# ARBITRAL AWARD

**(BAT 1547/20)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Klaus Reichert**

in the arbitration proceedings between

**Mr. Quincy Jyrome Acy**

**- Claimant -**

represented by Mr. Alexander Engelhard, attorney at law,

vs.

**Shenzhen City New Century Basketball Club**
Office 120, Dayun Center Arena, #99 Huangge Road,
Longcheng, Longgang District, Shenzhen City, Guangdong,
People´s Republic of China

**- Respondent -**

represented by Dr. AN Shouzhi, attorney at law,

## 1. The Parties

### 1.1 The Claimant

1. Mr. Quincy Jyrome Acy ("Player") is an American professional basketball player.

### 1.2 The Respondent

2. Shenzhen City New Century Basketball Club ("Club") is a Chinese professional basketball club.

## 2. The Arbitrator

3. On 14 May 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 ("BAT Rules"). None of the Parties have raised any objection to the appointment of the Arbitrator, to his declaration of independence and impartiality, or to his conduct of this arbitration.

## 3. Facts and Proceedings

### 3.1 Summary of the Dispute

4. By a contract dated 7 March 2019 ("Contract"), Player was retained by Club for the then balance of the 2018-2019 season. Player's base salary was agreed at USD 300,000.00, net, payable in a number of instalments. A series of bonuses which could be earned by Player are set out in the Contract (USD 100.00 to USD 250,000.00). The Contract also provided for a number of benefits for Player including transportation, accommodation, utilities, medical cover, a car, and so on.

5. Following his arrival at Club in China on 14 March 2019 (this date of arrival is not in dispute as between the Parties as per para. 24 of the Request for Arbitration and para. 8(iii) of the Answer), Player played once for Club (on 25 March 2019 against the Beijing Ducks), and no further games thereafter. This is not in dispute between the Parties (as per para. 5 + 6 of the Request for Arbitration and para. 8 (iv)-(v) of the Answer).

6. Player left Club on 10 April 2019 as his visa was due to expire on 11 April 2019. The fact that he left Club on that date and the date of the expiry of his visa are not in dispute between the Parties (as per para. 24 of the Request for Arbitration and para. 8(vi) of the Answer).

7. Player says that of the USD 300,000.00, net, base salary provided for in the Contract, Club paid him USD 220,000.00, net, thus leaving USD 80,000.00, net outstanding. Club does not dispute these figures as to what it was it paid, and did not pay Player (as per para. 15 of the Answer). Its position is that it was under no obligation to pay Player that amount due to a combination of fines (USD 57,000.00) and deduction of daily salary amounts (USD 66,666.64) following his departure on 10 April 2019 (as per para. 12 of the Answer).

8. Player says (para. 16 of the Request for Arbitration) that he is owed late payment fees up to the date of the Request for Arbitration in the amount of USD 37,600.00. This arises from Article 3 of the Contract which provides for a fine of USD 100.00 per day (following a 7 working day grace period) in the event of a late payment of salary by Club. Player also articulates an alternative case, in the event that the fine is deemed to be excessive, that interest at 5% per annum would apply to all payments. Club says (paras. 17-18 of the Answer) that, save for some small amounts, no fines arise, and in any event, the amount of USD 100.00 is excessive necessitating a reduction to an equivalent of 5% per annum instead.

9. Finally, Player says that he is entitled to USD 100,000.00, net, by way of bonus due to Club's reaching the playoff semi-finals (arising from Article 3 of the Contract). Club denies that it has any responsibility (para. 18 of the Answer) and relies on the predicate language in the Contract for the position that a bonus-entitlement only arises if Player "*participates in games*".

### 3.2 The Proceedings before the BAT

10. On 16 April 2020, Player filed a Request for Arbitration dated 15 April 2020 in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,000.00 on 30 April 2020.

11. On 20 May 2020, the BAT informed the parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant (Mr Quincy Jyrome Acy) EUR 6,000.00* [paid on 29 May 2020 by Player]
>
> *Respondent (Shenzhen City New Century BC) EUR 6,000.00* [paid on 2 June 2020 by Club]*"*

12. On 15 June 2020, Club filed its Answer.

13. The Parties filed further submissions as follows: (a) Player's Reply was dated 8 July 2020; and (b) Club's Rejoinder was dated 21 July 2020.

