

**ARBITRAL AWARD**

**(BAT 2049/23)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Pensack Sports**

2654 W Horizon Ridge Pkwy., Ste B5 pmb 1104, Henderson, NV 89053, USA

**- Claimant -**

represented by Mr. Benjamin Pensack

vs.

**Mr. Noah Vonleh**

**- Respondent -**

represented by Messrs. Juan de Dios Crespo Pérez and Alessandro Mosca,  
attorneys at law

## **1. The Parties**

1. Pensack Sports (hereinafter referred to as the “Agency” or “Claimant”) is a sports management company based in the USA.
2. Mr. Noah Vonleh (hereinafter referred to as the “Player” or “Respondent”) is a US-American basketball player.

## **2. The Arbitrator**

3. On 27 November 2023, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (hereinafter referred to as the “BAT”), appointed Mr. Stephan Netzle as an arbitrator (hereinafter referred to as the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

4. The dispute is about two claims of the Agency against the Player for the payment of agency fees:
  - (1) A claim for payment of the agency fee related to the Foreign Player Employment Agreement 2021/2022 (hereinafter referred to as the “Employment Contract 2021/2022”) with the Chinese club Shanghai Sharks (hereinafter referred to as the “Club”); this agency fee is hereinafter referred to as “Agency Fee 2021/2022”; and

- (2) A claim for payment of the agency fee related to the Foreign Player Employment Agreement 2023/2024 (hereinafter referred to as the “Employment Contract 2023/2024”), also between the Player and the Club; this agency fee is hereinafter referred to as “Agency Fee 2023/2024”.
5. The Player mainly asserts that the Agency Fee 2021/2022 was paid by the Club to Chinese agents who then forwarded the respective amount to the Claimant, and that no Agency Fee 2023/2024 is due to the Agency because the Player terminated the representation agreement with the Claimant (hereinafter referred to as the “Representation Agreement”) before signing the Employment Contract 2023/2024 with the Club.

#### **Agency Fee 2021/2022**

6. On 30 July 2021, the Agency and the Player signed the Representation Agreement with a term of one year. Pursuant to clause IV., the Representation Agreement

*“shall continue at least until the one year anniversary date. After the one year anniversary date, this contract shall continue and either party may terminate this agreement by sending fifteen (15) days written notice of termination to the other party by certified, registered, or overnight mail.”*

7. According to clause III. of the Representation Agreement,

*“[f]or any playing contract signed by the Player with a team outside the NBA during the term of this agreement, the Agent shall receive an agent fee of 10% of the Player’s negotiated base net salary for each year while Player is under contract with the team. In negotiating the Player’s contract, the Agent shall include a clause according to which the Agent collects his fee directly from the team and the fee shall be in addition to the salary paid to Player by the team. The fees outlined in this paragraph shall apply to any and all contracts entered into by the Player during the term of this contract and all buy-out payments, renewals, re-signings, extensions, or modifications of any contracts entered into by the Player during the term of this player-agent contract”.*

8. On 10 September 2021, the Player and the Club signed the Employment Contract 2021/2022. The Agency was not a party of the Employment Contract 2021/2022. Instead, Mr. Zhang Jiji was named as the Player’s agent.

9. According to the Employment Contract 2021/2022, the Club undertook to pay the Player a salary of USD 1,974,728.00 gross (i.e., including applicable Chinese taxes). According to Article 7.1,

*"[t]he agent fee shall be borne by Party B [Player] in accordance with the Measures of Chinese Basketball Association on the Administration of Agents (for Trial Implementation) and its substitute documents".*

10. Also on 10 September 2021, the Player, the Agency and the Club entered into an addendum to the Employment Contract 2021/2022 (hereinafter referred to as the "Addendum"). According to the Addendum, the Player is represented by "Adam Pensack and Benjamin Pensack of Pensack Sports". Clause 1 of the Addendum specified that the Club shall pay the Player a base salary of "1,300,000.00 (one million three hundred thousand) USD net of any and all Chinese taxes" in seven monthly instalments.
11. Pursuant to clause 3 of the Addendum, "the net payments received by Player from Club include agent fees and that Player shall pay 10% of net salary amounts received to Agent as the agent fee".
12. Due to the Covid-19 pandemic, the Player arrived in China only in December 2021 and missed about two months of the 2021/2022 season.
13. Upon arrival in China, the Player and the Club entered into another contract, i.e., the Representatives Fees Agreement (hereinafter referred to as the "RFA"). The Agency was not party of the RFA. The RFA lists Shanghai Nasika Enterprise Management Consulting Center (hereinafter referred to as "Nasika") represented by Mr. Zhang Jiji, and EJY LLC, represented by Mr. Miodrag Raznatovic and Mr. Alex Yam, as agents of the Club, not the Player, but providing services to both, the Club and the Player. According to para. 1 RFA, the Club undertook to pay an agent fee of USD 110,000.00 to agents Nasika and EJY LLC on behalf of the Player.

14. For the remainder of the 2021/2022 season, the Club paid the Player a total amount of USD 1,172,715.00 net.
15. It is undisputed that neither the Club nor the Player paid any agent fees related to the Employment Agreement 2021/2022 directly to the Claimant. The Player refers however to the RFA, according to which the Club undertook to pay agents fees of USD 110,000.00 on behalf of the Player. While Claimant was not a party of the RFA, Respondent submits that it was understood that the Chinese agencies Nasika and EJY LLC, which received a share of the agent fee from the Club, "*paid the Claimant*". Hence, the first question is whether the Claimant's agent fee was paid by Nasika and/or EJY LLC.

***Agency Fee 2023/2024***

16. During the 2022/2023 season, the Player tried to gain a foothold in the NBA and did not continue to play for the Club or any other club outside of the NBA. However, these endeavours did not lead to a player contract with a NBA club for the 2023/2024 season.
17. In July 2023, the Player, an Agency's representative and Club's representatives met by occasion of the NBA Summer League to discuss the possibility of a further employment for the 2023/2024 season. These discussions became more and more concrete, and the Claimant and the Club exchanged specific offers for an employment of the Player in the 2023/2024 season.
18. By e-mail dated 27 July 2023, i.e., before another Employment Agreement with the Club was signed, the Player sent the Agency a letter of termination.
19. On 14 August 2023, the Club announced that the Player will return for the 2023/2024 season. The Employment Contract 2023/2024 was signed by the Club and the Player on 11 September 2023. The Claimant now claims the payment of the agent fee for the 2023/2024 season in the amount of USD 140,000.00.

20. This is the second question, namely whether the Player is obliged under the Representation Agreement to pay the agent fee related to the Employment Agreement 2023/2024 even though the Employment Agreement was signed after the termination of the Representation Agreement.

