a contract (the "Player Contract"), pursuant to which the Club engaged the Player as a professional basketball player for the 2018-19 season ("*from the date of the signature until the last official game of 2018-19 season CBA League is completed (including the play-off season)*", Clause 2.1.1. of the Player Contract).

8. The Player was to receive a base salary of USD 1,721,700.00 gross, payable in nine equal instalments of USD 191.300,00 each, starting on 30 September 2018 until 30 May 2019 (Clause 3 of the Player Contract). The salary payments were "*fully guaranteed*" during the contractual term (Clause 3.2 of the Player Contract).

9. Furthermore, the Parties agreed that the Player would have to undergo an initial medical examination upon his arrival in China. In this respect, the Player Contract set forth

detailed requirements for the timing and scope of the medical examination, including notification of its results (Clause 1.2 of the Player Contract), as well as the legal consequences of a failed medical examination (Clause 1.5 of the Player Contract).[1]

10. On 7 September 2018, the Player reported to the Club. He underwent a medical examination on the next day, 8 September 2018 (the "First Medical Examination"). The First Medical Examination consisted of a Magnetic Resonance Imaging ("MRI") examination of the Player's previously_____, which Claimant undertook at the radiology department of Tianjin First Central Hospital in Tianjin. The radiologist issued a signed Report of Medical Imaging (the "Radiology Report") on the same day, which contained (*inter alia*) the following observations:

> *"**FINDINGS:***
>
> _____.
>
> ***IMPRESSIONS:***
>
> _____"

11. On 9 September 2019, based on the Radiology Report, Respondent sent a "Declaration of Holman Physical Examination Result", informing the Player that he failed the medical examination (the "Notice of Failure"). In relevant part, the Club's Notice of Failure provided the following:

> *"According to the examination report, it shows that Holman has such sport injuries* _____
>
> *After discussion with full caution, the Club affirms that Holman cannot fulfill the duty of all games and practices of 2018-2019 CBA season, therefore, the examination result is failed.* […]*, the Player didn't pass*

[1] The relevant provisions in the Player Contract are quoted below on the Findings section at ¶ 103.

the physical and medical examination conducted by the club. So the club hereby declares that the contract is null and void."

12. Claimant's representatives immediately rejected the Club's Notice of Failure. They informed the Club by e-mail that they "*officially reject the conclusion in* [the Notice of Failure] *and look forward to obtaining a new medical examination as soon as possible in accordance with the contract*", cf. Clause 1.2.1 of the Player Contract.

13. The Claimant's representatives in China set up an appointment for the Player to undergo a medical examination at the United Family Healthcare Hospital in Tianjin ("UFH"). It is undisputed between the Parties that UFH is technically considered to be a "Level 2" hospital, whereas Clause 1.2.1 of the Player Contract requires the medical examination to take place at "*any level 3 Category A hospital*".[2] In order to ensure that UFH was an acceptable venue for the Respondent to conduct the second medical examination, the Player's China-based representative, Mr. Alex Olin, approached a representative of the Club, Mr. Frank Ren, via the WeChat messenger service. The following conversation took place between Mr. Olin and Mr. Ren:

"Alex Olin:	*Hey Frank, just got in to Tianjin.*
Alex Olin:	*Scheduled a 1pm appointment at* [United Family Healthcare, in Chinese letters]
Alex Olin:	*Can you please confirm that will be ok?*
Frank Ren:	[United Family Healthcare, in Chinese letters] *is okay.*
Alex Olin:	*Perfect*
Frank Ren:	*I talked with Mr Xu. And one thing we need to make in clear. U guys need to pay for this examination. Not the club.*

[2] Emphasis added.

Frank Ren: We will arrange the car for you guys."

14. The Player, Mr. Olin (his representative) and Mr. Ren (the Club's representative) arrived at UFH at 1 pm on 11 September 2018. UFH informed the Player that he had an appointment for MRI at Tianjin Orthopedic Hospital. It is undisputed that Tianjin Orthopedic Hospital is a "Level 3 Category A" hospital. After the MRI had been conducted at Tianjin Orthopedic Hospital, the Player, Mr. Olin and Mr. Ren returned to UFH, and the Player was physically examined by Dr. Li, an orthopedic surgeon who has been working at UFH and also at Tianjin First Central Hospital. It is undisputed that Tianjin First Central Hospital is also a "Level 3 Category A" hospital. The examinations which took place on 11 September 2018 at UFH and Tianjin Orthopedic Hospital are hereinafter referred to as the "Second Medical Examination".

15. Dr. Li issued his signed report on 11 September 2018 (the "Dr. Li Report"). The Dr. Li Report provided the following:

> *"Diagnosis / Assessment / Chief Complaint:*
>
> _____
>
> *Physican /Clinician Comment:*
>
> *according the pt's* [patient's] *complain and physical examination, we think the main problem is* _____ *however, we think the pt can return to the game now with the proper support and good guidance of physical therapist.* [sic]*"*

16. Still on the same day, Claimant's counsel sent a letter to the Club, attaching the Dr. Li Report. Claimant's counsel reported that the Second Medical Examination "*was passed by Eli*" and noted that the results, pursuant to the Player Contract, were "*binding*" on the Parties and that the Player Contract "*is now fully binding and is in full force and effect*." The letter concludes stating that "*Eli looks forward to beginning practice immediately now that the medical exam has been passed and the doctor said he can begin play now*."

17. On 12 September 2018, Claimant's representatives received a letter from Respondent, rejecting Claimant's assumption that the Second Medical Examination was passed by the Player (hereinafter referred to as the "Second Notice of Failure"). In particular, the Club wrote as follows:

> *"Tianjin United Family Hospital is not a hospital with level 3 category. Therefore, any medical written opinion from that hospital is not legally accepted by the club.* […]
>
> *Tianjin United Family Hospital is not the hospital which is specialized in sports athlete injury. And there is even no MRI machine to take the picture for the athlete. So club doubts that second opinion from this doctor of Tianjin United Family Hospital is convincing enough to prevail over the first medical opinion.* […] *In brief, the club affirms that Holman cannot fulfill the duty of all the games and practices of 2018-19 CBA season which is 46 games in the regular season in around 5 months. The club still considers Eli Holman didn't pass the physical examination and the club hereby declares that the contract is null and void."*

18. In the following days, Claimant's representatives offered Respondent to change the fully-guaranteed Player Contract into a non-guaranteed contract, allowing the Club to release the Player in case of an injury or for other reasons. Respondent did not accept this offer.

19. On 15 September 2018, the Player left China, on a ticket bought for him by the Club.

20. On 17 September 2018, Dr. Li provided a further letter (the "Follow-Up Letter"), which provided as follows:

> *"My name is Dr. Li Yijin and I am an orthopedic doctor. I work at Tianjin First Central Hospital which is a Level 3 Category A hospital.*
>
> *I saw patient Mr. Eli Holman on September 11, 2018 and evaluated the condition of _____. I examined the MRI taken the same day at Tianjin Orthopedic Hospital, examined Mr. Holman's _____, and discussed with Mr. Holman about his current training. I concluded that despite Mr. Holman _____, Mr. Holman's _____ is fit and healthy enough for him to play professional basketball now with the support of a _____ and a physical therapist.*

Sincerely,

Dr. Li Yijin"

21. It is undisputed between the Parties that the Follow-Up Letter was drafted by Mr. Alex Olin, the Player's agent in China. The following WeChat conversation took place between Mr. Olin and Dr. Li on the following day (18 September 2018):

"Dr. Li:	*I hope this won't bring me any trouble.*
Alex Olin:	*Thank you very much!*
	[…]
Dr. Li:	*I think the two certificates* [the Dr. Li Report and the Dr. Li Letter] *are not quite the same.*
Dr. Li:	*I hope it won't be misunderstood because of that.*
Alex Olin:	*I know that, and I will make it clear to them in advance."*

22. On 6 December 2018, the Player signed an employment contract with the Chinese second league club Anhui Wenyi Basketball Club (the "Anhui Wenyi Contract"). Under this agreement, the Player was hired from 20 April 2019 until the day after the last official game of the 2019 NBL season (prospectively in August 2019). He was to earn a total base salary of EUR 300,000.00 net.

23. On 27 December 2018, the Player signed an employment contract with the Puerto Rican club Capitanes de Arecibo (the "Arecibo Contract", together with the Anhui Wenyi Contract the "Additional Contracts"). The Player played for the club for one month, from 12 January 2019 until 11 February 2019 (3 games). He earned USD 25,000.00 under the Arecibo Contract.

24. On 17 April 2019, after the present proceedings had been commenced by the Player, the Player's agent in China, Mr. Olin, was contacted via WeChat by Dr. Li. The following conversation took place:

"Dr. Li:	*As for the matter of the player, is there any follow-up problem?* […]
Alex Olin:	*Up until this point, there haven't been*
Alex Olin:	*Did they contact you?*
Dr. Li:	*I heard this is going to litigation?*
Dr. Li:	*Did the player participate in competition?*
Alex Olin:	*Tianjin didn't use him this season.*
Alex Olin:	*He played in competition in other places.*
Dr. Li:	*He can play?*
Alex Olin:	*Yes, there is no problem.*
Dr. Li:	*Then it is fine.*
Dr. Li:	*My suggestion was right, so there's no problem.*
Alex Olin:	*Your suggestion is correct.*
Dr. Li:	*OK, then it's fine."*

3.2 The Proceedings before the BAT

25. On 19 March 2019, the BAT received a Request for Arbitration (dated 6 February 2019) filed by Claimant together with several exhibits in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 6,973.53 was received in the BAT bank account on 19 March 2019.

