BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 2030/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Mr. Kenneth S. Hayes

Mr. Johnny S. Foster

- Claimants -

both represented by Mr. Ozcan Yuksel, attorney at law,

vs.

Shijiazhuang Xianglan Basketball Club Co., LTD.
No. 372, Zhongshan East Road, Chang'an District, Shijiazhuang, Hebei Province
No. 1, Guanghua Road, Xindu District, Xingtai City, Hebei Province, 050032, China

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Kenneth S. Hayes (hereinafter "Claimant 1") is an American professional basketball player. Mr. Johnny S. Foster (hereinafter "Claimant 2") is a professional basketball agent (Claimant 1 and Claimant 2 shall hereinafter be referred to as the "Claimants").

1.2 The Respondent

2. Shijiazhuang Xianglan Basketball Club Co., LTD (hereinafter the "Respondent") is a professional men's basketball club in Shijiazhuang, China.

2. The Arbitrator

3. On 12 October 2023, Prof. Ulrich Haas, President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Rhodri Thomas as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (hereinafter the "BAT Rules").

4. Neither Party has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. The relevant facts and allegations presented in the Parties' written submissions and evidence are summarised below. Additional facts and allegations are 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 relationship between the Claimants and the Respondent

7. In May 2023, Claimant 1 and the Respondent's interpreter, Mr. Steve Ma, exchanged WhatsApp messages discussing the possibility of Claimant 1 re-signing for the Respondent.[1] From the evidence submitted in these proceedings, it appears that the exchange ended on 8 May 2023 with Claimant 1 stating that he needed to stay at home for a family emergency and could not sign for the Respondent.

8. On 12 June 2023, Mr. Ma messaged Claimant 1 to ask if he was available to play for the Respondent at the end of that month. Claimant 1 responded on the same day to say that he was available after 6 July 2023 as he was helping his family move into a new home. Mr. Ma explained that the Respondent had had issues with another foreign player that the Respondent had signed ("*Yes, we had some problem with one of our import").* Claimant 1 reiterated his availability to Mr. Ma on 13 June 2023, stating: "*I told my agent if you don't have a play* [sic] *by 6th of July I could come there for the rest of the season*."

9. On 14 June 2023, the Claimants and the Respondent, as well as Claimant 1's Chinese agent, entered into a player contract for the remainder of the 2023 season (hereinafter the "Contract"). The Contract contained, among others, the following provisions:

> "***Article 1. Term of Agreement and Definition***
>
> *The term of this agreement starts from June/30/2023 till the end of Club's last official game of the 2023 NBL season including playoffs. Player must arrive in Hongkong on June/30/2023. Club will arrange a medical test for Player within two business days after his arrival. If Player passes the medical test, this agreement will take effect immediately. If Player fails the medical test, this agreement will become null and void. If Player participates in any physical contact practice, game, or other team activity prior to the results of the physical, Player will be deemed to have passed for the purposes of this agreement, but Player's participation in team's tactical drills (no jumping, running or any movement may get injured) without physical contact will NOT be deemed to have passed the medical test. Club shall notify Player and Agent in writing of the result of the medical test within three*

[1] The Claimant had previously played for the Respondent.

business days after the medical test is finished. If the result in writing is not sent by the scheduled time, Player will be deemed to have passed for the purpose of this agreement. Upon passing the medical check, the salary for the regular season is GUARANTEED, after the regular season, team has rights to decide to continue the contract or not with the same salary

[…]

Article 3. Basic Salary

After the agreement becomes effective, The [sic] *Club will pay $60,000 US Dollar (net of all tax in China) to the Player as season salary from player arrived team* [sic] *to the end of regular season, pay $1000 by day if not enough for a month. The salary is fully guaranteed for regular season, team has rights to decide to keep the player or not at the end of the regular season with the same salary, which is $30,000 a month. specific* [sic] *salary payment indicates as below:*

Guaranteed Period	*Guaranteed Amount*
07/30/2023	*$30,000 net*
08/30/2023	*$30,000 net*
After 09/01/2023 *(within 5 business days after the Club's last game of the season)*	*$1,000/per day net*

All of Player's salary payments will be made by Club to Player's bank account All [sic] *wire fees on the payments will be paid by Club.*

If the Club delays with any of the payment with more than 7 days, the Players [sic] *has right to stop performing, what means going to the practices and the games.*

If the Club delays with any of the payment with more than 15 days, the Player has right unilaterally to terminate contract, sending written notice to the Club, and accelerate all the monies from this agreement.