### **3.2 The Proceedings before the BAT**

21. On 11 November 2023, the Claimant filed a Request for Arbitration against the Player in accordance with the BAT Rules (received by the BAT on 13 November 2023) and paid the non-reimbursable handling fee of EUR 5,996.23<sup>1</sup> (received in the BAT bank account on 13 November 2023).
22. On 30 November 2023, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator, invited the Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.4 BAT Rules by no later than 21 December 2023 and fixed the Advance on Costs to be paid by the Parties by 11 December 2023 as follows:

<i>"Claimant (Pensack Sports)</i>	<i>EUR 5,003.77</i>
<i>Respondent (Mr. Noah Vonleh)</i>	<i>EUR 5,000.00"</i>

23. On 22 December 2023, the BAT acknowledged receipt of the Claimant's share of the Advance on Costs (i.e., EUR 5,006.20) and noted that the Respondent had failed to pay his share of the Advance on Costs and to submit the Answer. In the same Procedural Order, the BAT invited the Respondent to submit the Answer and to pay his share of the Advance on Costs until 8 January 2024.

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<sup>1</sup> The applicable handling fee in this matter is EUR 6,000.00 pursuant to Article 17.1 BAT Rules. The outstanding amount of EUR 3.77 for the Claimant had been added to the Advance on Costs of the Claimant.

24. On 7 January 2024, the Respondent's counsel requested a deadline extension of 14 days.
25. By e-mail of 8 January 2024, the BAT granted a deadline extension for Respondent to submit his Answer by 18 January 2024.
26. On 18 January 2024, the Respondent submitted his Answer to the Request for Arbitration.
27. On 19 January 2024, the BAT informed the Parties that the Respondent had still failed to pay his share of the Advance on Costs. In accordance with Article 9.3 BAT Rules, the BAT invited the Claimant to pay the outstanding Advance on Costs of EUR 5,000.00 until 26 January 2024.
28. On 8 February 2024, the BAT acknowledged receipt of the Respondent's share of the Advance on Costs paid by the Claimant (i.e., EUR 5,004.91) and invited the Respondent to provide an official translation of Exhibit 3 and a copy of Exhibit 4 in a good readable quality with an official translation by no later than 19 February 2024.
29. On 19 February 2024, the Respondent provided the requested translations/documents.
30. By letter dated 22 February 2024, the BAT invited the Claimant to answer several questions, respectively to comply with several requests of the Arbitrator by no later than 4 March 2024.
31. On 3 March 2024, the Claimant submitted its answers dated 1 March 2024 to the BAT Procedural Order of 22 February 2024.
32. By letter dated 5 March 2024, the BAT invited the Respondent to comment on the Claimant's submission by 15 March 2024.

33. On 15 March 2024, the Respondent submitted his comments to the Claimant's submission dated 1 March 2024.
34. On 20 March 2024, the Respondent submitted a witness statement and requested the Arbitrator to admit this new evidence to the case file and to grant the Parties the opportunity to provide their comments.
35. By letter dated 21 March 2024, the BAT granted the Parties a deadline until 2 April 2024 to submit their final comments on the newly submitted evidence.
36. On 2 April 2024, the Parties submitted their comments on the newly submitted evidence (Claimant's submission dated 31 March 2024 and Respondent's submission dated 2 April 2024).
37. On the same date, the BAT informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT granted the Parties a deadline until 8 April 2024 to provide a detailed account of their costs.
38. On 4 April 2024, the Claimant submitted its accounts of costs dated 3 April 2024. The Respondent provided his cost statement on 8 April 2024, together with another piece of evidence (another copy of the Employment Contract 2023/2024).



## 4. The Positions of the Parties

### 4.1 The Claimant's Position

#### *Summary of Agency's argument regarding the Agency Fee 2021/2022*

39. After signing the Representation Agreement, the Agency started to find the best possible employment contract for the Player in the global basketball market.
40. On 10 September 2021, the Club and the Player signed the Employment Contract 2021/2022. According to Article 4.5.2 of the Employment Contract 2021/2022, the Club is obliged to pay a gross salary of USD 1,974,728.00 plus bonuses. At the time the contract was signed, this amount corresponded to the equivalent of USD 1,300,000.00 net after deduction of Chinese taxes. In the Addendum signed on the same day, the Club, the Player, and the Agency agreed that the Player's salary would be USD 1,300,000.00 net. Article 7.1 of the Employment Contract 2021/2022 provided that “[t]he agent fee shall be borne by Party B [Player] [...]”. Clause 3 of the Addendum confirms that the Player was required to pay the agent fee of 10% of his net salary to the Agency as the Club was not willing to cover these costs. By signing the Addendum, the Player agreed to pay 10% of the total net salary that he received from the Club to the Agency.
41. During the negotiations for the 2021/2022 season, the Agency was assisted by the American-Chinese agent Mr. Alex Yam. The Agency knew that the Player believed it had already paid a Chinese agent (i.e., Nasika and EJY LLC), however, Mr. Alex Yam has not received any agent fee from the Club. For this reason, the Agency stated in an e-mail of 9 May 2023 that “[w]e also owe the Chinese agent the rest of his part on the Shanghai deal but we’ve been holding him off for quite a while now”. The Agency expected that by using the phrase “the rest of his part”, the Player would understand that even if a Chinese agent had received something (which the Player believed was the case), the Agency still owed the Chinese agent (Mr. Alex Yam) additional fees (i.e. “the rest of his part”) based

on a fee agreement between the Agency and Mr. Alex Yam (hereinafter referred to as the “Fee Agreement”). According to this Fee Agreement, the Agency is obliged to pay 20% of the agent fee to Mr. Alex Yam.

42. Mr. Zhang Jiji, who is mentioned as the Player’s agent in the Employment Contract 2021/2022, had no function/role in the negotiation of the contract for the 2021/2022 season. It is the Agency’s understanding that from time to time, the Club uses Mr. Zhang’s name on contracts as the officially CBA-licensed agent for the standard contract of the federation. In addition, Mr. Zhang’s witness statement, according to which he had forwarded an amount of USD 70,000.00 to the Agency as agent fee for the negotiation of the Employment Contract 2021/2022 is not credible as (i) the statement does not contain an address of the witness or a date when this alleged payment was made, (ii) there is no full and detailed description of the facts upon which the statement is based, and (iii) there are no documents in support of the witness statement. Therefore, Mr. Zhang’s witness statement shall be disregarded. If there was any proof of a payment from Nasika or Mr. Zhang to the Agency, the Player would have submitted it in the present proceedings. However, there is no proof because no such payment was executed. In addition, the Player first argued that Mr. Michael Liu Peng (a basketball agent apparently associated to Nasika) paid the fee to the Agency. Then the Player submitted the witness statement of Mr. Zhang, according to which it was him who transferred the agent fee to the Agency.
43. The Agency submits a witness statement of Mr. Adam Pensack who confirms that the Agency never received an agent fee for negotiating the Employment Contract 2021/2022.
44. The Agency has no relationship with Nasika or EJY LLC, which are mentioned as the Club’s agent in the RFA. In addition, these companies had no function/role in the negotiation of the Employment Contract 2021/2022. The Agency never heard of these entities before the present BAT proceedings.

