



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1541/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Ms. Tina Charles

Wasserman Media Group LLC

10900 Wilshire Blvd., Suite 1200, Los Angeles, CA 90024, USA

- Claimant 1 -

- Claimant 2 -

both represented by Mr. Howard L. Jacobs, attorney at law
31111 Agoura Road, Suite 225, Westlake Village, CA 91361, USA

vs.

Jiangsu Wutaishan Women Professional Basketball Club

2-2, Nanjing Huangpu Hotel, 15th Floor, Block D, 210016 Nanjing, PRC

- Respondent -

represented by Ms. Shao Zhong, Mr. Zhou Bin and Ms. Liu Fang, attorneys at law,
Jiangsu Q PLUS Law Firm, 10/F, 5A Building, No. 68 Olympic St., 210029 Nanjing, PRC

1. The Parties

1.1 The Claimants

1. Ms. Tina Charles (hereinafter “Claimant 1”) is a professional basketball player. Wasserman Media Group LLC (hereinafter “Claimant 2”) is the agent of Claimant 1 (together hereinafter the “Claimants”).

1.2 The Respondent

2. Jiangsu Wutaishan Women Professional Basketball Club (hereinafter “Respondent”) is a professional basketball club in China.

2. The Arbitrator

3. On 1 May 2020, Mr. Raj Parker, Vice-President of the Basketball Arbitral Tribunal (hereinafter the “BAT”) appointed Mr. Rhodri Thomas as arbitrator (hereinafter the “Arbitrator”) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”).
4. None of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. The relevant facts and allegations presented in the Parties’ written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

6. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Contract

7. On 23 September 2019, the Parties entered into an employment contract in relation to the 2019-2010 basketball season (hereinafter the “Contract”), pursuant to which Claimant 1 was engaged as a basketball player and Claimant 2 as an agent. The Contract contains, among others, the following provisions:

*“II. **Compensation.** Club agrees to pay Player guaranteed net compensation, without deduction for any taxes, cost, fees, and other charges, equal to USD\$480,000, payable as follows (the “Base Wage”):*

1st installment [sic] of US \$80,000 shall be paid three (3) days after Player has reported to the Club in China, and has fully completed the WCBA league physical test and registration, or [sic] no later than Nov 20, 2019;

2nd installment [sic] of US \$80,000 shall be paid on December 20, 2019;

3rd installment [sic] of US \$80,000 shall be paid on January 20, 2020;

4th installment [sic] of US \$80,000 shall be paid on February 20, 2020;

5th installment [sic] of US \$80,000 shall be paid on March 20, 2020;

Last installment [sic] of US \$80,000 shall be paid within (1) week of the Club’s last official game.

[...]

***Bonus Compensation:** Club shall pay to Player the following bonuses of achievement of each such event (“Bonus Competition”), on a cumulative basis, unless otherwise designated below. Per game win bonus will be paid after every five (5) wins, within seven (7) days of every 5th win. The bonuses will be paid without deduction for any taxes, cost fees, and other charges.*

[...]

Club wins a regular season home game – USD\$500;

Club wins a regular season away game – USD\$600;

Club wins a playoff home game – USD\$500;

Club wins a playoff away game – USD\$800;

Club finishes 2nd place in playoffs – USD\$20,000;

Club wins championship – USD \$50,000, non-cumulative.

For purposes of this Agreement, the Base Wage and Playoffs Compensation shall be referred to as the “Guaranteed Compensation” for 2019-20 WCBA season. In the event any payments of the Guaranteed Compensation are more than fifteen (15) days late, Club acknowledges and agrees that it shall incur a late fee of USD\$250.00 per day as a non-exclusive remedy to player.

[...]

All payments to Player set forth herein shall be fully guaranteed, vested and owing in full upon execution of this Agreement by Player and Club. All payments of Guaranteed Compensation to player shall be without deduction for any taxes, social (employer and employee) charges, bank fees and other costs, Club acknowledges and agrees that Club is responsible for the payment of all applicable income, VAT, local, state, federal and other taxes, social fess [sic], and other costs on any monies paid to player under this Agreement and shall pay all such taxes and costs on Player’s behalf to the appropriate governmental entities. Prior to player’s departure from the China or upon request, Club will provide Player with a certified tax receipt that all applicable taxes on [sic] have been on Player’s behalf. Club will make all arrangements necessary within the Chinese banking system to allow Player to transfer funds to a bank account in any other country designated by Player, at Club’s sole cost and expense.

[...]

III. Additional Benefits. *In addition to the compensation set forth above, Club agrees to provide, throughout the Term of this Agreement, and at no cost to Player, the following:*

[...]

C. During the Term of this Agreement, Club shall provide Player with two (2) roundtrip business class airline ticket for Player to China and vacation during FIBA window and leave after season is over. Club shall provide one (1) roundtrip additional business class ticket and two (2) economy roundtrip business class ticket for Player’s family, or Player’s guests, as determined by Player in her sole discretion. Player agrees that she will make reasonable best efforts to ensure that any request for guest airlines travel will be made at least three (3) weeks prior to guest’s departure date.

Club will allow Player guests to travel for any away games during the time the guest is visiting Player. Player is responsible for paying for Guest’s airline tickets (solely for travel to such away games) and hotel accommodations, but Club agrees to assist Player with booking of airline tickets for Player guest. When Player’s family and friends travel with team for away games, Player cannot miss any training or fail to participate in any game to spend

time with Player's friends or family, unless Player is otherwise injured or ill.

The Club agrees that during the Term, club will book business class roundtrip for all domestic air travels. If travel by train, club will book 1st class train ticket.

[...]

IV. Agent's Commission.

Club agrees to pay Agent a guaranteed fee of USD\$48,000 USD without deduction for any taxes, fees, and charges for the negotiation of this Agreement, with i) USD\$28,000 due and payable on the day after Player plays her 1st 2019-20 WCBA season game and ii) USD\$20,000 due and payable on Feb 10, 2020. Club shall pay the fee after the VAT invoice offered by Agent. The VAT tax is subjected to 6% and shall be covered by Club. Club acknowledges and agrees that it shall incur a late fee of USD\$100.00 per day as a non-exclusive remedy to Agent. All payments to Agent shall be collectively referred to as the "Agent Fees"...

[...]

VI. Vacations. *Player will be allowed to take vacation during the FIBA Window where the league pauses. Player will be allowed to leave China on Jan 4th, 2020 and then return to China on Feb 1st, 2020. Play will need to make sure to train and stay in shape during such vacation time.*

[...]

VII. Contract Guarantee. *Club agrees that this Agreement is an unconditionally guaranteed contractual Agreement and that Player's Guaranteed Compensation and the Agent Fee are fully guaranteed, due and payable. For the avoidance of doubt and without limiting the foregoing, in the event that Player sustains an incapacitating injury or illness during the term hereof that renders Player incapable of performing in some or all of the Club's remaining games, Club shall pay the Base Compensation and Agent Fees as set forth herein.*

[...]

IX. Governing Law, Disputes, Translation. *This Agreement contains the entire agreement between the parties and there is no oral or written inducements, promises or agreements except as contained herein. Any or all prior agreements or contracts are void upon the execution of this Agreement. Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the BAT Arbitration Rules, by a single arbitrator appointed by the BAT President. The seat of arbitration shall be Geneva, Switzerland. The arbitration shall be governed by the 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 upon appeal shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute.*

XI. Rights of Termination.

Club may terminate this Contract immediately upon giving written notice to Player, on or at any time after the happening or occurrence of any of the following events or circumstances: (1) Violating WCBA league rules and policies, or unreasonably violating team training policies set forth herein or in team manual provided by Club to Player.(2) Physically attacking WCBA league staff, referees, club staff and other even staff. Club will have right to evaluate such incident(s) and reserve rights of termination. (3) Player is injured due to her participating in an unreasonably dangerous activity (and specifically not including Player's participation in Club practices or WCBA games). Club reserves rights to terminate and will pay Player salary, per diem and bonus up until the month Player is injured due to participating in an unreasonably dangerous activity. (4) Club and Player are unable to carry contract terms set form herein due to a Force Majeure Event. A "Force Majeure Event" shall mean an Act of God, war, an act of public enemy, governmental act, act of terrorism, regulation or rule, or other reason beyond the control of the parties that is generally regarded as force majeure and would prevent Club and Player from carrying out the contract terms set forth herein, specifically excluding injury to Player incurred during activity during the Term not deemed unreasonably dangerous.

