Arbitrations CAS 2016/A/4588 FC Internazionale Milano v. Sunderland AFC & CAS 2016/A/4589 Sunderland AFC v. FC Internazionale Milano, award of 15 June 2017

Panel: Mr Sofoklis Pilavios (Greece), President; Mr Marco Balmelli (Switzerland); Prof. Philippe Sands QC (United Kingdom)

Football
Termination of a loan and potential subsequent transfer agreement due to the medical condition of the player
Termination and avoidance of a contract under Swiss law
Just cause to terminate the agreement
Fundamental error or fraudulent misrepresentation
Financial consequences of the impossibility to execute the agreement

1. **Swiss contractual law precludes the termination of a contract, unless the party in breach has committed a material breach of the agreement and the terminating party cannot be reasonably expected to continue the contract (Article 337 paragraph 2 SCO). As far as the avoidance of the contract is concerned, the Swiss Code of Obligations (SCO) provides grounds when a contract can be avoided for fundamental error (Articles 23-26 SCO) or for misrepresentation (Article 28 SCO). In short, the right to terminate a contract relates to cases when the breach lies in the performance of a concluded contract, whereas a contract can be avoided if the problem (mistake or misrepresentation) is related to the conclusion of the contract.**

2. **Failure to respond promptly to a contractual party's request to allow a player to undergo knee surgery or refusal to allow the player to undergo said surgery do not constitute just cause to terminate a loan and potential subsequent transfer agreement in the sense of the meaning of "just cause". The breach must be material in the sense that, in the circumstances of the breach at stake, the other party cannot be expected to continue the contract while the first party is in breach.**

3. **By (unsuccessfully) invoking a contractual right to terminate an agreement based on (alleged) material breaches of the agreement, a party ratifies the agreement and is therefore precluded from avoiding the agreement based on fundamental error and/or fraudulent misrepresentation. Moreover, there is no fundamental error or fraudulent misrepresentation where evidence indicates that the medical staff of the party invoking the right to terminate or avoid a transfer agreement due to the medical condition of the player performed its own medical examination of the player, and itself identified and raised doubts as to the condition of the player's right knee, as well as the possibility of previous operations on that knee.**

4. **In case the performance of an obligation becomes impossible due to the obligee's fault, the debtor is deemed to have performed its obligation despite the impossibility and**

remains entitled to the financial consideration for the obligation. The financial consideration is to be reduced by what the obligor saved because of the impossibility. Accordingly, the debtor is to be put in the position it would have been in but for the impossibility. This is in line with the principle according to which compensation for the breach or the unjustified termination of a valid contract is to be calculated on the basis of the principle of the so-called positive interest. This principle dictates that the judging authority will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur.

I. PARTIES

1. FC Internazionale Milano ("Inter") is a football club, with registered seat in Milan, Italy. Inter is affiliated to the Italian Football Federation, which is a member of the Fédération Internationale de Football Association (FIFA).

2. Sunderland AFC ("Sunderland") is a football club, with registered seat in Sunderland, United Kingdom. Sunderland is affiliated to the English Football Association, which is a member of the Fédération Internationale de Football Association (FIFA).

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. In summer 2014, Inter and Sunderland (collectively the "parties") engaged in discussions and negotiations for the potential transfer of the Argentine player Ricardo Alvarez (the "Player") from Inter to Sunderland, initially for a one-season loan.

5. On 30 August 2014, in the course of such discussions, the Player underwent a medical screening in Sunderland.

6. The medical screening consisted in the following assessments: a musculoskeletal examination by David Binningsley, Sunderland's Senior Physiotherapist at Newcastle Nuffield Hospital,

the taking and analysis of MRI scans by Dr Raj Sinha, Consultant Radiologist at Newcastle Nuffield Hospital, a cardiac screening by Ms Antoinette Kenny, Consultant Cardiologist at the Freeman Road Hospital and a medical examination by Sunderland's Club Doctor, Dr Gough, at Sunderland's training ground.

7. On the same day on 30 August 2014 and following the medical screening and the assessment of its findings by Sunderland, Inter and Sunderland entered into an agreement for the transfer of the Player from Inter to Sunderland on a loan basis for the duration of the 2014/2015 season against a loan fee of EUR 900,000 and a conditional automatic transfer at the end of the 2014/2015 season (the "Agreement").

8. The Player co-signed the Agreement in acknowledgement and acceptance of its terms.

9. The Agreement contained, *inter alia*, the following provisions:

"2.4. Subject to clause 2.6 below, parties further agree that, in the event that SUNDERLAND's first team, at the end of the current Premier League - edition 2014/2015 obtains the right to participate in the next Premier League - edition 2015/2016 (independently from the performances, attendances, or physical conditions of the player during the season 2014/2015), the player shall be automatically and permanently transferred from Inter to SUNDERLAND starting from 1 July 2015. In this event, SUNDERLAND shall pay Inter, as fixed consideration for the permanent transfer of the player, the net amount of EUR 10,500,00.00 as follows:

a) EUR 2,500,000.00 on 31st August 2015;

b) EUR 2,500,000.00 on 31st August 2016;

c) EUR 2,500,000 on 31st August 2017;

d) EUR 3,000,000.00 on 31st August 2018;

e) after receipt of regular invoice, by bank transfer on the Inter current account above referred.

2.5. In the event that SUNDERLAND's first team, at the end of the current Premier League - edition 2014/2015 does not obtain the right to participate in the next Premier League - edition 2015/2016 (independently from the performances, attendances, or physical conditions of the player during the season 2014/2015), the player shall return to Inter at the end of the loan period (30 June 2015).

2.6. Parties acknowledge and accept that the player has chronic patellar tendonitis in the left knee. In the event that the mentioned physical problem has accelerated during the season 2014/15 to a level that would result in the player being unable to play football at a professional level in the Premier League, then clause 2.4. shall not apply.

(…)

3.3. This agreement is the result of articulated dealings between the parties hereto, and the FIFA Regulations on the status and transfer of players together with Swiss law, under which it has been constructed and wanted by the parties, exclusively governs it.

3.4. Any dispute arising between the parties in relation to this agreement will be submitted exclusively to the competent Committee of FIFA. Furthermore, both parties recognised the eligibility, as an appeal body, of the Court of Arbitration for Sport (CAS), as ruled by both the FIFA Statutes and the CAS Code of Sport-Related Arbitration.

(…)".

10. On 27 September 2014, during a match, the Player suffered an injury to his right knee and an MRI scan which was undertaken on 29 September 2014 revealed a flap tear to the middle and posterior thirds of the medial meniscal.

11. On 3 October 2014, as a result of the injury, the Player underwent surgery to his right knee and returned to training on 17 November 2014, but was not fit to play for another two weeks. In addition, some time after the Player returned to training, he developed an effusion in his right knee, which – according to Sunderland – was an indicator of an underlying problem as there was no other reason for the effusion to develop.

12. On 21 November 2014, the Player was seen by a consultant radiologist and was treated with an aspiration to the right knee followed by a steroid injection which, however, had only a temporary effect.

13. In early January 2015, the Player began again to suffer from effusions.

14. On 16 January 2015, the Player's right knee was treated again with an aspiration followed by a steroid injection.

15. In late February 2015, the Player developed a further effusion to his right knee and underwent another series of MRI scans to identify the cause of his condition.

16. In March 2015, the Player consulted a renowned Spanish knee specialist, Dr Ramon Cugat, in Barcelona, with respect to the continuing large and painful effusions to his right knee. Dr Cugat recommended a conservative approach (platelet rich plasma injections to the right knee), but the Player developed an effusion to his right knee again when he resumed play.

17. On 23 March 2015, the Player had a consultation with a consultant knee specialist in London, Mr Andy Williams, who presented the Player with two options: a conservative option to treat the joint with aspirations and injections and have a rehabilitation period of three months and an interventionist option to have surgery, which could involve microfracture surgery, depending on the arthroscopic findings. Mr Williams was in favour of the latter.

18. According to Sunderland, in the course of this consultation the Player revealed for the first time that he had undergone a microfracture surgery in 2012, when he was still playing for Inter. According to Sunderland, he also revealed that he had only had a 5-6 month recovery period, instead of the usual recovery period, which is 7.5-10 months.

19. Sunderland considered it necessary to proceed with the surgery option and sought Inter's consent.

20. On 8 April 2015, in the course of an email exchange between Dr Piero Volpi of Inter and Dr Ishtiaq Rehman of Sunderland, Dr Volpi disclosed also for the first time to Sunderland that the Player had undergone microfracture surgery to his right knee in 2012.