45. Contrary to the Player's assertion, the Agency's cooperation with Mr. Alex Yam greatly benefited the Player, as Mr. Yam was very helpful in securing several lucrative contracts in China for the Player. While Mr. Alex Yam was needed as an intermediary and connector to Chinese clubs, the Agency remained the Player's exclusive agent and always had the lead in all negotiations. Also, contrary to the Player's assertion, the Player was aware of the involvement of Mr. Alex Yam. There was at least one personal meeting between Mr. Alex Yam and the Player, and Mr. Alex Yam was mentioned in several text messages exchanged between the Agency's representative and the Player.
46. The Agency became aware of the RFA between the Player and the Club only during these proceedings and understands now why the Player believes that the Club paid the agent fee. The Player signed the RFA without consulting with the Agency. The RFA was signed at a time when the Player was indisputably under an exclusive representation agreement with the Agency. In addition, it seems strange that the RFA was signed only at the end of the 2021/2022 season, as agent agreements are usually signed before the start of the season. It appears that the Player agreed to the RFA because he thought it would relieve him of his obligation to pay the agent fee to the Agency. However, this is not the case as the Player is obliged to pay the agent fee to the Agency based on the clear wording of the Addendum.
47. It is not relevant whether Nasika or EJY LLC received any agent fees based on the RFA since the Agency is not a party of the RFA and has no connection or business relationship with these two companies. The fact that the Player signed the RFA without the Agency's knowledge or consent, thereby authorizing the Club to pay two other companies, should have no effect on the amount owed by the Player to the Agency under the Addendum, which is a completely different agreement from the RFA. The Player is responsible for the conclusion of two separate agent fee agreements.
48. Due to the Covid-19 pandemic and the strict immigration rules in China, the Player missed the first 13 games for the Club. That is why the Club reduced the Player's salary

and paid a total net salary of USD 1,172,715.00 for the 2021/2022 season. Therefore, the Player owes the Agency an agent fee of 10% thereof, i.e., USD 117,271.50.

*Summary of the Agency's argument regarding the Agency Fee 2023/2024*

49. After the 2021/2022 season, the Player informed the Agency that he wanted to get back to the NBA. The Agency worked hard to place the Player with an NBA club. On 7 September 2022, the Agency negotiated a contract for the Player with Boston Celtics. On 5 January 2023, the Player was traded to the San Antonio Spurs and the Spurs released him on the same day.
50. In mid-January 2023, the Player received an offer from the Club for the remainder of the 2022/2023 season, which he declined.
51. During the summer 2023, the Club showed huge interest in re-signing the Player for the 2023/2024 season.
52. On 8 July 2023, the Agency's representative met the Club's coach with a view to discussing a new commitment of the Player in the 2023/2024 season. Two days later, these parties got together with the Player and discussed the possibility of a new contract. At the end of this meeting, the Club's coach assured the Agency that he would ask the management to send an offer for the 2023/2024 season. The Player confirmed his interest in a new assignment with the Club.
53. On 12 July 2023, the Agency's representative texted the Player that the Club would send the offer soon and that he would keep him updated. The Player answered "*bet*", which is a slang term meaning "*okay*".

54. On 14 July 2023, the Agency forwarded an offer received from the Club to the Player (hereinafter referred to as the “First Offer”). The Parties had the following text message exchange:

*Claimant:* “Hit me when you can”

*Respondent:* “Bout [sic] to leave the gym call you in 5”

*Claimant:* “Got the offer from Shanghai to discuss [Claimant sent the actual offer to Respondent as a pdf file].”

*Claimant:* “This is the Shanghai offer sheet. Some key points:  
Basically \$1.55M total  
Plus bonuses  
Apartment  
Plane ticket [...]”

55. The Agency meant to write “*Basically 1.54M total*” rather than “*\$1.55M total*”. The text should have stated a net salary of USD 1,540,000.00 because the base salary in the First Offer was USD 1,400,000.00 and the Club orally agreed to pay 10% of the salary as agent fee, i.e. USD 140,000.00, directly to the Agency on top of the net salary of USD 1,400,000.00. That is what the Agency's representative explained the Player in a 22-minutes phone call on 14 July 2023.
56. The fact that the Club accepted to pay the agent fee directly to the Agency (due to an oral agreement between Mr. Alex Yam and the Club) was the result of the Agency's difficulties to obtain the agent fee for the 2021/2022 season from the Player. In the present BAT proceedings, the Agency submitted a written agent fee agreement, according to which the Club is obliged to pay the Agency a fee of USD 140,000.00. This agreement would have been executed if the Player had signed the First Offer. The fact that the Agency's text to the Player stated that the base amount of the contract was essentially 10% higher than the net salary stated in the First Offer is strong evidence that there was an agreement for the additional 10% agency fee to be paid by the Club.

57. At the time of negotiating the First Offer, the Agency had not yet received the Agency Fee 2021/2022. As a result, the Agency would certainly not advise the Player to sign the First Offer for the 2023/2024 season without a clause on the payment of the agent fee, unless there is a separate agent fee agreement, which obliges the Club to pay the 10% agent fee directly to the Agency.
58. After examining the offer, the Player insisted on an NBA-opt-out-clause and an advance salary payment by the Club of USD 200,000.00. The Agency managed to convince the Club to include these two points in the offer.
59. On 22 July 2023, the Club sent an updated offer (hereinafter referred to as the “Second Offer”) to the Agency, which was forwarded to the Player on the same day.
60. Soon thereafter, the Player began to correspond directly with the Club. The Agency also learned that a former translator of the Club was now working as an agent and tried to represent the Player.
61. Between 8 and 27 July 2023, the Parties made 30 phone calls of total 214 minutes about these offers. The Agency kept the Player informed about the offers and responded in detail to all the Player’s questions and concerns.
62. By e-mail to the Agency dated 27 July 2023, the Player terminated the Representation Agreement. However, the termination notice was not sent by certified, registered, or overnight mail as requested by the Representation Agreement. The termination was therefore not formally valid. The Agency is entitled to an agent fee of USD 140,000.00 for negotiating the Employment Contract 2023/2024. Even if the Arbitrator were to conclude that the termination was valid, the Player must still be held liable to pay the agent fee to the Agency because it negotiated the Employment Contract 2023/2024.