26. On 25 March 2019, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in

accordance with Article 11.2 of the BAT Rules by no later than 15 April 2019 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

> *"Claimant (Mr. Elijah Holman)* *EUR 6,526.47* *(EUR 6,000 AoC* [sic] *+ EUR 26.47 underpayment NRF)*
> *Respondent (Tianjin Ronggang Basketball Club)* *EUR 6,500.00"*

27. On 8 April 2019, upon request by the Respondent, the Arbitrator extended the time limit for the filing of the Answer until 5 May 2019.

28. On 22 April 2019, Respondent filed an expedited discovery request (the "Respondent's 1st Discovery Request"), asking Claimant to answer certain medical questions and to issue medical authorizations and authorizations to discuss the Claimant's medical records with his doctors. Upon the Arbitrator's invitation, Claimant filed comments dated 24 April 2019 on Respondent's 1st Discovery Request on 25 April 2019. Respondent submitted additional comments on 27 April 2019.

29. On 29 April 2019, the Arbitrator informed the Parties that a decision on Respondent's 1st Discovery Request would be taken after receipt of Respondent's Answer, and that Claimant would also be granted the opportunity to file his own discovery requests. She further advised the Parties that decisions on requests for discovery would be guided by the principles contained in the IBA Rules on the Taking of Evidence.

30. On 5 May 2019, Respondent filed its Answer, including a counterclaim (the "Counterclaim"). On 7 May 2019, it updated Respondent's 1st Discovery Request by submission dated "*May 9, 2019*". On 8 May 2019, the Arbitrator issued a procedural timetable for the discovery phase. In accordance with this procedural timetable, Claimant filed comments dated 14 May 2019 on the Respondent's (updated) 1st Discovery Request on 15 May 2019, together with his own request for the production of documents (the "Claimant's Discovery Request"). On 21 May 2019, Respondent filed comments on

Claimant's Discovery Request, together with further comments regarding its own (updated) 1st Discovery Request. On 22 May 2019, Claimant objected to Respondent's latest comments on Respondent's 1st Discovery Request, arguing that these comments were not foreseen by the procedural timetable and thus unsolicited. Claimant requested that these (allegedly) unsolicited comments be stricken from the record.

31. On 27 May 2019, the Arbitrator issued a procedural order on the Parties' discovery requests (the "First Discovery Order"), rejecting the Respondent's 1st Discovery Request in its entirety, and granting Claimant's Discovery Request as follows:

> *"Respondent is ordered to produce the following documents to Claimant by no later than 10 June 2019:*
> *a. The September 8, 2018 MRI images taken at Tianjin Hospital;*
> *b. The September 11, 2018 MRI images taken at Tianjin Hospital."*

32. On 7 June 2019, Respondent filed a new discovery request, requesting to take the deposition of Dr. Li, the doctor who performed Claimant's medical examination on 11 September 2018 (above at ¶ 14) and who issued the Dr. Li Report and the Follow-Up Letter (above at ¶¶ 15, 20), or, in the alternative, authorization signed by Claimant permitting Respondent's counsel to discuss with Dr. Li Claimant's medical examination of even date (the "Respondent's 2nd Discovery Request"). By e-mail dated 10 June 2019 and submission dated 11 June 2019 but received by BAT on 12 June 2019 only, Claimant commented on Respondent's 2nd Discovery Request and requested to deny the requests

33. On 17 June 2019, the Arbitrator issued a decision on Respondent's 2nd Discovery Request (the "Second Discovery Order"), ordering the following:

> *"Claimant is ordered to authorize Dr. Li Yijin to discuss with Respondent's duly authorized counsel the Claimant's medical examination of 11 September 2018, including the related medical reports dated 11 September 2018 and 17 September 2018. Claimant shall submit a written authorization signed by him by no later than 25 June 2019."*

34. In the Second Discovery Order, the Arbitrator also invited Claimant to submit a reply to Respondent's Answer by no later than 1 July 2019 (the "Reply"). Respondent was provided with a time limit for filing comments to the Reply by no later than 12 August 2019 (the "Rejoinder").

35. On 23 June 2019, Claimant filed a motion dated 22 June 2019 to compel discovery in order to enforce the First Discovery Order, based on Respondent's alleged non-compliance with said order ("Claimant's Discovery Enforcement Motion").

36. On 25 June 2019, Claimant, in response to the Second Discovery Order, issued a written document authorizing Respondent's counsel to discuss the Claimant's medical examination of 11 September 2018 and related reports with Dr. Li (the "Medical Authorization"). On 27 June 2019, Respondent submitted comments to Claimant's Discovery Enforcement Motion. Respondent also filed its own request to compel discovery and to impose sanctions based on the alleged non-compliance of the Medical Authorization with the Second Discovery Order ("Respondent's Discovery Enforcement Motion").

37. On 1 July 2019, the Arbitrator issued a procedural order on the Parties' respective Discovery Enforcement Motions (the "3rd Discovery Order"). Respondent was ordered to submit the MRI images addressed in the 1st Discovery Order in electronic format by no later than 3 July 2019, and to provide BAT with a duplicate of the electronic data by CD or USB stick by no later than 10 July 2019 so that BAT would be in a position to ensure that the data is accessible and readable. Claimant was ordered to provide to Respondent a Medical Authorization without certain limitations that were contained in the first version of such document.

38. Still on the same day, Respondent provided the requested MRI images to Claimant and BAT by e-mail. A USB stick containing the same documents reached the BAT office

shortly thereafter. BAT found that the information on the USB stick was readable and forwarded the USB stick to Claimant.

39. Also on 1 July 2019, Claimant submitted his Reply, together with several exhibits. A slightly corrected version of the Reply was filed with BAT on 1 and 3 July 2019.

40. On 5 July 2019, Claimant – in response to the 3rd Discovery Order – issued a revised Medical Authorization for Respondent's counsel to talk to Dr. Li about Claimant's medical examination and related reports.

41. On 11 July 2019, BAT issued a procedural order, requesting the Respondent to pay a non-reimbursable handling fee of EUR 1,500.00 for the Counterclaim by no later than 22 July 2019. Respondent was also reminded of the opportunity to file the Rejoinder by no later than 12 August 2019.

42. On 12 August 2019, Respondent filed its Rejoinder, together with several exhibits.

43. On 3 September 2019, the Arbitrator informed the Parties that she considered an in-person hearing necessary to obtain oral testimony of several witnesses offered by the Parties. The Arbitrator made specific suggestions with respect to such hearing and invited the Parties to comment thereon by no later than 10 September 2019. Upon Claimant's further inquiries, the Arbitrator supplemented her hearing proposals on 5 September 2019.

44. Upon receipt of the Parties' respective comments, the Arbitrator issued a Procedural Order on 17 September 2019, informing them that she intends – in reliance on Article 3.1 of the BAT Rules and Article 4.10, 8.5 of the IBA Rules – to obtain the oral testimony of Dr. Li, despite that he was not called for examination by any of the Parties. The Arbitrator requested Claimant to make Dr. Li available for the oral hearing. Furthermore, the Arbitrator requested an additional advance on costs in the amount of EUR 7,000.00, to

be paid by both Parties in equal shares by no later than 30 September 2019. The Parties commented on the Arbitrator's instructions on 24 and 25 September 2019.

45. On 27 September 2019, in light of Claimant's explanation that he was unable to reach Dr. Li, the Arbitrator requested Respondent to use its best efforts to make Dr. Li available for the oral hearing. On 15 October 2019, Respondent informed the Arbitrator about Dr. Li's reluctance to testify and advised BAT as follows:

> *"Dr. Li prefers to speak only to the Arbitrator. He even suggested that perhaps the Arbitrator could travel, if not to Tianjin, then to Beijing, to meet with him. When it was suggested that this option is likely not viable, Dr. Li (also) suggested that his fall-back preference would be to:*
>
> *1. Answer a set of written questions authored and propounded by the Arbitrator. Such questions would be answered by Dr. Li "under oath". As to this option, the Respondent is willing to waive all cross examination rights, provided that the Claimant does the same.* […]
>
> *2. If not option 1, then Respondent suggests that the best ice-breaker here would at least be to have the Arbitrator contact Dr. Li so to persuade him to give an hour or two of his time, more or less, to testifying via WeChat (which has audio and video capabilities). Respondent's sense, based on what is known, is that, if option 2, Dr. Li would need a push by the Arbitrator, who is a non-partisan."*

46. On 28 October 2019, BAT sent an e-mail to Dr. Li, requesting him to provide his oral testimony. Dr. Li declared that he would be principally willing to testify via videoconference. On 4 November 2019, the Arbitrator informed the Parties that the oral hearing would take place on 3 December 2019, via videoconference. The Arbitrator provided further logistical information with respect to the video conferencing system on 27 November 2019. Due to an emergency surgery of Dr. Li, the Arbitrator had to reschedule the hearing to 4 December 2019 (11:15 CET).