This contract is fully guaranteed, excluding the cases mentioned in the article 6 of this agreement.

At the end of the contract, the team will issue tax certificate and hand over to the player, as a proof of all Chinese taxes paid on Player's behalf.

[…]

Article 6: Termination of the agreement

Club shall have the right to terminate this agreement and stop paying any salary or compensation and will not be restrained by the guarantee clause due to the following situations:

1) *Player is arrested and convicted for any crimes such as murder,*[sic] *detention, imprisonment, rape, or robbery etc.;*
2) *Player is tested positive for doping in drug test at any time during the season, as evidenced by an official drug test;*
3) *Player refuses to play games or stops playing during games without the approval of Club;*
4) *Player fails to be registered in the NBL due to such factors as letter of clearance, passport, health issue, crime etc, unless such failure to register is due to the actions of Club.*
5) *Player breaches Provision B of Article 5: Club regulations and penalties.*
6) *Player has any violation to the Public Security Administration Punishment Law of the People's Republic of China such as drug abuse, alcohol abuse, trouble-seeking, drunk driving and so on.*
7) *Player involved any activities like gambling, match-fixing, and so on.*
8) *Player becomes suspect of committing a crime, being under compulsory measures such as detention, arrest, bail pending for trial, and surveillance of residence or being investigated for criminal responsibility according to laws.*

[…]

Article 7: Flight Ticket and Accommodation

A. *The Club shall provide the Player with two (2) Business class one way ticket from USA to China, and China to USA; and one (1) economy class round trip tickets from anywhere-China. Team shall provide player Business class flight to away game during the season. Player will be responsible for all the expenses incurred by his family or friend during the period of his/her stay in China.*
B. *Club will provide Player with a four star hotel single room including a cable TV, Internet, AC/heater, new bed sheets and towels, and other normal furnishings. The apartment will not be shared with another player. Club shall not bear phone bills for any calls or any damage to accommodations caused by Player. Player will stay and eat with the team on road trip. Club will only pay for Player's game and practice jerseys*

laundry on road. Club will pay Player 3000 RMB per month as food compensation at home.

[…]

Article 9: Visas and other documents

Club shall provide and pay all costs associated with all necessary national and local visas, residence and working permits and all other documents necessary for Player to be with the club.

[…]

Article 12: Arbitration

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

[…]

Article 13: Entire Agreement

This is the entire agreement for the parties, any amendments and or additions to this agreement shall be made in writing and has to be agreed to by Player and his representatives to be binding.

[…]

Article 14: Agent Fee & Payments

If the Player fails the medical test, the Club will cover the player's traveling expenses accordingly.

If the Player passes the medical test, Club will pay the Agents 10% of the total amount of Player's salary during this term as Agent fee to agent. The team should pay the agents fee (USD $6000) evenly to Mr. Johnny Foster (Limited) and Grant Zhou per their invoice when the player passes the medical test and should pay remains agent fees within 3 days after season ends.

If the Club has not made payment to the agent [sic] *or to the salary of the player* [sic]*, the Agent may have his Player refuse to participate in any team functions including*

> *practice/games until the Agent's fee or monthly salary has been paid in full. If the Agent fee or salary is delayed for more than 10 days, there will be a late fee of $150 USD net per day until the fees have been paid in full. All Agent fees will be free of the Chinese taxes and social security. If any payment delayed more than (30) days then player is free with his letter of clearance but all the team's financial duties remain.*
>
> *The Agent promises to assist with the Club to take care of the Player and communicate with the Player in order to achieve the goal of the team. Electronic Mail and Telefax copies of this Agreement will be considered as an original. The Club agrees to make a wire transfer to an account specified in the Agent's invoice. The signature below of the parties is the evidence of their willingness and desire to be bound by the aforementioned terms of this Agreement.*

10. During the remainder of June 2023 and early July 2023, Claimant 1 and Mr. Ma continued to exchange WhatsApp messages, principally relating to the progress of Claimant 1's visa application.

11. On 29 June 2023, Claimant 1 received his visa enabling him to travel to China and notified Mr. Ma by WhatsApp. Mr. Ma responded to state: "*Ok the GM already knows And* [sic] *We're looking for the flight. I'll send it to you when they booked it.*"

12. On 29 June 2023 and again on 2 July 2023, Mr. Ma and Claimant 1 continued to discuss the practicalities of Claimant 1's arrival in China, including the need for him to undertake his medical examination and obtain a working permit before playing. Mr. Ma informed Claimant 1 that he would miss games. Claimant 1 replied: "*Damn really ? It takes time? How many games will I have to miss ?* […] *Ok I didn't know that*".

