BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0888/16)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Casper Ware

- Claimant -

represented by Mr. Billy J. Kuenzinger, attorney at law,
700 Ygnacio Valley Road, Ste. 330, Walnut Creek, CA 94596, USA

vs.

BC Tianjin Ronggang Co. Ltd.
Nankai District of Tianjin Road, Rehabilitation 9,
300074 Tianjin, China

- Respondent -

represented by Mr. Juan de Dios Crespo Pérez and
Mr. Agustín Amorós Martínez, attorneys at law,
Avda. Reino de Valencia, 19-4ª y 6ª · 46005 Valencia, Spain

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1. The Parties

1.1 The Claimant

1. Mr. Caspar Ware ("Player") is an American professional basketball player.

1.2 The Respondent

2. BC Tianjin Ronggang Co. Ltd. ("Respondent") is a professional basketball club in Tianjin, China.

2. The Arbitrator

3. On 14 October 2016, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 28 July 2015, Player and Respondent entered into an agreement ("the Agreement") whereby Respondent engaged Player to play basketball for the 2015-2016 season. The salary of Player was agreed at a guaranteed sum of USD 430,000.00, net. Further, Player was to be paid certain sums for meals and travel.

5. Player says that he was paid USD 240,000.00 by Respondent, but that USD 190,000.00 remains due and owing to him, along with certain sums for meals and

travel. Respondent says that Player violated the Agreement by missing practices, and a match. Respondent says that it validly terminated the Agreement, and owes no money to Player. Respondent also says that Player did not participate in a number of matches from late November 2015 to late January 2016.

3.2 The Proceedings before the BAT

6. On 9 September 2016, Player filed a Request for Arbitration dated 7 September 2016 in accordance with the BAT Rules.

7. The non-reimbursable handling fee in the amount of EUR 3,000.00 was paid on 21 September 2016 (together with an overpayment of EUR 1,000.00, see also para. 35 below).

8. On 18 October 2016, the BAT informed the Parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant (Mr. Casper Ware) EUR 6,000.00*
>
> *Respondent (BC Tianjin Ronggang) EUR 6,000.00"*

The foregoing sums were paid as follows: 31 October 2016, EUR 6,000.00 by Player; and 2 December 2016, EUR 6,000.00 by Player, in substitution for the payment which was to have been made by Respondent.

9. Respondent filed its Answer on 30 November 2016.

10. Player filed his Reply on 21 December 2016.

11. Respondent filed its Rejoinder on 10 January 2017.

12. By Procedural Order dated 16 January 2017, the Arbitrator stated the following to the Parties:

> *"The Arbitrator notes that in the Reply the following is stated:*
>
> *"….the documents submitted are simply false" and "[J]ust by way of observation on the Warning Letters, the signature of Mr. Nash is inconsistent between the 3 signatures."*
>
> *The Arbitrator further notes that in the Rejoinder these positions of the Claimant are disputed, and a hearing is requested. Respondent also states that it is seeking a 15 day time period in order to seek to obtain a witness statement from Mr. Nash.*
>
> *The Arbitrator notes that an allegation of falsified documents is a serious one, and has, in the past been addressed in a number of ways in BAT cases (e.g. BAT 0256/12 - Donewald, Lee vs. Xinjiang Guanghui BC, BAT 0440/13 - Walker, Lacy vs. Elitzur Ramla, 0448/13 – Quinn vs Elitzur Ramla BC).*
>
> *The Arbitrator also notes that the position under the BAT Rules is that no hearing is held unless otherwise directed by the Arbitrator. This position is reflected in the small number of hearings which have been held across the now, more than 900 BAT cases.*
>
> *For the present, the Arbitrator permits Respondent to file a witness statement of Mr. Nash by no later than Monday, 30 January 2017. Once that deadline has passed, and depending on what is or is not received from the Respondent, the Arbitrator will thereafter revert to the Parties."*

13. Upon the Respondent's request, the deadline to obtain a witness statement from Mr. Nash was extended to 6 February 2017.

14. The Respondent did not obtain a witness statement from Mr. Nash within the time allowed.

15. By Procedural Order dated 7 February 2017, the Arbitrator stated the following to the Parties:

"The Arbitrator notes that the Respondent has not filed a witness statement from Mr Nash within the time allowed in the Procedural Order of 16 January 2017 and subsequent e-mail correspondence of 30 January 2017.

In the Rejoinder there was a request for a hearing ("[…] the Respondent requests the Arbitrator to hold a hearing in order to hear Mr. Nash as witness.").

However, given that no witness statement of Mr Nash has been filed within the extended time allowed, it appears to the Arbitrator that even if a hearing was directed it would be unlikely in these circumstances that Mr Nash would testify. If the Respondent has not been able to obtain a witness statement from Mr Nash by now, it does not tend to indicate a likelihood of him being in attendance at a hearing.