47. On 2 December 2019, the Arbitrator informed the Parties that Dr. Li would be examined in the presence only of the Arbitrator, the Parties' counsel and the BAT Secretariat. She

also scheduled the dates for the examination of the other witnesses on 4 and 5 December 2019.

48. On 4 and 5 December 2019, a hearing took place by video conference. The following participants were present at the hearing:

- Mr. Benjamin Pensack, counsel for Claimant
- Mr. William McCandless, counsel for Respondent
- Ms. Xinglai Wang, translator
- Ms. Annett Rombach, BAT Arbitrator
- Mr. David Menz, BAT Secretariat

49. The Arbitrator opened the hearing by discussing certain organizational and procedural issues, followed by the examination (first by the Arbitrator, followed by questions from the party representatives) of the following witnesses and parties:

- Dr. Yijin Li (4 December 2019)
- Mr. Alex Olin (4 December 2019)
- Mr. Elijah Holman (5 December 2019)

50. At the end of the video hearing, the Parties confirmed that they had had sufficient opportunity to examine the witnesses.

51. By procedural order dated 10 December 2019, the Arbitrator advised the Parties that she considered additional medical expertise necessary to resolve certain remaining factual questions relating to the Player's first medical examination. The Parties were invited to comment on the Arbitrator's proposed appointment of Dr. Jochen Hahne as an independent expert by no later than 20 December 2019. The Parties submitted their respective comments on 20 December 2019.

52. On 2 January 2020, the Arbitrator invited the Parties to comment on the respective other party's latest comments regarding Dr. Hahne's appointment by no later than 9 January 2020. The Parties provided their respective comments on 8 and 9 January 2020.

53. By procedural order of 11 February 2020, the Arbitrator informed the Parties of her decision to appoint Dr. Hahne as medical expert. The reasons for her decision included the following:

> *"1. On the basis of the Parties' briefings and Dr. Li's testimony, the Arbitrator has won the impression that there are certain discrepancies between the MRI images taken of Claimant's ____ on 8 September 2018 and 11 September 2018.*
>
> *2. The Arbitrator believes that independent medical expertise is necessary to resolve these discrepancies. In particular the Arbitrator believes that independent medical expertise is necessary to understand the medical content of the MRI images of 8 September 2018 and 11 September 2018.*
>
> *3. For the avoidance of any doubt, the Arbitrator notes that Dr. Hahne's expertise is by no means intended to be a "third medical examination" or a "third bite to the apple" on behalf of the Claimant. The limited purpose of Dr. Hahne's mandate will be to guide the Arbitrator, from a purely medical point of view, in reading and understanding the MRI images on which the Club based its decision to fail the Player on his medical examination.*
>
> *4. The Arbitrator notes that Respondent did not invoke any relevant concerns regarding Dr. Hahne's independence or impartiality. Respondent's concerns that Dr. Hahne does not have the proper qualifications to read the MRI images at issue here are not shared by the Arbitrator. According to his resume, Dr. Hahne has more than 10 years of experience as an orthopedic doctor and sports physician, which the Arbitrator considers is sufficient to fulfill his mandate in the present case. The Arbitrator further notes that she does not see any benefit in allowing the Parties to submit their own expert testimony at this stage of the proceedings. Both Parties have already submitted (divergent) medical expert evidence. The Arbitrator is of the view that an independent tribunal-appointed medical expert is the most efficient and expeditious way forward to answer the open questions relating to the MRI images.*
>
> *5. The Parties will be given the opportunity to examine Dr. Hahne during an in-person hearing. While the ground rules for such questioning will have to be discussed in more detail at the appropriate stage, the*

Arbitrator notes that she is open to Respondent's proposal to give the Parties the lead in questioning Dr. Hahne, by means of a (cross-) examination.

6. In terms of the scope of Dr. Hahne's mandate and the questions he shall address and his expert report, the Arbitrator, considering Respondent's objections to some broader questions proposed earlier, suggests to keep it relatively short, and to limit, essentially, his written report to a medical description of what he sees on the MRI pictures dated 8 September 2018 and 11 September 2018. Further questions could, in such scenario, be reserved for his oral questioning."

54. The Parties were invited to comment on item 6. of the procedural order by no later than 18 February 2020. Both parties submitted comments on 18 February 2020.

55. On 2 and 3 March 2020, the Arbitrator and Dr. Hahne executed the Mandate of the medical Expert (the "Expert's Mandate"). Upon a respective reference by Claimant, the Arbitrator corrected two minor typographical errors in the Expert's Mandate on 14 April 2020. Upon the Arbitrator's request, Claimant submitted copies of the 8 September 2018 and 11 September 2018 MRIs.

56. On 16 March 2020, Respondent raised a "point of order" in regards of paragraph 4 of the Expert's Mandate. The Arbitrator considered Respondent's point of order to be an unsolicited submission and struck this submission from the record on 17 March 2020.

57. On 20 March 2020, Dr. Hahne issued his Expert Report (the "Medical Expert Report"). The Medical Expert Report was submitted to the Parties on 1 April 2020. On 9 April 2020, a telephone conference took place between the Arbitrator and the Parties' representatives, regarding the logistics and ground rules for a hearing involving Dr. Hahne's examination on the Medical Expert Report.

58. On 22 April 2020, a hearing by videoconference took place. The following participants were present at the hearing:

- Mr. Benjamin Pensack, counsel for Claimant
- Mr. William McCandless, counsel for Respondent
- Dr. Jochen Hahne, medical expert
- Ms. Annett Rombach, BAT Arbitrator
- Mr. David Menz, BAT Secretariat

59. On 23 April 2020, Respondent submitted further written evidence to the case. Respondent also raised the following procedural objection with respect to the examination of Dr. Hahne:

> *"Yesterday, I believe Ms. Rombach asked me to interpose an objection in writing. I objected to the fact that, in preparation for the hearing (day before yesterday), Dr. Hahne was told certain facts which were not intended to be disclosed to him, i.e., that the Claimant had indeed _____ in December, 2017. This was not within Dr. Hahne's mandate; his mandate was limited to examining MRI images. When I asked him about "prior injury history" (a) the Respondent lost the element of surprise since Dr. Hahne had been "tipped," and already knew of Mr. Holman's December, 2017 injury, and (b) Dr. Hahne made a gratuitous remark in this area of questioning (i.e., he offered an answer/opinion about this prior injury history even though I hadn't asked a question at that time). As to item (b) I surely will be more forthcoming when the hearing is transcribed, but I am moving to "strike" this answer. Again, when we sort of transcription issues I shall try to be much more clear."*

60. On 8 May 2020, Respondent informed the BAT that it would proceed with the case without its counsel, and that counsel should be excluded from any further communication relating to this case. On 14 May 2020, BAT acknowledged receipt of Respondent's message and invited the Parties to submit final post hearing briefs ("PHBs") by no later than 5 June 2020. In their PHBs, the Parties were invited to focus on the following questions:

- Was the Respondent's decision to fail the Claimant on his first medical examination reasonable and comprehensible?
- Did the Claimant pass or fail the second medical examination by Dr. Li?

61. The Parties were also requested to pay an additional Advance on Costs in the amount of EUR 3,000.00 by no later than 25 May 2020.

62. On 5 June 2020, the Parties submitted their respective PHBs.

63. By Procedural Order of 17 June 2020, BAT acknowledged receipt of the additional Advance on Costs. The Arbitrator closed the proceedings and invited the Parties to submit their detailed cost accounts by no later than 24 June 2020. The Parties submitted their respective cost accounts on 23 June 2020.

4. The Positions of the Parties

64. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

4.1 Claimant's Position and Request for Relief

65. Claimant submits the following in substance:

4.1.1 On the Main Claim

- By failing the Claimant on two medical examinations that the Claimant should have passed, Respondent breached the Player Contract and is thus liable to the Claimant for damages as a result of these breaches. Respondent had no right to terminate the Player Contract on the basis of these medical examinations.

- The Claimant was healthy and fit to play when he arrived at the Club in early September 2018. He had fully recovered from the _____ he had suffered in December 2017. This was confirmed by his athletic trainer in the U.S. before he signed the Player Contract with the Club.
- The Club's Notice of Failure and termination of the Player Contract on the basis of the First Medical Examination did not rely on "*objective and comprehensible medical reasons*", in the sense of BAT's standing jurisprudence. The medical expert retained by BAT, Dr. Jochen Hahne, disagreed with the findings in the Radiology Report on which alone the Club's decision not to pass the Player relied. The Club's decision not to verify the (false) interpretation of the Radiology Report by means of a physical examination goes to its own detriment. On the basis of the Radiology Report alone, the Player should not have failed the First Medical Examination.
- The Player adhered to the formal requirements stipulated in the Player Contract (Clause 1.2.1) for his right to exercise a second medical examination. The Club had expressly agreed that the examination could take place at UFH, a "Level 2" hospital.
- The Player also passed the Second Medical Examination. The Dr. Li Report stated that the Player "*can return to the game now with the proper support and good guidance of physical therapist*". The Follow-Up Letter later confirmed the Dr. Li Report. In April 2019, Dr. Li observed towards Claimant's agent that his previous diagnosis must have been right. In light of these facts, Dr. Li's testimony during the oral hearing that his report was wrong is not credible and must be rejected.