14. On 22 July 2020, the Parties were invited to set out (by no later than 29 July 2020) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.

15. The Parties filed their costs submissions on 29 July 2020.

## 4. The Positions of the Parties

### 4.1 Player's Position

16. In the Request for Arbitration, Player seeks the following relief (which, for present purposes, succinctly sets out his position):

> *"55. On the basis of the above facts, the Player requests the BAT to rule as follows:*
>
> *1. Shenzhen City New Century Basketball Club shall pay to Mr. Quincy Jyrome Acy USD 217,600.00 plus 5 % interest as of 17 April 2020 until payment.*
>
> *Alternatively:*
>
> *Shenzhen City New Century Basketball Club shall pay to Mr. Quincy Jyrome Acy USD 190,598.35 plus 5 % interest as of 17 April 2020 until payment.*
>
> *2. The costs of the arbitration shall be borne by Shenzhen City New Century Basketball Club.*
>
> *3. Shenzhen City New Century Basketball Club shall pay the full contribution to the Claimant's legal fees and expenses, to be specified at a later stage."*

### 4.2 Club's Position

17. Club's Answer seeks the following relief:

*"51. In light of the above, except the amount in the above paragraph 17[1], others in the Paragraph 55 shall be dismissed.*

*52. The Costs for arbitration and attorneys shall be borne by the Player."*

## 5. The jurisdiction of the BAT

18. First, the President of BAT has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Secondly, according to Article 1.3 of the BAT Rules it now falls to the Arbitrator to finally decide jurisdiction.

19. 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).

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

21. 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.[2]

22. The jurisdiction of the BAT over the dispute is said by Player to result from Article 11 of

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[1] The text of para. 17 of the Answer is: "*17. Except the late payment amounts, Paragraph 13 and 14 are admitted. The late payment as per USD 100 per day is excessive, and shall be adjusted at the reasonable range, namely to be calculated at annual rate of 5%: (i) Regarding the first payment, the late payment fee for the period from 27 March 2019 (i.e. 7 working days after the original due date) to 4 April 2019 is USD 61.64. (ii) Regarding the second installment, the late payment fee for the period from 5 April 2019 to 10 April 2019 is USD 41.09. (Please be aware that 5-7 April 2019 was public holiday in China.)*"

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

the Contract:

> *"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. Chapter 12 of the Swiss Acton Private International Law, irrespective of the parties' domicile, shall be govern the arbitration. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

24. 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 agreement under Swiss law (referred to by Article 178(2) PILA).

25. The predicate wording "[a]*ny dispute arising from or related to the present contract* […]" clearly covers the present dispute.

26. Club participated in this arbitration without objection or reservation as to the Arbitrator's jurisdiction.

27. For the above reasons, the Arbitrator rules and finds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to finally decide and adjudicate upon Player's claims and Club's defences thereto.

## 6. Discussion

### 6.1 Applicable Law – ex aequo et bono

28. 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".*

29. Under the heading " Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

> *"15.1 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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

30. Article 11 of the Contract provides, expressly, that the Arbitrator shall decide the dispute *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.

31. 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[3] (Concordat)[4], 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*

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3 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).

4 P.A. Karrer, Basler Kommentar, No. 289 ad Article 187 PILA.

> *not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

32. 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".

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

### 6.2 Findings

34. By way of introduction, the Arbitrator recalls the consistent position taken now over many years by BAT arbitrators that the doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the corner-stone principle by which the merits of the claims are examined.

35. Secondly, and also by way of introduction, the Arbitrator notes the following principles of contract interpretation which are reflected in prior reasoned BAT awards. It is a matter of particular importance for the doctrine of *pacta sunt servanda* that there is clarity as to the methods by which the "pacta" (*i.e.* the content of the obligations concerned) are duly ascertained. As already noted above, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule *ex aequo et bono*, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation on a plea *ad misericordiam* from one side or the other.