Once Club and Player comes to agreement on termination including settlements, Club will not be responsible for further compensations.

[...]

XII. Special Termination. *Notwithstanding anything herein to the contrary, Club acknowledges and agrees that Player shall be relieved of Player's obligations hereunder, in the event that: (i) any payment to Player and/or Agent required by this Agreement is more than two (2) business days past due; and/or (ii) Club breaches any other term of this Agreement and fails to cure such breach within (2) days after Club receives notice of such breach from Player or Agent. Player shall promptly resume performance of all obligations set forth herein upon Club's cure of any breach or failure to pay as set forth above.*

[...]

Additionally, Club agrees that Player may immediately terminate and/or void this Agreement in the event that: (i) any payment to Player and/or Agent required by this Agreement is past due more than seven (7) days; and/or (ii) Club breaches any other term of this Agreement and fails to cure such breach within seven (7) days after notice of such breach. In the case of such termination and/or voiding of this Agreement by Player, Club will immediately grant Player her unconditional release and free agency inside and outside of China, and Club shall take all necessary steps to immediately issue a Letter of Clearance. Upon forty-eight (48) hours after notice has been given, Club must pay Player and Agent all Guaranteed Compensation of player and all monies of Agent that otherwise would have been due to Player and Agent. Player agrees that Club may immediately terminate and/or void this Agreement in the event that: (i) Player is caught using illegal drugs or convicted of any drug related offense; and/or (ii) Player gambles on any WCBA games. Any termination of this Agreement shall not be seen as a waiver of either party of any rights available to such party at law or in equity."

3.1.2 Factual background to the dispute

8. On 4 January 2020, Claimant 1 returned from China to the United States for a contractually-agreed vacation pursuant to Clause VI of the Contract. The vacation period was during the scheduled hiatus of the Women's Chinese Basketball Association league (the league in which the Respondent participates and hereinafter the "WCBA") between 2 January 2020 until its scheduled resumption on 13 February 2020.
9. Claimant 1 received payment of the third instalment of her salary on 20 January 2020.
10. On 3 February 2020, due to the ongoing COVID-19 pandemic, the Chinese Basketball Association announced that WCBA games were postponed with immediate effect and until further notice. Claimant 1 did not return to China following this announcement.
11. Claimant 2 did not receive payment of the outstanding portion of the agent fee of USD 20,000.00 (hereinafter the "Agent Fee") on 10 February 2020 and Claimant 1 did not receive the fourth instalment of her salary on 20 February 2020 (hereinafter the "4th salary instalment").
12. On 17 March 2020, Respondent sent a letter to Claimant 1 stating that she must return to China to report to the Respondent on 20 March 2020. This letter enclosed a draft "Supplemental Player Agreement" which suggested revised dates on which certain outstanding salary payments were to become due.
13. On 19 March 2020, the Claimants sent a letter to the Respondent stating that the USA had a "Do Not Travel" advisory note in place for travel to China and therefore Claimant 1 could not return to China. The letter enclosed an offer to terminate the Contract as of 20 March 2020, pursuant to which the Respondent would pay Claimant 1 USD 160,000.00 (being the fourth and fifth instalments of Claimant 1's salary) and Claimant 2 USD 20,000.00 (being the outstanding Agent Fee). The letter also stated that if the Respondent did not agree to these terms, the Claimants would terminate the

Contract “*due to the fact that the Club is more than two (2) days late on the payments due to Payer and Agent (See Section XII of the Agreement), and file a claim with BAT to collect all outstanding and past due amounts owed to Player and Agent under the Agreement*”.

14. On 24 March 2020, the Respondent sent a letter to the Claimants in which it stated that “*Due to force majeure, the club has the right to cancel the contract in advance*”. The Claimants sent a letter on the same date stating that “*In accordance with Section XII of the [Contract], this letter shall serve as notice that the Player is hereby exercising her right to terminate the [Contract] effective immediately*”.
15. Claimant 1 did not receive the fifth instalment of her salary on 20 March 2020 (hereinafter the “5th salary instalment”) nor the final instalment (hereinafter the “final salary instalment” and together with the 4th salary instalment and 5th salary instalment, the “unpaid salaries”).
16. Representatives of the Claimants and the Respondent had further discussions in relation to the dispute following the filing of the Request for Arbitration by WeChat and by formal letter sent on 30 May 2020 by Respondent to the Claimants. In this letter, Respondent offered “*50% of all of the unpaid wage (USD 240,000 * 50% = USD 120,000) can also be negotiated. There was no different opinion on the brokerage expenses of USD 20,000*”. These discussions did not lead to a settlement of the dispute.

3.2 The Proceedings before the BAT

17. On 21 April 2020, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. On 15 April 2020, the BAT received EUR 3,000.00 of the non-reimbursable handling fee of EUR 3,000.00 from the Claimants.
18. By letter dated 5 May 2020, the BAT Secretariat fixed a deadline of 20 May 2020 for the Respondent to file an Answer to the Request for Arbitration. By the same letter, and

with a deadline of 18 May 2020 for payment, the following amounts were fixed as the Advance on Costs:

<i>“Claimant 1 (Ms. Tina Charles)</i>	<i>EUR 4,500.00</i>
<i>Claimant 2 (Wasserman Media Group LLC)</i>	<i>EUR 2,000.00</i>
<i>Respondent (Jiangsu Wutaishan Women Professional Basketball Club)</i>	<i>EUR 6,500.00”</i>

19. By letter dated 25 May 2020, the BAT Secretariat confirmed that it was unable to deliver the letter dated 5 May 2020 to the Respondent and that both Parties had failed to pay their respective shares of the Advance on Costs. The BAT Secretariat therefore confirmed new deadlines of 8 June 2020 for the Respondent to file its Answer and of 4 June 2020 for the Parties to pay the Advance on Costs.
20. Claimant 2 paid the Claimants’ share of the Advance on Costs on 28 May 2020. The Respondent paid its share of the Advance on Costs on 3 June 2020.
21. The Respondent filed its Answer on 8 June 2020 with certain exhibits not translated into English. The Respondent filed fully translated exhibits on 13 June 2020.
22. By Procedural Order dated 17 June 2020, the Arbitrator requested that the Parties provide further information by 29 June 2020 (hereinafter the “First Procedural Order”).
23. The Claimants and the Respondent each responded to the First Procedural Order on 29 June 2020.
24. By Procedural Order dated 3 July 2020, the Arbitrator requested that Claimant 1 provide further information by 10 July 2020 (hereinafter the “Second Procedural Order”).
25. By email of 3 July 2020, Claimant 1 requested an extension to file her response to the Second Procedural Order until 17 July 2020. The Arbitrator granted this request by email on 6 July 2020.