63. On 2 August 2023, the Agency heard for the first time that the Player had signed the Employment Contract 2023/2024.
64. On 14 August 2023, it was reported online that the Player had signed a contract with the Club for the 2023/2024 season. Obviously, the Player was careful to publish the signing of the Employment Contract 2023/2024 only after the 15-day notice period had expired. As with the Agency Fee 2021/2022 season, the Player is again attempting to evade responsibility for the Agency Fee 2023/2024. In the interest of justice and fairness, the Player must compensate the Agency for the services provided relating to the Employment Contract 2023/2024.
65. The Agency submits that the copy of the Employment Contract 2023/2024 provided by the Player has been altered on pages 2, 46 and 48 (i.e., the pages where the Chinese agent is mentioned). These pages clearly differ in format and appearance from all other pages. It seems that the name of the Chinese agent, i.e., Mr. Zhang Jiji, was replaced by another name (i.e., Mr. Jixi Tong). In BAT 1501/20, the arbitrator found that certain peculiarities of a document submitted – such as different font sizes and footers on the pages of the document – may raise serious doubts as to the document’s authenticity.
66. This case is comparable to the case of *Duffy v. Wiggins* under the National Basketball Players Association Regulations. In that case, the agent provided negotiation services under a player-agent contract which led to a lucrative offer from a club to the player. Just as in the case at hand, the representation contract between the player and the agent was terminable upon 15 days’ notice. The agent forwarded the club’s offer to the player and shortly thereafter, the player terminated the agent contract and signed the club’s offer after the 15-day notice period had expired. In that case, the arbitrator ruled that the agent was entitled to the full agency fee because the contract concluded between the club and the player was a result of the agent’s negotiations.

67. Applying the principle of *ex aequo et bono* must lead to the result that the Player is obliged to compensate the Agency for services provided under the Representation Agreement regarding the Employment Contract 2021/2022 and the Employment Contract 2023/2024.

68. In the Request for Arbitration of 11 November 2023, the Claimant requests the following relief:

*“1. Pertaining to the agent fee owed for Respondent’s 2021-22 season contract with Shanghai, for the BAT to hold that that [sic] Respondent must immediately pay \$117,271.50 USD net to Claimant plus lawful interest of 5% per annum to be calculated as the BAT deems appropriate.*

*2. Pertaining to the agent fee owed for Respondent’s 2023-24 season contract with Shanghai, for the BAT to hold that that [sic] Respondent must immediately, or by a date deemed appropriate by the BAT, pay \$140,000 USD net to Claimant plus lawful interest of 5% per annum to be calculated as the BAT deems appropriate.*

*3. For the BAT to hold that Respondent shall reimburse Claimant and bear the cost of the 6,000 EUR handling fee to bring this arbitration.*

*4. For the BAT to hold that Respondent shall bear all further costs of this arbitration.*

*5. For the BAT to hold that Respondent shall pay Claimant’s costs of attorney fees for this case.*

*6. For such other and further relief that the BAT may deem appropriate.”*

#### **4.2 The Respondent's Position**

##### *Summary of Player’s argument regarding the Agency Fee 2021/2022*

69. Due to strict visa regulations, the Player was able to enter China only in December 2021. Upon his arrival, the Club confirmed that it would pay the agent fee and requested the Player to sign a further contract, i.e., the RFA. In the RFA, the Club accepted to pay the agents Nasika and EJY LLC on behalf of the Player. A basketball agent apparently associated with Nasika (i.e., Mr. Michael Liu Peng) informed the Player that the Agency



had received the agent fee from Nasika. In other words, the Club paid the agent fee to Nasika and the latter transferred the money to the Claimant. Mr. Michael Liu Peng assured the Player of the following:

*“the payment was made to me in Chinese yuan by the club. Then, I transferred the funds through someone else to the United States, and from there, it was sent to Pensake.”*

*“I did send out the money, as you know. I couldn’t directly make each payment because there are strict foreign exchange controls in the country.”*

*“He split it into two payments because each person’s limit is \$50,000. So he first sent a payment of \$50,000 and then another payment of \$20,000”*

70. In addition, the Club explicitly confirmed in a witness statement that “[f]or the 2021-2022 season, player Noah Vonleh’s agent fees [sic] has been fully paid, with the recipient being Shanghai Nasika Enterprise Management Consulting Center and EJY LLC, which representing [sic] the player at that time”.
71. The Agency confirmed in the present BAT proceedings that it was not directly involved in the negotiation with the Club for the Employment Contract 2021/2022, but that the negotiations were conducted by Mr. Alex Yam. The Player did not authorize the Agency to pass on or delegate the services for the Player to another person. The Player never agreed that the Agency signed a Fee Agreement with Mr. Alex Yam. This is a fundamental breach of an exclusive player-agent relationship and the duty of trust, which extinguishes any entitlement of the Agency to receive payment from the Player.
72. In addition, such a delegation constitutes a clear conflict of interest as Mr. Alex Yam is mentioned in the RFA as contact person for EJY LLC, which is, according to the RFA, one of the Club’s agents. It is a general principle of law that mandatees (i.e., the Agency) that delegate the business to unauthorized parties (i.e., Mr. Alex Yam) are liable for the delegate’s actions. Moreover, it is a general principle of law that agents acting under the influence of a conflict of interest forfeit their right to compensation under the relevant

mandate agreement, as set out, e.g., in Article 415 of the Swiss Code of Obligations. Therefore, the Agency is not entitled to any compensation.

73. The Agency confirmed in these BAT proceedings that it is a partner of Mr. Alex Yam. The latter is the contact person of EJY LLC, which received a payment of USD 28,301.89 from the Club for negotiating the Employment Contract 2021/2022. However, Mr. Alex Yam is not only the contact person of EJY LLC, but also the owner of this company. Therefore, the allegation that Mr. Alex Yam has never received money for the negotiation of the Employment Contract 2021/2022 is not correct.
74. The Agency confirmed in these BAT proceedings that it did not know Mr. Zhang Jiji. It obviously advised the Player to sign the Employment Contract 2021/2022 that mentioned Mr. Zhang Jiji as the Player's agent, without even identifying Mr. Zhang Jiji and why his name appeared in the contract. This is not credible and demonstrates that the Agency did not act in the Player's interest, while it was mainly concerned to have the Player and the Club signing the Addendum.
75. In his witness statement, Mr. Zhang Jiji confirmed that he paid an amount of USD 70,000.00 to the Agency for its services relating to the Employment Contract 2021/2022. This amount must therefore be deducted from the claimed amount. As Nasika has been dissolved meanwhile, it is impossible for the Player to prove that the Agency has actually received this amount. Therefore, a lower standard of proof shall apply regarding the receipt of the agent fee for the 2021/2022 season.
76. In the present BAT proceedings, the Player requested from the Arbitrator to compel the Claimant to disclose its bank statements regarding the year 2022 to demonstrate that it received the agent fee. Furthermore, the Player requested from the Arbitrator to compel the Agency to disclose its full cooperation with Mr. Alex Yam.