In the foregoing circumstances, the Arbitrator asks the parties now for their views as to the holding of a hearing. The Parties are herewith invited to file their comments by no later than Tuesday, 14 February 2017."

16. On 7 February 2017, Player stated the following:

"Claimant objects to Respondent's request for a hearing.

As aptly noted by the Arbitrator, the Rejoinder requests the hearing to examine Mr. Nash in order to support its claims. Respondent's statements in the Rejoinder suggest that it has a good relationship with Mr. Nash, that he was not fired from the team, and that he would testify favorably to the Respondent's claims. The Respondent has had since October 18, the date that the initial Claim was delivered to Respondent, to obtain the statement of Mr. Nash. As can be noted, in that Claim it was stated that Claimant never received any notice, and as subsequently seen, all of the "Notices" Respondent has placed into evidence purport to be from Mr. Nash. The Respondent has therefore had ample opportunity to present evidence on this issue. Further, and as the Arbitrator notes, if the Respondent were able to get a witness statement from Mr. Nash, it would have done so. Granting a hearing for the purpose of having Mr. Nash testify would seem fruitless if the Respondent has been unable to get him to sign a witness statement for now almost 4 months.

On the chance that the Arbitrator does grant the hearing, then Claimant requests that Respondent bear all costs of the hearing. As stated above, the Respondent has had ample opportunity to provide evidence of Mr. Nash's involvement, not simply from January 16, but from the moment it received the initial Claim, which stated that Claimant never received any notices. Any of the responses, or even the rejoinder, could have attached

> *Mr. Nash's statement. None of them did. In this instance, and given that the primary, if not sole, purpose of the hearing as requested is to question Mr. Nash, the burden of doing so should be on the Respondent, and Claimant should not be required to pay those costs.*
>
> *We believe that all issues raised by both parties have been addressed by the evidence presented to the Arbitrator to date, and request that the Respondent's request for a hearing be denied."*

17. The Respondent made no observations within the time allowed.

18. By Procedural Order dated 16 February 2017, the Arbitrator stated the following to the Parties:

> *"The Arbitrator notes the observations received from the Claimant in reply to the Procedural Order dated 7 February 2017. A copy is attached hereto for the Respondent's information. The Arbitrator also notes that the Respondent did not make any observations within the time allowed.*
>
> *In light of the foregoing, the Arbitrator considers that a hearing will not be necessary.*
>
> *Nonetheless, the authenticity of certain documents filed in this arbitration remains a live issue. Annexes 1, 2, and 3, to the Answer are challenged by the Claimant as to their authenticity. Given the importance placed upon them by the Respondent, and noting the Claimant's submission that the signatures of Mr Nash are not the same on each (without delving too deeply into this submission, the Arbitrator does note that on Annex 3 the signature is "Carl Wayne Nash" whereas on Annexes 1 and 2 the signature is "Carl Nash"), the Arbitrator has decided to investigate further these three documents.*
>
> *The Respondent is therefore directed to send to the Arbitrator, c/o the BAT Secretariat by no later than Wednesday, 1 March 2017, the originals (not copies) of the three documents, along with the original of any other three documents it has which bear Mr Nash's signature."*

19. The Respondent did not send any documents to the BAT Secretariat by the deadline set by the Arbitrator.

20. By Procedural Order dated 6 March 2017, the Arbitrator stated the following to the

Parties:

> *"The Arbitrator recalls that he has decided to investigate further the question of authenticity of three documents, namely, Annexes 1, 2 and 3 to the Answer. The Arbitrator notes his direction to the Respondent that the originals (not copies) of the three documents, along with the original of any other three documents it has which bear Mr Nash's signature, be sent to the BAT Secretariat. The Arbitrator further notes that the BAT Secretariat did not receive these documents by the deadline set. The Arbitrator also recollects that the Respondent sought time, after the filing of its Rejoinder, for the purposes of obtaining a witness statement from Mr Nash, which did not result in such witness statement from that person.*
>
> *Having considered the position, the Arbitrator wishes now to give the parties an opportunity to observe, in writing, on the following proposed course of action. As an arbitrator, sitting in Geneva and mandated to rule ex aequo et bono, he considers that he has the authority to make further enquiries. With that in mind, he is proposing to write directly to Mr Nash, in terms to be circulated in draft to the parties in due course, enclosing copies of the three documents, and asking him to reply as to whether he did, or did not sign them.*
>
> *The parties are invited to comment on this proposed course of action by no later than Friday, 10 March 2017."*

21. On 6 March 2017, Player stated that he had no objection to the course of action indicated in the Procedural Order of the same date.

22. On 10 March 2017, Respondent stated the following:

> *"We regret to say that our attempts to get in contact with Mr Carl Nash have been fruitless. Therefore, we have been unable to provide the Honorable Arbitrator a related witness statement or any other useful information.*
>
> *Nor does the Claimant has any objection to the Arbitrator's proposal."*

23. By Procedural Order dated 13 March 2017, the Arbitrator stated the following to the Parties:

> *"The Arbitrator notes that in reply to the Procedural Order of 6 March 2017, the Claimant stated that he had no objection to the proposed*

course of action. The Arbitrator also notes that the Respondent replied that "[N]or does the Claimant has any objection to the Arbitrator's proposal."