36. The sort of principles which might inform the exercise of interpretation in the context of

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

a BAT arbitration include: (a) looking at all of the contractual language chosen by parties through the eyes of a reasonable reader to see what is the ordinary and natural meaning of the words used; (b) the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used; (c) when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart from the ordinary and natural meaning; that is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to justify departing from it; (d) the description or label given by parties to something in a contract is not inflexibly determinative of its true nature; (e) the mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and (f) in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, *ex aequo et bono*, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase *ex aequo et bono* and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices.[6]

37. The Arbitrator notes that many of the background facts are not in dispute, as discussed above in Section 3.1 of this Award. In particular, there is no dispute as to the dates of Player's arrival at, and departure from Club. There is also no dispute as regards the date provided for in Article 1 of the Contract which says that Player must report to Club on or before 11 March 2019. Player did not make that deadline and arrived three days later. Player departed from China on 10 April 2019, i.e. five days before the last official day of

[6] See BAT 0756/15, para. 60.

Club's season on 15 April 2019. The Parties blame each other for these matters.

38. *Late arrival*: Player says (para. 24 of the Request for Arbitration) that all the travel and visa arrangements were put in place by Club. He had no control over those matters and arrived as soon as was possible, which was 14 March 2019. Club counters with the argument that Player could have requested an earlier flight to the one he actually took (as booked by Club) which would have brought him to Hong Kong a number of days before he actually arrived there (11 March 2019). Hong Kong was the venue for Player's visa processing and this took a number of days. Thus, according to Club, had Player got to Hong Kong sooner then he would have made the contractual deadline of 11 March 2019 to arrive at Club. Club also notes that according to Article 4 of the Contract, Player's Agent was responsible to assist Club and Player in efforts to obtain the necessary documentation and go through the procedures to receive a Work Visa and Residence Permit. Player's riposte is that Club should have alerted Player to the fact that the flights it booked for him could, by reason of the date of arrival in Hong Kong, lead to a delay in his arrival at Club. Player makes the point that he could rely on Club to ensure that the travel itinerary was in conformity with the Contract. Club's reply, in its Rejoinder, is now recorded in full (para. 7):

> *"Actually, the late report is caused by the Player himself. As stated in the Answer (paragraph 21 (iii)), if the Player could have departed from Dallas earlier, he would have enough time to get the Visa and report physically on 11 March 2019. When the Club signed the Contract, the Club also originally thought the Player could report as per the Contract. But after signing the contract on 7 March 2019, the Club was informed that the Player's wife and daughter would be together and the Player needs to go to passport agency on 8 and 9 March in Dallas to get everything updated for his wife and daughter to fly. That is a real reason why the Player fails to report on time. But for the purpose of the friendly cooperation, the Club has no choice but to match the Player's schedule, and book the flight ticket for the Player. However, this does not affect the Club's rights under the Contract."*

39. The Arbitrator notes that the Rejoinder contains something not seen before in the submissions, namely, a factual allegation of quite some specificity involving Player's family. This is advanced (solely by assertion in the Rejoinder and without any evidence

such as contemporaneous correspondence) at a point in the Arbitration by which time Player had his say and no further opportunity would be reasonably open to him to comment. As a matter of the BAT Rules (Article 12) parties do not have an automatic right to further submissions beyond the Request for Arbitration and Answer. As a matter of practice, on the occasions when a BAT arbitrator does direct further submissions, this is usually confined to one exchange. There is an importance consequence, therefore, for the manner by which parties approach their initial filings in a BAT arbitration, namely, that the Request for Arbitration and Answer contain all the facts on which a party seeks to rely. That unambiguous rule for the content of those two submissions in any BAT arbitration can be found, expressed in explicit terms, at Articles. 9.1 and 11.4 of the BAT Rules.

40. The Arbitrator is satisfied that Club has not observed the requirements of the BAT Rules in its approach to the submissions. The facts (as asserted) in the Rejoinder and quoted above were matters which should have been set out in the Answer and suitably verified by reference to contemporaneous correspondence. Their arrival with the last submission in the arbitration, and absent any proof, undermines both their credibility and weight.

41. Even if some credence were to be attached to these allegations, the Arbitrator notes that the Contract does contemplate his family travelling with him to China (Article 3) with two round-trip business class air tickets from a city of his designation to Hong Kong being provided (including "*one of that with the baby*"). If Player's family required updating of their passports to enable them to travel with him, then that should not cascade into a consequence to Club's monetary advantage. They moved promptly to make their passport arrangements, and left for Hong Kong thereafter.