21. On 8 April 2015, Inter also informed Sunderland that it was of the opinion that conservative treatment of the Player's right knee would be preferred over surgery.

22. On 6 and 11 May 2015, Sunderland informed Inter that the Player was now in a position to undergo surgery and that it understood that the Player had received consent from Inter to proceed with the surgery.

23. On 12 May 2015, Inter replied to Sunderland and indicated that it did not consent to the surgery.

24. On 15 May 2015, Sunderland sent Inter a letter informing Inter that it terminated the Agreement (the "Termination Letter"). The Termination Letter stated *inter alia* the following:

"(…)

(ii.) The Agreement

(…) Further, it was an implied term of the Agreement that Sunderland would not consent to any medical treatment or procedure being carried out on the Player without the consent of Inter Milan. It was also implied that Inter Milan would not act unreasonably in withholding such consent and in any event that Inter Milan would not, whether by act or omission, undertake any act which might prevent the Player from playing for the Sunderland First Team during the 2015/16 Premier League season or impair his ability to play in that team in any way.

(iii.) Termination

At the date of this letter, Sunderland has not obtained the right to participate in the 2015/16 Premier League season. However, regardless of whether Sunderland does obtain that right this letter is notice that:

1. Inter Milan's failure to respond promptly to Sunderland's reasonable request to allow the Player to undergo knee surgery is a breach of the implied terms of the Agreement set out above.

2. Inter Milan's refusal to allow the Player to undergo the said surgery is a further breach of the Agreement.

The said breaches are of terms that are fundamental to the Agreement. Sunderland is obliged to provide prompt and appropriate medical treatment for the Player pursuant to clause 6.13 of the Premier League Contract between Sunderland and the Player. Further, the implied term deals with the health of the Player and his ability to play and to continue to play as a professional footballer. Those matters are of critical importance and go the heart of the Agreement. In those circumstances, the implied terms relating to medical treatment were and are fundamental terms of the Agreement and in those circumstances the breach of those terms is a repudiation of the Agreement. The importance of such matters to both parties is reflected in the terms of clause 2.6 of the Agreement (see below).

As Inter Milan has had in excess of six weeks to agree to the proposed surgery, it is clear that it has no intention of complying with its contractual obligations. In those circumstances, Sunderland hereby notifies you the Agreement is terminated. In these circumstances, the Player is no longer a Sunderland player and we will advise the Player and his agent that he should return to Inter Milan.

(iv.) Patellar Tendonitis

Further and without prejudice to Sunderland's primary position that the Agreement has now been terminated, the Agreement contains a provision at clause 2.6 thereof which states that clause 2.4 (permanent transfer) would not apply to the extent that the chronic patellar tendonitis in the Player's left knee had accelerated during the 2014/15 Premier League season to a level that would result in the Player being unable to play football at professional level in the Premier League.

In the course of seeking advice as to the treatment of the Player, we have been advised by orthopaedic surgeons that:

1. The Player's current problem with his right knee has been indirectly caused by the patellar tendonitis in his left knee. In short, the symptoms in the right knee are a result of the condition in the left knee and an acceleration thereof.

2. As such during the 2014/15 Premier League season there has been a biomechanical stress placed upon the right knee as a result of the underlying left patella tendon problem which has resulted in a situation where the Player is unable to play football at a professional level in the Premier League.

In those circumstances, if (which is denied) the Agreement has not been terminated pursuant to this letter, Sunderland's position is that as a consequence of the facts set out above, pursuant to clause 2.6 of the Agreement, clause 2.4 of the Agreement does not apply and there will be no permanent transfer.

(…)".

25. On 19 May 2015, Inter sent a reply to Sunderland stating *inter alia* that:

"(…) Our club has always timely replied to all your requests of estimation regarding the treatments of the player concerned (the exchange of email is more than enough to prove it).

Our club is not responsible for any breach whatsoever in connection with the transfer agreement signed between our clubs on 30 August 2014.

The alleged termination of such transfer agreement on your side, besides being fully ungrounded, it is illegitimate and without any legal effect. Both clubs remain fully bound to such transfer agreement.

At the same time, the attempt to replace the "left knee" – as clearly stated under art. 2.6 of the transfer agreement – with the right one, is legally and medically unsustainable and we contest it in full.

Our club will continue to execute the transfer agreement which is fully valid and binding between the parties, which the consequence that, if your club shall obtain the right to participate in the 2015/2016 Premier League, the player Alvarez shall be automatically and permanently transferred to your club, as clearly established in the transfer agreement. (…)".

26. On 20 May 2015, Sunderland replied to Inter that its position had not altered.

27. On 22 May 2015, Inter wrote a letter to Sunderland congratulating it for its achievement to remain in the Premier League, which *"determines the automatic permanent transfer of the player Alvarez to your club".*

B. Proceedings before the FIFA Players' Status Committee

28. On 7 July 2015, Inter lodged a claim with the FIFA Players' Status Committee (the "FIFA PSC") against Sunderland, requesting payment of EUR 10,500,000 plus 5% interest as from 15 May 2015, which corresponds to the transfer fee under the Agreement. Inter also requested payment of EUR 14,000,000 plus 5% interest from the moment the damage occurred, corresponding to damages in the event Inter is not able to respect the maximum break-even deficit of EUR 30,000,000 set forth in a settlement agreement it signed with UEFA, as well as payment of its legal expenses.

29. On 13 August 2015, Sunderland filed its response with FIFA and rejected Inter's claims and allegations, indicating that at the time it concluded the Agreement, the following elements were not disclosed to it: the Player had undergone microfracture surgery to his right knee in 2012; thereafter he had suffered from recurrent effusions to his right knee; Inter had regularly treated the Player's recurrent effusions. Sunderland submitted thus that the Agreement was concluded on the basis of a fundamental error and, alternatively, that the Agreement was unenforceable on account of a hidden defect and that the termination was valid on the basis that the Player's right knee condition was materially contributed to by a continuation and acceleration of the Player's patellar tendonitis in his left knee, causing him to place a compensatory undue stress on his right knee. Sunderland also lodged a counterclaim against Inter requesting restitution of 63% of the loan fee of EUR 900,000 (corresponding to the loan period the Player was unavailable due to his right knee condition), and the compensation of additional damages it incurred by engaging the Player on loan (salaries and insurance).

30. On 15 March 2016, the Bureau of the FIFA PSC rendered its decision (the "Appealed Decision"), by which it partially accepted the claim of Inter and ordered Sunderland to pay to Inter *"within 30 days as from the date of notification of this decision, the amount of EUR 2,500,000 plus 5% interest p.a. on said amount as from 1 September 2015 until the date of effective payment"*. The Bureau of the FIFA PSC rejected the other requests of Inter as well as Sunderland's counter-claim.

31. On 15 April 2016, FIFA communicated to the parties the grounds of the Appealed Decision, determining *inter alia* the following:

"(…)

5. Having analysed all the arguments raised by the parties, the Bureau observed that, in essence, it had to examine whether Sunderland had a legitimate reason to terminate the agreement dated 30 August 2014 and, as a result, not to proceed with the definitive transfer of the player to Sunderland. In this respect, the Bureau noted that Sunderland raised the following three arguments: i) the agreement was concluded on the basis of a fundamental error, ii) the agreement was unenforceable on account of a hidden defect, and iii) the agreement was validly terminated on the basis that the player's right knee injury was materially contributed to by the injury in the player's left knee.

6. Starting with addressing the first two arguments raised by Sunderland, the Bureau does not share Sunderland's opinion that those specific arguments allowed Sunderland to terminate the contract or to consider the agreement null and void. The Bureau has taken due note that Sunderland performed a variety of medical exams on the player prior to signing the agreement and that it consciously decided to limit the content of art. 2.6 to the player's left knee. The Bureau finds that the relevant clauses are indeed very clear:

'Subject to clause 2.6 below, parties further agree that, in the event that Sunderland's first team, at the end of the current Premier League – edition 2014/2015 obtains the right to participate in the next Premier League – edition 2015/2016 (<u>independently from the performances, attendances, or physical conditions of the player during the season 2014/2015</u>), the player shall be automatically and permanently transferred from Inter to Sunderland (emphasis added).

(…)

2.6. Parties acknowledge and accept that the player has chronic patellar tendonitis <u>in the left knee</u>. In the event that <u>the mentioned physical problem</u> has accelerated during the season 2014/5 to a level that would result in the player being unable to play football at a professional level in the Premier League, then clause 2.4. shall not apply (emphasis added).