The Arbitrator thanks the parties for their replies.

It appears from some online research that Mr Nash is presently working as a coach at Frederica Academy, 200 Murray Way, Saint Simons Island, GA 31522, USA. The Arbitrator now shares the following draft letter to Mr Nash for the parties' comment:

> *"Dear Sir,*
>
> *I am a sole arbitrator, appointed by the BAT President, in a pending arbitration, BAT 0888/16 – Ware vs. BC Tianjin Ronggang, with its legal seat in Geneva, Switzerland.*
>
> *In the course of the arbitration, three documents were filed with me by one of the parties. I attach copies in PDF format.*
>
> *I invite you to confirm, in writing to me, whether or not the signatures on these three documents are yours, and are genuine.*
>
> *Please reply by [deadline] to the BAT Secretariat at the following email address c.paulsen@martens-lawyers.com "*

The Arbitrator will ask the BAT Secretariat to initially make contact by telephone with Mr Nash in order to ascertain his email address.

The Arbitrator asks the parties for their comments by no later than Wednesday, 15 March 2017."

24. On 13 March 2017, Player stated that he accepted the contents of the draft letter to Mr. Nash and had no objection thereto. On the same day, Respondent stated the following:

> *"We acknowledge receipt of the Procedural Order dated 13 March 2017 in the above referred matter.*
>
> *The Respondent accepts the content of the draft letter to Mr Nash proposed by the Arbitrator, and would like take the opportunity to*

complete his witness statement adding the following question, raised during the exchange of the Parties' submissions:

> *"If so, as Head Coach of TIANJIN RONGGANG during 2015/2016 season, do you endorse the content of such three letters related to the discipline problems with the Player Mr Casper Ware?"*

25. Player objected to the suggestion of Respondent of the additional question to be posed to Mr. Nash.

26. On 14 March 2017, the Arbitrator informed the Parties that he would not add the suggested question proposed by Respondent. On the same day, Respondent stated the following:

> *"Concerning the Claimant's objection to the additional question proposed by the Respondent, we have no choice but to clarify:*
>
> - *To date, the Respondent hasn't been able to contact with the witness Mr Nash. For this reason his statement has not been provided to the Arbitrator as requested.*
>
> - *The additional question proposed is relevant and has direct connection with the object of this proceeding attending to the both Parties' positions.*
>
> - *It would infringe the fundamental right of defense if the witness was contacted by this Tribunal and any Party is deprived of the right of asking questions to him, especially in an ex aquo et bono proceeding.*
>
> - *The Claimant was granted an identical right and decided not to exercise it. This fact cannot harm the Respondent's position.*
>
> *As a consequence, we humbly but firmly reiterate our request."*

27. On 14 March 2017, the Arbitrator wrote to Mr. Nash (at an email address at his place of work in the USA) in the terms circulated to the Parties on 13 March 2017, with a deadline of 17 March 2017 for a reply. The Arbitrator's letter to Mr. Nash enclosed PDF

versions of Annexes 1, 2, and 3, which accompanies the Answer.

28. On 16 March 2017, the BAT received an email from Mr. Nash as follows:

> *"I don't recall signing these papers. Casper was always on time."*

29. Following receipt of Mr. Nash's email, the Arbitrator circulated it to the Parties for comment.

30. On 20 March 2017, Player stated the following:

> *"It is clear that Respondent is relying on Mr. Nash's explicit confirmation that he did in fact sign these papers. Mr. Nash did not give that confirmation. He says that he "doesn't recall signing these papers." In light of the fact that Respondent has placed 3 notices of such high importance, not just one, into issue, and has claimed that Mr. Nash signed all of those notices, it is Claimant's position that it would be highly unlikely for a coach to actually sign such documents and not recall that he gave a player a notice of violating the Club's regulation on three separate occasions. In fact, Mr. Nash additionally states that Mr. Ware was "always on time". Having such a recollection certainly suggests that if he did in fact notify Mr. Ware on three separate occasions that he violated the Club's regulations for failing to attend practice, he certainly would have remembered it.*
>
> *Further, while the arbitrator did not ask the supplemental question that was of interest to Respondent, that being whether Mr. Nash "endorsed the content of the three letters related to the discipline problems with Player Mr Casper Ware", it appears Mr. Nash has answered the question to which the letters were directed. He said Mr. Ware was "always on time". Given that the contents of the purported evidence dealt with claimed failures of Mr. Ware to be present, it would be inconsistent for him to be always on time and have a disciplinary problem of not being present.*
>
> *Claimant has contended from the beginning that no notice was ever given to him claiming he violated the Club's regulations. The Club was given the opportunity to contact Mr. Nash and obtain a witness statement in that respect as well as the respect of whether he actually participated in signing notices to this effect. The Club was unable to do so. The arbitrator, however, was able confirm directly from Mr. Nash that he does not recall ever signing these documents, and from his additional statement, clearly conveys that he is not aware of any problems with Mr. Ware's behavior vis-*