26. The Claimants responded to the Second Procedural Order on 17 July 2020. On the same date, the Respondent provided unsolicited comments on the Claimants' response to the First Procedural Order. These comments have not been admitted by the Arbitrator because they were not requested by the Arbitrator. However, given the content of the comments, they would not have affected the Arbitrator's decision in any event. Where relevant, this is addressed in section 6 below.
27. By Procedural Order dated 20 July 2020, the Arbitrator declared the exchange of submissions complete, and requested that the Parties submit detailed accounts of their costs by 27 July 2020. The Respondent submitted an account of costs on 27 July 2020. The Claimants did not submit an account of costs.
28. Since none of the Parties filed an application for a hearing, and the Arbitrator did not deem a hearing necessary, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Positions of the Parties

4.1 Claimant 1's Position

29. In summary, in the Request for Arbitration Claimant 1 claimed from the Respondent:
- a) a total of USD 160,000.00 for the unpaid salaries;
 - b) USD 11,500.00 as late payment penalties for 46 days that the Respondent failed to pay the above outstanding sums (calculated at USD 250.00 per day from 6 March 2020 (being 15 days after the date of payment of the 4th salary instalment) until the date of filing the Request for Arbitration);
 - c) USD 8,100.00 as unpaid bonus payments; and

d) default interest calculated at 5% per annum on the amounts set out at a) and c) above, from the date of filing the Request for Arbitration until payment.

30. In the Request for Arbitration, the Claimants also claimed “7. *Reimbursement of all Arbitration costs paid by Claimants; and 8. A contribution towards Claimants’ Attorney’s fees*”.

4.1.1 Unpaid salaries

31. Claimant 1 accepts that, in light of the COVID-19 pandemic, it would be fair and equitable not to receive the full amount of the unpaid salaries. Instead, she submits that it would be equitable for her to receive from the Respondent 100% of the 4th salary instalment (being USD 80,000.00) and 50% of each of 5th salary instalment and final salary instalment (each being USD 40,000.00).¹ This, Claimant 1 submits, would be consistent with the BAT Covid-19 Guidelines issued on 20 April 2020 (hereinafter the “BAT Covid-19 Guidelines”).

4.1.2 Unpaid bonuses

32. Claimant 1 submits that she is owed bonus compensation of USD 8,100.00, which comprises nine bonuses of USD 500.00 for home game wins (in total, USD 4,500.00) and six bonuses of USD 600.00 for away game wins (in total USD 3,600.00).

33. In her response to the First Procedural Order, Claimant 1 accepted that she had received bonus payments for the 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 11th, 12th and 13th games of the WCBA season (as referred to in the Respondent’s Answer) but requested that the Respondent provide copies of Claimant 1’s acknowledgment of these payments. Claimant 1 stated that she had not received bonus payments for the 14th, 15th, 16th, 17th

¹ In her response to the First Procedural Order, Claimant 1 additionally claimed payment of unpaid salary for January 2020. However, in her response to the Second Procedural Order, Claimant 1 submitted that this reference to unpaid salary in January 2020 was included in error and confirmed that she is not claiming any salary in respect of January 2020.

and 18th games (being three away game wins and two home game wins), totalling USD 2,800.00.

4.1.3 Expenses

34. In her response to the First Procedural Order, Claimant 1 accepted that certain personal expenses could be deducted from amounts owed by the Respondent to Claimant 1. However, Claimant 1 did not accept that the full amount of expenses claimed by Respondent (RMB 8,413.00 (or USD 1,288.50)) had been shown by the Respondent to relate *only* to Claimant 1.
35. In her response to the Second Procedural Order, Claimant 1 accepted that the following expenses were deductible: CNY 2610 and CNY 2350 (around USD 708.58²) for Claimant 1's mother's airfare and RMB 429.50 (around USD 61.34³) for Claimant 1's train fare. Claimant 1 did not accept that the following expenses were deductible: "*catering expenses*", invoices for taxi fares and "*small invoices with no description at all*". On that basis, and by accepting certain expenses were deductible, Claimant 1 accepted that USD 769.92 was deductible from any amounts awarded to her.

4.2 Claimant 2's Position

36. Claimant 2 claims that the Respondent did not pay him the Agent Fee and therefore claims:
- a) USD 20,000.00 in respect of the outstanding Agent Fee;

² Per exchange rate as of 29 July 2020:

<https://www.xe.com/currencyconverter/convert/?Amount=4960&From=CNY&To=USD>.

³ Per exchange rate as of 29 July 2020:

<https://www.xe.com/currencyconverter/convert/?Amount=429.5&From=CNY&To=USD>

- b) USD 6,100.00 as late payment penalties for 61 days that the Respondent has failed to pay the above outstanding sum (calculated at USD 100.00 per day from 20 February 2020 until the date of filing the Request for Arbitration); and
- c) default interest calculated at 5% per annum on the amount set out at a) above, from the date of filing the Request for Arbitration until payment.

37. Claimant 2 submits that it is owed the full amount of the Agent Fee as it is entitled to the Agent Fee because: (i) it is guaranteed, regardless of whether the Contract is terminated as a result of a material breach by Claimant 1; because it was earned well before the COVID-19 pandemic began; and (ii) it was due within one week of the season being postponed. Claimant 2 submits that payment of the full amount of the Agent Fee would be consistent with the BAT Covid-19 Guidelines.

4.3 The Claimants' Request for Relief

38. The Claimants' Request for Relief states:

"Claimants request the following:

An award against Jiangsu Wutaishan Women BC, as follows:

1. *Unpaid player compensation to Tina Charles in the amount of US \$160,000.00;*
2. *Unpaid bonus compensation to Tina Charles in the amount of US \$8,100.00;*
3. *Unpaid agency payment to WMG in the amount of US \$20,000.00;*
4. *Late payment penalties to Tina Charles in the amount of US \$11,500.00;*
5. *Late payment penalties to WMG in the amount of US \$6,100.00;*
6. *Legal interest at 5% per annum from the date of the filing of this request for Arbitration until paid;*
7. *Reimbursement of all Arbitration costs paid by Claimants; and*
8. *A contribution toward Claimants' Attorney's fees.*

In the alternative, Claimants request an award against Jiangsu Wutaishan Women

Basketball Club in an amount which the arbitrator deems to be owed under the contract, including an award of costs, legal fees and interest in an amount which the arbitrator deems just and proper.”

4.4 The Respondent’s Submissions

4.4.1 Unpaid salaries

39. In short, the Respondent submits that it terminated the Contract due to force majeure on 24 March 2020. Therefore, the final salary instalment was not payable.
40. In relation to the 4th and 5th salary instalments, the Respondent accepts that some payment is due to Claimant 1. However, the Respondent submits that, pursuant to the BAT Covid-19 Guidelines, the following calculation should be applied:

*“for every euro of monthly salary exceeding EUR 2500(about US\$2811.75), reduction by 50% as a starting point, but subject to adjustment upwards or downwards”. Calculated based on Claimant1’s salary: $(80000 - 2811.75) * 50\% + 2811.75 = US \41405.875 per month, this brought the two months salaries to US \$82811.75.”*

4.4.2 Unpaid bonuses

41. The Respondent submits that it paid Claimant 1 bonus payments for the Respondent’s first 10 victories of the season but has not yet paid Claimant 1 bonus payments for the most recent five games, totalling USD 2,800.00.
42. The Respondent also submits that it incurred expenses on Claimant 1’s behalf totalling RMB 8,413.00 (or USD 1,288.50). The Respondent argues that the unpaid bonus compensation due to Claimant 1 should be reduced to USD 1,511.50.

4.4.3 Unpaid Agent Fee

43. The Respondent acknowledges that when it tried to settle the dispute, it offered Claimant 2 USD 20,000.00 on 30 May 2020 in respect of the Agent Fee. However, the Respondent submitted in its Answer that a fair sum would in fact be USD 10,000.00, in particular given that *“the work actually carried out by the agent was reduced correspondingly”*.

4.4.4 Late payment penalties

44. The Respondent submits late payment penalties should not be accounted for in the “normal way” because of the circumstances created by Covid-19.

5. The jurisdiction of the BAT

45. 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).