In this context, the Bureau stressed that there has been no documentation submitted by Sunderland proving that it ever requested Inter to provide any additional medical information about the previous injuries of the player. This, despite the fact that it is clear from the documentation on file that Sunderland was aware that the player had a history of injuries. […] As such, the Bureau cannot accept Sunderland's argument

that Inter failed to disclose certain medical information and that, to the contrary, it was rather Sunderland that failed to request the pertinent information.

7. *In relation to the above, the Bureau also deems that there has not been sufficient objective evidence submitted by Sunderland to establish that i) Sunderland asked the player whether he ever underwent microfracture surgery, and ii) that the player had indeed confirmed to Sunderland that he never underwent microfracture surgery. However, even if the player had provided Sunderland with incorrect information, the Bureau does not see any reason why this should be held against Inter, the latter evidently not being responsible for the player's actions.*

8. *In other words, the Bureau finds that Sunderland was aware of the injury history of the player and that it could have readily broadened the scope of art. 2.6 of the agreement to both knees of the player or his overall fitness. Yet, it agreed to limit the scope of art. 2.6 to the player's left knee and explicitly agreed to the definitive transfer of the player "independently from the performances, attendances, or physical conditions of the player during the season 2014/2015". As a result, the Bureau deems that the arguments raised by Sunderland in relation to the "fundamental error" and "hidden effect" cannot be upheld and therefore cannot lead to the conclusion that the agreement dated 30 August 2014 should be declared null and void.*

9. *As to the third argument raised by Sunderland, the Bureau notes that, according to Sunderland, the player's right knee injury was materially contributed to by a continuation and acceleration of the player's CPT of the left knee, causing him to place a compensatory undue stress on his right knee, with the result that he is [sic] been unable to play football at a professional level in the Premier League. In this framework, the Bureau emphasises that according to the information contained in TMS, the player had already found a new professional club (Sampdoria) in January 2016, i.e. on the highest level in Italy. The Bureau finds therefore that the question whether the player's right knee injury was somehow caused by the injury in his left knee may be left unanswered since it is clear that the player is still able to play professional football. As such, the condition mentioned in art. 2.6 of the agreement that the player's left knee injury problem would have accelerated to a level that would result in him not being able to play "at a professional level" has clearly not been met.*

10. *As a consequence of the above-mentioned considerations, the Bureau finds that also Sunderland's third argument fails to establish that the agreement between Inter and Sunderland should be considered null and void. Therefore, the Bureau is of the view that Sunderland cannot justify the termination of the transfer agreement dated 30 August 2014. As a result, the relevant agreement is fully valid and enforceable. Hence, in accordance with the basic legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith, the Bureau determined that Sunderland has to fulfil its contractual obligations towards Inter.*

11. *Turning to the specific financial requests of Inter, the Bureau has noted that Inter is claiming the full transfer compensation in the amount of EUR 10,500,000. However, the Bureau sees no reason to deviate from the payment schedule as agreed upon by the parties in art. 2.4 of the agreement. As a result, and considering that only the first instalment to be paid on 31 August 2015 has fallen due at the moment of*

passing its decision, the Bureau finds that it can currently only award Inter the first instalment of the transfer fee in the amount of EUR 2,500,000.

12. (…)

13. Furthermore, the Bureau has noted that Inter is also claiming EUR 14,000,000 should it not able to respect the maximum break-even deficit of EUR 30,000,000 set forth in a settlement agreement signed with UEFA. Apart from not being convinced that Sunderland can be held accountable from such non-compliance, the Bureau underlines that no further information has been provided by Inter in this respect. As a consequence, in absence of any further evidence provided by Inter, the Bureau is of the view that this part of Inter's claim need to be rejected.

14. In continuation, with regard to Inter's claim for legal expenses, the Bureau decided to reject such claim in accordance with art. 18 par. 4 of the Procedural Rules.

15. Finally, and considering the previous conclusions reached by the Bureau, the Bureau decided to reject the counter-claim lodged by Sunderland.

(…)".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 4 May 2016, Sunderland lodged a statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") with the CAS, requesting that the Appealed Decision be set aside, Inter's claim be dismissed and Sunderland's counter-claim be upheld. This procedure was opened and styled *CAS 2016/A/4589*.

33. With its statement of appeal, Sunderland nominated Prof. Philippe Sands QC, Barrister in London, United Kingdom, as arbitrator.

34. On 6 May 2016, Inter lodged a statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") with the Court of Arbitration for Sport (the "CAS"), challenging the Appealed Decision. This procedure was opened and styled *CAS 2016/A/4588*.

35. With its statement of appeal, Inter nominated Prof. Ulrich Haas, Professor at Law, Zurich, Switzerland, as arbitrator.

36. On 10 May 2016, the CAS Court Office sent a letter to the parties informing them of the two aforementioned procedures and inviting them to inform the CAS Court Office whether they agree to consolidate the two proceedings.

37. On 11 May 2016, Inter informed the CAS Court Office that it had no objection to a consolidation of the proceedings.

38. On 12 May 2016, Sunderland also confirmed that it agreed to consolidate the two proceedings.

39. On 18 May 2016, the CAS Court Office informed the parties that Prof. Ulrich Haas did not accept his nomination as arbitrator in the present procedure.

40. On 25 May 2016, Sunderland filed its appeal brief and made the following prayers for relief:

"75. As a result of the matters set out above, Sunderland respectfully invites the CAS Panel to uphold its appeal, to dismiss Inter's claim and uphold Sunderland's counterclaim.

76. With respect to the counterclaim, Sunderland relies upon the factual matters stated above, and the legal bases of fundamental mistake and misrepresentation set out above in support of its counterclaim to the sums already paid under the Loan and Transfer Agreement.

77. The consequences of the avoidance of the Loan and Transfer Agreement are that the transaction is unwound in accordance with the principles of unjust enrichment under Swiss law (see paragraph 30 of the expert report of Professor Ernst). Sunderland submits that the most fair and appropriate remedy in the circumstances of this case is an order under which credit is given only for the value received during the period of the loan of the Player for the 2014/2015 season. Sunderland will not be entitled to restitution of the loan price paid to the extent of the loan period in which the undisclosed condition of the Player's right knee did not prevent him from playing for the Club. To the contrary, Sunderland will be entitled to restitution of the loan sums paid in respect of that portion of the loan period in which the condition of the Player's right knee did so prevent him from playing.

78. Sunderland submits that the appropriate calculation and quantification of the credit which must be given in respect of the loan period is to adopt a linear division whereby for each week of the loan period in which the Player was so prevented from playing, a proportionate percentage of the €900,000.00 payable in respect of the loan of the Player (pursuant to Article 2.2 of the Loan and Transfer Agreement) shall be repaid to Sunderland by Inter by way of restitution.

79. Sunderland submits that, of a total loan period of 43.5 weeks, the Player was not available to play due to his right knee for the following periods:

a. 2 months from 27 September to 29 November 2014;

b. 2 weeks of January 2015;

c. 1 week in February 2015;

d. 15 March – 31 July 2015.

80. This amounts to the Player being unavailable to play for 27.5 weeks of the total loan period of 43.5 weeks, which equates to 63% of the loan period.

81. Accordingly Sunderland is entitled to restitution of 63% of the fee of €900,000.00 payable in respect of the loan of the Player, amounting to restitution of €567,000.00.

82. Additional damage has been caused to Sunderland by Inter's intentional breaches of contract, in that Sunderland has incurred total expenses of £3,338,117 directly caused by taking the Player on loan additional to the loan sums payable under the Loan and Transfer Agreement. Of that total, Sunderland claims against Inter:

a. That portion of the salary paid to the Player which relates to the period when he was unavailable for play (i.e. 63% as explained above) as follows:

i. Player's salary for the loan period, £2,434,667.00.

ii. National Insurance payable to UK tax authorities in respect of the Player's salary for the loan period, £360,099.00.

iii. Total costs of salary and national insurance payment, £2,794,766.00.

iv. 63% of that total cost, £1,760,702.00.

b. Agency fees paid on behalf of the club of €350,000.00 (equivalent £282,330.00).

c. Agency fees paid on behalf of the Player of €160,000.00 (equivalent £130,580.00).

d. Total claim against Inter for additional damage in the amount of £2,173,612.00".

41. Together with its appeal brief, Sunderland filed an expert report on Swiss law by Professor Wolfgang Ernst, dated 24 May 2016.