13. Later on 2 July 2023, Claimant 1 sent a WhatsApp message to Mr. Ma stating: "*Y'all signed another guard*".

3.1.2 Pre-action correspondence and discussions between the Parties

14. On 6 July 2023, the Claimant's legal counsel wrote to the Respondent with a notice for breach of contract. The email stated:

> *"*[Y]*ou have breached the contract you have signed with Mr. Hayes and violated the contract obligation.*

You are avoiding to buy the plane ticket necessary for Mr Hayes to join the team, both in correspondence and in the contract.
In this process, Mr Hayes relied on the warranty contract he signed with you and did not make any other transfer. I request that you fulfill all your contractual obligations, including payments. On the contrary, behavior will mean that we seek our rights before FIBA."

15. On 12 July 2023, the Respondent's legal counsel wrote a response letter to the Claimants saying that it was Claimant 1 who was in breach of contract, not the Respondent. The letter stated:

"On the 14th of June, we signed the player recruitment agreement, which clearly states that you will be in Hong Kong on the 30th of June. Because it takes time to apply for your visa and your family needs to take care of medical treatment and other problems, you have been telling us that you can't come to China to participate in the competition until July 5th. Even if you arrive in China on July 5th, it will take at least one week for you to complete the relevant medical examination, work permit, registration and other work tasks, and the first match of our team this season is on July 5th, so you will not be able to participate in at least 3 matches on our behalf. in this urgent situation, we have to find players who will not delay the match. We received your visa at 3am on June 30th, China time, and informed us to book the air ticket to China on July 5th. We believe that you have informed us of the booking information beyond the time agreed by both parties, which cannot meet our competition needs. You are in breach of contract. We are not in breach of contract. In view of the pleasant cooperation between the two sides before, we also hope that the two sides can cooperate again in the future, and we are willing to pay you the visa fee. At the same time, we are also actively recommending other teams for you and hope that you will come to work in China again."

16. On 17 August 2023, the Claimants' legal counsel wrote to the Respondent purporting to unilaterally terminate the Contract in accordance with Article 3. The letter stated:

"In our previous e-mail, we stated that you were violating the contract and avoiding to buy a plane ticket as agreed in accordance with contractual obligations and agreed in the contract, but in the answer e-mail you sent, you stated that you agreed with another player and no tickets will not be purchased.

It has been determined that you have not paid the $30,000 salary that you are obliged to pay according to the contract for more than 15 days. For this reason, in accordance with the article3 of the agreement we declare that we have terminated the agreement unilaterally for just cause. We inform you that all contractual fees ($60,000 player salary) and agent fee should be paid to us immediately, otherwise a compensation lawsuit will be filed against you before FIBA."

17. On 27 August 2023, the Respondent's legal counsel responded to the Claimants. The letter stated:

"On June 14, 2023, the two sides signed to the player employment agreement. The first article of the agreement clearly stated the conditions for the agreement to take effect: Kenneth Hayes must arrive in Hong Kong on June 30, 2023, and have a medical examination within two days; If the player passes the medical examination, this Agreement shall take effect immediately. If the player fails the medical examination, this Agreement shall not take effect.

Due to the player Kenneth Hayes, on June 30th, you informed us through your Chinese agent that we need to purchase your flight to China on July 5th, you failed to arrive at Hong Kong before June 30th as agreed in the contract, and you failed to meet our condition of having a medical examination of the player within two days (before July 2nd, 2023). Therefore, in accordance with Article 1 of the Player Employment Agreement between the parties, the player employment Agreement entered into by the Parties is not effective.

Accordingly, the US $30,000 claimed by lawyer Mr. Ozcan Yuksel in his letter dated 18 August 2023 and the US $60,000 claimed for termination of the agreement are not valid. We believe that: this agreement has not come into force, there is no termination; None of the claims made by counsel Ozcan Yuksel have any basis in contract and will not be considered by us.

In view of our previous happy cooperation, and in line with our Chinese principle of the golden mean, we kindly offered to voluntarily pay you $2,000 on the condition that Mr. Kenneth Hayes and Attorney Ozcan Yuksel permanently give up their arbitration before the Court of Arbitration for Sport in Switzerland. Otherwise, we will defend firmly and never compromise again."

3.2 The Proceedings before the BAT

18. On 9 October 2023, the Claimants filed a Request for Arbitration with the BAT in accordance with the BAT Rules, which was received by the BAT on the same day. The non-reimbursable handling fee of EUR 4,000.00 was received by the BAT on 5 October 2023.