42. The Arbitrator accepts Player's argument that he followed Club's transportation arrangements, and the visa process took the time which it did in Hong Kong. There is no guarantee, or indeed anything approaching such language, in the Contract on the part of Player or Agent to secure a visa (as per Article 4 of the Contract) save to provide

assistance. The process took the time which it did, and the Arbitrator does not consider it to be established that either side could have had any definitive role in the outcome of Player's visa application. Player arrived at Club as soon as was possible according to the visa procedures. In short, no-one, neither Player nor Club, was at fault for the time this took.

43. In such circumstances the Arbitrator finds that Club has not established any fault on the part of Player with regard to his late arrival on 14 March 2019. He was delayed by circumstances outside of his control and that is precisely the sort of circumstance contemplated by the Contract as an exception for late arrival. In particular, Club's right to fine Player for late arrival is only triggered "*because of personal reason*". His late arrival was not his fault. He followed the travel arrangements put in place by Club and the visa process in Hong Kong took the time which it did. Those are not personal reasons.

44. The Arbitrator is fortified in this approach to the late arguments raised by Club when considering the letter sent on its behalf on 22 February 2020 (Exhibit R-10) (while marked "without prejudice", Club itself put this letter before the Arbitrator and therefore must be taken to have waived whatever reservations, if any, might have attached to that document) and nowhere in its text is there a reference to Player's family as an excuse. This is similarly the case with another letter attached to the Answer dated 1 March 2020. Indeed on a perusal of the approximately 190 pages of exhibits which are attached to the Answer, no mention appears to have been made of Player's family.

45. *Early departure*: Player's position is that he left China on 10 April 2019 because his visa was due to expire on 11 April 2019 and, further, his agent received a text message dated 8 April 2019 (Exhibit 3 to the Request for Arbitration) from Club's American player liaison office/translator giving him permission. That message is not denied by Club, but rather its position is that Player should have renewed his visa to allow him to stay on in China.

46. The Arbitrator does not accept Club's position. It gave him express permission to leave

China via the text message on 8 April 2019. That is the end of the debate. Secondly, by that stage it was quite clear that he was not in favour as a player, and he reasonably took the view that he may as well return home given the foregoing text message.

47. *Consequences of the foregoing*: as the Arbitrator has found that Club's allegations that Player wrongfully arrived late and left early are not substantiated, it must follow that its arguments that it could deduct a *pro rata* salary amount for the days he was not in China are denied.

48. What Club sought to do in this arbitration is divide the number of days Player would have been in China had all gone according to the Contract's terms (36 days) into the total base salary of USD 300,000.00. This results in an average daily salary of USD 8,333.33. Club then wanted to deduct the relevant number of days' average salary from the base amount it owed him. That was a premise which, in the Arbitrator's analysis and interpretation of the Contract, could not be sustained by Club (nor indeed was it a sustainable premise). The Contract is unambiguous that it is fully guaranteed, regardless of the sufficiency of Player's skill or competitive ability or injury. Club could not slice off parts of the agreed base salary in the manner sought in this arbitration. As it is undisputed that Club did not pay USD 80,000.00 of the overall USD 300,000.00 base salary, Player is entitled to be awarded that amount.

49. The Arbitrator does consider it necessary and appropriate to take into account one other matter, namely, the "net" nature of the payments provided for in the Contract. In particular, Article 3 of the Contract says, explicitly, that Player's salary will be paid net after all Chinese taxes. Later on in the same Article the Contract also provides for a similar "net" payment of bonuses. Player has not included the word "net", or more precisely, the phrase "net of all Chinese taxes" in the prayers for relief. The Arbitrator does also note that in the predicate text of the Request for Arbitration that Player references the "net" nature of the payments which were due to him. That characteristic of the payments to Player was not gainsayed by Club. Lest there be any cause for future

fiscal debates, wherever such might take place, the Arbitrator considers it appropriate to add the phrase "net of all Chinese taxes" to the dispositive of this Award. This small, but important addition cannot possibly take Club by surprise, and does not add any additional burden onto it beyond that for which it expressly contracted with Player. This addition is, therefore, in the Arbitrator's view, within the boundaries of his powers and does not constitute trespass into the realms of *ultra petita*. It should, of course, be said that the margins of an arbitrator's powers are not elastic in that regard, and it would have been preferable for the prayer for relief to have included that phrase, or at the least the word "net".