4.1.2 On the Counterclaim

- The Counterclaim is a completely frivolous, baseless and retaliatory claim. Claimant did not wrongfully induce Respondent to sign the Player Contract by

concealing his medical condition. Respondent was well aware of Claimant's previous injury sustained while Claimant was playing for Respondent in December 2017. Claimant, in good faith, informed Respondent of Claimant's recovery during contract negotiations.

4.1.3 Request for Relief

66. Claimant, in his Request for Arbitration, requests the following relief in respect of his claims:

> *"1. For the BAT to hold that that Respondent must immediately pay $1,721,700 USD gross or $968,000 USD net to Claimant plus lawful interest less the appropriate offset for compensation received due to Claimant's alternative employment during the term of the employment contract between Claimant and Respondent.*
>
> *2. For the BAT to hold that Respondent shall reimburse Claimant and bear the cost of the 7,000 EUR handling fee to bring this arbitration.*
>
> *3. For the BAT to hold that Respondent shall bear all further costs of this arbitration.*
>
> *4. For the BAT to hold that Respondent shall pay Claimant's costs of attorney fees for this case.*
>
> *5. For such other and further relief that the BAT may deem appropriate."*

67. Claimant, in his Reply dated 1 July 2019, requests the following relief in respect of the Counterclaim:

> *"1. For the BAT to dismiss the Respondent's counterclaim with prejudice.*
>
> *2. For the BAT to hold that the Respondent shall reimburse the Claimant for and bear all of the arbitration costs related to the counterclaim.*

3. *For the BAT to hold that the Respondent shall reimburse the Claimant for and bear the cost of all attorney fees related to the counterclaim.*

4. *For such other and further relief that the BAT may deem appropriate."*

4.2 Respondent's Position and Request for Relief

68. Respondent submits the following in substance:

4.2.1 On the Main Claim

- After receiving the Radiology Report and the corresponding MRI images, the Club's General Manager, called for a meeting with, *inter alia*, the team doctor, the head coach, and the assistant coach. During the meeting, the team doctor expressed his concerns with respect to the results stated in the Radiology Report. The General Manager and the coaches agreed to consult with other athletic doctors regarding the situation of the Player's right knee.
- On the day after receipt of the Radiology Report, Dr. Han, a renowned athletic doctor and Chief Surgeon of the Orthopedic Department of Tianjin TEDA Hospital, reviewed the MRIs and noticed a _____, which – in his view – rendered the Player's_____. On the basis of the MRIs, a video of the playing scene in which the Player incurred the _____ in December 2017, and pictures of the _____, Dr. Han concluded that the Player's _____.
- Similarly, the doctor of the Chinese National Basketball Team, Dr. Du Wenliang (who had been approached by the Club's head coach), found the Player's ___ situation to be serious and stated that he could not guarantee the quality of the Player's training and game play.

- Based on these medical opinions, the General Manager scheduled a second meeting, where all of the Club's key members agreed that the Club could not take the risk to sign the Player as an import player because of his _____.
- The Club conducted the First Medical Examination *lege artis*. Upon a respective request by the Club for interpretation of the standard league contract, the CBA League replied that "*the club has the right to independently determine whether the player's medical examination is passed or not based on the results of relevant medical examinations, including but not limited to MRI results*" (the "CBA Letter"). Dr. Han, a very experienced doctor, was able to assess the Player's ____ solely upon MRI images and did not find it necessary to examine Dr. Holman in person.
- The Club had no duty to provide Dr. Han's and Dr. Du's opinions to the Player in addition to the Notice of Failure. It is the Club's internal business of how it reaches a conclusion regarding a player's passing or failing a medical examination, because the Club enjoys a margin of appreciation in this respect.
- Dr. Li's testimony on the second medical examination demonstrated that he shared the views of Dr. Han and Dr. Du, and that it was only due to the pressure received from Claimant's agent that he had declared the Second Medical Examination to be passed.

4.2.2 On the Counterclaim

- Nobody ever mentioned the Player's injury to the Club prior to the Player Contract being signed, which is a violation of FIBA Regulations. The Player and his camp had an obligation to inform the Club of his knee condition before signing the Player Contract. The failure to do so constitutes fraud, which means that the Player Contract is null and void.

4.2.3 Request for Relief

69. Respondent, in its Rejoinder, requests the following relief in respect of Claimant's claims:

"Claimant's BAT [sic] *must be dismissed."*

70. Respondent, in its Answer, requests the following relief in respect of the Counterclaim:

> *"The Respondent is, without prejudice, counter-claiming against the $13,208 on the basis that Claimant and his team of agents knew and/or had reason to know that the Claimant's ____ wasn't fully healed, nor would Claimant be ready to face the demanding CBA schedule."*

71. In its Answer, Respondent made the reservation that "[i]*f, after discovery, the counterclaim lacks merit, it will be withdrawn*."

72. After the exchange of discovery requests and discovery, Respondent confirmed – in the Rejoinder – that "*Respondent's counter-claim must be sustained*."

5. The Jurisdiction of the BAT

73. 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").

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

75. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.

76. The Player Contract (Clause 12) contains the following dispute resolution:

> *"**DISPUTE RESOLUTION***

> *12.1 Any dispute concerning this Contract, Party A* [Club] *and Party B* [Player] *agree to contact Party C* [Agent] *to settle the dispute before taking any action.*
>
> *12.2 Any dispute concerning the signing or performance of the contract may be submitted to 12.2.2 (option as follows):*
>
> *12.2.1 CBA for arbitration;*
>
> *12.2.2 Basketball Arbitral Tribunal of the International Basketball Federation ("BAT") for arbitration;*
>
> *12.3 In the event that there is a dispute regarding the differences of language versions, the English version and its interpretation shall prevail."*

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

78. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity or applicability of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). Clause 12.2 of the Player Contract is sufficiently clear that the Parties shall have the opportunity to submit a dispute to BAT. While Clause 12.2 also refers to arbitration before the CBA, the Arbitrator finds that there is no need to further analyze the meaning of such alternative right, because it does by no means compromise the Parties' right to seize BAT as their first option.

79. Clause 12.1 of the Player Contract requires the Club (Party A) and the Player (Party B) to contact the Player's agents, including Mr. Ben Pensack (Party C) before taking any action before BAT. This clause is to be interpreted as a pre-arbitration negotiation requirement. Under the jurisprudence of the Swiss Federal Tribunal, failure to fulfil such

requirement entails a temporal lack of jurisdiction and requires the arbitral tribunal to suspend the proceedings and invite the parties to satisfy the negotiation requirement.[3]

80. In the present case, the issue of the Player's failure of the medical examinations has been discussed between the Club and the Player's agent Mr. Pensack before the arbitration began (see above at ¶ 18). Furthermore, Respondent did not object to the timing of Claimant's arbitration filing and never raised Clause 12.1 of the Player Contract as a defense to the admissibility of Claimant's claims. Therefore, the Arbitrator finds that Clause 12.1 does not amount in a lack of jurisdiction *rationae temporis*.

81. The Arbitrator further notes that the Respondent actively participated in the arbitration and did not challenge the jurisdiction of BAT. The same is true for the Claimant in respect to the counterclaim. As a result, the Arbitrator finds that she has jurisdiction to decide the present case.

6. Other Procedural Issues

82. On 23 April 2020, Respondent raised a procedural objection with respect to the oral examination of Dr. Hahne, indicating that it may request certain answers of Dr. Hahne to be stricken from the record (see the quote of Respondent's objection above at para. 59). In relevant part, Respondent' counsel stated that he "*shall be more forthcoming*" and "*much more clear*" upon receiving a transcript of the hearing. Respondent, however, never followed up on its objection. In particular, it never made any request for relief in respect of the objections. The Arbitrator is not permitted to take any decision on a party's objection to a procedural aspect of the case without that such party clarifies what the legal consequence of the objection shall be.

[3] Judgement of the Swiss Federal Tribunal dated 16 March 2018, 4A_628/2015, paragraph 2.1.

83. The fact that a transcript of the hearing has never been prepared does not change this analysis. Respondent had no right to receive a transcript from BAT, and it has always been made clear by the Arbitrator that a transcript would only be made if one or both parties cover the respective costs of transcription. In the end, neither party was willing to pay for such costs. The Arbitrator notes that the hearing was audio-recorded and that the recording has been made available to the Respondent.

84. As a result of the Respondent's failure to follow up on its own objection, the objection remains without any consequence, and the Arbitrator does not have to take a formal decision thereon.

7. Applicable Law – *ex aequo et bono*

85. 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 reads as follows:

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

86. Under the heading "Law Applicable to the Merits", 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."*

87. In the Player Contract, the Parties have not provided for a choice of law. They have also not excluded the Arbitrator's mandate to decide this dispute *ex aequo et bono*. Hence,

the Arbitrator is called to decide the dispute *ex aequo et bono* on the basis of Article 15.1 of the BAT Rules.

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

8. Findings

89. The present dispute has been fueled with quite some complexity and emotion by both of the Parties. It centers on a situation which is not very common in basketball. A club releases one of its supposed star import players almost immediately upon his arrival, on the basis of an allegedly failed initial medical examination. Both Parties have extensively briefed not only on the relevant medical issues of this case, but also on side aspects, including the cultural and economic background of a Chinese club's hiring of a U.S. player. Neither the Player nor the Club have spared with mutual blaming.