77. As the Claimant has already received the agent fee for the season 2021/2022 (partially from EJY LLC and Mr. Alex Yam, and partially from Nasika), the Player is not obliged to pay a further compensation to the Claimant.
78. If the Arbitrator concludes (*quod non*) that the Player is obliged to pay an agent fee to the Agency, the claimed amount of USD 117,271.50 is disproportionate and shall be reduced for the following reasons:
79. First, the Player has received from the Club a total amount of USD 1,172,715.00 for the 2021/2022 season. This amount, however, includes bonus payments of USD 95,050.20. Therefore, the Claimant would in principle only be entitled to 10% of USD 1,077,664.00, i.e., USD 107,766.50.
80. Second, on 9 May 2023, the Agency requested the payment of the agent fee for the 2021/2022 season emphasizing that “[w]e also owe the Chinese agent the rest of his part on the Shanghai deal”. The Claimant thereby acknowledged that it worked on that deal with a Chinese agent who shall receive “the rest of his part” of the fee. In other words, the Agency acknowledged that it had received a partial payment. Against this background, the Player requested the Arbitrator to compel the Agency to disclose its agreement with the Chinese partner to properly deduct the relevant fees. In case the Claimant fails to do so, the standard practice is to split the fee in half. Therefore, the Claimant’s agent fee shall be halved, i.e., USD 53,883.24.
81. Third, in its e-mail of 9 May 2023, the Agency acknowledged a reduction of the agent fee to USD 91,627.00. In addition, the already paid agent fee to the Chinese agent of USD 53,883.24 must also be deducted. The Claimant should be estopped from asserting further claims based on the principle *venire contra factum proprium*, which has been applied by the BAT on several occasions (e.g. BAT 0121/10, BAT 1171/21).

82. Finally, the amount received by EJY LLC (i.e., USD 28,301.89) shall at least be deducted from the Agency's claimed amount (i.e., USD 117,271.50) in case the Arbitrator deemed that the Agency is entitled to a compensation for the negotiation of the Employment Contract 2021/2022 (totalling USD 88,969.61), otherwise the Agency would be unjust enriched. In addition, the already paid amount of USD 70,000.00 by Mr. Zhang Jiji must be deducted as well (totalling USD 18,969.61).

*Summary of Player's argument regarding the Agency Fee 2023/2024*

83. Although the relationship between the Club and the Player was good after the 2021/2022 season, the latter preferred to go back home looking for an employment in the NBA.
84. In July 2023, Las Vegas hosted the NBA Summer League, i.e., a must-to-be pre-season tournament where all international basketball stakeholders meet every year. Therefore, the Claimant's and the Club's representatives did not travel to Las Vegas to exclusively talk about the Player. Furthermore, the Player already knew at that time that the Club was interested in signing him for the 2023/2024 season.
85. On 14 July 2023, the Agency sent the First Offer to the Player. The Agency confused the Player when he texted that the base salary would be USD 1,550,000.00 while the First Offer provides for a total base salary of USD 1,400,000.00. In addition, the Player asked that the agent fee shall be paid by the Club (not the Player) but there was no confirmation in the First Offer.
86. There is no evidence that the Club orally agreed to an agent fee of USD 140,000.00 and that the Club would have signed the draft agreement as submitted by the Agency if the Player would have accepted the First Offer. The Agency never provided any evidence for the Club's alleged promise to pay the agent fee, even though it knew that the Player would not accept the offer without a confirmation of payment of the agent fee by the Club.

The Agency could have included such a condition in the offer, but it did not even send the Player the draft agent fee agreement.

87. Although the Player requested a salary of USD 1,500,000.00 net and that the Club would pay the agent fee in addition to the mentioned salary, the Agency was not able to include these two points in the Second Offer despite weeks of negotiations. By failing to do so, the Agency jeopardized the signing of the contract with the Club, who also pursued other options.
88. As the Player was not satisfied with the Second Offer and the discussions with the Agency, and after spending the entire NBA Summer League receiving unsatisfactory offers from the Agency, the Player decided to terminate Representation Agreement on 27 July 2023.
89. Because of his good relationship with the Club, the Player was able to negotiate a new contract with the Club with better conditions (hereinafter referred to as the “Third Offer”). This resulted in the signing of the Employment Contract 2023/2024 on 11 September 2023.
90. Clause IV of the Representation Agreement provides for a notice period of 15 days. As the Employment Contract 2023/2024 was signed after the expiry of the 15-day notice period, the Agency is not entitled to any compensation. In addition, the termination notice is formally valid as the Agency has acknowledged receipt of the termination notice, healing any formal deficiency. This is supported by BAT jurisprudence (e.g., BAT 1853/22).
91. In addition, the Club confirmed the following to the Player:

*“The team negotiated with the players in July 2023, and the first offer was not signed. About 15 days later, the player told us that he had a new Chinese agency. So we made another offer after negotiating with the new agency. The player accepted the new offer and signed the contract with the team on August 14.”*

92. After termination of the Representation Agreement, the Agency still had 15 days to work on the deal and to ensure that the two points that were important to the Player were included in the contract. However, the Agency failed to do so. The conditions that were finally agreed in the Employment Contract 2023/2024, namely the net salary of USD 1,500,000.00 and the obligation of the Club to pay the agent fee directly to the Player's agent, were not negotiated by the Agency. The negotiations between the Player and the Club were conducted quickly, mainly because they were able to build on a good and longstanding relationship.
93. The case *Duffy v. Wiggins* under the National Basketball Players Association Regulations mentioned by the Agency is not relevant because it is not part of the BAT jurisprudence. It has been decided by a different judicial body and was based on a different applicable law. Furthermore, *Duffy v. Wiggins* differs substantially from the present case: (i) the offer accepted by the Player was not based on the negotiation of the Agency, (ii) the Agency had ample opportunity to secure the signing of the Employment Contract 2023/2024, which it however missed, and (iii) the increase in the salary was not the result of the negotiation conducted by the Agency, but by the Player himself.
94. Finally, clause III of the Representation Agreement obliges the Agency to include a clause into the player's contract, according to which the Agency collects the agent fee directly from the club and that the agent fee shall be paid on top of the Player's salary. However, no such clause has been included in any of the documents submitted by the Agency. Therefore, the Agency is not entitled to any compensation from the Player. It is well-known in the basketball industry that agents are retained by players, but agent fees are paid by the clubs.
95. In case clause III of the Representation Agreement becomes subject to interpretation (*quod non*), it must be kept in mind that the contract was drafted by the Claimant, which allows the Respondent to rely on the principle of *contra proferentem*, i.e., a well-established principle in BAT case law (e.g., BAT 0051/09). As an example, BAT has dismissed

an agent's claim against a player based on a very similar clause and obligations incumbent on the agent (see BAT 0065/09).