19. On 16 October 2023, the BAT fixed a deadline of 6 November 2023 for the Respondent to file an Answer to the Request for Arbitration. The BAT also fixed the following amounts as the Advance on Costs with a deadline of 26 October 2023 for payment:

Claimant 1 (Mr. Hayes)	EUR 3,500.00
Claimant 2 (Mr. Foster)	EUR 500.00
Respondent (Shijiazhuang Xianglan B.C:)	EUR 4,000.00

20. On the same day, the Claimants' legal counsel requested an extension to the deadline to provide the Claimants' share of the Advance on Costs to 1 November 2023. On the same day, the Arbitrator granted the extension sought by the Claimants.

21. On 24 October 2023, Claimant 1 paid EUR 3,500.00 as his share of the Advance on Costs.

22. On 26 October 2023, JSF Hoops Inc. paid EUR 500.00 on behalf of Claimant 2 and in respect of his share of the Advance on Costs.

23. On 31 October 2023, the Respondent's legal counsel filed an Answer to the Request for Arbitration.

24. On 8 November 2023, the BAT wrote to the parties acknowledging receipt of the Claimants' shares of the Advance on Costs. The BAT noted that the Respondent had failed to pay its share of the Advance on the Costs and gave the Claimants until 20 November 2023 to pay the Respondent's share.

25. On 9 November 2023, the Claimant's legal counsel wrote to request an extension of time until 27 November 2023, to pay the Respondent's share of the Advance on Costs. On 9 November 2023, the BAT approved an extension of time until 27 November 2023 for the Claimants to pay Respondent's share of the Advance on Costs.

26. On 24 November 2023, Claimant 1 paid the Respondent's share of Advance on Costs in the amount of EUR 4,000.00.

27. By Procedural Order dated 20 December 2023 (hereinafter "Procedural Order 1"), the BAT requested the Parties to provide further information by 17 January 2024. On 10 January 2024, the Respondent responded to Procedural Order 1. On 11 January 2024, the Claimants responded to Procedural Order 1.

28. On 5 February 2024, the BAT declared that the exchange of submissions in the proceedings was complete and invited submissions on costs from the Parties by 12 February 2024.

29. On 8 February 2024, the Respondent provided an unsolicited submission to the BAT.

30. On 15 February 2024, the Claimants provided their submission on costs.

31. On 21 February 2024, the BAT invited the Claimants to respond to the Respondent's unsolicited submission by 28 February 2024.

32. On 22 February 2024, the Claimants responded to the Respondent's unsolicited submission.

33. On 27 February 2024, the Arbitrator requested that the Parties provide any updated submissions on costs by 5 March 2024. No further submissions on costs were received.

4. The Position of the Parties

4.1 The Claimants

Claimant 1's claim

34. Claimant 1 submits that although Article 1 of the Contract provides that Claimant 1 was required to arrive in China by 30 June 2023, it was consistently Claimant 1's position both before and after entering into the Contract, and as agreed with a representative of the Respondent (Mr. Ma), that Claimant 1 would arrive in China on 5 July 2023. Claimant 1 adduces several WhatsApp exchanges with Mr. Ma in support of this position.

35. Claimant 1 received his visa to travel to China on 29 June 2023 (USA time) and informed the Respondent of this fact, but no plane ticket was purchased for him. Claimant 1 submits that he was deprived of his ability to undertake a medical examination and to perform under the Contract because, in breach of Article 7 of the Contract, the Respondent did not provide Claimant 1 with a plane ticket to travel to China.

36. In support of this position, Claimant 1 refers to a section of the Federal Act on the Amendment of the Swiss Civil Code which provides:

> *"● An obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove that he was not at fault. (**Section Two: The Consequences of Non-Performance of Obligations Art. 97**)*
>
> *● 1 Where the obligation is to take certain action, the obligee may without prejudice to his claims for damages obtain authority to perform the obligation at the obligor's expense.*
>
> *2 Where the obligation is to refrain from taking certain action, any breach of such obligation renders the obligor liable to make amends for the damage caused.*
>
> *3 In addition, the obligee may request that the situation constituting a breach of the obligation be rectified and may obtain authority to rectify it at the obligor's expense. (**Obligation to act or refrain from action Art 98**)"*

37. Claimant 1 further submits that he was entitled to terminate the Contract in accordance with Article 3 of the Contract, on the basis that the Respondent had delayed payment of sums which were rightfully owed to Claimant 1. Claimant 1 submits that he duly terminated the Contract in this way on 17 August 2023. Accordingly, Claimant 1 claims for the full value of the Contract, being USD 60,000.00 as set out in its Article 3. Claimant 1 claims this amount net of tax.