90. The core questions to be resolved by the Arbitrator are plain compared to the complexity of the evidence taking process that was necessary to answer them. That is, whether the Club, before hiring the Player, had received sufficient and accurate information about the Player's medical state and whether the Club's decision to fail the Player on his medical examinations upon his arrival can be upheld under BAT's relevant legal standards.

91. The discussion below is organized as follows: In Part One (below at 8.1), the Arbitrator will discuss whether the execution of the Player Contract was afflicted with any defect, such as fraud, which rendered Player Contract null and void (below at 8.1.1). The Arbitrator will further discuss whether the Club's decision to fail the Player on his medical examination – with a view to terminate his employment with immediate effect or rendering it null and void – withstands scrutiny under BAT's legal standard of review for medical examinations (below at 8.1.2). Finally, the Arbitrator will analyze the quantum of any potential claim by the Player (below at 8.1.3). In Part Two (below at 8.2), the Arbitrator will address the merits of Respondent's Counterclaim.

8.1 Part One: The Player's Claims

92. The Player claims his contractually-stipulated annual salary for the 2018-19 season, subject to mitigation by the amounts subsequently earned under the Additional Contracts.

8.1.1 Initial Validity of the Player Contract

93. Respondent contests the initial validity of the Player Contract. It argues that the agreement is "*null and void*", because the Player hid his injury before the Player Contract was signed.

94. BAT has established detailed jurisprudence with respect to a basketball player's duty to make disclosures on his medical condition prior to signing a contract, and a club's corresponding duty to proactively obtain medical information on a player it intends to hire.[4] It is the essence of this jurisprudence that a disclosure – if any – must be made by the Player only with respect to injuries which are unknown to the club and which the club cannot find out through reasonable measures it must take in order to reduce the risk of an undetected pre-existing injury.[5]

95. In the present case, the Club was at all times well aware of the _____ the Player had sustained in December 2017. In fact, the injury happened during a game for the Respondent, where the Player had been under contract at the time. The injury was even diagnosed by the Club itself.

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[4] See, e.g., BAT 0008/08, BAT 0066/09; BAT 0190/11; BAT 0213/11; BAT 1365/19; BAT 1064/17; BAT 0841/16; BAT 0833/16.

[5] BAT 0213/11.

96. The core of the Club's accusation (though it has not been clearly expressed this way in Respondent's submissions) is not that the Player hid the injury itself, but that he deceived the Club about the progress of his recovery, and that his true rehabilitation status at the time the Player Contract was negotiated was different from what he and his agents had been representing. This allegation raises two questions: First, whether and to what extent a player has a duty to inform a club not only about an injury as such, but also about his rehabilitation progress and the pending status of his healing, and second, whether – in the present case – the Player breached any such duty.

97. With respect to the first question, the Arbitrator finds it apparent that whatever facts a player tells a club about his rehabilitation and recovery process must, to the best of the player's knowledge, be true. A player must not mislead a club by misrepresenting his recovery progress or ability to play after the injury. On the other hand, the Player's disclosure duties in this respect must not be overstretched, given that a club who hires a player with full knowledge of the date, type and scope of the player's previous injury is responsible to do its own due diligence with respect to the injury and recovery progress if it wants to exclude the risks which may be associated with signing a player with a prior injury. The club may, for example, ask the player specific questions before the execution of the contract, ask for (specific) medical records, or request a medical examination by a trusted doctor to obtain its own assessment of the status of the injury. In short, while everything the Player says must be true, it is the Club's responsibility to obtain the information it considers necessary for its own decision whether or not the Player is fit enough to be hired.

98. In the present case, the Arbitrator has no indication that any of the information the Player provided to the Club with respect to his rehabilitation between the injury (in December 2017) and the signing of the Player Contract (in August 2018) was wrong or inaccurate. This relates, in particular, to the information provided by the Player's representative, Mr. Olin, on 4 June 2018 and the corresponding letter of the Player's athletic trainer, Mr. Miller, dated 1 June 2018 (both Mr. Olin's message and the essential parts of Mr.

Miller's letter are quoted above at paras. 5, 6). Both of them confirmed in June 2018, on a factual level, that the Player did not have any significant _____ and that they did not expect any long-term problems with the _____. Mr. Miller added his opinion that the Player would be "*100% medically cleared in the near future*" and that in the upcoming season, the Player would*, "without question* […] *be able to compete at the same, if not higher, level as he did the season prior."* Mr. Miller's opinion does not reflect hard naturalistic facts, but expresses his (positive) subjective view about the Player's ability to play in the 2018-19 season. It is exactly this subjective nature of the trainer's opinion for what the Club, on its own account, took these statements. In its Answer, Respondent confirmed its contemporaneous understanding that Mr. Miller's "*puffing arises from his hope*"[6] that the Player would be fully fit to play, and that it does not "*begrudge Mr. Miller for providing Holman with his own cheering section*". In other words, the Club well understood that Mr. Miller's letter was intended to be a subjective opinion based on the Player's rehabilitation progress rather than a clinical assessment of the injury. The Club also knew that Mr. Miller is not a doctor and does not hold a medical degree. Remarkably, Respondent expressly admitted in this arbitration that it simply relied on Mr. Miller's opinion on the basis of trust, while "*no GM in Europe at the Euroleague level would ever trust such a letter.*"[7] Respondent also admitted that based on its decision to trust Mr. Miller's letter, it abstained from unfolding any efforts on its own to find out more about the Player's health status before the signing.

99. Respondent has failed to prove that the only factual statement in Mr. Miller's letter (no significant _____) was wrong.[8] While Respondent did not bother to find out more about the Player's medical status at the time, it sought to obtain the relevant information *post hoc*, through discovery in the present arbitration. The Arbitrator declined

[6] Emphasis in the original, see Answer, p. 4.

[7] Answer, p. 4.

[8] This point is also discussed in detail below at Section 8.1.2.3.

Respondent's discovery requests. In the absence of any proof that the Player, his representative or his athletic trainer said anything before the signing of the Player Contract that was inaccurate or unjustifiable, the Club's choice not to investigate into the Player's medical condition before the signing was made at its own risk. The Club knew about the nature and scope of the injury the Player had suffered in December 2017. If the Club was really concerned whether a player with an 8 month old _____ would be ready and able to compete at highest level with an intense schedule such as the CBA's, the Club should have done its own due diligence by requesting more information, by conducting its own medical examination even before the signing, or by hedging against the identified risks through modified terms of the Player Contract (e.g. by making the contract non-guaranteed). The Club chose none of these or other options, despite the fact that – as submitted in this arbitration – it found that the nature, scope and extent of the Player's rehabilitation was a mystery. In accordance with the legal principles outlined above, the Club's conscious decision to refrain from any measures that could have shed light on the "mystery" of the Player's rehabilitation goes to its detriment. It is not the purpose of document discovery in arbitration to provide the Club with information after the fact that it could have – and should have – requested at the time directly from the Player and his representatives.

100. As a result, because there is no proof that any of the (limited) factual information provided by the Player, his agents and his athletic trainer was wrong, and because the Club consciously undertook the risk not to investigate the Player's recovery progress on its own before the signing of the contract, the Arbitrator finds that the Player Contract was validly executed. There is no indication of any fraudulent action on the part of the Player before the execution of the Player Contract.

8.1.2 Validity of the Club's Contract Termination For Failing the Medical Examination

101. The next question is whether the Club validly terminated the Player Contract based on an allegedly failed medical examination. In its two Notices of Failure, the Club declared

the Player Contract to be "*null and void*" because it considered that the Player had not passed the medical examination.

102. In analyzing the Club's termination of the Player Contract on the basis of its view that the medical examination was failed, the Arbitrator will – in a first step – review the contractual requirements and standards for medical examinations in the Player Contract (below at 8.1.2.1). In a second step, she will outline the relevant legal standards for a BAT arbitrator's review of medical examinations developed in BAT's jurisprudence (below at 8.1.2.2). In a third step, she will assess whether on the basis of the evidence presented in this arbitration, the Club's decision to fail the Player on his medical examinations can be upheld (below at 8.1.2.3).

8.1.2.1 Contractual Regime Governing the Player's Medical Examination

103. The requirements for the Player's initial medical examination upon his arrival at the Club are set forth in the Player Contract as follows:

> *"Party B* [the Player] *must* […] *pass the medical exam at the medical institution designated by Party A* [the Club] *as well as the physical exam by Party A within 5 days after the check-in."*
>
> Clause 1.2

> *"Medical exam shall at least include health status check, injury check, medicine check.* [The Club] *shall notify the result of medical exam to* [the Player] *in writing within 2 business days after exam. If* [the Player] *has dispute regarding such result, it is entitled to request another medical exam to be made in any level 3 Category A hospital at the domicile of* [the Club]. [The Player] *shall be deemed as passed the medical exam if* [he] *passed the hospital's exam."*
>
> Clause 1.2.1

> "[The Club] *shall notify the result in writing to* [the Player] *or* [the Agent]*, if* [the Player] *fails to pass the physical exam of* [the Club]."
>
> Clause 1.2.2

> *"In the event that no medical exam or physical exam is arranged by* [the Club] *for* [the Player] *or* [the Club] *failed to notify* [the Player] *that* [he] *failed to pass the medical exam or physical exam, then* [the Club] *shall be deemed as waived its right to request any such exam and* [the Player] *shall be deemed as passed."*
>
> Clause 1.2.3
>
> *"If* [the Player] *fail to reach any of the 1.1, 1.2, 1.3 or 1.4 mentioned above, this Contract would be invalid."*
>
> Clause 1.5

104. The process, timeline and scope of the Player's medical exam is described here in a rather detailed manner. For example, Clause 1.2.1 of the Player Contract provides that the Player's medical examination shall "*at least*" include a health status check, injury check and medicine check. It also provides that the medical exam "*shall be deemed as passed*" if the Player passes the "*hospital's exam*". It is unclear, however, what the criteria are for the decision of whether the hospital's exam was successful or not. The Player Contract is silent in this respect.