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

47. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.⁴

48. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

3 The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."

49. Clause 9 of the Contract stipulates:

***“IX. Governing Law, Disputes, Translation.** This Agreement contains the entire agreement between the parties and there is no oral or written inducements, promises or agreements except as contained herein. Any or all prior agreements or contracts are void*

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

upon the execution of this Agreement. Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the BAT Arbitration Rules, by a single arbitrator appointed by the BAT President. The seat of arbitration shall be Geneva, Switzerland. The arbitration shall be governed by the 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 upon appeal shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute."

50. The Contract is in written form and thus its arbitration clause fulfils the formal requirements of Article 178(1) PILA. 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 respective arbitration agreements contained in the Contract under Swiss law (referred to by Article 178(2) of the PILA). In addition, the Respondent did not object to the jurisdiction of the BAT over it.
51. For these reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims against the Respondent.

6. Discussion

6.1 Applicable Law – ex aequo et bono

52. 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*", as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

53. 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."

54. Clause 9 of the Contract states that "[t]he arbitrator upon appeal shall decide the dispute ex aequo et bono" and that any disputes submitted to the BAT shall be determined in accordance with the BAT Rules. The preamble to the BAT Rules states "the parties recognise [...] that the BAT arbitrators decide ex aequo et bono" and Article 15 of the BAT Rules provides that the Arbitrator shall decide the dispute ex aequo et bono unless the parties have expressly and specifically agreed that he is not authorized to do so.
55. The Arbitrator notes the application of ex aequo et bono by the Arbitrator is said to be "upon appeal". This could suggest that *ex aequo et bono* only applies in appeals proceedings and not in the first instance. However, such an interpretation would render the provision meaningless as the Parties cannot appeal the decision of the Arbitrator and the Contract does not contain a reference to any other forum of dispute resolution. Given that Clause 9 of the Contract also requires that "any dispute" be submitted to BAT, the Arbitrator finds that the use of the words "upon appeal" are intended in effect to mean when a claim is submitted to BAT, the Arbitrator shall decide the matter *ex aequo et bono*. The Arbitrator notes for completeness that none of the Parties has sought to argue that any other law was relevant for these proceedings. Therefore, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

56. The concept of *équité* (or *ex aequo et bono*) used in 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*⁵ (Concordat),⁶ 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.”*⁷

57. 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”.⁸

58. 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”.

6.2 BAT Covid-19 Guidelines

59. The BAT Covid-19 Guidelines are aimed at addressing “the consequences of the COVID-19 crisis on contracts in basketball, in particular those consequences arising out of domestic championships being suspended or terminated early as a result of the pandemic”⁹. Both Parties refer to and rely on the BAT Covid-19 Guidelines in their respective submissions (although the Parties have interpreted the effect of the BAT Covid-19 Guidelines differently).

⁵ 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).

⁶ P.A. KARRER, *Basler Kommentar*, No. 289 *ad Art.* 187 PILA.

⁷ *JdT* 1981 III, p. 93 (free translation).

⁸ Poudret/BESSON, *Comparative Law of International Arbitration*, London 2007, No. 717, pp. 625-626.

⁹ BAT Covid-19 Guidelines, p.1.

60. For completeness, the principles included in the BAT Covid-19 Guidelines that are directly relevant to the issues in this case are set out below:

“2. Amicable settlements are the preferred means of resolving disputes arising out of the COVID-19 crisis. Parties are under a duty to renegotiate in good faith the terms of their contract in order to resolve on an amicable basis contractual issues arising from the pandemic.

3. Any breach of this duty may be taken into account by the arbitrator when deciding the merits of the case and when deciding on arbitration costs, legal fees and other expenses.

[...]

8. The consequences of the COVID-19 crisis cannot be allocated to one of the parties only, absent any clear contractual language stipulating otherwise for events sufficiently similar to the current pandemic and its consequences on basketball competitions. Without such clear language in the contract, the adverse consequences of the COVID-19 crisis shall be shared by both parties according to their respective circumstances...

9. The principle of pacta sunt servanda shall be generally upheld in a manner consistent with the standing jurisprudence of BAT in times of the COVID-10 crisis. Consequently, a contract is not automatically terminated because of the pandemic. Neither does the COVID-19 crisis give either party just cause to unilaterally terminate the contract.

[...]

15. Bonuses that fell due before the Lockdown Period continue to be owed, but their maturity shall be deferred to the beginning of the 2020/21 season in the relevant domestic championship...

16. The obligation of clubs to pay salaries to players and coaches must be adapted to take into account that

- during the Lockdown Period, the players' and coaches' obligation to provide services is largely suspended (see no. 18, 19 below for players) and that

- the COVID-19 crisis has disrupted the financial framework and presumptions based on which the contracts were executed between the parties.

Based on the above considerations, it is fair and just that the obligation of the club to pay salaries during the Lockdown Period be subject to a general reduction as follows:

a) The size of the salary reduction will depend on the player's/coach's monthly



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salary, with the following scale guiding the arbitrators' assessment of the equitable reduction:

<i>First EUR up to EUR 2,500/month</i>	<i>Reduction by 0-20%</i>
<i>Every EUR exceeding EUR 2,500/month</i>	<i>Reduction by 50% as a starting point, but subject to adjustment upwards or downwards (see below)</i>

When deciding the precise percentage to apply in an individual case, the arbitrator will take into account in particular the following (non-exhaustive) criteria:

- *the overall amount of the salary, keeping in mind that, in principle, lower salaries shall be submitted to a lower reduction than higher salaries;*
- *the financial situation of the club as a result of the COVID-19 crisis;*
- *the individual circumstances of the player/coach, in particular his or her reasonable living costs and the extent to which he or she is financially responsible also for others;*
- *whether the parties have complied with their duty to no. 2 above of these Guidelines and, more generally, have acted in good faith...*
- *the principle of proportionality and reasonableness, in particular how the club will use any liquidity saved through the salary reduction.*

b) It is the duty of the parties to substantiate and provide the necessary evidence to determine the appropriate salary reduction in an individual case...

17. Clubs are under a duty of care towards their players and coaches. In particular, clubs shall apply for any and all financial help available in the applicable jurisdiction in order to ease any consequences arising for its player/coaches because of COVID-19-related pay cuts. A breach of this duty shall be taken into account when deciding on a reduction or deferral or the player's/coach's claim.

[...]

18. The obligation of players to provide sporting services shall be suspended during the Lockdown Period, except and to the sole extent applicable public health guidelines so permit. Obligations in respect of non-sporting services shall not be suspended except to the extent inconsistent with applicable public health guidelines.

19. Players are under an obligation to stay fit and healthy during the Lockdown-Period (to the extent possible under the conditions prevailing in the relevant country) and to participate in any scheduled team activities that are permissible in the relevant jurisdiction, e.g. team meetings by videoconferencing or, subject to applicable public health guidelines, individual or group training sessions.

[...]

20. While these Guidelines focus on contractual relations between clubs and their players/coaches, arbitrators will seek to draw on principles herein also for contractual relations with other actors, in particular agents, to the extent deemed appropriate”.

61. The BAT Covid-19 Guidelines are not binding rules of mandatory application and the Arbitrator has not applied them in such a way. However, the Parties made submissions by reference to them and, based on the circumstances of the case, the Arbitrator considers it is fair and appropriate to apply the BAT Covid-19 Guidelines.
62. In light of the foregoing matters, the Arbitrator makes the following findings.

6.3 Findings

6.3.1 Termination of the Contract

63. Both Claimant 1 and the Respondent assert that they unilaterally terminated the Contract. It falls for the Arbitrator to determine which party (if either) in fact validly terminated the Contract.