50. *Bonus*: the Parties each refer to the following language of the Contract for the purposes of ascertaining the entitlement to a bonus (Article 3 of the Contract):

> *"• PLAYER will also receive the following bonuses (all bonuses net after all Chinese taxes)*
>
> *• PLAYER will also receive the following bonuses only if PLAYER participates in games"*

51. The Parties differ in their approach to the interpretation of this language. Club suggests that Player would have need to play in the relevant playoff games which triggered the particular bonus amounts. Player says otherwise and points to the fact that he only got to play in one game (at Club's choice) which deprived him to playing in "games".

52. The Arbitrator will now apply the principles of interpretation set out earlier in this Award to ascertain the "pacta" as between these Parties. One point which immediately strikes the Arbitrator is that the language is repetitive to a certain extent. Some distinction, therefore, may be ascertained as to what exactly was intended by two apparently similar predicate sentences.

53. The background to the Contract is that it was, apparently, for the playoffs only and was not, as might usually be seen in professional basketball contracts for a full season, made up of a regular season salary and playoff bonuses. Player was being paid USD 300,000.00, net, for the playoffs regardless of how far Club progressed.

54. The bonuses prescribed in the Contract fall into three categories: (a) win bonuses (home and road, USD 5,000.00 and USD 6,000.00 respectively); (b) extra bonuses for specified performance achievements during a game (USD 5,000.00 per game); and (c) substantial playoff bonuses for team record. Player's claim is only directed to category (c) as a playoff bonus for a team record. He is not seeking individual game win bonuses under category (a), or performance bonuses under category (b).

55. The Arbitrator interprets the contractual language set out above as follows. The first sentence is a predicate for the playoff bonus for the team record. The second sentence is a predicate for the "win bonuses" and "extra bonuses" which, on their terms, appear to specifically require Player to play in the relevant games. If he does not play in a particular game, he cannot get the particular bonus associated with that match. However, the "team record" is different and Player is part of the team. Club's reliance on prior BAT awards is unavailing. The contract underlying BAT (FAT) 0082/10 had far more specific language for the entitlement to a bonus than the Contract at hand. In BAT 0535/14 the player was no longer with the team and had moved on elsewhere. In BAT 0703/15 the player left the club without permission.

56. In conclusion, Club is obligated to pay Player the team bonus of USD 100,000.00, net (i.e. net of all Chinese taxes, see supra no. 49), as it is undisputed that Club made its way to the Semi Finals.

57. *Fines*: Player asserts a claim in the amount of USD 37,600.00 for late payments fees as against Club. As already noted above, the Contract provides for such a fee or fine in the amount of USD 100.00 per day. Thus, it must follow that Player is seeking 376 days of

fines running up to 15 April 2020 (the date of the Request for Arbitration). The commencement date for fines would, therefore, be 5 April 2019. The Arbitrator has considered the letter dated 20 July 2019 from Player's Agent (Exhibit R-8) which states that Club was, at that time, 91 days late. That would indicate a commencement date of 10 April 2019 for fines. However, the Arbitrator notes that 10 April 2019 was itself an agreed salary instalment date under the Contract, and the fines per day would only commence after seven working days (which would be 19 April 2019). Thus, the Arbitrator, *ex aequo et bono*, ascertains that the correct starting dates for fines was 19 April 2019. There are 362 days from that date to the date of the Request for Arbitration, which would result in a total amount of late payment fees of USD 36,200.00. This is the amount which the Arbitrator finds to be presumptively due to Player by way of penalties.

58. The Arbitrator says "presumptively due" as penalties are themselves the subject of particular attention in prior BAT awards.