42. On 27 May 2016, Inter filed its appeal brief, requesting CAS:

"(i) To amend the Decision under Appeal according to the following Prayers for Relief;

(ii) To condemn Sunderland to pay to Inter Milan EUR 10,500,000 net plus interest of 5% p.a. as from 16 May 2015 until the date of effective payment;

(iii) In the event the Prayer for Relief no. 2 is not accepted, to condemn Sunderland to pay to Inter Milan EUR 10,500,000 net plus default interest in accordance with the following schedule:

(a) EUR 2,500,000 due on 31 August 2015 plus interest of 5% p.a. as from 1 September 2015 until the date of effective payment;

(b) EUR 2,500,000 by 31 August 2016 plus interest of 5% p.a. as from 1 September 2016 until the date of effective payment;

(c) EUR 2,500,000 by 31 August 2017 plus interest of 5% p.a. as from 1 September 2017 until the date of effective payment;

(d) EUR 3,000,000 by 31 August 2018 plus interest of 5% p.a. as from 1 September 2018 until the date of effective payment.

(iv) To condemn Sunderland to the payment in favour of Inter Milan of the legal expenses incurred;

(v) To establish that the costs of the present arbitral proceedings shall be borne by Sunderland".

43. On 30 May 2016, Inter nominated Dr. Marco Balmelli, Attorney-at-Law in Basel, Switzerland, as arbitrator.

44. On 1 July 2016, Sunderland filed its answer in the procedure CAS 2016/A/4588 in accordance with Article R55 para. 1 of the Code requesting that the CAS:

"1. Dismisses the Appeal of FC Internationale Milano S.P.A.

2. In the event that the Panel finds that Sunderland AFC shall pay damages instead of ordering specific performances, that:

a) The amount of damages shall be reduced by at least 50% but in any event at the discretion of the Panel, taking the circumstances of the termination of the contract into due account;

b) The compensation shall be payable according to the payment schedule of article 2.4 of the Loan and Transfer Agreement whereas the respective deduction (Prayer for Relief # 2.a) shall be deducted from the last and second to last instalments.

3. Orders that FC Internationale Milano S.P.A. shall be liable for all the costs of this arbitration and shall be liable for all of Sunderland AFC's costs incurred in relation to this arbitration, including but not limited to legal fees, disbursements and any and all fees payable to the CAS".

45. On 1 July 2016, Inter filed its answer in the procedure CAS 2016/A/4589 in accordance with Article R55 para. 1 of the Code requesting the CAS:

"(i) To reject in its entirety the appeal of Sunderland against the Decision under Appeal;

(ii) To amend the Decision under Appeal according to the below Prayers for Relief set out in the Appeal Brief of Inter Milan of 27 May 2016;

(iii) To condemn Sunderland to pay to Inter Milan EUR 10,500,000 net plus interest of 5% p.a. as from 16 May 2015 until the date of effective payment;

(iv) In the event the Prayer for Relief no. (iii) is not accepted, to condemn Sunderland to pay to Inter Milan EUR 10,500,000 net plus default interest in accordance with the following schedule:

(a) EUR 2,500,000 due on 31 August 2015 plus interest of 5% p.a. as from 1 September 2015 until the date of effective payment;

(b) EUR 2,500,000 by 31 August 2016 plus interest of 5% p.a. as from 1 September 2016 until the date of effective payment;

(c) EUR 2,500,000 by 31 August 2017 plus interest of 5% p.a. as from 1 September 2017 until the date of effective payment;

(d) EUR 3,000,000 by 31 August 2018 plus interest of 5% p.a. as from 1 September 2018 until the date of effective payment.

(v) To condemn Sunderland to the payment in favour of Inter Milan of the legal expenses incurred;

(vi) To establish that the costs of the present arbitral proceedings shall be borne by Sunderland".

46. Together with its answer, Inter submitted extracts of the Player's clinical diary during his time at Inter.

47. Inter also offered to make available at a hearing Professor Sylvain Marchand as an expert on Swiss contractual law, to provide a professional opinion on Professor Ernst's expert report and answer any question the Panel might have regarding any aspect of Swiss contractual law.

48. On 5 July 2016, the CAS Court Office invited the parties to state whether they wished to have a hearing to be held in this matter.

49. On 6 July 2016, the CAS Court Office informed the parties that the Panel appointed to decide this matter had been constituted as follows:

President: Mr. Sofoklis P. Pilavios, Attorney-at-Law in Athens, Greece

Arbitrators: Dr. Marco Balmelli, Attorney-at-Law in Basel, Switzerland

Prof. Philippe Sands QC, Barrister in London, United Kingdom

50. On 14 July 2016, Sunderland wrote a letter to Mr Gianpaolo Monteneri, counsel for Inter, including the following request: *"[g]iven that you have referred to the Player's medical records in your client's Response and have exhibited the Player's clinical diary, please now provide full disclosure of the Player's medical records. We would expect to receive copies of the Player's MRI scans, records of all interventions (including injections and aspirations), letters or reports from consultants / specialists and notes from any procedures or operations"*. The said letter was copied to the CAS Court Office.

51. On 18 July 2016, the CAS Court Office informed the parties that the Panel has decided to hold a hearing in this matter.

52. On 29 July 2016, Inter wrote to the CAS Court Office submitting that Sunderland failed to make any document production request in due time and fashion in accordance with the requirements of Article R56 of the Code.

53. On 2 August 2016, Sunderland wrote a letter to the CAS Court Office requesting that CAS compel Inter to disclose a full set of the Player's medical records covering the period from July 2011 until September 2015, including but not limited to: 1. MRI scans; 2. Records of all interventions (including injections and aspirations); 3. All daily records (beyond those disclosed); 4. The full clinical diary of the Player; 5. All letters or reports from consultants / specialists; and 6. All notes from any procedures / operations. Additionally, Sunderland requested that Inter be compelled to provide Professor Marchand's written comments on the report of Professor Ernst as a matter of urgency, and in any event by 20 August 2016.

54. On 9 August 2016, Inter replied to Sunderland's aforementioned requests by stating that a procedural request for document production is required to be made either in Sunderland's appeal brief (in case 2016/A/4589) or in its answer (in case 2016/A/4588). Furthermore, Sunderland cannot rely on Article R56 of the Code with respect to the submission of additional evidence as it does not even attempt to argue that the exceptional circumstances required by the said Article do exist. As to Sunderland's request that Inter be compelled to provide Professor Marchand's written comments on the expert report of Professor Ernst, Inter noted that the approach it adopted in its answer is entirely in line with the requirements of Article R55 of the Code and well established CAS practice, given that in the case of experts the said provision only requires that the expert's area of expertise is provided and no brief summary of their expected testimony. The latter condition refers to witnesses only and does not relate to experts.

55. On 26 August 2016, Sunderland wrote a letter to the CAS Court Office repeating its request for the disclosure of the Player's full medical records, indicating that a reference included in paragraph 58 of its appeal brief of 25 May 2016 serves as an application for disclosure of the Player's medical records[1], and that Sunderland's request does not rely on Article R56 of the Code as Sunderland already indicated its reliance on the Player's medical records in its appeal brief within the meaning of Article R51 of the Code. With respect to the requested comments on behalf of Professor Marchand, Sunderland submitted that it is proportionate for the CAS to ask Professor Marchand to indicate what is agreed and not agreed regarding Professor Ernst's submitted expert report on Swiss law. To the extent that a basis in the CAS Code is necessary, Sunderland submits that it is provided by Article R57 of the Code which allows the President of the Panel to issue directions addressed to the parties.

56. On 5 September 2016, Inter reiterated its position as stated in its letter of 9 August 2016 and requested that both Sunderland's requests be dismissed.

57. On 8 September 2016, the CAS Court Office informed the parties that the Panel has decided (i) to grant Sunderland's request for disclosure of the Player's medical records, as long as there are no medical confidentiality issues and granted Inter a deadline until 15 September 2016 to

[1] The relevant passage states: *"Sunderland has requested the Player's medical records from Inter in the course of this dispute but Inter have, without explanation, refused to provide the records. This will be the subject of an application to the Tribunal by Sunderland seeking an order that Inter disclose the medical records".*

file the requested documents, and (ii) to deny Sunderland's request to compel Professor Marchand to submit a statement in the manner requested by Sunderland.

58. On 13 September 2016, Inter requested from the CAS a short extension of one week in order to seek to secure the Player's agreement to the production of his medical file.

59. On 14 September 2016, the CAS Court Office issued an Order of Procedure, which was signed and returned to the CAS on 21 September 2016 by Sunderland and on 22 September 2016 by Inter.

60. On 15 September 2016, Sunderland wrote a letter to the CAS Court Office expressing its concerns whether the reason for the extension given by Inter is genuine.

61. On 22 September 2016, Inter informed the CAS Court Office that the Player did not consent to the production of his medical file.