96. For all these reasons, the Agency is not entitled to any agent fee for the 2023/2024 season.
97. In the Answer to the Request for Arbitration of 18 January 2024, the Respondent requests the following relief:

*“The Respondent herein respectfully requests the BAT to decide that:*

- a.** *The Request for Arbitration filed by the Claimant against the Respondent shall be dismissed in its entirety.*

**Subsidiarily**

- b.** *The Claimant’s request as per point ‘1’ of its Request for Relief in the amount of USD 117,271.50 plus default interests of 5% per annum shall be reduced as the BAT Arbitrator deems appropriate, as such request is excessive and disproportionate and, in any case, it shall not be higher than USD 91,627.00, and*
- c.** *The Claimant’s requests as per point ‘2’, ‘3’, ‘4’, ‘5’, and ‘6’ of its Request for Relief shall be dismissed in their entirety.*

**In any case**

- d.** *Further to article 17.3 of the BAT Arbitration Rules to decide that the Claimant shall bear the entirety of the costs of this arbitration.*
- e.** *Further to article 17.4 of the BAT Arbitration Rules to decide that the Claimant shall pay the Respondent’s legal fees with respect to this procedure in the total amount of EUR 15,000.00.”*

98. In his second submission, the Player amended section b of his requests as follows:

*“The Claimant’s request as per point ‘1’ of its Request for Relief in the amount of USD 117,271.50 plus default interests of 5% per annum shall be reduced as the BAT Arbitrator deems appropriate, as such request is excessive and disproportionate and, in any case, it shall not be higher than USD 88,969.61, and”*

99. In his third submission, the Player amended section b of his requests as follows:

*“The Claimant’s request as per point ‘1’ of its Request for Relief in the amount of USD 117,271.50 plus default interests of 5% per annum shall be reduced as the BAT Arbitrator deems appropriate, as such request is excessive and disproportionate and, in any case, it shall not be higher than USD 18,969.61, and”*

## **5. Procedural Matters**

### **5.1 The jurisdiction of the BAT**

100. Pursuant to Article 2.1 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).

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

102. The Arbitrator finds that the dispute referred to him is of a financial nature and thus arbitrable within the meaning of Article 177(1) PILA.<sup>2</sup>

103. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under para. V of the Representation Agreement, which reads as follows:

*“Any dispute arising from or related to the present Contract shall be submitted for arbitration to the Basketball Arbitral Tribunal (BAT).”*

104. Furthermore, para. 4 of the Addendum reads as follows:

*“Any dispute arising from or related to the Employment Contract or this addendum 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*

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



*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."*

105. All contracts are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
106. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the Respondent has not raised any objection to jurisdiction.
107. The jurisdiction of BAT over the Agency's claims arises from the Representation Agreement and the Addendum. The wording "[a]ny dispute arising from or related to the present Contract" (see para. 5 of the Representation Agreement) respectively "[a]ny dispute arising from or related to the Employment Contract or this addendum" (see para. 4 of the Addendum) clearly covers the present dispute.
108. Moreover, the Respondent does not dispute that the BAT has jurisdiction to decide the present case.
109. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Agency's claims.

## **5.2 Respondent's Document Production Request**

110. In its Answer, the Player requests the Arbitrator *"to compel the Claimant to disclose the Claimant's bank statements regarding the year 2022 in order to demonstrate it actually received those fees"* (i.e. the agency fees related to the Employment Agreement 2021/2022), and *"invite(s) the Arbitrator to request the assistance of the state judge with the purpose of compelling the Claimant to produce the above documents."* The Player

submits that according to the RFA, the Club undertook to pay the agent fee to Nasika and EJY LLC which then transferred the agent fee to the Agency, or as the Club phrased it: *“In other words, Shanghai paid Nasika and then Nasika paid the Claimant.”* Allegedly, USD 70,000.00 have been paid by Nasika to the Agency, but *“there is no proof of payment since Nasika does no longer exist and was dissolved on 7 November 2023, i.e., four days before the Agency filed its Request for Arbitration”*, as the Player explains in its latest submission of 2 April 2024.

111. The burden to prove payment is on the Player. He must demonstrate that he paid the agency fee due to the Agency under the Representation Agreement. When paying the Agency through intermediaries, as agreed in the RFA, to which the Agency was not a party, the burden of proof does not change.
112. The Arbitrator is not convinced by the Player’s assertion that the payment allegedly made by Nasika to the Agency cannot be proven because the company has been dissolved in the meantime. Such records do not disappear overnight – neither in the files of the liquidator nor in the records of the bank which carried out the transaction. This shortcoming cannot be solved simply by redistributing the burden of proof. The Player’s production request is not specific enough when it comes to the justification of the amount, the name of the person who received the payment from Nasika (*“someone else in the US”*) and made the payment to the Claimant, as well as with respect of the date of the transaction, and ultimately results to a fishing expedition. For this reason, a request for legal assistance would have little chance of being granted. In any case, the requested procedure would be extremely time-consuming with very limited chance of success and would run counter the declared aim of the BAT to provide an efficient and effective means of resolving disputes (see Article 0.1 BAT Rules).
113. The Arbitrator therefore dismisses the Player’s document production request.

## 6. Discussion

### 6.1 Applicable Law – *ex aequo et bono*

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

*“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.*

115. Under the heading “Law Applicable to the Merits”, Article 15 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.”*

116. As seen above, para. V of the Representation Agreement provides for the jurisdiction of the BAT and therefore the application of the BAT Rules. There is no reference to national law in the Representation Agreement. In addition, para. 4 of the Addendum explicitly refers to the *ex aequo et bono* principle. Furthermore, the Respondent does not dispute the application of *ex aequo et bono*.

117. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

118. 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<sup>3</sup> (Concordat)<sup>4</sup>, 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.”<sup>5</sup>*

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

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

## **6.2 Findings**

### **6.2.1 Claim regarding the Agency Fee 2021/2022**

121. It seems undisputed that the Agency was entitled to an agent fee of 10% of the Player’s net salary for each year of employment by a team outside of the NBA, provided that the respective employment agreement was signed during the term of the Representation Agreement, and that this provision also applied to the Player’s employment by the Club for the season 2021/2022.

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<sup>3</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>4</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Article 187 PILA.