> *à-vis appearing where he was supposed to be. The Respondent has the burden in this instance to prove its defense (the Claimant cannot prove a negative regarding something he claims he never received), and it has simply and continually failed to do so.*
>
> *Claimant's request for judgment remains unchanged."*

31. Respondent's position was communicated on 24 March 2017 as follows:

> *"Following the reply provided by Mr Nash, we find two facts certainly surprising:*
>
> *(i) Mr. Nash simply states that he doesn't recall "signing these papers". For us it's obvious that if he has not signed the letters at stake, he would remember such fact clearly, taking into account the circumstances surrounding the Player's performance with the Club.*
>
> *(ii) In connection with the previous consideration, it's also surprising that Mr Nash, who was the Head Coach of the Club during the season at stake, states that "Casper was always on time", while it's undisputed that he didn't take part in the vast majority of the matches during the second part of such season.*
>
> *For both reasons, we leave to the Arbitrator's discretion to make a handwriting-graphological expert's report of Mr. Nash's signatures in the three letters."*

32. On 27 March 2017, the Parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. Further, the Parties were each required to set out how much of the applicable maximum amount awardable in respect of reasonable legal fees and other expenses should be awarded to them in case they were the prevailing party, and why (including any supporting documentation in relation thereto). The deadline was set at 3 April 2017.

33. On 28 March 2017, Player presented his claim for costs, including attorney's fees of USD 2,518.75, and also asked for an award without reasons by reason of the fact that Respondent had not paid any of the advances on costs.

34. Respondent did not present any submission on costs.

35. On 4 April 2017, the Arbitrator informed the Parties of the following:

> *"Moreover, we acknowledge receipt of the Claimant's request to receive an award without reasons. However, in view of the large number of submissions, the complexity of the case and the length of the proceedings, the Arbitrator decided to issue an award with reasons and accordingly not to reduce the Advance on Costs (Art. 16.2.1 b of the BAT Rules).*
>
> *The Claimant's overpayment of the non-reimbursable handling fee amounting to EUR 1,000.00 will be reimbursed at the end of the proceedings."*

4. The Positions of the Parties

36. Player's position is as sought in his claim for relief in the Request for Arbitration (in summary):

(a) USD 190,000.00 for unpaid salary;

(b) Late fees;

(c) Monthly meal fees of RMB 12,000.00;

(d) Reimbursement of an airline ticket cost of USD 3,551.46;

(e) Tax certificate for 2015;

(f) Tax certificate for 2016; and

(g) Costs.

(h) Interest, costs, and fees.

37. Respondent seeks a dismissal of the claim, and seeks costs and expenses to be paid by Player.

5. The Jurisdiction of the BAT

38. 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).

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

40. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

41. The jurisdiction of the BAT over Player's claims is stated to result from the arbitration clause in Article 5 of the Agreement, which reads as follows, in relevant part:

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

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

43. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clauses under Swiss law

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

(referred to by Article 178(2) PILA).

44. The language of the arbitration clause is quite clear, namely, the Parties have opted for BAT arbitration.

45. The Parties have presented their respective cases to the Arbitrator throughout this arbitration without reservation as to his jurisdiction.

46. For the above reasons, the Arbitrator has jurisdiction to decide the claims made in this arbitration.

6. Discussion

6.1 Applicable Law – ex aequo et bono

47. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

48. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

49. As noted in paragraph 41 above, the arbitration clause in the Agreement expressly

provides that the Arbitrator shall decide any dispute *ex aequo et bono*. The Arbitrator finds that the parties have made an express choice with regards to disputes decided by the BAT, namely that "*[t]he Arbitrator shall decide the dispute ex aequo et bono*."

50. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

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

52. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*."

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

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

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

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

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

6.2 Findings

54. The first matter which the Arbitrator needs to analyse is the questioning by Respondent, in a number of respects at a late stage in this arbitration, of the procedural conduct.

55. At paragraph 26 above, it was recorded that Respondent stated, in part, the following:

> *"- It would infringe the fundamental right of defense if the witness was contacted by this Tribunal and any Party is deprived of the right of asking questions to him, especially in an ex aquo et bono proceeding." (sic)*

56. This allegation, namely that there would be an infringement of a fundamental right of defence, arose after Respondent had filed both its substantive submissions in this arbitration, after it had sought, and obtained, additional time to file a witness statement from Mr. Nash (which then never materialised), and after it had been ordered to produce to the BAT the originals of the three Annexes to the Answer (which were not produced). It lies ill in the mouth of Respondent to make such a serious allegation of procedural impropriety when it had already been given a fulsome opportunity to present its defence and also stand over the authenticity of three key documents upon which it had placed particular importance.