38. Claimant 1 submits that the Respondent led the Claimant to believe that it would be acceptable for him to arrive after 30 June 2023 because of how the Respondent's dealings with another foreign player, Mr. Shannon Shorter. Claimant 1 alleges that the Respondent

signed a contract with Mr. Shorter on 19 May 2023, but at some point after that, Mr. Shorter told the Respondent that he would not, in fact, report to the Respondent. It was at this point that the Respondent signed an agreement with Claimant 1. After Claimant 1 signed with the Respondent, however, Mr. Shorter subsequently agreed to report to the Respondent. As the Respondent could not sign both Mr. Shorter and Claimant 1, the Respondent tried to "get out" of Claimant 1's contract by not purchasing him a plane ticket.

Claimant 2's claim

39. Claimant 2's claim is based on Article 14 of the Contract, which provides that if Claimant 1 passes the medical test, an agent fee equal to 10% of Claimant 1's salary should be payable to Claimant 1's agents, being Claimant 2 and a third party. Claimant 2 submits that he should be entitled to half of the agent fee, equal to 5% of Claimant 1's salary, i.e. USD 3,000.00 net of tax.

Claimants´ Request for Relief

40. The Claimants' Request for Relief states:

> *"Unpaid salaries USD 60.000*
>
> *Unpaid agent fee USD 3.000*
>
> *Handling fee*
>
> *Advance on costs*
>
> *Interest 5% per annum after the request of arbitration*
>
> *Legal / Arbitration costs and expenses*
>
> *Total amount in dispute: USD 63,000"*

4.2 The Respondent

41. In relation to Claimant 1's claim, the Respondent accepts that prior to entry into the Contract, Claimant 1 and Mr. Ma, did discuss Claimant 1 joining the Respondent on 5 July 2023. Those conversations, the Respondent submits, were superseded by the express wording of Article 1 of the Contract, which states that "*Player must arrive in Hongkong on*

June/30/2023". The Respondent submits that the reason for the change in stance was that as the relevant season (the NBL League) started on 5 July 2023, it was necessary for foreign players to arrive in advance of that date to process necessary registration materials and to go through "*entry-exit procedures*". The Respondent submits that this was expressly communicated to Claimant 1's Chinese agent and the Respondent adduced a WeChat exchange in which Claimant 1's agent replies on 14 June 2023: "*Haige* [Claimant 1] *is OK to sign*" in response to the Respondent stating: "*Have a look, I changed the time*".

42. The Respondent submits that no exchanges that took place after entry into the Contract had the effect of varying the Contract or constituted acceptance by the Respondent of Claimant 1's late arrival in China.

43. The Respondent submits that Claimant 1's requests to arrive in China after 30 June 2023 amounted to an attempt to unilaterally amend the Contract, to which the Respondent did not agree. The Respondent submits that it was Claimant 1 who failed to meet the conditions precedent for the effectiveness of the Contract.

44. Further, the Respondent asserts that Mr. Ma was not authorised to negotiate or make amendments to player contracts on behalf of the Respondent and nothing in the Contract precluded the Respondent from contracting with other foreign players.

45. Finally, the Respondent submits that Claimant 1's Chinese agent (who is not a party to this arbitration) only sent Claimant 1's visa to the Respondent at 2:53am on 30 June 2023 Beijing time.

46. Claimant 2's claim was not well particularised in the Claimants' Request for Arbitration and the Respondent did not make any submissions on it directly. Instead, the Respondent generally denied the claims in the Request for Arbitration.

47. The Respondent´s Answer concludes:

> *"to sum up, my club believes that Kenneth Hayes violated the agreement of the Employment Agreement concluded by the three parties, resulting in his failure to come to*

China on time (and passed the physical examination). If Kenneth Hayes breaches the contract, arbitration tribunal shall not support the arbitration claim made by him."

5. The Jurisdiction of the BAT

48. 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").

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

50. 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.[2]

51. The Contract grants jurisdiction to the BAT to deal with any dispute arising from it, governed by Chapter 12 of the PILA. Article 12 of the Contract contains the following arbitration clause:

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

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

---

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

53. With respect to the substantive validity of the arbitration clause, the Arbitrator considers that there is no indication in the file that could cast doubt on its validity under Swiss law (referred to by Article 178(2) of the PILA). The Respondent has not contested the jurisdiction of the BAT.