<sup>5</sup> JdT 1981 III, p. 93 (free translation).

122. The questions to be answered here are (a) what amount was owed as agent fee, (b) whether the agent fee was to be paid by the Player or by the Club and (c) whether it was actually paid.

*a. Amount of the Agent Fee*

123. The Employment Contract 2021/2022 dated 10 September 2021 and signed by the Player, the Club and Mr. Zhang Jiji of Nasika (but not the Agency) mentions Mr. Zhang Jiji as the Player's agent. According to Article 7 of the Employment Contract 2021/2022, the agent fee shall be paid by the Player. The amount of the agent fee is not regulated in the Employment Contract 2021/2022.

124. The Addendum also signed by the Player, the Agency and the Club on 10 September 2021 mentions the Claimant as the Respondent's agent. Para. 1 of the Addendum reads as follows:

*"Subject to the terms of the Employment Contract, Club shall pay Player a total base salary (not including bonuses) for the 2021-22 CBA season of 1,300,000.00 (one million three hundred thousand) USD net of any and all Chinese taxes. [...]"*

125. According to para. 3 of the Addendum,

*"[i]t is agreed by the parties that the net payments received by Player from Club include agent fees and that Player shall pay 10% of net salary amounts received to Agent as the agent fee."*

126. According to the RFA signed upon arrival of the Player in China and to which the Agency was not a party, the agent fee amounts to USD 110,000.00, while there is no explanation for this amount.

127. Due to travel restrictions because of the Covid-19 pandemic, the Player was only able to travel to China after a delay and missed several matches. His salary was therefore cut

to USD 1,172,715.00 net, which is the amount which the Player obtained from the Club and on which the Agency calculated the agent fee of USD 117,271.50 claimed in this arbitration.

128. It is disputed whether this amount represents salary only or also includes bonus payments in the amount of USD 95,050.20, as asserted by the Player. Undisputedly, the agreed net salary of USD 1,300,000.00 net was reduced because of the late arrival of the Player. In its letter of 19 August 2023, the Agency referred to the amount of USD 1,172,715.00 the player received from Shanghai for the 2021/2022 season and based his calculation of the agent fee (“10% of the net salary amounts received”) on this amount. There is no evidence in the file that the Player disputed the amount or the calculation. The Player also failed to demonstrate in this arbitration proceeding that the deduction due to his late arrival resulted in a lower amount than USD 1,172.715.00 and that this amount, which he undisputedly received, therefore, included the bonus earned in the 2021/2022 season.
129. The Claimant’s letter of 19 August 2019 also contained a settlement offer for a reduced agent fee of USD 91,627.00. The Player did not accept this offer within the deadline set by the Claimant. The Claimant was therefore no longer bound by that offer as explicitly stated in that letter: “However, if payment is not made by August 25, 2023, please be advised that we will pursue legal action to recover the full agent fee owed for the 2021-22 season of \$117,271.50.”
130. The Arbitrator therefore concludes that the Player is, in principle, obliged to pay the Agency an agent fee of USD 117,271.50 for negotiating the Employment Contract 2021/2022.
131. The Player requests that this amount should be further reduced by USD 53,883.24, which allegedly reflects the share of the Chinese agent and referred “*to the agent fee already paid by Shanghai to the Chinese agent [emphasis added]*”. This is not what the

Agency said and is not supported by any evidence of an agreement of a split of the agent fee between the Claimant and the Chinese agent. The Player's claim for a reduction of the otherwise due agent fee will therefore not be taken into calculation.

*b. Who must pay the agent fee?*

132. The agreements provided by the Parties in the present proceedings are somewhat contradicting regarding how and by whom the agent fee shall be paid. Clause III of the Representation Agreement between the Agency and the Player provides the following agent fee regulation:

*"For any playing contract signed by the Player with a team outside the NBA during the term of this agreement, the Agent shall receive an agent fee of 10% of the Player's negotiated base net salary for each year while Player is under contract with the team. In negotiating the Player's contract, the Agent shall include a clause according to which the Agent collects his fee directly from the team and the fee shall be in addition to the salary paid to Player by the team. [...]" [emphasis added]*

133. According to the Employment Agreement 2021/2022, the *"agent fee shall be borne by Party B [i.e. the Player] in accordance with the Measures of Chinese Basketball Association on the Administration of Agents (for Trial Implementation) and its substitute documents."* Also the RFA signed by the Club, the Player, and the agencies Nasika and EJY LLC provides that *"[a]ccording to the FOREIGN PLAYER EMPLOYMENT CONTRACT, Party B [i.e. the Player] should pay a total fee of \$ [110,000.00] USD (agent fee) to Party C [i.e. Nasika and EJY LLC]."*
134. While the Agency may have tried to implement the requirement of clause III of the Representation Agreement to include a clause in the Employment Agreement 2021/2022 according to which the Club must pay the agent fee, the Club has managed to enforce that the agent fee must be paid by the Player. This has been accepted by the Player and the Agency in the Addendum, which was signed after the Representation Agreement, and takes precedent over the contrary objective in the Representation Agreement.

135. The Player seeks support from BAT Award 0065/09, paras. 44 and 48:

*“44. [...] Claimant’s financial fate is thereby in his own hands; if he succeeds in inserting a clause in the contract to the relevant effect then he creates an obligation as between himself and the club independent of Respondent.*

*[...]*

*48. Claimant must be bound by the terms of the Agreement – that is consistent with pacta sunt servanda. He arranged his affairs with Respondent in a particular way and cannot now put those arrangements to one side merely because either, on the one hand, he failed to protect himself by having the appropriate clause inserted into the player/club contract, or, on the other hand, is put off by a mere declining by [club] of its liability.”*

136. However, the history of this case shows that the Player himself did not consider this obligation indispensable: None of the contracts which he signed with the Club obliged the latter to bear the agent fee in addition to the Player’s salary.

137. The Player refers also to the RFA, according to which Nasika (represented by Mr. Zhang Jiji) and EJY LLC (represented by Mr. Miodrag Raznatovic; contact person: Mr. Alex Yam) are the relevant agents. According to the RFA, the Club is obliged to pay an agent fee of USD 110,000.00 to Nasika and EJY LLC on behalf of the Player. There is however no reference to the Agency or to an understanding that Nasika and EJY LLC should compensate the Agency from the fee they obtained from the Club. In addition, the RFA does not stipulate that the Club shall pay the agent fee on top of the Player’s salary but on his behalf.

138. While interpreting these contradictory provisions in the different contacts, the Arbitrator concludes that the RFA cannot be considered a relevant legal basis to assess a claim of the Agency against the Player. On one side, the RFA explicitly mentions Nasika and EJY LLC as the Club’s (not the Player’s) agents, on the other side, the Agency is not party of the RFA and does, therefore, not have to bear the consequences of the RFA.