59. It is well-established in reasoned BAT awards that 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 (*e.g.* by reference to the primary or substantive obligations in a contract), may be refused enforcement, or moderated in its application. Whether or not a BAT arbitrator might refuse enforcement of such a penalty, or moderate its application to some extent, is usually left to their discretion depending on the individual circumstances of a case. This is a highly fact-sensitive exercise, and the discretion in that regard is not to be taken to be unfettered.

60. Turning to the actual case at hand, the Arbitrator considers that USD 36,200.00 is not out of all proportion to the legitimate interest of Player in getting paid and the detriment imposed on Club is commensurate with such interest. The overall amount owed to Player is USD 180,000.00 (by way of salary and team bonus). The amount of fines is

approximately 20%.

61. The Arbitrator does also take into account the fact that Player waited more than a year to commence the arbitration and, in principle, has potentially accrued to himself the benefit of the concomitant number of daily fines. However, in the case at hand that, in and of itself, has not given rise to a detriment out of proportion imposed on Club. The overall amount of salary and team bonus of USD 180,000.00 plays a role in the analysis of the overall amount of fines. Were the underlying substantive amounts of salary and team bonus considerably less than USD 180,000.00 then the Arbitrator would likely subject the arguably-substantial number of days of fines to much greater scrutiny for the purposes of assessing the detriment/interest dichotomy. While there are no black-letter distinctions to be made, the point remains that each case of daily fines and penalties must be assessed in all of their respective individual circumstances to guard against disproportionate detriment.

62. Thus, the Arbitrator sees no reason to attenuate, moderate, or disallow the application of the penalty clause. Taking into account the principles associated with penalty clauses as set out earlier in this Award, the Arbitrator upholds the penalty in this case and awards Player USD 36,200.00. The Arbitrator denies Club's argument that a contractually-agreed provision should be changed into a simple interest calculation. The Parties agreed a daily late payment fee, and that "pacta" is duly upheld by the Arbitrator.

63. Finally, Player claims interest at 5%. In line with BAT jurisprudence, the Arbitrator finds that the Player shall be entitled to 5% interest on the principal amount due (USD 180,000.00) as from 17 April 2020 (i.e. the day after the Request for Arbitration) until payment in full.

## 7. Costs

64. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as

follows:

> *"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]*"*

65. On 15 November 2020, the BAT President determined the arbitration costs in the present matter to be EUR 12,000.00

66. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, 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."*

67. Considering that Player prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Club alone. Consequently, Club must pay Player an amount of EUR 6,000.00, representing the share of the advance on costs paid by him.

68. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

> *"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to 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."*

69. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.

70. Player claims a contribution to his legal fees in the amount of EUR 10,000.00 together

with the non-reimbursable handling fee of EUR 3,000.00. He notes that his actually-incurred legal fees are well in excess of that amount.

71. Taking into account the factors required by Article 17.3 of the BAT Rules, the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this case (particularly the fact that Club adopted a line-by-line denial, in most respects, of Player's claims and placed a large number of arguments in play), the Arbitrator holds that: (a) EUR 3,000.00 for the non-reimbursable handling fee and (b) EUR 10,000.00 for Player's legal fees and expenses, represent a fair and equitable contribution by Club to Player in this regard.

72. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

    (i) Club shall pay EUR 6,000.00 to Player, being the costs advanced by him;

    (ii) Club shall pay to Player EUR 3,000.00 for the non-reimbursable fee plus EUR 10,000.00 for legal fees, representing a contribution to the amount of his legal fees and other expenses.

## 8. AWARD

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

1. **Shenzhen City New Century Basketball Club is ordered to pay Mr. Quincy Jyrome Acy USD 80,000.00, net after all Chinese taxes, by way of unpaid salary, USD 100,000.00, net after all Chinese taxes, by way of unpaid team bonus, and USD 36,200.00 by way of late payment fees, together with 5% interest on the amount of USD 180,000.00 from 17 April 2020 until payment in full.**

2. **Shenzhen City New Century Basketball Club is ordered to pay Mr. Quincy Jyrome Acy an amount of EUR 6,000.00 in respect of arbitration costs.**

3. **Shenzhen City New Century Basketball Club is ordered to pay Mr. Quincy Jyrome Acy EUR 13,000.00 in respect of his legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 18 November 2020

Klaus Reichert
(Arbitrator)