62. On 23 September 2016, Sunderland wrote a letter to the CAS Court Office stating that it did not accept Inter's explanation that Inter was unable to disclose the Player's medical record, given that Inter had been able to overcome issues of confidentiality and disclose part of the said record in its appeal brief. Sunderland reiterated its request for the production of the specified documents and medical files and requested also that the arbitration be stayed until Inter persuades the Player to consent to the production of his medical file.

63. On 27 September 2016, Inter wrote a letter to the CAS Court Office stating that it disagrees with Sunderland's approach that the Player's treatment during his time with Inter goes *"to the very heart of this dispute"*, but in light of its obligation to arbitrate in good faith proposes to contact the Player again and request that the Panel be allowed on a confidential basis to review the Player's medical records.

64. On 30 September 2016, the CAS Court Office informed the parties that the Panel has approved Inter's proposal concerning the Player's medical records and, in view of the confidentiality issues, the Panel has decided to review the medical records on a confidential basis and to decide whether they should be admitted to the file.

65. The same day on 30 September 2016, Sunderland wrote a letter to the CAS Court Office indicating that it would be contrary to the requirement of fairness, should the Player's medical records be known to and seen by Inter and by the Panel, but withheld from Sunderland.

66. On 5 October 2016, Inter informed the CAS Court Office that it had secured the Player's consent that his medical files be produced *"only to the referred Panel and on a confidential basis"*.

67. On 6 October 2016, Sunderland stated that it did not consider Inter's proposal to restrict access to the Player's medical file to the Panel to be a just and fair proposal and requested that the proceedings be stayed until the Player consents for disclosure of the records to Sunderland.

68. On 7 October 2016, the CAS Court Office informed the parties that the Panel, taking due note of Sunderland's position, decided to invite Inter to bring the Player's medical records to the hearing for the Panel to review confidentially and that, should the Panel admit them to the file, Sunderland's counsel would be able to review it on a strictly confidential basis, and be able to comment on it.

69. On 7 November 2016, Sunderland wrote a letter to the CAS Court Office requesting that additional evidence be admitted to the case file, in the form of medical notes with respect to the Player and a new witness statement by Mr Ronan Malt, the interpreter who translated for the Player during the transfer medical, together with an "updated" witness statement of Dr Sinha.

70. On 14 November 2016, Inter wrote a letter to the CAS Court Office indicating that the new evidence had been filed by Sunderland in violation of Article R56 of the Code. It also provided some additional comments on the Sunderland's requests for the witness statements of Mr Malt and Dr Sinha.

71. On 22 November 2016, Sunderland wrote to the CAS Court Office requesting that the admissibility issues be determined by the Panel in advance of the hearing.

72. On 2 December 2016, the CAS Court Office informed the parties that the Panel had decided to admit Dr Sinha's corrected statement and Mr Malt's new witness statement, but to reject the medical notes filed by Sunderland on 7 November 2016.

73. On 9 December 2016, a hearing took place at the Lausanne Palace Hotel in Lausanne, Switzerland.

74. The Panel sat in the following composition:

President: Mr Sofoklis P. Pilavios, Attorney-at-Law in Athens, Greece

Arbitrators: Dr. Marco Balmelli, Attorney-at-Law in Basel, Switzerland

Prof. Philippe Sands QC, Barrister in London, United Kingdom

75. The Panel was assisted by Mr William Sternheimer, CAS Deputy Secretary General.

76. The following persons attended the hearing:

- Inter was represented by its legal counsels, Professor Antonio Rigozzi, Mr. Gianpaolo Monteneri, Mr. Angelo Capellini and Mr. William McAuliffe.

- Sunderland was represented by its legal counsels Mr. Ian Mill QC and Mr. Tom Mountford.

77. At the outset of the hearing, the parties confirmed that they did not have any objection as to the constitution and composition of the Panel.

78. In accordance with the Panel's decision which was communicated to the parties by the CAS Court Office on 7 October 2016, the Player's medical records were reviewed by the Panel confidentially. The Panel determined that the said records were not relevant to the matters in dispute in this arbitration and decided not to admit them to the file of the case.

79. The Panel heard evidence by Dr Volpi, Professor Mariani, Mr Ausilio, witnesses called by Inter, and by Dr Rehman, Dr Gough, Mr Binninglsey, Ms Byrne, and by Dr Batty and Dr Sinha (over the telephone), witnesses called by Sunderland. The Panel also heard the two experts, Professor Marchand for Inter and Professor Ernst for Sunderland.

80. The Panel also had an opportunity to review the Player's medical files and records from the Player's time with Inter, which were brought to the hearing by Inter's counsel following the respective invitation of the CAS Court Office of 7 October 2016 and gave an opportunity for Sunderland's counsel to review it having offered additional undertakings on confidentiality.

81. The Panel, upon request by the parties during the hearing, allowed the submission of two further rounds of post-hearing briefs, so the parties could address (i) the factual issues raised during the hearing, and (ii) points of disagreement between the two expert reports on Swiss law.

82. At the conclusion of the hearing, the parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected. The Panel closed the hearing and indicated that its award would be rendered after the submission of the post-hearing briefs and post-hearing replies by the parties.

83. On 10 January 2017, Sunderland wrote a letter to the CAS Court Office requesting the Panel to confirm whether it preferred the option agreed during the hearing (namely that the matters related to the two expert reports on Swiss law be dealt with separately by the parties' post-hearing submissions) or, alternatively, whether it would be preferable for the Panel to instruct the experts to convene by telephone and produce a joint short note explaining the matters which are agreed and, if any, the issues of Swiss law which remain in dispute.

84. On 11 January 2017, Inter expressed its disagreement with Sunderland's proposal and confirmed its view that the three points of disagreement between the experts were sufficiently identified at the hearing.

85. On 16 February 2017, the parties filed their post-hearing briefs.

86. In its post-hearing submission, Inter commented on the factual developments during the hearing, elaborating on the testimonies given by Sunderland's witnesses. It also attempted to rebut Sunderland's position as to whether the Player stated to Sunderland during the transfer

medical that he had not had microfracture surgery while he was playing for Inter, and whether he understood the questions that were (allegedly) put to him and the answers he was (allegedly) giving.

87. In turn, Sunderland submitted its comments on the evidence given during the hearing (identifying the most significant factual issues relating to the questions answered by the Player during the pre-transfer medical screening and the significance of the microfracture surgery for Sunderland's decision to conclude the Agreement) and on the two expert reports on Swiss law. In conclusion, Sunderland asserts that the evidence heard by the Panel satisfies the elements required for the application of the doctrine of fundamental error, which is set out in paragraphs 59 and 62 of Sunderland's appeal brief. In addition, the evidence also supports Sunderland's case for the application of the doctrine of third party fraudulent misrepresentation at the conclusion of the Agreement. Consequently, the Panel ought to uphold Sunderland's appeal.

88. On 3 March 2017, the parties filed their post-hearing replies.

89. Inter, in its reply post-hearing brief, commented on Sunderland's submission setting out the reasons why the factual issues raised by Sunderland are in any event not sufficient for an invalidation of the Agreement under Swiss law.

90. In Sunderland's reply post-hearing submission, it argued that, on account of specific references made to the evidence given at the hearing, Sunderland's appeal should be upheld on the basis of fundamental mistake and/or false misrepresentation.

IV. SUBMISSIONS OF THE PARTIES

91. The following summarises the parties' arguments and submissions and does not necessarily address each point advanced. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

92. The submissions of Inter, in essence, may be summarized as follows:

Case CAS 2016/A/4588 FC Internazionale Milano v. Sunderland AFC

- The appeal of Inter is limited to challenging the finding of the Appealed Decision which held that Inter is only entitled to recover EUR 2,500,000, which corresponds only to the first payment due to be made under the Agreement.

- During Sunderland's initial research on the Player, it had already been identified that the Player had "further knee problems in spring 2012 which caused swelling and a period of time out". However, and in spite of the findings of Dr Sinha and Dr Binningsley during

the Player's comprehensive pre-signing medical examination by Sunderland, Sunderland did not, in 2012, raise issues with Inter with regard to the Player's right knee problems. Thereafter, the parties agreed to include a clause in the Agreement governing problems only with respect to the Player's left knee only.