57. It has also to be remembered that the stated sole purpose for the Arbitrator in writing to Mr. Nash was to investigate the authenticity of the three Annexes to the Answer. Respondent could not have reasonably understood the intention of the Arbitrator, as recorded in the correspondence, as opening up an opportunity to put a question (in, frankly, self-serving terms) to Mr. Nash about matters of substance when it already had sought, and was granted an opportunity to secure a witness statement from that person. Its attempt to insinuate a question as to the merits of the case into a narrow process of establishing the authenticity of documentation, could not possibly be countenanced by the Arbitrator.

58. The Arbitrator also notes a further insinuation made by Respondent at a late stage, namely that the question it wanted to pose to Mr. Nash with the following intent: *would like [to] take the opportunity to complete his witness statement*. It is obvious that there was no witness statement of Mr. Nash to complete.

59. Respondent had its opportunity to present its case on the defence, and the late complaint of infringement of right of defence is manifestly unsustainable.

60. The second matter which the Arbitrator will address is whether Annexes 1, 2, and 3, as attached to the Answer, are authentic documents.

61. Annex 1, in relevant part, is reproduced on the following page of this Award.

Tianjin Ronggang Basketball Club, hereby officially gives Casper Ware the first letter of warning for the following reason. The player was absent from practices without any reason during November 30th to December 10th 2015. This behavior violate the term of the contract(page 5).

Therefore, the club gives the first official warning to Casper Ware and will not tolerate these unprofessional behaviors.

Tianjin Ronggang Basketball Club

天津荣钢篮球俱乐部

General Coach:

Date:2015/Dec/10th

62. Annex 2, in relevant part, is now reproduced.

Tianjin Ronggang Basketball Club, hereby officially gives Casper Ware the second letter of warning for the following reason. The player was absent from practices without reason during December 15th to 31st 2015. This behavior violate the term of the contract(page 5).

Therefore, the club gives the second official warning to Casper Ware and will not tolerate these unprofessional behaviors.