54. For these reasons, the Arbitrator has jurisdiction to adjudicate the claim against the Respondent.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

55. 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:

> *"*[T]*he parties may authorise the arbitral tribunal to decide ex aequo et bono".*

56. 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".*

57. Article 12 of the Contract states that "*the arbitrator shall decide the dispute ex aequo et bono*". By virtue of the preceding paragraph, the concept of *ex aequo et bono* is therefore incorporated into the Contract as the law applicable to the merits of the present dispute.

58. For these reasons, the Arbitrator will decide the issues submitted to him in these proceedings *ex aequo et bono*.

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

60. 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*".

61. In light of the foregoing matters, the Arbitrator makes the following findings.

6.2 Findings

Claimant 1's obligation to report in China

62. The first issue to determine in this dispute is when it was that Claimant 1 was required to arrive in Hong Kong. Article 1 of the Contract states: "*Player must arrive in Hongkong on June/30/2023.*" Claimant 1 submits that this wording was intended to reflect the Parties' understanding that Claimant 1 would report on 30 June 2023 only if his family circumstances

---

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* Art. 187 PILA.

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

changed and he was able to report to the Respondent prior to 5 July 2023. The Respondent, on the other hand, submits that the relevant wording in Article 1 was intended to convey that Claimant 1 was required to arrive in China on 30 June 2023. The Arbitrator considers that the wording of Article 1 is clear: the Parties agreed that Claimant 1 "*must*" arrive in Hong Kong on 30 June 2023. If the Parties wanted to reflect their understanding that Claimant 1 would arrive in China by 5 July 2023 and would only arrive earlier if his circumstances changed, an entirely different formulation of wording should have been used.

63. It is also the case that Claimant 1's Chinese agent confirmed to the Respondent that Claimant 1 was willing to agree to a contractual start date of 30 June 2023 (see paragraph 41 above). It has not been established whether or not Claimant 1's Chinese agent did check with Claimant 1 whether or not a start date of 30 June 2023 would be acceptable. Given Claimant 1's repeated position that he could not start before 5 July 2023, it appears entirely feasible that his agent did not check with him, although the Arbitrator does not make a finding in this regard. However, as it was Claimant 1's agent that made this statement to the Respondent it is reasonable for the Respondent to have relied on it (though in any event, Claimant 1 signed the Contract which reflected this wording). Given that Claimant 1 agreed in the Contract that he would be present in Hong Kong by 30 June 2023 and failed to do so, *prima facie* he committed a breach of the Contract.

64. Claimant 1 did not report on 30 June 2023 and frequently indicated that he would report to the Respondent only after 5 July 2023. Had he arrived on or after 5 July 2023, the Arbitrator notes that this is only 5 days after the contractual deadline for Claimant 1 to arrive. As such, there is a question as to the materiality of Claimant 1's breach. The Arbitrator notes that the Contract was very short in duration, lasting only two months (with the potential to be extended on a daily basis after 1 September 2023). The Arbitrator also notes that the league had a busy schedule, with three games to be played each week. As such, timely performance under the Contract would be necessary to give it its intended effect. By failing to report on 30 June 2023 and communicating to Mr. Ma that he was only able to travel on or after 5 July 2023, Claimant 1 would therefore have likely missed several games. In that context, Claimant 1's *prima facie* breach of the Contract, by failing to be present in Hong

Kong on 30 June 2023, was material as it would have deprived the Respondent of a substantial proportion of the benefit it intended to receive under the Contract.

Respondent's requirement to provide Claimant 1 with a plane ticket to China

65. Article 7A of the Contract provides:

> "*The Club shall provide the Player with two (2) Business class one way ticket from USA to China, and China to USA; and one (1) economy class round trip tickets from anywhere-China. Team shall provide player Business class flight to away game during the season*."

66. Article 9 of the Contract provides:

> "*Club shall provide and pay all costs associated with all necessary national and local visas, residence and working permits and all other documents necessary for Player to be with the club*."

67. Claimant 1 submits that the Respondent breached its obligation under the Contract by not providing Claimant 1 with plane tickets to arrive in China, despite the fact that Claimant 1 had informed the Respondent on 29 June 2023 (in his time zone) that he had received his visa. As a result of that alleged breach, Claimant 1 was not able to undertake the necessary steps to ensure that the Contract became fully guaranteed, i.e. travel to China and undertake his medical examination. Conversely, the Respondent submits that as Claimant 1's visa was only received by the Respondent on 30 June 2023 (in its time zone) and that more generally Claimant 1 failed to meet the conditions precedent (such as passing his medical) that were necessary for performance under the Contract, it was under no obligation to purchase a ticket for Claimant 1.