- The termination of the Agreement by Sunderland on 15 May 2015 is unlawful. The original termination grounds which Sunderland alleged (Inter's failure to respond promptly to Sunderland's request to allow the Player to undergo knee surgery and Inter's refusal to allow the Player to undergo the said surgery) do not constitute a breach of the Agreement, let alone a just cause justifying its termination, and are in any case not established by supporting evidence. The *ex post* alleged termination grounds (fundamental error as to the medical history and physical condition of the Player's right knee, hidden defect in that regard and termination according to Article 2.6 of the Agreement) are misconceived and ill-founded, because a) a party that terminated a contract for alleged just cause cannot subsequently invalidate the same contract based on different legal grounds, b) circumstances constituting just cause must be relied upon without delay, c) a fundamental error concerns circumstances before the conclusion of the contract which do not entitle a party to terminate the contract or if they do, they must be invoked without delay, d) the "hidden defect" provisions apply to the sale of goods only and, in any case, Inter never warranted that the Player had not suffered any microfracture of the right knee, and e) Article 2.6 of the Agreement is irrelevant because it does not provide Sunderland with a termination right.

- Inter maintains that, since the Agreement had been effectively terminated, the Appealed Decision should have ordered Sunderland to pay damages (instead of specific performance). In the dispute at hand, the damage suffered by Inter is quantified in the amount of EUR 10,500,000, *i.e.* the entire amount of the transfer compensation due to it. Article 2.6 of the Agreement does not apply in the present case as the exemption provided therein did not enter into force. In the alternative, Inter claims that specific performance be ordered in full under Article 107 par. 2 Swiss CO, whereby the Panel orders the payment in full by specifying the date upon which each instalment will become payable ("exigible") as per the Agreement.

<u>Case CAS 2016/A/4589 FC Sunderland AFC v. Internazionale Milano</u>

- Inter claims that Sunderland, due to the unlawfulness of its termination of 15 May 2015, sought to construct an *ex post* justification for its unjustified termination and breach of the Agreement.

- It is not in dispute between the parties that Sunderland and Inter entered into the Agreement which included a specific clause in relation to the Player's left knee and that there was no clause which made any reference to the Player's right knee. It is equally clear, that, apart from the left knee clause, a permanent move would materialise during the season 2014/2015, independently from the physical condition of the Player. Moreover,

Inter submits that Sunderland was aware that the Player had undergone a procedure to his right knee in 2012 (which Sunderland's qualified medical personnel considered might have involved a microfracture surgery) but chose not to make any enquiries with Inter with respect to the specific details of the procedure. Lastly, even after Sunderland became aware of the nature of the procedure in the Player's right knee, there was no indication that it considered that either Inter or the Player had concealed and/or withheld and/or misrepresented important information from them, at least not until they supposedly realised they needed to develop *ex post* a new basis for justifying the termination.

- As to Sunderland's grounds for appeal, Inter disputes that a party that has terminated a contract for (alleged) just cause can subsequently invalidate the same contract based on different legal grounds.

- Sunderland had not met the burden of establishing that the facts of the case constituted an instance of fundamental error. The fact that in 2012 the Player had undergone microfracture surgery to his right knee was not concealed by Inter. On the contrary, considering the findings of both Dr Sinha and Dr Binningsley during the pre-signing medical – which suggested the possibility of a previous microfracture surgery – if Sunderland had deemed this to have been an essential fact, and if it had harboured genuine concerns about the state of the Player's right knee, it could and should have raised them with Inter immediately. Moreover, it is untrue that, as alleged by Sunderland, the Player had, subsequent to the microfracture surgery and his recovery period thereafter, suffered from recurrent effusions to the right knee. Finally, Inter did not regularly treat the Player's right knee with aspirations and injections.

- Inter further submits that Sunderland did not meet the burden of establishing that the facts of the case constitute an instance of third party fraudulent misrepresentation. Inter disputes that the Player made any wilful misrepresentation as there is no evidence about the Player's intentions, assuming he indeed made any misrepresentation (which is denied by Inter). In this context, Inter contests the evidence according to which Sunderland's team doctors asked the Player on numerous occasions whether or not he had undergone microfracture surgery, since this contradicts Sunderland's own medical reports dated 30 August 2014. Furthermore, such wilful misrepresentation, if any, cannot be attributed to Inter, as it is reasonable for it to expect that, should Sunderland have noticed anything suspicious regarding the Player's medical history, it would have asked for some documentation and information in this regard. However, after the pre-signing medical Sunderland only requested to include in the Agreement an exclusion-clause for the Player's left knee.

93. The submissions of Sunderland, in essence, may be summarized as follows:

Case CAS 2016/A/4588 FC Internazionale Milano v. Sunderland AFC

- Sunderland claims that, should the Panel reject Sunderland's main grounds against the Appealed Decision and confirm the invalidity of the termination of the Agreement, the default position of Swiss law is that the appropriate remedy of the other party is an order for specific performance. Moreover, in this respect, Inter does not set out any legal or factual basis upon which it is entitled to be awarded damages *in lieu* of specific performance. Additionally, Inter provides no reason why it would be appropriate or equitable now to treat the Agreement as no longer subsisting and to order Sunderland to pay damages, thereby allowing Inter to receive the total of the amounts due to be paid in instalments under the Agreement. Finally, should Sunderland's termination be considered ineffective, the appropriate solution would be for the Agreement to be deemed as if it was still in force and, consequently, any damages awarded should correspond to the contractual instalment dates.

- Should the Panel decide that the Agreement was terminated by Sunderland's termination notice of 15 May 2015, the compensation payable by Sunderland to Inter must be calculated according to the Swiss law of damages. As a result, Articles 43 and 44 Swiss CO apply, which contain a general prohibition on enrichment or overcompensation and also provide a broad discretion for the Panel to determine the "form and extent" of compensation for loss and damage caused, corresponding to the specific circumstances of the case at hand.

- In this context, Sunderland requests that the Panel consider the misrepresentations made by the Player, the Player's history of serious right knee problems and the fact that it contracted to pay a large sum of money to hire a Player who was unable to perform at the requisite level in the English Premier League, and that the Panel should reduce the sums payable to Inter under the Agreement by at least 50%.

Case CAS 2016/A/4589 FC Sunderland AFC v. Internazionale Milano

- Sunderland submits that, unknown to Sunderland but fully known to Inter and the Player, the Player underwent a microfracture surgery to his right knee in 2012, whilst he was with Inter. The abovementioned fact was, additionally, the subject of a false representation made by the Player to Sunderland during the pre-signing medical examination of the Player.

- The Appealed Decision failed to address important parts of Sunderland's case, ignored or misrepresented and misapplied the governing Swiss law and erred in its analysis of those parts of Sunderland's case, which it did address, reaching unsustainable conclusions on the evidence before it.

- The Agreement was concluded on the basis of a fundamental error as to the medical history and physical condition of the Player's right knee with regard to his history of

microfracture surgery. The Swiss doctrine of fundamental error dictates that when essential facts are not disclosed to the other contracting party, the legal consequence is the invalidity of the entire contract, which leads to the transaction being reversed. Sunderland deems that such essential facts not disclosed to it were the following: a) the Player's history of microfracture surgery, b) the Player suffering from recurrent effusions to his right knee subsequent to the microfracture surgery, and c) the Player having been treated with aspirations or injections.

- Furthermore, Sunderland submits that the Agreement is avoided by application of the doctrine of fraudulent misrepresentation. This is a new legal basis for Sunderland's claim, which was not submitted before the FIFA PSC. Sunderland asserts that fraudulent misrepresentations were made to it by a third party, namely the Player, in the course of his pre-signing medical examination and, as a result, Sunderland is not bound by the Agreement. In this context, Sunderland submits that Inter knew or ought to have known that the Player had misrepresented the medical history of his right knee in that Sunderland did not require any equivalent contractual exclusion in respect of the Player's more serious right knee problems.

- Consequently, Sunderland submits that both legal arguments have as a consequence that the transaction is unwound in accordance with the principles of unjust enrichment under Swiss law.

Post-Hearing Briefs

- Inter argues that Sunderland is precluded from invoking fundamental error because it has invoked contractual termination rights. Sunderland accepts that a party can "approve" a contract and thereby forfeit or wave the right to avoid the contract expressly or impliedly even before the time limit for invoking the challenge lapses.

V. JURISDICTION

94. The jurisdiction of CAS, which is not disputed, derives from Article 67 par. 1 of the FIFA Statutes (April 2015 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the Code.

95. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

96. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

97. The two appeals were filed within the 21 days set by Article 67 par. 1 of the FIFA Statutes (April 2015 edition). The appeals complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fees.

98. It follows that the appeals are admissible.

VII. APPLICABLE LAW

99. Article R58 of the Code provides as follows:

"Law Applicable to the merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

100. The Panel notes that Article 66 par. 2 of the FIFA Statutes stipulates the following:

"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

101. In addition, Article 3.3 of the Agreement provides that:

"This agreement is the result of articulated dealings between the parties hereto, and the FIFA Regulations on the Status and Transfer of Players together with Swiss law, under which it has been constructed and wanted by the parties, exclusively governs it".