8.1.2.2 BAT's Legal Requirements for Establishing the Success of a Medical Examination

105. In the absence of any express agreement between the Parties on the criteria for the success of a medical examination, the relevant terms and standards have to be determined by taking into account the interests of the Parties and the general practice and customs of the relevant business sector.[9] For the basketball industry, it is BAT's jurisprudence that a club must rely upon "objective and comprehensible medical reasons"

[9] BAT 0107/10.

in order not to engage the Player it contracted.[10] As put in one of the relevant BAT Awards:

> *"The employer may also provide for medical exams to find out more about the health of the new player. Such medical examination may lead the employer to the conclusion that the new player was not fit for playing with the team in which case the employer is entitled not to accept the player. However, the medical exam must result in objective and comprehensible medical reasons for the employer not to engage a new player. The fact that a new player may be subject to medical exams is not a free pass for the employer to withdraw from a signed contract."*[11]

106. In assessing whether "objective and comprehensible medical reasons" justify a club's decision to fail a player on his medical exam, the club enjoys a margin of appreciation. This margin of appreciation provides a club with a certain discretion in its evaluation of the impact of a medical problem on the Player's physical ability to play at the desired level.[12] However, in the present case, the Arbitrator finds that the Club's margin of appreciation is significantly narrower than in other cases – such as in BAT 0107/10 – because the Club knew well about the Player's previous injury when it re-hired him. The Club had additional medical information about the Player as a result of his employment with the Club in the 2017-18 season. In short, the Club had significantly more knowledge about the Player's medical history than a club hiring a new player would normally have.

107. As a result of the Club's superior knowledge, its margin of appreciation in assessing the Player's physical status is insofar limited as the Club may not base its decision to fail the Player on facts it already knew when it signed the Player, i.e. the injury as such. Rather,

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[10] FAT 0066/09; BAT 0107/10; BAT 346/12.

[11] FAT 0066/09, para. 79.

[12] BAT 0107/10.

it is for the Club to demonstrate that the medical examination revealed a medical condition which it was unaware of and could not have found out or expected, for example:

- A different injury entirely unconnected to the patellar dislocation;
- A detrimental healing process of the patellar dislocation which deviates from the usual rehabilitation a reasonable person could expect; or
- Medical or physical follow-up problems which have their cause in the patellar dislocation, and which the Club did not and could not find out before it signed the Player.

108. These limitations must be kept in mind when it comes to the analysis whether the Club had "reasonable and comprehensible reasons" to fail the Player on his medical examination.

8.1.2.3 Did the Player Fail the First Medical Examination?

109. Whether or not the Club's decision to fail the Player on his medical examination can be upheld under the legal standards outlined above is the core question in this arbitration.

110. Pursuant to the Notice of Failure delivered to the Player by the Club on 9 September 2018, the Club's decision is based solely on the Radiology Report. The Radiology Report was made by a radiologist on the basis of MRI images taken from the Player's _____ on 8 September 2018. It is undisputed between the Parties that the Club did not physically examine the Player, but fully relied on the evaluation of the MRI images by the radiologist and by two sports doctors in China. The Club's waiver of a physical examination of the Player constitutes a deviation from the Player Contract, which requires that the medical examination shall "*at least*" include a health status check, injury

check and medicine check.[13] Being confronted with the fact that the Player was not physically examined, Respondent, in this arbitration, explained the following:

> *"An answer to this question is easy. Holman would have had additional tests and doctors* [sic] *appointments during the coming days if he had "passed day one."*
>
> *Historically, the Club begins the examination process by asking players (especially those with an injury history) to take an MRI, or, as applicable and depending upon the player's injury history, a CT scan or an x-ray. If, for example, (as has happened with Mr. Xu and a Chinese roster member), a player's x-ray shows that a bone is not fully healed, nothing further is done because the "objective" evidence is that the player cannot play (and thus has failed his medical examination).[10] But if the x-ray shows the bone as having healed, then more tests (e.g., stress tests, EKG's) and doctor's visits happen in subsequent days.*
>
> *The same had been tentatively planned in the case of Holman. After the MRI, Holman would have taken additional tests, but he didn't get past the MRI stage.*
>
> ---
>
> *10 No amount of palpation by a doctor in a physical exam can change an x-ray's objective diagnosis."*

111. With this explanation, the Club has set forth the standard for reviewing its decision to fail the Player on the medical examination. The Arbitrator must assess whether – solely on the basis of the MRI images and without any further examinations – a reasonable person having hired the Player in full knowledge of his previous _____ would have failed him on the medical examination. Because the Club deliberately waived the possibility to physically examine the Player, any doubt the analysis of the MRI images may leave with respect to the Player's fitness to play must go to the Club's detriment, at least to the extent that a physical examination could be reasonably expected to remove such doubt.

[13] See above at ¶ 103.

112. The evidence adduced by the Club in support of its allegation that, based on the MRI images, two renowned sports doctors in China confirmed serious risks for the Player to play basketball in the CBA, is thin. While the Arbitrator has no indication to doubt these doctors' medical expertise and experience in the field, the basis of their respective assessments is unclear. Specifically, it is unclear whether Dr. Du und Dr. Han reviewed the MRI images themselves or only commented on the Radiology Report created by the radiologist. Dr. Du informed the Club's coach via WeChat that "*it's serious*" and that he "*cannot guarantee the quality of the training and matches*." It seems that he received the Radiology Report, but it is unclear whether he also saw the MRI images. The basis for his evaluation thus remains in the dark, which is important in particular in view of Dr. Hahne's assessment that the Radiology Report was partially incorrect (see paragraphs 119-121 below). As a result, it is also unclear whether Dr. Du reached this conclusion based on circumstances that fall within the Respondent's margin of appreciation as delineated in paragraph 107 above. The same accounts for Dr. Han's report, which concludes that "*there are* [sic] *some risk to Mr. Holman return to the CBA*." The report is silent on Dr. Han's background materials and fails to provide any explanation on why and how Dr. Han reached his conclusion. Respondent did not offer either Dr. Du or Dr. Han as a witness in this arbitration. Hence, the Arbitrator finds that the short written doctors' statements are not credible proof for the reasonableness of the Club's decision to fail the Player on his medical examination based on the Radiology Report.

113. Because the Arbitrator found that the medical evidence on record was insufficient for her to determine whether a reasonable person would have failed the Player on his examination on the basis of the images of the 8 September 2018 MRI Examination, she appointed Dr. Hahne as her medical expert. Dr. Hahne is the head physician of the German basketball club Bayern Munich, with more than 10 years of experience as an orthopedic doctor in professional sports. He is a partner in one of Germany's most reputable Clinic of Orthopedics and Sports Medicine in Munich. In light of his credentials, the Arbitrator disagrees with Respondent's objection that Dr. Hahne is not sufficiently

qualified to review the MRI images which constituted the sole basis for the Club's Notice of Failure.

114. Dr. Hahne was provided by BAT with the original MRI files relied upon in the Radiology Report, as well as the MRI images taken three days later as part of the Second Medical Examination conducted by Dr. Li.

115. In his Medical Expert Report, Dr. Hahne confirmed that the MRI images of 8 and 11 September show the same____and the same medical conditions. He thereby refuted Claimant's suspicion that the MRI images on which the Notice of Failure relied may have been a fake. Dr. Hahne further informed that the quality of the MRI images (which were the same that were available to the Club at the time) was "*very poor*", and that the MRI images of 8 September 2018 were "*a little lighter*" than the MRI images taken on 11 September 2018. During the oral hearing, Dr. Hahne explained that such differences are not uncommon, because MRIs taken on different days can show differences in contrast.

116. As to the substance of his Medical Expert Report, Dr. Hahne was asked, in a first question, to provide the Arbitrator with his own independent observations regarding the two sets of MRI images (i.e. the sets taken on 8 September and 11 September 2018, respectively). In particular, he was asked to point out medical irregularities which could be relevant for the ability of a basketball player to play basketball at professional level. Dr. Hahne observed the following (identical) conditions on both sets of MRI images:

- _____

117. Dr. Hahne's conclusion during his oral examination was that based on these observations, he *"would not exclude*" a professional basketball player from playing basketball. He confirmed that the _____ of professional basketball players on average showed more irregularities than _____ of non-athlete people. He also confirmed that a majority of experienced professional basketball players would show certain abnormalities

in their _____ on the basis of MRI examinations. He finally confirmed that the three conditions he identified (_____) are rather common among basketball players and would usually not exclude a basketball player from playing professional basketball, at least not if one where to look at the MRI images alone. Dr. Hahne emphasized that in cases where such (typical) irregularities become visible during an MRI examination, it is crucial to physically examine the player, and that such physical examination is "*even more important than the MRI*", in particular where the quality of the MRI images is low, as in the present case.