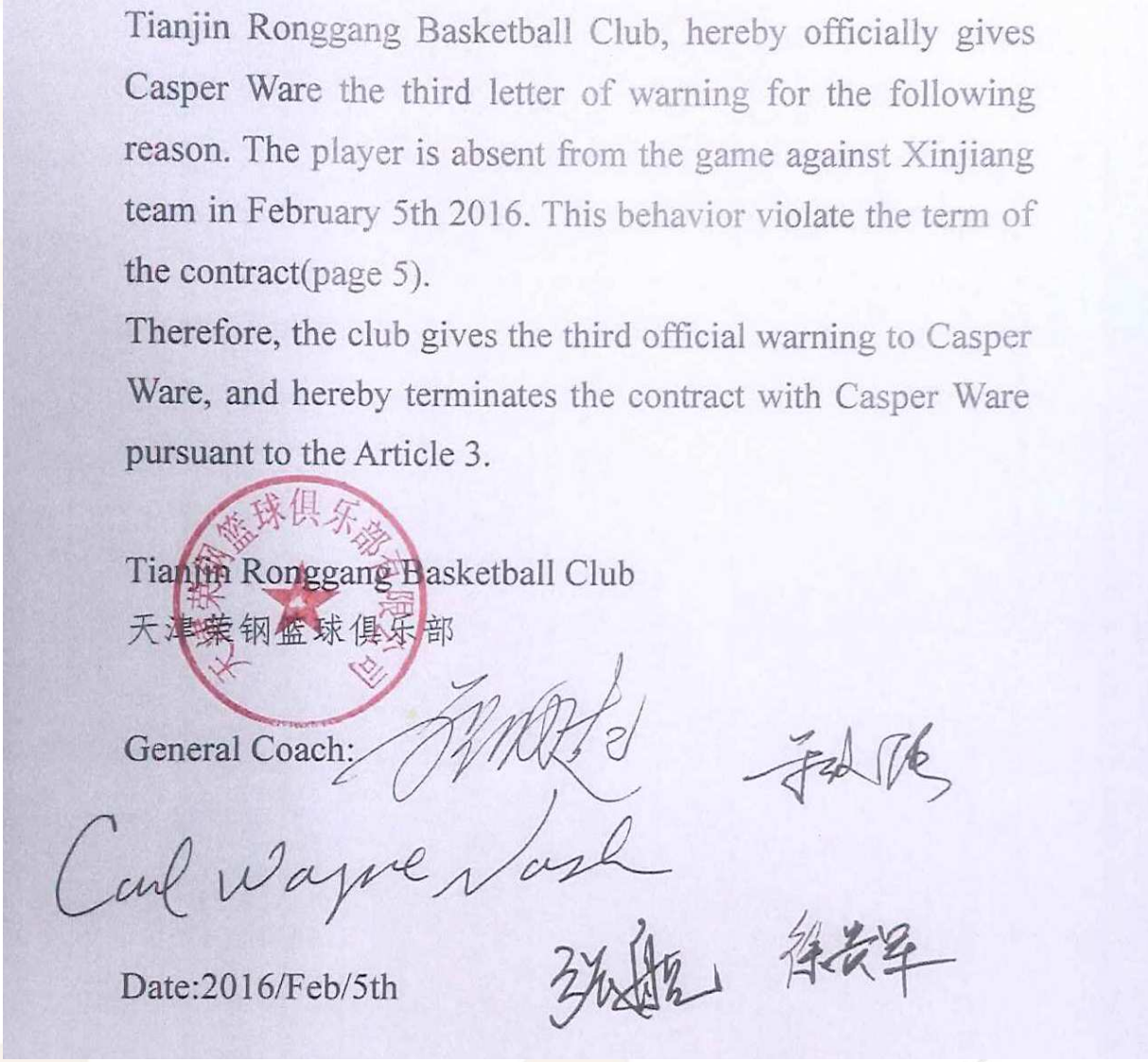
Tianjin Ronggang Basketball Club

天津荣钢篮球俱乐部

General Coach:

Date:2015/Dec/31st

63. Annex 3, in relevant part, is now reproduced.



Tianjin Ronggang Basketball Club, hereby officially gives Casper Ware the third letter of warning for the following reason. The player is absent from the game against Xinjiang team in February 5th 2016. This behavior violate the term of the contract(page 5).

Therefore, the club gives the third official warning to Casper Ware, and hereby terminates the contract with Casper Ware pursuant to the Article 3.

Tianjin Ronggang Basketball Club
天津荣钢篮球俱乐部

General Coach:

Carl Wayne Nash

Date:2016/Feb/5th

64. At a superficial level of examination, it is immediately obvious to any reader that the signature of Mr. Nash on the three documents is inconsistent. Annexes 1 and 2 have him signing “Carl Nash” whereas on Annex 3 has him signing “Carl Wayne Nash”. Secondly, the “N” at the start of “Nash” on Annexes 1 and 2 is written with curvatures as the letter is formed, whereas the “N” at the start of “Nash” on Annex 3 is angular and

unambiguously changes direction as the letter is formed.

65. Secondly, the Arbitrator recalls that Respondent specifically asked for time to obtain a witness statement from Mr. Nash when it filed its Rejoinder. That time was granted to it, yet no witness statement from Mr. Nash was forthcoming. Respondent subsequently represented to the Arbitrator (by way of one example) that *"our attempts to get in contact with Mr Carl Nash have been fruitless"*. However, that position appears, at best, curious to the Arbitrator when it is recalled that Mr. Nash replied within a number of days to the letter sent on 14 March 2017.

66. Thirdly, the Arbitrator specifically directed Respondent that the original of the three Annexes be sent to the BAT. Further, the Arbitrator directed that a number of other documents, each bearing the original signature of Mr. Nash upon them, be also furnished. Respondent did not send these originals to the BAT. There was never an explanation for Respondent's failure to send the originals of Annexes 1, 2, and 3. It is a matter of obvious logic that hand-writing expertise first and foremost looks to the original of signatures for examination. Respondent plainly has the three originals in its possession, and any meaningful retention of such an expert was, in fact, hindered by Respondent's own inaction. Thus, when Respondent stated, on 24 March 2017, that *we leave to the Arbitrator's discretion to make a handwriting-graphological expert's report of Mr. Nash's signatures*, this was substantively meaningless in light of the fact that the originals were not sent to the BAT.

67. Fourthly, Mr. Nash stated that he had no recollection of signing these documents.

68. Having considered these points both individually and collectively, the Arbitrator comes to the conclusion that the Annexes 1, 2, and 3, to the Answer are not authentic documents. The Arbitrator, therefore, gives them no further consideration in any way in relation to the merits of the case, save in relation to two relevant matters, namely, late payment penalty fees and costs.

69. Turning to the merits of the case, there is little factual dispute between the Parties as to non-payment. Respondent clearly states that it did not pay Player salary instalments for January, February, and March 2016. Each such instalment, due on the 15th of each month, amounted to USD 65,000.00, net. The three instalments total USD 190,000.00, net, which is Player's main claim for unpaid salary.

70. Respondent's defence justifying non-payment is:

> *"Due to the described violations of Player's duties, the Club decided to terminate the Contract with just cause on 5 February 2016 and, obviously, it was discharged from performing his obligations since that moment. As a consequence, the salaries scheduled on 15 February and 15 March 2016 are not due.*
>
> *Regarding the payment scheduled on 15 January 2016, due to the absolute lack of commitment of the Player with the team, missing almost all the practices during December, the Club deemed that it has no obligation to pay the salary scheduled on 15 January 2016."*

71. As regards the first paragraph, being the Respondent's stated justification for termination with cause, this position relies upon Annexes 1, 2, and 3. Given that these documents have been found not to be authentic, and that Respondent has not submitted any other evidence purporting to prove the alleged breaches by the Player, this position of Respondent is therefore unsustainable, and dismissed.