102. Consequently, the Panel will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, apply Swiss law in case of any gap in the FIFA Regulations.

103. The present matter was submitted to the FIFA PSC on 7 July 2015, hence after 1 April 2015, which is the date when the 2015 edition of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations") and the 2015 edition of the FIFA Statues came into force (see Articles 26 and 29 of the FIFA Regulations and Article 87 of the FIFA Statutes). These are the editions of the rules and regulations under which the case shall be assessed.

VIII. MERITS

104. According to Article R57 of the Code, the Panel has *"full power to review the facts and the law"*. As is long-established in the jurisprudence of the CAS, by reference to this provision, a CAS arbitration procedure may entail a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Panel to make an independent determination as to merits (see CAS 2007/A/1394).

105. In light of the facts of the case and the arguments of the parties, the Panel must first examine whether Sunderland validly terminated or avoided the Agreement and, second, address the financial consequences resulting from the valid or invalid termination or avoidance of the Agreement.

A. Termination or Avoidance of the Agreement by Sunderland

106. The first issue to be resolved is whether Sunderland validly terminated or avoided the Agreement.

107. Sunderland states in the Termination Letter that it terminates the Agreement on the basis of the following "fundamental" breaches by Inter:

> *"1. Inter Milan's failure to respond promptly to Sunderland's reasonable request to allow the Player to undergo knee surgery is a breach of the implied terms of the Agreement set out above.*
>
> *2. Inter Milan's refusal to allow the Player to undergo the said surgery is a further breach of the Agreement"*.

108. Additionally, Sunderland advanced the following grounds for the avoidance of the Agreement in its appeal brief: (i) that the Agreement was concluded on the basis of a fundamental error as to the medical history and physical condition of the Player's right knee with regard to his history of microfracture surgery, and (ii) that the Agreement is avoided by application of the doctrine of fraudulent misrepresentation.

109. In this respect and in order for the Panel to determine whether the facts alleged by Sunderland justify the termination or avoidance of the Agreement, the Panel notes that Article 14 of the FIFA Regulations states that *"[a] contract may be terminated unilaterally by either party without consequences, where there is just cause"*. Nevertheless, the FIFA Regulations do not define what constitutes *"just cause"*. As a result, the definition of just cause, and its application, is to be established on a case-by-case basis.

110. The Panel notes the relevant provisions of the applicable law and the case law developed by the CAS on this question. In this context, because of the subsidiary application of Swiss law and in view of the fact that this matter is not addressed by the FIFA Regulations, Article 337 paragraph 2 of the Swiss Code of Obligations ("SCO") provides that *"[i]n particular, good cause*

is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".

111. Further, pursuant to the well-established jurisprudence of the CAS and the Swiss Federal Tribunal ("SFT"), only breaches of a contract which are material may constitute just cause for its termination. A breach will be material in the sense that, in the circumstances of the breach at stake, the other party cannot be expected to continue the contract while the first party is in breach (CAS case law in employment related disputes: CAS 2004/A/587; CAS 2006/A/1180; CAS 2006/A/1100; and CAS 2011/A/2567).

112. In addition, in accordance with the principles governing the burden of proof, which is a basic principle in every legal system reflected also in Article 8 of the Swiss Civil Code ("SCC"), each party to a legal procedure bears the burden of establishing and proving the claims that it makes. In other words, any party deriving a right from an alleged fact shall carry the burden of proof and, in the matter at hand, it is up to the party invoking a "just cause" to establish the existence of the facts founding this "just cause" (see IBARROLA J., *La jurisprudence du TAS en matière de football – Questions de procédure et de droit de fond*, in BERNASCONI/RIGOZZI (eds.), The Proceedings before the Court of Arbitration for Sports, Berne 2007, p. 252 and also, *ex multis*, CAS 2009/A/1810 & 1811).

113. In the course of this dispute, Sunderland applied two distinct sets of contractual remedies in relation to the execution and conclusion of the Agreement. At first, Sunderland applied termination as a contractual remedy, by sending the Termination Letter to Inter and invoking that the above-mentioned conduct of Inter with regard to dealing with the Player's right knee problems constitutes sufficient grounds ("just cause") for termination. Subsequently, Sunderland asserted before the FIFA PSC that the Agreement can be avoided on grounds of fundamental mistake or misrepresentation.

114. The two remedies and the application of Swiss contractual law on the facts of the case were the object of lengthy submissions by the parties and two expert reports by Professor Ernst for Sunderland and by Professor Marchand for Inter presented at the hearing and discussed in the parties' post-hearing submissions.

115. In this respect, the Panel notes that Swiss contractual law precludes the termination of a contract, unless the party in breach has committed a material breach of the agreement and the terminating party cannot be reasonably expected to continue the contract (Article 337 paragraph 2 SCO). As far as the avoidance of the contract is concerned, SCO provides grounds when a contract can be avoided for fundamental error (Articles 23-26 SCO) or for misrepresentation (Article 28 SCO). In short, the right to terminate a contract relates to cases when the breach lies in the performance of a concluded contract, whereas a contract can be avoided if the problem (mistake or misrepresentation) is related to the conclusion of the contract.

116. Having regard to the totality of the evidence before it, the Panel has reached the findings set out in the paragraphs that follow.

117. The grounds advanced by Sunderland in its termination letter do not constitute just cause to terminate the Agreement in the sense of the meaning of "just cause" as set out above. The breach must be material in the sense that, in the circumstances of the breach at stake, the other party cannot be expected to continue the contract while the first party is in breach.

118. The Panel further finds that by (unsuccessfully) invoking a contractual right to terminate the Agreement based on (alleged) material breaches of the Agreement in its Termination Letter, Sunderland ratified the Agreement and is therefore precluded from avoiding the Agreement based on fundamental error and/or fraudulent misrepresentation. On the basis of the evidence before it, the Panel has little difficulty in concluding that Sunderland was aware of the relevant facts based on which it alleges the purported error and deceit at the time of the Termination Letter. In particular, The Panel takes note of the fact that Sunderland has itself confirmed that it learned of these facts on 23 March 2015, when the Player is said to have disclosed information as his microfracture surgery to Mr Williams, the consultant knee specialist in London.

119. Moreover, Sunderland has failed to establish any fundamental error or fraudulent misrepresentation on the part of Inter.

120. Specifically, the evidence before the Panel indicates that during the medical examination of the Player performed by Sunderland's medical staff and by doctors appointed by it, Sunderland itself identified and raised doubts as to the condition of the Player's right knee, as well as the possibility of previous operations on that knee. This is reflected in the relevant extracts of Dr Sinha and Dr Binningsley's imaging and screening reports, as submitted to the file. These state respectively:

"(…) MRI Knee Rt: (reported 30/08/14) There has been an ACL graft which remains intact. The patellar tendon has been used for the purpose of this graft. Both medical and lateral menisci demonstrate tear/post operative change. There is however an area of 25 x 14 mm along the lateral femoral condyle which demonstrates extensive chondral attenuation and subchondral oedema. Is there any history of previous microfracture at this site? The medial meniscal changes involve the posterior horn and the lateral meniscal change involves the body. (…)"

and

"(…) Right knee (…) LFC possible micro# (…)" (emphasis added).

121. The evidence before the panel indicates that, having identified these issues, Sunderland was in a position to investigate them further and chose not to, beyond allegedly raising questions with the Player, a point on which the evidence is limited. Moreover, Dr Binningsley confirmed that he had suspected that the Player might have had prior microfracture surgery to the right

knee (Dr Binningsley's Medical Screening Report of 30 August 2015. Dr Sinha identified the same potential issue in his Imaging Report during the pre-transfer medical of 30 August 2015.

122. On the basis of this evidence it is difficult for the panel to avoid the conclusion that Sunderland had sufficient information – including medical information – available to it to have been on notice as to the existence of a potentially serious issue with the Player's right knee, and that it took no further steps with Inter to address those issues. From this it may be concluded that the potential condition was known to Sunderland at the time of the examination. Sunderland's failure to raise the matter with Inter tends to undermine the claim that Sunderland felt that it could have obtained more information from Inter, and the claim that the possibility of the Player having undergone microfracture surgery to his right knee was of fundamental importance for Sunderland as a condition to conclude the Agreement.