68. As a practical matter, the substance of Articles 1, 7A and 9 of the Contract are related even if they are not expressly stated to be conditional on one another. Claimant 1 was required to arrive in Hong Kong by 30 June 2023 and the Respondent was required to arrange for his travel and visa, both of which were pre-requisites for Claimant 1 to arrive in China by the required date. Subsequent to entering into the Contract, Claimant 1 did not at any stage indicate that he intended to report in Hong Kong on the required date of 30 June 2023. From the WhatsApp exchanges between Mr. Ma and Claimant 1 it also appears that Claimant 1

took at least some of the responsibility for obtaining his visa. On 17 June 2023, he told Mr. Ma "*Yep everything is already being processed* […] *Waiting to get my passport back they are putting visa inside of it*". Claimant 1 then received his passport and visa on 29 June 2023 (in his time zone) and sent a WhatsApp message to Mr. Ma on the same day to update him. Claimant 1's agent also communicated this development to the Respondent separately. As the Respondent was 15 hours ahead of Claimant 1, this message was therefore received in the early hours of 30 June 2023 and the Respondent has confirmed that the message was only viewed by the Respondent after 7am on 30 June 2023.

69. The Arbitrator is satisfied that it was not unreasonable for the Respondent to have delayed the purchase of any ticket until Claimant 1's visa had been obtained, given the cost of purchasing a long-haul business class flight which may have ended up as a wasted cost if it was purchased but not used. Further, the Respondent only received notice that Claimant 1 had obtained his visa on the morning of 30 June 2023 (i.e. the day on which Claimant 1 was due to arrive in Hong Kong), at that point in time it would have been apparent to the Respondent that Claimant 1 would not have been able to report to the Respondent by 30 June 2023, as required under the Contract. Given (i) the materiality of this breach, for the reasons set out in paragraph 64 above, (ii) that the Contract is silent on the precise relationship between Claimant 1's obligation to report and the Respondent's requirement to purchase Claimant 1's plane tickets (for example when it was that the Respondent's obligation to purchase plane tickets became engaged) and (iii) that Claimant 1 never communicated an intention to arrive on the required date of 30 June 2023, the Arbitrator, deciding *ex aequo et bono*, is not persuaded that the Respondent remained under an obligation to purchase a ticket for Claimant 1 to arrive in China on a date after 30 June 2023, pursuant to Article 7A of the Contract.

70. The Arbitrator does not therefore accept Claimant 1's submission that he was unable to perform his obligations under the Contract due to the Respondent's alleged breach of Article 7A of the Contract.

<u>The effect of Claimant 1's breach of Article 1 of the Contract</u>

71. It is necessary to consider what the Claimant's failure to arrive in Hong Kong means in relation to Claimant 1's claim for salary. Claimant 1's claim is predicated on a section of Article 3 of the Contract which states:

> *"If the Club delays with any of the payment with more than 15 days, the Player has right unilaterally to terminate contract, sending written notice to the Club, and accelerate all the monies from this agreement. This contract is fully guaranteed, excluding the cases mentioned in the article 6 of this agreement."*

72. In Claimant 1's submission, the Respondent's delay in paying him salary for July 2023 by 15 days entitled Claimant 1 to terminate the Contract and to accelerate all amounts payable under it.

73. The Arbitrator does not accept this submission. Article 3 of the Contract begins with the wording "***After the agreement becomes effective**, The Club will pay $60,000 Dollar* […]" (Emphasis added). Similarly, Article 1 states:

> "*Club will arrange a medical test for Player within two business days after his arrival.* ***If Player passes the medical test, this agreement will take effect immediately****. If Player fails the medical test, this agreement will become null and void* […] *Upon passing the medical check, the salary for the regular season is GUARANTEED, after the regular season, team has rights to decide to continue the contract or not with the same salary*" (Emphasis added.)

74. Claimant 1's entitlement to any salary under the Contract is obviously contingent on the Contract being effective. It might be said that the medical test could not take place because the Respondent did not provide a plane ticket to Claimant and, as such, it is the Respondent's fault that the Contract did not become effective. However, as Claimant 1 committed a material breach – one that was core to the Contract – before this point in time, the Arbitrator is satisfied that no entitlement to salary arose under the Contract.