72. As regards the second paragraph, which Respondent suggests is a reason not to pay Player, namely his lack of commitment, the following is the position of Player:

> *"To begin, on November 30, the first date that Respondent claims Claimant failed to attend, the Club was playing an away game. The Club, through Mr. Ren had told the Claimant that it was replacing him, and bringing in a new player, and instructed him not to travel with the Club at that time. Therefore, the Claimant did not travel with the Club. As noted from the original Claim, this was not the first time the Respondent had not had Claimant travel with them (see Claim regarding November 4 away game).*

> *On December 3, and since he was still under contract with Respondent, Claimant contacted Mr. Ren for further instructions. Attached as Claimant's Supplemental Exhibit 1 is the WeChat communication between Mr. Ren and Claimant during which Claimant was told that the GM specifically said that if they need Claimant, they will tell him. As this communication shows, it was with reference to not just games, but practice also. With this communication, it becomes curious why the Respondent would then put into evidence a Warning Letter for November 30 through December 10 when on December 3 Claimant was told not to practice or play unless he was advised otherwise. So it appears the Respondent is trying to provide evidence to its counsel that simply has no basis in fact.*
>
> *Following this communication, the Claimant was not asked to participate in practice or play with the Respondent until the game on February 3. When he was asked, he played."*

73. Respondent's answer to Player in this regard is as follows:

> *"The Respondent ignores with which telephone number or device such conversation was held and consequently denies that such conversation took place with Mr. Ren.*
>
> *Moreover, the Claimant only submits a part of a conversation apparently held on 3 December, but it seems to be other contents, exchanged such day or in other moments, before and/or after, which might have been concealed.*
>
> *As a consequence, such evidence shall be disregarded.*
>
> *In any case, the fact submitted by the Claimant is completely absurd. If the Club would have had the intention of not using the Player's services from 3 December onwards, it would have dismissed him immediately in order to allow him to find a new Club and be able to mitigate any possible compensation due.*
>
> *The thesis of maintaining the Player in China just for nothing –but earning money from the Club- is simply unconceivable."*

74. Respondent's position is problematic for it for the following reasons:

(a) it denies that Mr. Ren had such an electronic conversation with Player, yet no effort whatsoever is apparently made to check the position with Mr. Ren (who it does not deny is its employee or in some way connected to it). The mere or

bald denial of a specifically articulated set of facts by Player, is insufficient;

(b) it insinuates that Player might have concealed parts of the electronic conversation. This is an allegation of a most serious nature, yet no effort whatsoever is made to show to the Arbitrator what the full conversation is, and whether anything else is material or relevant. It is an allegation which is unsustainable in light of the absence of any demonstrable effort on the part of Respondent to show the full electronic conversation; and

(c) the absurdity of keeping a player when it did not want to use him is, at best, a contrivance. Respondent was bound by a guaranteed contract and this submission is oblivious to the unambiguous provision in Article 1 of the Agreement which provides:

> *"This is a 2015/16 CBA season fully guaranteed contract for all payments regardless of circumstances."*

75. The Arbitrator dismisses Respondent's defence. It has no basis either in fact or as a matter of the Agreement.

76. In light of the foregoing findings, the Arbitrator finds that Player is entitled to an award of USD 190,000.00, net, by way of unpaid salary.

77. Player's next claim is for late fees in an amount to be determined by the Arbitrator. Article 3 of the Agreement provides that in the event Respondent is ten or more days late with a salary payment, a late fee of USD 200.00, net, per late day will be assessed. As Respondent did not make the scheduled salary payment due to Player on 15 January 2016, either within ten days, or at all, the agreed late fee mechanism becomes applicable. The first late day was 16 January 2016, and, in principle, the late fee runs as and from that date.

78. The Arbitrator must next decide, in principle, to what end date to the late fee run. In previous BAT cases, particularly in award 0100, the end date for late payment fees is generally held to be the final date of a contract's existence, whether by termination or by expiry in the normal course. This approach arises from two factors, namely, interpretation of the clause in hand, and the circumstances of the case which might militate towards a wider interpretation, or a more restricted view.

79. In this case the relevant clause states as follows (in pertinent part from Article 3):

> *"In the event Club is 10 or more days late a full-payment of Salary, a late fee of $200 USD net per each late day will be assessed. In the event Club is 20 or more days late with a salary full-payment, Player will have no duties to perform under this agreement and may cancel the Agreement by written notice to Club…….. Player will be owed entire salary of agreement in full prior to departure. Upon the conclusion of the Season, Player will cease to have any duties or obligations under this Agreement, and all monies that are not yet paid as base salary and/or bonus will be paid to Player within 3 business days of the last official game of Club for the 2015-2016CBA season."*

80. The Arbitrator, when interpreting this clause takes a number of pertinent factors into account as follows:

(a) Respondent presented, as the centre-pieces of its defence, three documents whose authenticity has not been established. Respondent was invited to produce the originals of these documents, and did not do so. Respondent stated that it was not able to obtain a witness statement from its former coach, yet within a matter of days that coach replied promptly and clearly to the Arbitrator.