123. In this respect, the Panel underlines that it is not disputed between the parties that Sunderland never raised with Inter any specific or other concerns with respect to the conditions of the Player's right knee, and did not see a need, on the basis of the concerns it had identified with respect to the condition of that knee, to make enquiries as to any previous treatment or operations on that knee.

124. Having requested the insertion of a clause in the Agreement regarding the Player's left knee, after having fully examined the Player and having identified the possibility of a problem with the right knee, the evidence before the Panel leads to the conclusion that the Player's right-knee condition – with the issues raised by its own medical examination - was not considered by Sunderland, at the time the Agreement was made, to be a material issue giving rise to any concerns.

125. On the basis of the evidence before it, the Panel finds that Sunderland has not established that it asked the Player questions about the condition of his right knee, or of any previous treatments or operations on that knee. On this basis the Panel concludes that Sunderland has failed to establish that the Player lied to it in the course of the pre-contractual examinations. Whether the Player intentionally misrepresented his right knee condition has not been proven by Sunderland. Moreover, and irrespective of what the Player did or did not say, the evidence before the Panel does not establish that Inter knew or should have been aware of an intentional misrepresentation by the Player. Consequently, on the basis of the standard set forth in Swiss law (according to the definition given by the SFT *"[p]roof is deemed to be shown, when the court is convinced of the truth of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the court has no serious doubt or any remaining doubt appears as insubstantial"*[2]) the alleged fraudulent misrepresentation is not established.

[2] See BGE 130 III 321 Section 3.2 (unofficial translation from German). The original text states: *"Ein Beweis gilt als erbracht, wenn das Gericht nach objektiven Gesichtspunkten von der Richtigkeit einer Sachbehauptung überzeugt ist. Absolute Gewissheit kann dabei nicht verlangt werden. Es genügt, wenn das Gericht am Vorliegen der behaupteten Tatsache keine ernsthaften Zweifel mehr hat oder allenfalls verbleibende Zweifel als leicht erscheinen".*

126. The Panel is also not persuaded, on the basis of the evidence before it, that Sunderland would not have entered into the Agreement if the alleged error regarding the Player's right-knee condition had been known to it more fully than appears to have been the case, given the evidence that indicates that a potential issue with the condition of the right knee had been identified. The failure to establish this element precludes the avoidance based on fundamental error and fraudulent misrepresentation.

127. Further, the Panel considers that the assertion by Sunderland that the Player's right knee condition affected his left knee condition, as alleged in Sunderland's appeal, is not established. In light of the above-described standard of proof in Swiss law, the evidence brought by Sunderland before this Panel, having taken into account the contradicting evidence submitted by Inter, does not allow the Panel to be convinced of the truth of such allegation.

128. The Panel feels bound to highlight the fact that Sunderland carried out its own medical examinations, and that Dr Rehman, Head of Medical Services and Club Doctor in Sunderland, reported to Sunderland's administration by email that *"[o]therwise the rest of the MRI screen showed some changes that were expected from previous surgery that were not of any concern. In Summary, the medical screen for this player has been completed and revealed a chronic patellar tendonopathy on his L knee and no other abnormalities of any great concern"*. With this clear conclusion, Sunderland proceeded to sign the Player on a loan basis.

129. In this context and quite tellingly, Sunderland expressly requested for an exemption clause to be included in the Agreement concerning the Player's left knee condition only. This supports the conclusion that the condition of the right knee – with certain concerns having been identified - was not material to Sunderland. On the basis of the evidence before the panel it appears that Sunderland had identified a potential problem with the Player's right knee, including the possibility of his having undergone microfracture surgery in the past.

130. Finally, the Panel refers to the evidence adduced by Inter, according to which the Player was signed by the Italian Serie A club Sampdoria in January 2016 without having undergone surgery to his right knee, after successfully passing a transfer medical on 28 December 2015, *i.e.* 7 months after Sunderland effectively terminated the Agreement. Until the end of the 2015/2016 Serie A season, the Player made 13 appearances over the course of 18 matches, and his employment contract with Sambdoria has been extended until 2019.

131. In light of the foregoing, the Panel concurs with the Appealed Decision. It concludes, on the basis of a careful examination of the evidence, that Sunderland has failed to establish the existence of a just cause for the termination of the Agreement. Further, Sunderland has failed to establish a fundamental error or fraudulent misrepresentation on the part of Inter. The Panel does not consider that Sunderland has produced convincing evidence on these points and considers this to be sufficient grounds to reject Sunderland's appeal and to confirm the Appealed Decision in this regard.

B. The financial consequences

132. The performance of the Agreement became impossible with regard to the transfer of the Player because Sunderland refused to take on the Player following the conclusion of the loan agreement. There is no support for Inter's argument that Article 337c para. 1 SCO applies to contracts like the Agreement. In case the performance of an obligation becomes impossible due to the obligee's fault, the debtor is deemed to have performed its obligation despite the impossibility and remains entitled to the financial consideration for the obligation. The financial consideration is to be reduced by what the obligor saved because of the impossibility. Accordingly, the debtor is to be put in the position it would have been in but for the impossibility. Therefore, Inter is deemed to have performed its obligation to transfer the Player and entitled to the transfer price according to the Agreement. Sunderland has not shown any grounds for the reduction of the transfer price.

133. This approach is in line with well-established CAS case law and the principles of Swiss law on obligations, according to which the compensation for the breach or the unjustified termination of a valid contract is to be calculated on the basis of the principle of the so-called positive interest. This principle dictates that the judging authority *"will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur"* (CAS 2008/A/1519-1520, para. 86, emphasis added).

134. In the same context, the SFT has ruled that: *"la partie qui a donné lieu à la résiliation anticipée pour cause d'inobservation des clauses du contrat doit la réparation intégrale du dommage causé. Celui-ci consiste dans l'intérêt positif qu'aurait eu la partie adverse à l'exécution du contrat jusqu'au plus prochain terme normal de congé"* (BGE 99 II 308 p. 312).

135. Accordingly, Inter is entitled to be placed in the financial positon it would have found itself if the Agreement had been duly performed in accordance with the Agreement. If Sunderland had duly performed the Agreement, Inter would not have been entitled to all instalments of the transfer price immediately but rather in accordance with the contractual due dates according to Article 2.4 of the Agreement. As of the time of this Award, two instalments are not yet due. If the entire transfer price were awarded immediately, the damages amount would have to be reduced because these two instalments would be awarded prematurely.

136. Against this background, the Panel finds it appropriate to award to Inter the transfer price according to the payment schedule agreed by the parties under Article 2.4 of the Agreement. Therefore, the Panel finds it appropriate to reject the second prayer for relief by Inter (as accepting it would put it to a better position compared to its position in the event the Agreement would have been executed by Sunderland) and accept its third prayer for relief, thus ordering Sunderland to pay to Inter the amounts set out under Article 2.4 of the Agreement due as of the dates specified therein.

137. Sunderland has failed to show any grounds based on which this amount could be reduced. In any case, the Panel finds that there are no grounds warranting a reduction of the amount awarded to Inter.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Sunderland AFC on 4 May 2016 against the decision issued on 15 March 2016 by the Bureau of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The appeal filed by FC Internazionale Milano on 6 May 2016 against the decision issued on 15 March 2016 by the Bureau of the Players' Status Committee of the Fédération Internationale de Football Association is partially upheld.

3. The decision issued on 15 March 2016 by the Bureau of the Players' Status Committee of the Fédération Internationale de Football Association is partially annulled to the extent that it ordered Sunderland AFC to pay to FC Internazionale Milano, within 30 days as from the date of its notification, the amount of EUR 2,500,000 plus 5% interest *p.a.* on said amount as from 1 September 2015 until the date of effective payment.

4. Sunderland AFC is ordered to pay to FC Internazionale Milano the transfer fee amounts according to the payment schedule agreed under Article 2.4 of the Transfer Agreement of Professional Football Player concluded between the parties on 30 August 2014, as follows:

   a) the amount of EUR 2,500,000, payable within 30 days from the notification of the present award, plus 5% interest *p.a.* on said amount as from 1 September 2015 until the date of effective payment;

   b) the amount of EUR 2,500,000, payable within 30 days from the notification of the present award, plus 5% interest *p.a.* on said amount as from 1 September 2016 until the date of effective payment;

   c) the amount of EUR 2,500,000, which shall be payable on 31 August 2017, plus 5% interest *p.a.* on said amount as from 1 September 2017 until the date of effective payment;

d) the amount of EUR 3,000,000, which shall be payable on 31 August 2018, plus 5% interest *p.a.* on said amount as from 1 September 2018 until the date of effective payment.

5. (…).

6. (…).

7. (…).

8. All other motions or prayers for relief are dismissed.