6.3.1.1 Respondent’s purported termination of the Contract

64. In a letter to Claimant 1 dated 24 March 2020, the Respondent stated that “*According to the agreement between the two parties (see page 11 of the contract, the “rights of termination”), Due to force majeure, the club has the right to cancel the contract in advance*”. It is not clear from the language of the letter itself that this is in fact a notice of termination pursuant to Clause 11 of the Contract, a point noted by the Claimants in their submissions: “[the Respondent] *did not invoke the “force majeure” termination provision, choosing instead to try to leverage its late salary and agent payments to force Ms. Charles to return to China despite the severe health risks that she would take to do so*”.
65. However, the Respondent stated in its Answer that it had the “*right to terminate the contract with written notice by reason of force majeure*” and described the letter in the

index of exhibits to the Answer as “*Respondent’s letter on cancelling contract on March 24 2020*”.¹⁰ While it is not wholly clear from the evidence that has been presented, the Arbitrator is prepared to accept for the purposes of these proceedings that it was the intention of the Respondent to terminate the Contract by this letter.

66. The Respondent relies on Clause 11 of the Contract, that it may terminate the Contract immediately upon giving written notice to Claimant, on or after a number of specified events including if the Parties are unable to carry out the contract terms due to a “Force Majeure Event”. The Contract specifically defines the relevant events to be regarded as a “Force Majeure Event”:

“an Act of God, war, an act of public enemy, governmental act, act of terrorism, regulation or rule, or other reason beyond the control of the parties that is generally regarded as force majeure and would prevent Club and Player from carrying out the contract terms set forth herein”.

67. Pandemics (such as COVID-19) are not specifically included in the list of enumerated events in the definition of “Force Majeure Event”. Although the definition contains the generic wording of “*other reason beyond the control of the parties that is generally regarded as force majeure*”, the BAT Covid-19 Guidelines specifically state that the “*consequences of the COVID-19 crisis cannot be allocated to one of the parties only, **absent any clear contractual language stipulating otherwise for events sufficiently similar to the current pandemic and its consequences on basketball competitions***” [emphasis added]. The events listed in Clause 11 of the Contract are not sufficiently similar to the current pandemic for the clause to cover COVID-19. Therefore, the Arbitrator does not consider that Clause 11 allows the Respondent to terminate the Contract for force majeure for present purposes and so the Respondent’s letter of 24 March 2020 did not terminate the Contract.

¹⁰ The Arbitrator also notes that in its unsolicited and unadmitted comments on 17 July 2020, the Respondent stated expressly that it did exercise its right to terminate the contract based on force majeure. The Arbitrator had in any event concluded this based on the other evidence presented by the Parties.

68. For completeness, the Arbitrator notes that the Respondent submitted that by failing to return to China when requested to do so, Claimant 1 failed to perform her contractual obligation to attend practices and matches. The Respondent did not expressly submit these actions constituted a repudiatory breach of the Contract, which the Respondent subsequently treated as a termination of the Contract. However, to the extent that this does form part of the Respondent's arguments, the Arbitrator finds that there was no repudiatory breach committed by the Respondent. First, the WCBA was suspended and so Claimant 1 did not miss any games. Claimant 1 may well have missed practice sessions, however in light of the travel restrictions in place at the time, it was reasonable for her to have not returned to China during February, March or April. In this regard the Arbitrator notes paragraph 18 of the BAT Covid-19 Guidelines, which state “[t]he obligation of players to provide sporting services shall be suspended during the Lockdown Period, except and to the sole extent applicable public health guidelines so permit”.

6.3.1.2 Claimants' purported termination of the Contract

69. In response to the Respondent's letter of 24 March 2020, the Claimants sent their own letter to the Respondent in which it stated that “*In accordance with Section XII of the Basketball Agreement, this letter shall serve as notice that the Player is hereby exercising her right to terminate the Basketball Agreement effective immediately*”.

70. The Claimants relied on Clause 12 of the Contract which provides that Claimant 1 may “*immediately terminate*” the Contract in the event that any payment to it or Claimant 2 is more than seven days late. There is no dispute between the Parties that the unpaid salaries remain unpaid. The 4th salary instalment was due on 20 February 2020 and therefore Claimant 1 had the right to terminate the Contract from 28 February 2020 onwards. In this regard the Arbitrator notes paragraph 9 of the BAT Covid-19 Guidelines, whereby “*The principle of pacta sunt servanda shall be generally upheld in a manner consistent with the standing jurisprudence of the BAT in times of the COVID-19 crisis.*” While the same paragraph states that the COVID-19 crisis does not give a

unilateral termination right, this does not prevent the Claimants from relying on the principle of *pacta sunt servanda* by exercising a contractual termination right that is unrelated to the pandemic. Also, the Arbitrator notes that while, in accordance with paragraph 16 of the BAT Covid-19 Guidelines, the Respondent did not owe Claimant 1 her full salary once the Lockdown Period began (see section 6.3.2 below), the Respondent's failure to pay any part of the 4th salary instalment did justify termination based on Clause 12 of the Contract.

71. Therefore, the Arbitrator finds that Claimant 1 terminated the Contract on 24 March 2020. The consequences of such termination (including unpaid amounts due under the Contract) are set out below.

6.3.2 Claimant 1's unpaid salaries

72. Given that termination took place pursuant to Clause 12 of the Contract and not Clause 10, the consequences of such termination must flow from Clause 12 and not Clause 10. Therefore, pursuant to Clause 12, the "*Club must pay Player and Agent all Guaranteed Compensation of player and all monies of Agent that otherwise would have been due to Player and Agent*".
73. The definition of "*Guaranteed Compensation*" covers the unpaid salaries, including the final salary instalment. As the Respondent did not terminate the Contract pursuant to Clause 10 (the consequences of which are that after termination, the Respondent will not be "*responsible for further compensations*"), its submission that the final salary instalment is not due is not accepted.¹¹
74. Each of the Parties submit that it would be equitable for a reduced amount of the unpaid salaries to be awarded to Claimant 1 and that the BAT Covid-19 Guidelines apply. The parties' respective submissions in this regard are summarised in paragraphs 31 and

¹¹ The Arbitrator further notes that, by letter dated 30 May 2020, the Respondent appears to implicitly accept that some part of all three unpaid salary payments are due as it offered to pay Claimant 1 50% of the total unpaid amount of USD 240,000.00.

paragraphs 39 to 40 above. It therefore falls to the Arbitrator to decide what amount of the unpaid salaries is due, taking into account the BAT Covid-19 Guidelines.

75. Paragraph 16 of the BAT Covid-19 Guidelines provides a scale to guide the assessment of what reduction of a player’s salary is fair and just. The starting point of the scale is as follows:

“The size of the salary reduction will depend on the player’s/coach’s monthly salary, with the following scale guiding the arbitrators’ assessment of the equitable reduction:

First EUR up to EUR 2,500/month

Reduction by 0-20%

Every EUR exceeding EUR 2,500/month

Reduction by 50% as a starting point, but subject to adjustment upwards or downwards (see below)”

76. Applying this formula to each of the salary payments claimed by Claimant provides as follows:

Payment Date	Contractual amount (in USD)	BAT Covid-19 Guidelines	Result (in USD)
20 February 2020	80,000.00	First EUR up to EUR 2,500/month (being USD 2,943.00 ¹²) reduction by 20%	2,354.40 +
		Every EUR exceeding EUR 2,500/month (i.e. USD 77,057.00) reduction by 50%	38,528.50
			= 40,882.90
20 March 2020	80,000.00		40,882.90
Within 1 week	80,000.00		40,882.90

¹² Per exchange rate as of 29 July 2020:

<https://www.xe.com/currencyconverter/convert/?Amount=2500&From=EUR&To=USD>

of the end of the season			
Total	240,000	N/A	122,648.70

77. Paragraph 16 further provides a list of non-exhaustive criteria for the arbitrator to take into account “*when deciding the precise percentage to apply in an individual case*”.
78. The Arbitrator therefore takes USD 122,648.70 as a starting point for determining the amount of salary awardable to Claimant 1. The next step is for the Arbitrator to determine whether any relevant criteria apply so as to require an adjustment upwards or downwards, and if so, by how much.
79. First, the Arbitrator must consider the overall salary given that lower salaries should be subjected to a lower reduction than higher salaries. Claimant 1’s salary is a relatively high salary, and so the Arbitrator does not consider that the size of the salary in this case warrants further adjustment.
80. Secondly, the Arbitrator must consider the financial situation of the club as a result of the Covid-19 crisis. In the First Procedural Order, the Arbitrator enquired whether the Respondent was facing financial difficulties. In response, the Respondent submitted that the adverse impact on the club included, but was not limited to “*the loss of access to the awards and financial assistance granted by the Jiangsu provincial government, the financial loss from the fact that the CCTV live broadcasts originally scheduled were called off, the loss of revenue in the form of undertaking fees from the Culture, Sports, Radio & Television Administration and Tourism Bureau of Liyang Municipality (referring to the Respondent’s Evidence 10, 11, 12). In this submission, please find Supplementary Evidence 1: the Statement of Revenues and Expenditures of the Club since January 2020, which can further prove the substantial losses and financial difficulties the Club has been facing after the COVID-19 pandemic*”. The Respondent presented documentary evidence that it was facing financial difficulties, all of which the

Arbitrator accepts. The Respondent also submitted evidence that it had sought (unsuccessfully) financial support from the Jiangsu Basketball Association,¹³ thereby discharging its duty to apply for any and all financial help available pursuant to paragraph 17 of the BAT Covid-19 guidelines. The provision of this evidence also discharges the Respondent's duty to substantiate and provide the necessary evidence to determine the appropriate salary reduction pursuant to paragraph 16(b) of the BAT Covid-19 guidelines. However, whilst the Respondent has evidenced a difficult financial situation, the Arbitrator does not consider that this goes beyond the impact that other clubs in similar circumstances will have suffered. In light of that, this evidence alone does not warrant further adjustment to Claimant 1's salary.

81. Thirdly, the Arbitrator must consider the individual circumstances of the player and her reasonable living costs and the extent to which she is financially responsible for others. The Claimants have presented no evidence in this regard.
82. Fourthly, the Arbitrator must consider whether the Parties have complied with their duty to seek an amicable settlement and have acted in good faith. In this regard, the Arbitrator notes the following:
 - a) the Respondent sought to agree a change to Claimant 1's salary payment dates by a "Supplemental Agreement" which was enclosed with its letter dated 19 March 2020 stating that Claimant 1 should return to China and report to the Respondent;
 - b) on 19 March 2020, the Claimants sought to agree to a settlement agreement which would terminate the Contract and avoid a dispute;
 - c) by letter dated 30 May 2020, the Respondent offered to settle Claimant 1's claims in relation to the unpaid salaries by paying her USD 120,000.

¹³ See Exhibit 2 attached to the Respondent's response to the First Procedural Order.

83. The Arbitrator therefore considers that all of the Parties have attempted amicable settlement of the dispute, albeit the Respondent was apparently more proactive after the Claimants filing the Request for Arbitration.
84. In relation to the duty to act in good faith, the Arbitrator considers that the mere act of requesting Claimant 1 return to China was not unreasonable or made in bad faith. However, it was also not unreasonable for Claimant 1 to refuse to return, particularly given the USA's "*Do Not Travel*" advisory note in place for travel to China.
85. In light of the above, the Arbitrator considers that no further adjustment to Claimant 1's salary is required following application of the formula as set out in paragraph 76 above. Therefore, the Arbitrator finds that the Respondent is liable to pay Claimant 1 salary payments totalling USD 122,648.70 net¹⁴.

6.3.3 Claimant 1's unpaid bonus payments

86. Claimant 1 stated in her response to the First Procedural Order that she believes she has received bonus payments in relation to the 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 11th, 12th and 13th games. However, Claimant 1 requested that the Respondent provide copies of her acknowledgment of receipt of those payments. There is no requirement under the Contract for either Claimant 1 to an acknowledgment of receipt of bonus payments, nor indeed any requirement for the Respondent to provide Claimant 1 with copies of any such acknowledgments. If Claimant 1 believed that she has not been provided with bonus payments in relation to those games, she should have provided evidence of this; however, she has not done so. On that basis, the Arbitrator finds that no bonus payment is due in relation to these games.
87. There is no dispute between the Parties that the Respondent has not paid Claimant 1 bonus payments for the 14th, 15th, 16th, 17th and 18th games, totalling USD 2,800.00.

¹⁴ Clause 2 of the Contract provides that salary payments are to be paid 'net'.

The Arbitrator therefore finds that this amount is, prima facie payable by the Respondent to Claimant 1.

6.3.4 Claimant 1's expenses

88. The Respondent submitted in its Answer that RMB 8,413.00 (or USD 1,288.50) is deductible from the outstanding bonus payments because the Respondent incurred that amount in expenses on Claimant 1's behalf.
89. Claimant 1 has accepted that USD 769.92 of expenses are deductible from the outstanding bonus payments. However, Claimant 1 does not agree that the remaining expenses are deductible.
90. The Respondent has provided various receipts and invoices and submits that they relate to certain expenses incurred by Claimant 1. Claimant 1 disputes this. While the Arbitrator does not question the veracity of the receipts and invoices, the Arbitrator finds that there is not sufficient evidence to prove that those expenses were incurred by Claimant 1. There is, however, one exception to this: a train fare of RMB 219.50 (or USD 31.35¹⁵) for Claimant 1's mother on 6 December 2019. The train fare includes the name of Claimant 1's mother on the ticket. It is also similar to another train fare for Claimant 1's mother of RMB 429.50, which Claimant 1 has accepted is deductible.
91. Therefore, the Arbitrator finds that USD 769.92 (which Claimant 1 accepts is deductible) and USD 31.35 (representing Claimant 1's mother's train fare) are both deductible from the bonus payments due to Claimant 1. Accordingly, the Respondent is liable to pay Claimant 1 bonus payments totalling USD 1,998.73 net.¹⁶

¹⁵ See exchange rate as of 29 July 2020:

<https://www.xe.com/currencyconverter/convert/?Amount=219.50&From=CNY&To=USD>.

¹⁶ Clause 1 of the Contract provides that bonus payments are to be paid without deduction for any taxes, cost, fees, and other charges.

92. Paragraph 15 of the BAT Covid-19 Guidelines states that “[b]onuses that fell due before the Lockdown Period continue to be owed, but their maturity shall be deferred to the beginning of the 2020/21 season in the relevant domestic championship”. In light of this, the Arbitrator finds that payment of the bonus amount is suspended until the beginning of the 2020/21 WCBA season.

6.3.5 Claimant 2’s Agent Fee

93. Clause 4 of the Contract states that the Respondent will pay Claimant 2 a “guaranteed fee” of “USD \$48,000...with i) USD\$28,000 due and payable on the day after Player plays her 1st 2019-20 WCBA season game and ii) USD\$20,000 due any payable on Feb 10, 2020 [sic]”. The Parties do not dispute that the first instalment of USD 28,000.00 was paid in accordance with the Contract.

94. The Respondent argued that the second instalment of Claimant 2’s fees should be contingent on Claimant 2 fulfilling his obligations under the Contract, and that Claimant 2 did not fulfil its obligations because the Contract was terminated early and so “*the work carried out by the agent was reduced correspondingly.*” The Respondent submitted that a fee of USD 10,000.00 would be “*proper*”.

95. The Contract does not expressly state that the agent fees are conditional or contingent on any specific services provided by Claimant 2; the Contract simply states the amounts and dates on which they are payable. However, the Arbitrator considers that one of the primary purposes of structuring agent fee payments in instalments is to reflect the fact that the agent continues to provide services. This approach is consistent with BAT jurisprudence, for example in cases where instalments of agent fees that fell due after the termination of a contract have been found not to be payable.