118. In a second question, Dr. Hahne was asked whether he found any indication for any of the medical conditions that the Radiology Report had identified on the 8 September 2018 MRI images (without that he received a copy of the Radiology Report, and without that he was made aware that these conditions had been used as a basis for the Club to fail the Player on his medical exam). These observations were the following:

    (1) _____

119. Based on his examination of the MRI sets, Dr. Hahne only found an indication for Finding 1. He explained that Finding 1 – essentially the condition of ____ – may become a problem for a basketball player's ability to play in case of a _____. Dr. Hahne, however, did not see a _____, which he considered an indication that the small defect did not create any problems. In this context, he again emphasized the poor quality of the MRI images, and the importance of a physical examination for a more accurate assessment.

120. Dr. Hahne did not find any indication for Findings 2, 3, and 4. Regarding Finding 2, he explained that technically, a _____ does not exist. Dr. Hahne explained that what is relevant is whether the _____. Based on the sets of MRI images he reviewed, Dr. Hahne excluded the possibility that the _____. He testified that the MRI images showed _____. Dr. Hahne did also not see the _____ described in the Radiology Report in

Finding 3. While Dr. Hahne confirmed that a _____ would exclude a Player from playing basketball, as it is one of the most serious injuries for a basketball player, he saw no indication for such an injury on the MRI images. Specifically, Dr. Hahne saw _____. He explained that a principally _____ may show some irregularities caused by _____, which may be typical for a specific player. However, in order to evaluate whether such an ____ – the latter of which potentially being relevant for a player's ability to play – a clinical examination of the ____ is "most important". He emphasized that it is not possible to make a conclusion of the Player's ability to play with an intact, but ____ only based on MRI images. With respect to Finding 4, Dr. Hahne testified that he did not observe _____, but only a small amount of _____, which he considered to be normal and not pathological.

121. In summary, Dr. Hahne's examination of the sets of MRI images did not reveal any ____ which would have *per se* excluded the Player from playing professional basketball. It further revealed that the Radiology Report is wrong with respect to 3 out of 4 findings. On the basis of Dr. Hahne's testimony, the Arbitrator is satisfied that the MRI images of 8 September 2018 did not provide an appropriate basis for the Club to fail the Player on his medical examination. Dr. Hahne's testimony was plausible and coherent and did not show any contradictions. Accordingly, the Arbitrator finds that based on "objective and comprehensible medical reasons", a reasonable person would not have failed the Player on his medical examination solely in reliance on the MRI images. A reasonable person would have, at least, arranged a physical examination of the Player, just as it is stipulated in the Player Contract.

122. For the avoidance of any doubt, the Arbitrator wishes to clarify that the Club may not exculpate itself with the argument that the Radiology Report reported wrong findings. It is the Club's responsibility to make sure that an MRI examination is carried out correctly, and that the MRI images are read by suitable medical experts who have experience in reading them correctly in the relevant context. The interpretation of MRI images by a radiologist of a hospital is not sufficient in this respect.

123. Similarly, the Club cannot exculpate itself with Reference to the CBA Letter, which provides that "*the club has the right to independently determine whether the player's medical examination is passed or not based on the results of relevant medical examinations, including but not limited to MRI results."* As a matter of principle, the CBA Letter, which was issued long after the fact shortly before the close of the present proceedings, cannot and does not trump the Parties' contractual agreement that required a physical examination. But more importantly, the CBA Letter does not even support the Club's argument that the MRI examination was a sufficient basis for the Club's avoidance of the Player Contract. The CBA Letter only states that the Club's decision may be based on the results of medical examinations "*including but not limited to MRI results*". As Dr. Hahne's testimony demonstrated, there may well be cases in which an MRI examination is sufficient to establish failure, e.g. in case of an _____. This is, however, not such a case. The CBA Letter does not state that an MRI examination alone always suffices for a club to decide that a player should not pass his medical examination.

124. As a result of the analysis above, the Club's decision to fail the Player on the First Medical Examination cannot be upheld, and the Notice of Failure did not render the Player Contract null and void.

8.1.2.4 Does the Second Medical Examination Justify the Club's Decision to Terminate the Player Contract / to Declare it Null and Void?

125. The Club further contends that the Player, in any event, failed the Second Medical Examination, and that, accordingly, the Player Contract is to be deemed null and void. In the Second Notice of Failure (quoted above at ¶ 17), the Club wrote to the Player that it "*still considers Eli Holman didn't pass the physical examination*".

126. The Arbitrator notes that the Club's arguments are contradictory insofar as the Club – on the one hand – wants to rely on the Second Medical Examination to establish the Player's failure of his medical exam, but – on the other hand – rejects the relevance of

the Second Medical Examination because it allegedly did not meet the formal requirements (Level 3 Hospital) established for such second examination in the Player Contract. It is also questionable whether a club that wrongfully failed a player on his medical examination should benefit from the results of a second examination which the player only arranged because of the club's wrongful decision not to pass him. The Arbitrator finds that there are convincing arguments for the conclusion that a wrongful decision that a player failed a medical examination should result in the Player being deemed to have passed such exam.

127. However, this question can – in the end – be left undecided. Based on the adduced evidence, the Arbitrator finds that Respondent, which bears the burden of proof for its allegation, failed to show – under the applicable standard of proof – that Dr. Li failed the Player on the Second Medical Examination, and that such decision would have been reasonable and comprehensible.

128. Neither the PILA nor the BAT rules provide any clarifications on the applicable standard of proof in arbitrations seated in Switzerland. Considering that the question of the standard of proof is a procedural question, the Arbitrator proceeds according to Article 182(2) PILA. In application of this provision – and taking account of the restrictions provided in Article 182(3) PILA – the Arbitrator is guided by the principles applicable in Swiss Civil Procedure. According thereto the applicable standard of proof is, in principle, the one of "full conviction".[14]

[14] BAT 0448/13 (relying on BGE 130 III 321 sect. 3.2, cited and translated in Mark Schweizer, The civil standard of proof – what is it, actually?, MPI Collective Goods Preprint, No. 2013/12 (2013), p. 4.) *contra* BAT 0903/16 (balance of probabilities).

129. The Arbitrator is not convinced that the Player can be deemed to have failed the Second Medical Examination on the basis of Respondent's contention that Dr. Li was forced by the Player to issue the Dr. Li Report as well as the Follow-Up Letter in favor of the Player.

130. Dr. Li made a 180 degree turn between the time when he examined the Player and his oral examination in this arbitration. In the Dr. Li Report, Dr. Li's evaluation was that the Player's main problem was an "_____." Despite this condition, Dr. Li found that the Player could "*return to the game now with the proper support and good guidance of physical therapist*." In the Follow-Up Letter issued by Dr. Li a few days after the Club had sent the player the termination notice, he confirmed that the Player's _____ "*is fit and healthy enough for him to play professional basketball now with the support of a ____and a physical therapist*". These letters are, undisputedly, not a basis for considering the Second Medical Examination to be failed.

131. In his private deposition taken by Respondent during the arbitration, Dr. Li for the first time changed his story and alleged that he was of the opinion that the Player was not fit to play basketball, but needed a surgery. He repeated this testimony in his oral examination before the Arbitrator and the Parties. It is a rather astonishing fact in itself that a witness completely changes course and testifies the opposite in a legal proceeding than what he had said before. In such a rather uncommon scenario, the decision maker needs to carefully examine the motives and reasons for the witness to change its story. Dr. Li was asked multiple times why he wrote in his reports that the Player was fit to play basketball while his true opinion was that he could not play, but needed surgery. Dr. Li gave various explanations for his abrupt shift during the oral hearing:

- He said that he was pressured to pass the Player by the agent, Mr. Olin."[15]

[15] Audiotape of the 4 December 2019 hearing, 1:28:38.

- He also said that he acted out of "*sympathy for the black basketball player*", who "*almost cried in my office*".[16]
- He finally said he wanted to receive a positive review from the Claimant for the hospital:

> *"I have to admit maybe I wasn't completely abiding by ethical standards. There is always a balance between do I choose ethics or commerce because in that hospital we have an after care service where we call the patient and ask whether they liked the service and they had gotten, or the support they had gotten, and the patient has the opportunity to give feedback and review on a certain doctor. So because of that yes maybe I wrote it. Who is there to judge whether you are more concerned with ethics or your reputation. And because of this incident I already lost my position at this hospital."*[17]

132. The Arbitrator finds the diverse bundle of motives presented by Dr. Li to be incoherent and unconvincing. She agrees with Claimant that it does not make sense that – on the one hand – he felt threatened by Claimant's agent, and – on the other hand – pitied the Player and still thought of his commercial success and good reviews for the hospital.