Was the Contract varied after 14 June 2023?

75. It remains to be considered if communications or actions which took place after the Parties entered into the Contract had any effect on the Parties' respective obligations under the Contract.

76. Claimant 1 submitted that the WhatsApp exchanges between Claimant 1 and Mr. Ma had the effect of varying Article 1 of the Contract to permit Claimant to arrive in Hong Kong after 30 June 2023.

77. In particular Claimant 1 relies on a WhatsApp exchange from 19 June 2023:

> *Claimant 1: What's up bro*
>
> *Claimant 1: They just told me my passport will be ready by June 26 it will have visa put inside*
>
> *Mr. Ma: All good bro I'll let them know So when you want us to fly you*
>
> *Claimant 1: They know I can't leave until after the 5th.. after that it's green for me to leave*
>
> *Mr. Ma: Ok, bro*

78. In response, the Respondent argues that Mr. Ma, as a translator, did not have authority to negotiate changes to player contracts. While Mr. Ma's role was that of translator for the Respondent, the Arbitrator is satisfied that, given Mr. Ma interacted with Claimant 1 regularly and in relation to the date by which Claimant 1 needed to arrive in China, Mr. Ma could have reasonably been relied on by Claimant 1 as a representative of the Respondent. However, this does not mean that Mr. Ma had authority to make variations to the Contract via WhatsApp.

79. Claimant 1's submission is that Mr Ma's statement, "*Ok, bro*" should be taken to constitute an agreement to amend the relevant section of Section 1 of the Contract. However, the Arbitrator does not accept this for two reasons:

    a) First, Article 13 of the Contract states: "*any amendments and or additions to this agreement shall be made in writing and has to be agreed to by Player and his representatives to be binding*." A WhatsApp conversation between a translator and Claimant 1 does not satisfy this requirement as it is not written evidence of

a formal amendment agreed to in writing by the Respondent (or indeed the Claimant's representatives).

b) Second, in any case the Arbitrator is not satisfied that the statement "*Ok, bro*" is sufficiently definitive to have constituted a clear acceptance by the Respondent of Claimant 1's proposal to arrive later than 30 June 2023.

80. Ultimately, the Arbitrator considers that there is not sufficient evidence in these proceedings that the Parties intended to amend the Contract, or that they satisfied the formal requirements for doing so.

Claimant 2's claim

81. Claimant 2's claim is based on Article 14 of the Contract, which states:

> "*If the Player passes the medical test, Club will pay the Agents 10% of the total amount of Player's salary during this term as Agent fee to agent. The team should pay the agents fee (USD $6000) evenly to Mr. Johnny Foster (Limited) and Grant Zhou per their invoice when the player passes the medical test and should pay remains agent fees within 3 days after season ends.*"

82. Claimant 1 did not pass (or take) his medical examination, because he did not report to the Respondent by 30 June 2023, in breach of the Contract. More broadly, Claimant 1 was not entitled to salary under the Contract. Consequently, Claimant 2's claim fails in its entirety.

7. Costs

83. 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).* […]"

84. On 10 May 2024, the BAT President determined the arbitration costs in the present matter to be EUR 8,000.00.

85. 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*."

86. As the Claimants' claims have failed entirely, the starting point for the Arbitrator to determine the allocation of the arbitration costs between the Parties is that the Claimants should bear all of the arbitration costs. Having regard to the conduct of the parties and noting in particular that on the one hand the Respondent did communicate a settlement proposal on 27 August 2023 (notwithstanding eventually being fully successful in defending the Claimants' claim), the Arbitrator sees no reason to depart from this position.

87. Therefore, the Arbitrator decides that the Claimants shall be responsible for the costs of the arbitration.

88. 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."*

89. The Claimants submitted an initial account of costs on 15 February 2024 and claimed USD 7,500.00 in legal fees (including VAT). The Respondent has not submitted an account of costs.

90. As the Claimants' claim failed entirely and the Respondent has not submitted an account of its costs, the Arbitrator finds that the Parties shall bear their own legal fees and expenses, if any.

8. AWARD

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

1. **Mr. Kenneth S. Hayes' and Mr. Johnny S. Foster's claims against Shijiazhuang Xianglan Basketball Club Co., LTD. are dismissed.**

2. **Mr. Kenneth S. Hayes and Mr. Johnny S. Foster shall jointly bear the costs of the arbitration.**

3. **The Parties shall bear their own legal fees and expenses, if any.**

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

Geneva, seat of the arbitration, 23 May 2024

Rhodri Thomas
(Arbitrator)