96. In this case, the second instalment fell due *before* the Contract was terminated and it is therefore, *prima facie*, payable. However, the second instalment was due and payable after the WCBA was suspended and so the Arbitrator must consider the application of the BAT Covid-19 Guidelines in relation to the Agent Fee.

97. Paragraph 20 of the BAT Covid-19 Guidelines states “[w]hile these Guidelines focus on contractual relations between clubs and their players/coaches, arbitrators will seek to draw on the principles herein also for contractual relations with other actors, in particular agents, to the extent deemed appropriate.” Paragraph 8 of the BAT Covid-19 Guidelines provides that, absent clear contractual language stipulating otherwise, “the adverse consequences of the COVID-19 crisis shall be shared by both parties”. The Arbitrator considers that this principle should guide an *ex aequo et bono* determination of the amount of the Agent Fee payable in this case.
98. With that in mind, the Arbitrator notes that: (i) paragraph 16(a) of the BAT Covid-19 Guidelines provides for a general salary reduction of 50% for players;¹⁷ (ii) Claimant 1 has been awarded just over 50% of the amount salaries due under the Contract the WCBA was suspended. For these reasons, the Arbitrator considers that the Respondent’s submission that it shall pay 50% of the Agent Fee that was due after the WCBA was suspended is fair and reasonable. Accordingly, the Respondent shall pay Claimant 2 USD 10,000.00 in respect of the unpaid Agent Fee. The Arbitrator notes that this will still leave Claimant 2 with approximately 80% of the agreed Agent Fee, which the Arbitrator finds reasonable under the circumstances.

6.4 Late payment penalties and Interest

99. The Claimants have claimed late payment penalties in respect of Claimant 1’s unpaid salary and Claimant 2’s unpaid Agent Fee.
100. Clauses 3 and 4 of the Contract provide (respectively) that:

“In the event of any payments of the Guaranteed Compensation are more than fifteen (15) days late, Club acknowledges and agrees that it shall incur a late fee of USD\$250.00 per day as a non-exclusive remedy to player”

[...]“

¹⁷ Over and above a reduction of 0-20% for the first EUR 2,500.00 per month of salary.

Club acknowledges and agrees that it shall incur a late fee of USD\$100 per day as a non-exclusive remedy to Agent.”

101. The Contract therefore contains a late payment penalty clause that, prima facie, covers both Claimant 1’s unpaid salary and Claimant 2’s unpaid Agent Fee.
102. Claimant 1 claimed late payment penalties at a rate of USD 250.00 per day on the unpaid salary for 46 days of delay, from 6 March 2020 until the date on which the Claimants’ Request for Arbitration was filed. This amounts to a total of USD 11,500.00. Claimant 2 claimed late payment penalties at a rate of USD 100.00 per day for 61 days delay. This amounts to a total of USD 6,100.00 starting from 20 February 2020 until the date on which the Claimants’ Request for Arbitration was filed. In both cases, the penalties accumulate over a period of time throughout which the WCBA was suspended.
103. The BAT Covid-19 Guidelines make no reference to late payment penalties; however, this does not mean that the pandemic is irrelevant to the question of whether, ex aequo et bono, late payment penalties should accrue during the period of lockdown. Late payment penalties can be a valid means of incentivising clubs to make timely payments of compensation to players, coaches and agents alike. They have been recognised in BAT jurisprudence as being enforceable, provided always that they are proportionate and do not lead to excessive results.¹⁸ However, the assessment of what is equitable and proportionate is necessarily different in the extraordinary circumstances presented by the COVID-19 pandemic to normal circumstances. The Parties did not negotiate the late payment penalties with the pandemic in their contemplation and the justifications for upholding late penalty payments at a time when basketball games are suspended are less valid. The Respondent has shown that it is suffering serious financial hardship as a consequence of the pandemic. Indeed, this is reflected in the reduction in salary and agent fees that it has been ordered to pay. The Arbitrator considers that, in these circumstances, taking into account also the factors mentioned in paragraphs 78 to 83

¹⁸ See, for example, BAT 0036, 0306 and 0769.

above, it would be inequitable to require the Respondent to pay late payment penalties in respect of payments that fell due while the league was suspended. Consequently, the Claimants' claims for late payment penalties fail.

104. The Arbitrator does, however, recognise that the Respondent should have paid at least some of Claimant 1's salary and some of the Agent Fee while the WCBA was suspended. It failed to make any payments and the Claimants are entitled to some form of compensation for this late payment. Claimant 1 claimed interest on the unpaid salary at a rate 5% per annum from the date of the Request for Arbitration until the sums are paid. *Ex aequo et bono*, the Arbitrator considers it fair that the Respondent should pay interest on the unpaid salary amounts from the day after the dates on which the salary payments fell due (as opposed to the date of the Request for Arbitration) until the sums are paid, in order to compensate Claimant 1 for the Respondent's failure to pay salary amounts on time.¹⁹
105. Similarly, Claimant 2 claimed interest on the unpaid Agent Fee at a rate 5% per annum from the date of the Request for Arbitration until the sum is paid. *Ex aequo et bono*, the Arbitrator considers it fair that the Respondent should pay interest on the unpaid Agent Fee from the day after it fell due (as opposed to the date of the Request for Arbitration) until the sum is paid, in order to compensate Claimant 2 for the Respondent's failure to the Agent Fee on time.
106. Therefore, the Arbitrator finds that for Claimant 1, interest is payable at 5% per annum as follows:

¹⁹ The Claimants have correctly identified that the Contract does not expressly account for default interest. However, consistent with BAT jurisprudence, default interest can be awarded *ex aequo et bono* without being expressly agreed in a contract, and 5% per annum is generally a fair rate.

- a) on the sum of USD 40,882.90 from 21 February 2020 (being the day after which the 4th salary instalment fell due) until payment;
- b) on the sum of USD 40,882.90 from 21 March 2020 (being the day after which the 5th salary instalment fell due) until due payment; and
- c) on the sum of USD 40,882.90 from 25 March 2020 (being the day after which the Contract was terminated and so when the final salary instalment fell due) until due payment.

107. In relation to Claimant 2, interest is payable at 5% per annum on the sum of USD 10,000.00 from 21 February 2020 (being the day after which the Agent Fee fell due) until payment.