(b) Respondent made a serious allegation against Player of concealment of evidence. Respondent did not back up, at all, this allegation of procedural impropriety.

(c) Most particularly, at an early stage in this dispute, on 19 February 2016, Respondent, through Counsel, made allegations in writing impugning Player's professional conduct, and threatened a claim for compensation in the event of a BAT arbitration. Respondent did not make good on this threat of a claim for compensation in this arbitration. It did not establish any unprofessional conduct. The letter of 19 February 2016 can only be seen as an attempt, *in terrorem*, to persuade Player not to pursue his lawful rights.

81. The Arbitrator, therefore, interprets the clause at hand as being operative until the last day of the 2015-2016 CBA season, plus 3 business days.

82. The Agreement indicates that the last payment date to Player was 15 March 2016 and, further, that if "the team will have a game after" that date, then he would be paid USD 2,100.00 per day. That suggests to the Arbitrator that the end date envisaged by the parties was indeed 15 March 2016, and there is no indication on the file that Respondent had any game after that day. Three business days after 15 March 2016 brings one to Friday, 18 March 2016.

83. Thus, the Arbitrator holds that upon the interpretation of the clause at hand, the end date for the running of late fees is 18 March 2016. From 16 January 2016 to 18 March 2016 inclusive there are 63 days. Multiplying 63 days by a late fee of USD 200.00 per day results in a total amount of USD 12,600.00.

84. The next issue for the Arbitrator is whether that total amount of USD 12,600.00 should be reduced or moderated.

85. As was discussed in BAT award 0756, the following factor is of relevance to the Arbitrator:

> *"contractual clauses which apply in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling ex aequo et bono. In particular, such a clause which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party, may be refused enforcement, or moderated in its application"*

86. The question for the Arbitrator is whether or not late fees amounting to, approximately 6.6% of the main salary claim of Player imposes a detriment on Respondent out of all proportion to any legitimate interest of Player.

87. A proportion of 6.6% is, in principle, and at first appreciation of the matter, not out of proportion, but is nonetheless generous. However, the Arbitrator does also take into account the factors discussed at paragraph 80 above. Taken together, these factors, namely the manner by which Respondent has conducted itself in this arbitration, and beforehand, lead the Arbitrator to hold that Player is entitled to the full amount of USD 12,600.00, net, by way of late fees.

88. As regards the balance of Player's claims, he is entitled to RMB 3,000.00 per month for meal money (and he claims four months of unpaid allowances in that regard, but only three are allowed as the Arbitrator understands he was not in China in March 2016), airfares (for which he has presented proof of a Delta Airlines fare of USD 3,548.46), and tax certificates. These are upheld by the Arbitrator.

8. Costs

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

expenses incurred in connection with the proceedings.

88. On 10 July 2017 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 12,000.00.

89. Considering that Player prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that, in general, the fees and costs of the arbitration, as well as Player's reasonable costs and expenses, be borne by Respondent. 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 maximum amounts set out in Article 17.4 of the BAT Rules.

90. Player's claim for costs amounts to USD 2,518.75, which is very modest, and is awarded in full, along with EUR 3,000.00 for the Non-Reimbursable Handling Fee (the overpayment of EUR 1,000.00 will be reimbursed to the Player by the BAT, as per BAT's letter of 4 April 2017, see para. 35 above).

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

    (i) Respondent shall pay EUR 12,000.00 to Player, being the amount of the costs

advanced by him and now owed to Player;

(ii) Respondent shall pay USD 2,518.75 and EUR 3,000.00 to Player, representing a contribution by it to his legal fees and expenses.

9. AWARD

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

1. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware USD 190,000.00, net, as unpaid salary.**

2. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware USD 12,600.00, net, as late payment fees.**

3. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware RMB 9,000.00 for unpaid meal allowances.**

4. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware USD 3,548.46 by way of reimbursement for airfare costs.**

5. **BC Tianjin Ronggang Co. Ltd. shall provide Mr. Casper Ware certificates of tax paid on his behalf for the years 2015 and 2016.**

6. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware EUR 12,000.00 as reimbursement for his arbitration costs.**

7. **BC Tianjin Ronggang Co. Ltd. shall pay Mr. Casper Ware USD 2,518.75 and EUR 3,000.00 as a contribution to his legal fees and expenses.**

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

Geneva, seat of the arbitration, 4 August 2017

Klaus Reichert
(Arbitrator)