133. Furthermore, it is curious that Dr. Li proactively approached Mr. Olin through WeChat (despite the fact that he had allegedly been threatened by him) in April 2019 – seven months later – to inquire about the Player's physical status. When Mr. Olin told him that the Player was fit to play, Dr. Li commented that then "[m]*y suggestion was right, so there's no problem*." This is another indication that Dr. Li's story that for a variety of reasons he gave a false medical diagnosis is not credible.

134. Lastly, the Arbitrator notes that Dr. Li's allegedly false diagnosis is remarkably close to the impressions delivered by Dr. Hahne. Dr. Hahne confirmed that on the basis of the

[16] Audiotape of the 4 December 2019 hearing, 1:28:43.

[17] Audiotape of the 4 December 2019 hearing, 1:08:55.

MRI images, any potential in the Player's _____could be treated by a physical therapist through special training for the _____. It is exactly such instability _____ that the Dr. Li Report identified, and it is exactly such therapy ("*support and good guidance of a physical therapist*") that Dr. Li initially suggested. The Dr. Li Report and Dr. Hahne concurred that the Player would be fit to play basketball. Dr. Hahne clearly refuted Dr. Li's revised diagnosis that the Player needed surgery.

135. As a result, the Arbitrator finds that the testimony delivered by Dr. Li in this arbitration is not credible and cannot be relied upon. In particular, it cannot be used to consider the Second Medical Examination failed. Absent any proof by the Club for contemporaneous "reasonable and comprehensible" reasons to fail the Player on his medical examination, the Player Contract remained in full force and effect and was not avoided by the Club's various notices of termination.

8.1.3 Quantum of the Player's Claims

136. Because the Club breached the Player Contract by wrongfully failing the Player on his medical examination, the Player is principally entitled to damages for breach of contract. According to Clause 3.2.1, the Player Contract was fully guaranteed for the entire 2018-19 season. Accordingly, the Player is principally entitled to receive his annual salary as damages, subject to mitigation by the income he earned or could have earned during the same time period.

137. According to Clause 3.1.1 of the Player Contract, the Player's annual gross salary was USD 1,721,700.00 for the time period between 1 September 2018 and 31 August 2019. This gross amount corresponds – according to Claimant's submissions which have not been contested by Respondent – to USD 968,000.00 net. Under the Additional Contracts, Claimant earned the following amounts during the 2018-19 season:

- USD 25,000.00 (net) under the Arecibo Contract;

- USD 300,000.00 (net) under the Anhui Wenyi Contract

138. After deduction of these amounts from the net salary the Player is entitled to receive under the Player Contract, a difference of USD 643,000.00 remains open. The salaries earned under the Additional Contracts amount to approximately one third of what the Player was promised under the Player Contract. Even though the Arbitrator accepts that the CBA in China is a rather high paying league and that it was difficult for the Player to find a new employment after the Club terminated him in mid-September 2018, she finds that an additional deduction must be made for the fact that the Player only managed to earn USD 25,000.00 under the Arecibo Contract between mid-September 2018 and mid-April 2019, when he began his employment at the Anhui Wenyi Club. The Arbitrator is not satisfied with Claimant's explanations as to why he did not find any other employment during the considerable time period of 7 months. Claimant emphasized many times in this proceeding that he was fit and healthy to play. He is a strong player with a strong track record, which makes it hardly plausible that he could not find any job that could have further mitigated the damages.

139. For these reasons, the Arbitrator – deciding *ex aequo et bono* – finds that the Player's compensation claim must be further reduced by USD 100,000.00 (bringing the total amount of mitigation up to USD 425,000.00). As a result, the Player is entitled to compensation in the amount of USD 543,000.00 net (USD 968,000.00 minus USD 425,000.00). The Arbitrator is entitled to award the Claimant the salary compensation as "net" amounts, because in his request for relief, Claimant expressly allowed the Arbitrator to elect between an award of "gross" or "net" amounts ("*Respondent must immediately pay $1,721,700 USD gross <u>or</u> $968,000 USD net*").[18] Respondent has not objected to this approach.

[18] Emphasis added.

140. Claimant further requests "lawful interest" on any amounts to be received by him. The Arbitrator – deciding *ex aequo et bono* and in line with BAT's legal principles on default interest – finds it appropriate that Claimant shall receive 5% p.a. on his salary compensation from the date of the initiation of the present arbitration (i.e. 19 March 2019).

8.2 Part Two: The Club's Counterclaim

141. With its Counterclaim, Respondent requests, as damages, payment of certain expenses it incurred for bringing the Player to China. The Club suggests that these expenses became frustrated, because the Player had lied about his true medical condition, and because the Medical Examinations revealed that he was unfit to play for the Respondent. Under these circumstances, Respondent would never have hired the Player.

142. As demonstrated above in Section 8.1.1, there is no evidence that the Player misrepresented his true physical condition. There is also no evidence that the Player otherwise acted in a fraudulent manner or breached disclosure or information duties.

143. Hence, the Counterclaim lacks merit and must be dismissed.

8.3 Summary

144. In accordance with all of the above, the Arbitrator finds that the Player is entitled to salary compensation in the amount of USD 543,000.00 (net), plus interest of 5% p.a. from 19 March 2019.

145. The Counterclaim is dismissed.

9. Costs

146. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceeding.

147. On 11 November 2020 – 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"; 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", and 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 23,000.00.

148. Considering that Claimant prevailed on the main question (claim and counterclaim) in this arbitration, i.e. the unlawfulness of the Club's purported termination / nullity of the Player Contract, it is consistent with the provisions of the BAT Rules that 100% of the fees and costs of the arbitration, as well as 100% of Claimant's reasonable costs and expenses, be borne by Respondent. The fact that the Claimant's compensation was (further) reduced by EUR 100,000.00 (cf no. 136 seq.) is negligible (both regarding the time and effort spent on this question). Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("[W]*hen deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties*"). Additionally, the Arbitrator notes the provisions of Article 17.4 of the BAT Rules as follows:

"The maximum contribution to a party's reasonable legal fees and other expenses (including the non-reimbursable handling fee) shall be as follows:

Sum in Dispute *(in Euros)*	Maximum contribution *(in Euros)*
up to 30,000	5,000
from 30,001 to 100,000	7,500
from 100,001 to 200,000	10,000
from 200,001 to 500,000	15,000
from 500,001 to 1,000,000	20,000
over 1,000,000	40,000

In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party according to the foregoing table on the basis of the relief sought by/against this party."

149. The question is whether for the purpose of determining the amount of the contribution to Claimant's legal fees, the Arbitrator needs to refer to the net value of his claim (which is between EUR 500,001.00 and EUR 1,000,000.00) or to the gross value (which is over 1,000,000.00). The request for relief is unclear, because Claimant gives the Arbitrator the elective power to make a net or gross amount. The Arbitrator chose to award the compensation "net", but solely because the deduction of the alternative salaries, which were net salaries, worked more accurately with only net amounts.

150. Deciding *ex aequo et bono*, the Arbitrator finds that the gross amount shall be the relevant number to determine the maximum possible contribution. The Player Contract identifies the Player's salary only as a gross amount, which means that it was reasonable and not abusive for the Claimant to refer to the gross number in his request for relief. Claimant's request for relief is clearly not an attempt to inflate the amount in dispute with a view to obtain a higher contribution to his legal fees.

151. Turning to Claimant's actual claim for legal fees and expenses, this comprises: (a) EUR 7,000.00 (the non-reimbursable handling fee); (b) EUR 45,000.00 in legal fees and (c), EUR 160.00 for four international bank wires.

152. The maximum contribution for Claimant is EUR 40,000.00 for the main claim plus EUR 5,000.00 for the Counterclaim (the value of which is below EUR 30,000.00). Claimant's requested legal fees (EUR 45,000.00) plus the handling fee (EUR 7,000.00) exceed the maximum amount that is reimbursable under the BAT Rules. The Arbitrator finds that Claimant is entitled to receive the maximum amount the BAT Rules allow, which is EUR 45,000.00, including the handling fee. Much of the complexity of the case was added by Respondent, and Claimant had to address each of the material defenses and procedural tactics employed by Respondent. Hence, the Arbitrator considers a reimbursement of the maximum possible amount to be justified. The Arbitrator, however, finds no proof for the wire transfer fees and therefore declines to award a reimbursement of such fees.

153. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- Respondent shall pay EUR 11,500.00 to Claimant, as a reimbursement for the latter's advances for the arbitration costs;

- Respondent shall pay EUR 45,000.00 to Claimant, representing a contribution by it to his fees and expenses;

- Respondent shall bear its own legal fees and expenses.

10. AWARD

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

1. **Tianjin Ronggang Basketball Club is ordered to pay Mr. Elijah Holman USD 543,000.00 net as salary compensation, plus interest of 5% p.a. from 19 March 2019.**

2. **The counterclaim is dismissed.**

3. **Tianjin Ronggang Basketball Club is ordered to pay Mr. Elijah Holman EUR 11,500.00 as a reimbursement of the arbitration costs.**

4. **Tianjin Ronggang Basketball Club is ordered to pay Mr. Elijah Holman EUR 45,000.00 as a contribution towards his legal fees and expenses. Tianjin Ronggang Basketball Club shall bear its own legal fees and expenses.**

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

Geneva, seat of the arbitration, 13 November 2020

Annett Rombach
(Arbitrator)