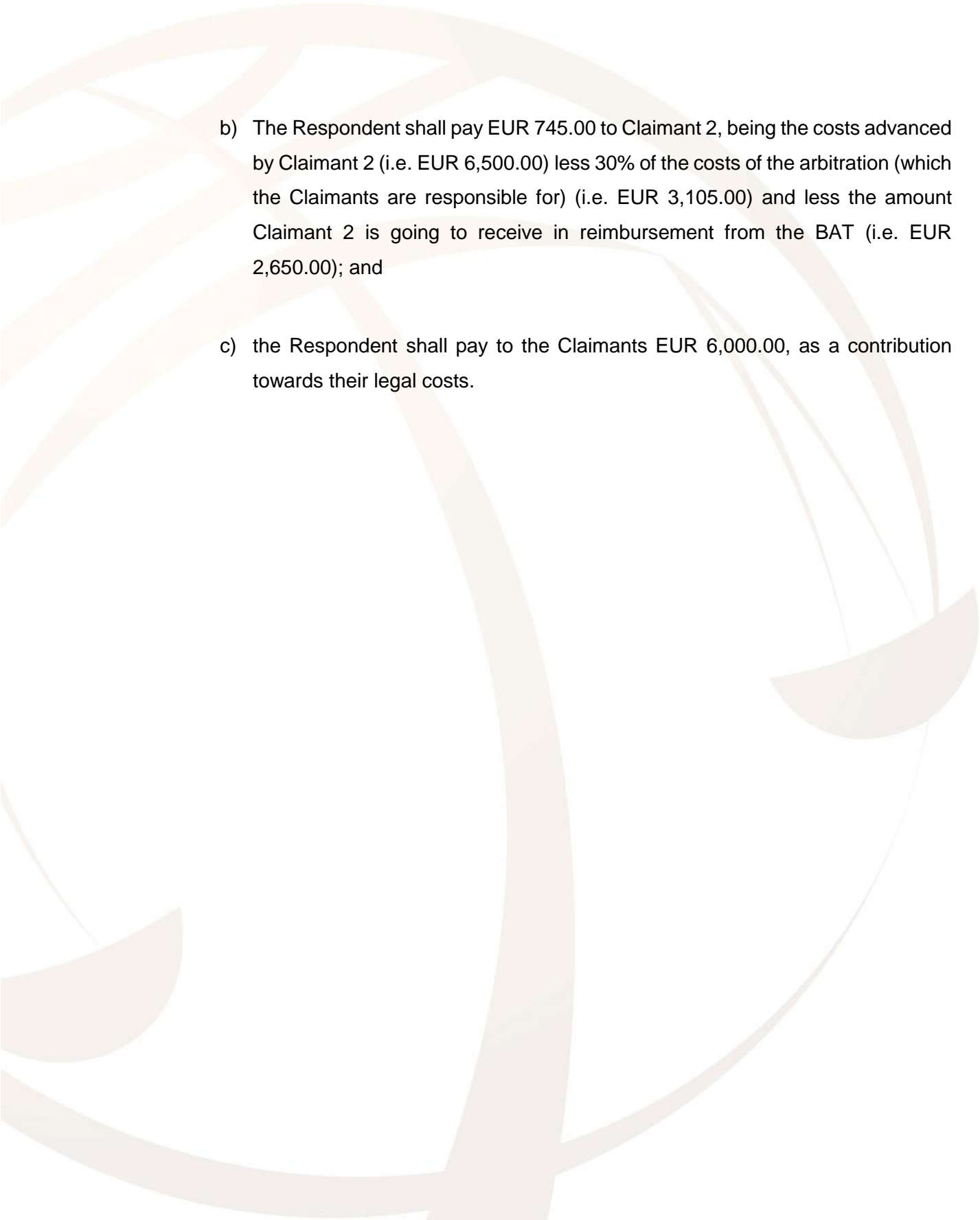
7. Costs

108. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

109. On 26 August 2020, considering that, pursuant to Article 17.2 of the BAT Rules, “*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*”, 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 at EUR 10,350.00.

110. Article 17.3 of the BAT Rules provides that the award shall determine which party shall bear the arbitration costs and in which proportion and that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings. In doing so, *“the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and financial resources of the parties.”*
111. Clause 9 of the Contract states that *“The prevailing party shall be entitled to recover all costs, fees, and attorneys’ fees from the other party in any such dispute.”* Whilst this wording is indicative of the Parties’ intentions, it is nonetheless subject to application of the principals of ex aequo et bono.
112. Broadly speaking, the Claimants were the prevailing parties. Claimant 1 has been awarded roughly 75% of the principal claimed from the Respondent in respect of unpaid salaries (although Claimant 1 later accepted that less might be due) and roughly 25% of the principal claimed from the Respondent in respect of unpaid bonus payments. Claimant 2 has been awarded 50% of the principal claimed from the Respondent in respect of unpaid agent fee but much less in respect of the amounts it claimed in respect of late payment penalties.
113. The Arbitrator notes that the Claimants changed their submissions during the course of the proceedings. Claimant 1 submitted in her response to the First Procedural Order that she had not received payment due on 20 January 2020, a submission she withdrew in her response to the Second Procedural Order. In the same response she also submitted an alternative request for relief (which was much closer to the settlement offer provided by the Respondent). Claimant 1 also originally submitted that she was owed bonus payments for 15 games, whereas she accepted in response to the First Procedural Order that she had in fact received payment for 10 of those games.
114. The Arbitrator also notes that the Respondent submitted unsolicited comments which were not accepted by the Arbitrator and provided no further detail or assistance.

115. In light of all of the above, the Arbitrator considers it is fair in the circumstances and in application of Article 17.3 of the BAT Rules, that 70% of the costs of the arbitration be borne by the Respondent and 30% of the costs be borne by the Claimants.
116. The Claimants did not submit an account of legal costs when requested to, however in their Request for Arbitration they claimed EUR 3,000.00 in respect of the non-reimbursable handling fee and legal fees totalling USD 7,425.00.
117. Article 17.4 of the BAT Rules allows for a maximum contribution of EUR 15,000.00 to a party's legal fees for cases of this size (with the Claimants' request for relief in the RfA being for between EUR 200,001.00 and EUR 500,00.00).
118. It is somewhat regrettable that the Parties could not reach a settlement in this case. By the time of the Second Procedural Order, the Parties were reasonably aligned in the amount of compensation that they considered ought to be paid in respect of the unpaid salary and bonuses. That amount is also similar to the sum that has been awarded in these proceedings. While it is entirely understandable that the Claimants commenced the proceedings in light of the Respondent's failure to pay large sums of money that were due, the Arbitrator considers that there was scope for the Claimants to negotiate a settlement once the proceedings were on foot. It is for this reason – and the fact that the Claimants were not awarded the full sums that they claimed – that the Arbitrator decides *ex aequo et bono* not to award the Claimants their full legal fees and expenses. Instead, in the circumstances the Arbitrator finds that it would be fair and reasonable for the Respondent to pay the Claimants EUR 6,000.00 as a contribution towards their legal fees and expenses.
119. Therefore, the Arbitrator decides:
- a) The BAT shall reimburse EUR 2,650.00 to Claimant 2, being the difference between the costs advanced by Claimant 2 and the Respondent and the arbitration costs fixed by the BAT Vice-President;

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- b) The Respondent shall pay EUR 745.00 to Claimant 2, being the costs advanced by Claimant 2 (i.e. EUR 6,500.00) less 30% of the costs of the arbitration (which the Claimants are responsible for) (i.e. EUR 3,105.00) and less the amount Claimant 2 is going to receive in reimbursement from the BAT (i.e. EUR 2,650.00); and
 - c) the Respondent shall pay to the Claimants EUR 6,000.00, as a contribution towards their legal costs.

8. AWARD

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

- 1. Jiangsu Wutaishan Women Professional Basketball Club shall pay Ms. Tina Charles USD 122,648.70 net as compensation for unpaid salary plus interest at a rate of 5% per annum as follows:**
 - a. on the sum of USD 40,882.90 from 21 February 2020 until payment;**
 - b. on the sum of USD 40,882.90 from 21 March 2020 until payment; and**
 - c. on the sum of USD 40,882.90 from 25 March 2020 until payment.**
- 2. Jiangsu Wutaishan Women Professional Basketball Club shall pay Ms. Tina Charles USD 1,998.73 net for unpaid bonuses, but that payment is suspended until the beginning of the 2020/21 WCBA season.**
- 3. Jiangsu Wutaishan Women Professional Basketball Club shall pay Wasserman Media Group LLC USD 10,000.00 net in unpaid agent fees plus interest at a rate of 5% per annum from 21 February 2020 until the date of payment.**
- 4. Jiangsu Wutaishan Women Professional Basketball Club shall pay Wasserman Media Group LLC the amount of EUR 745.00 as reimbursement of the advance on BAT costs.**
- 5. Jiangsu Wutaishan Women Professional Basketball Club shall pay Ms. Tina Charles and Wasserman Media Group LLC jointly the amount of EUR 6,000.00 as a contribution towards their legal expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 28 August 2020



BASKETBALL
ARBITRAL TRIBUNAL

Rhodri Thomas
(Arbitrator)