139. For all these reasons, the agent fee is owed by the Player.



c. *Was the due agent fee actually paid to the Agency?*

140. The Player's obligation to pay the agent fee must be distinguished from the payment method agreed in the RFA. The Club accepted to pay the Chinese agents on behalf of the Player, which means that the agent fee under the RFA had to be deducted from the Player's salary claim and should be transferred directly to the Chinese agents. However, the RFA does not mention the agent fee owed to the Agency, since the Agency is not even a party to that agreement. It can therefore be left open why the Club, the Player and two Chinese parties signed the RFA, which is simply not relevant to the present case.

141. Undisputedly, the Player himself did not pay any agent fee related to the Employment Agreement 2021/2022 to the Agency. He rather asserts that the Agency Fee 2021/2022 was entirely or partially paid by the Club to Nasika. Then, Nasika allegedly paid an amount of USD 70,000.00 *"through someone else to the United States"* (according to a message of Mr. Michael Liu Peng, i.e., a basketball agent apparently associated to Nasika) who finally paid these amounts to the Agency. The Player relies on the following evidence:

i. Text messages of Mr. Michael Liu Peng, which include the following:

*"[...] the payment was made to me in Chinese yuan by the club. Then, I transferred the funds through someone else to the United States, and from there, it was sent to Pensake. So, all I have is the proof of payment for the amount that I sent out. [...]"*

*"I did send out the money, as you know. I couldn't directly make each payment because there are strict foreign exchange controls in the country. [...] He split it into two payments because each person's limit is \$50,000. So he first sent a payment of \$50,000, and then another payment of \$20,000."*

ii. A witness statement of a Club's representative, which reads as follows:

*"[...] For the 2021-2022 season, player Noah Vonleh's agent fees [sic] has been fully paid, with the recipient being Shanghai Nasika Enterprise Management Consulting Center and EJY LLC, which representing the player at that time. [...]"*

iii. Payment receipt for a payment of the Club to Nasika: According to this evidence, on 25 May 2022, the Club paid Nasika an amount of RMB 1,668,232.44 (approx. USD 230,219.00<sup>6</sup>) with the reference “*Personality rights and brokerage fees*”. There is no reference on this document to the Player or the Agency.

142. The Arbitrator is not satisfied that Nasika (or Mr. Zhang Jiji or Mr. Michael Liu Peng as natural persons) paid an amount of USD 70,000.00 to the Agency for the following reasons:

- First, if such a payment had been executed, there would be a bank receipt, regardless of whether the company still exists or not.
- Second, the so-called witness statement of Mr. Zhang Jiji, which was submitted only very late in the procedure, is not convincing mainly because it lacks any explanation of the reason and circumstances of the payment of USD 70,000 to Mr. Pensack as well as of the role which Mr. Zang Jiji actually played in the connection with the engagement of the Player with the Club.
- Third, it is unclear who is supposed to have made this payment, Nasika as company or Mr. Zhang Jiji or Mr. Michael Liu Peng as natural persons as both persons are stating that they personally paid USD 70,000.00 to the Agency or to an intermediary in the USA. The Arbitrator does not see any connection or business relationship between the Agency and Nasika and/or Mr. Zhang Jiji or Mr. Michael Liu Peng.
- Fourth, according to the payment receipt submitted by the Player on 25 May 2022, the Club paid Nasika an amount of RMB 1,668,232.44 (approx.

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<sup>6</sup> <https://www.oanda.com/currency-converter/de/?from=CNH&to=USD&amount=1668232> (30 May 2024)

USD 230,219.00), which is much more than the agent fee agreed with the Agency in the Addendum. Pursuant to the RFA on which the Player relies, Nasika is mentioned as the Club's agent. Therefore, it appears to the Arbitrator that this payment was made for services rendered by Nasika to the Club (not the Player).

143. For all these reasons, the payment of RMB 1,668,232.44 from the Club to Nasika cannot be attributed to the Agency and therefore does not have to be deducted from the agent fee otherwise due.
144. Although the Agency was not a party to that payment arrangement in the RFA, it must accept that any payments which were made by a third party to settle the agent fee owed by the Player to the Agency based on the Addendum, must be considered. Otherwise, the Agency would be unjustly enriched. While there is no sufficient evidence that the payment of USD 70,000.00 by the Club to Nasika was intended to cover the Agency's fee as agreed in the Addendum, a payment of USD 28,301.89 was made to EJY LLC, and the question needs to be answered whether this payment must be regarded as part of the settlement of the agent fee owed by the Player to the Agency. The burden of proof in this respect rests on the Player, as the party seeking a right from the alleged payment.
145. The Player relies on the following evidence:
  - i. Payment receipt for a payment of the Club to EJY LLC: According to this evidence, on 26 March 2022, the Club paid EJY LLC an amount of USD 28,301.89 with the reference "*Brokerage fee*". However, there is no reference to the Player or the Agency in that document.
  - ii. An Annual Report of EJY LLC dated 1 May 2023, which was signed by Mr. Alex Yam, a Certificate of Reinstatement dated 9 July 2022, where Mr. Alex Yam is mentioned as owner of EJY LLC and a statement of the Office of the Secretary of

State of the State of Wyoming confirming that a request that EJY LLC should be reinstated effective was filed by Mr. Alex Yam.

- iii. The RFA mentions Mr. Alex Yam as “Contact Person” of EJY LLC.
  - iv. Furthermore, *Mr. Alex Yam seems to have played a significant role in the negotiation of the Employment Contract 2021/2022 due to his close business relationship with the Agency.*
  - v. The Claimant indeed confirms that he knows and works with Alex Yam and that it is required to pay Mr. Yam 20% of amounts received by Claimant to Respondent.
146. The Respondent concludes that payments to EJY LLC in connection with the Player’s engagement with the Club must therefore be attributed to the Claimant.
147. On the other side, the Agency argues that it never received the agent fee for the 2021/2022 season and that it had no business relationship with EJY LLC. The Claimant submits a witness statement of Mr. Alex Yam to prove that only the Agency and Mr. Alex Yam were involved in the negotiation of the Employment Contract 2021/2022 (and no other company or agents). The main parts of this witness statement read as follows:

*[...] I was the intermediary who facilitated the deal between Pensack Sports, which represented player Noah Vonleh, and Shanghai Juss Basketball Club for the 2021/2022 season contract between Noah Vonleh and Shanghai Juss.*

*I have an agreement with Pensack Sports that Pensack Sports pays me 20% of any commissions it receives on any deals that I obtain for Noah Vonleh in China. [...]*

148. Considering all evidence, the Arbitrator is not comfortably satisfied that under the circumstances, payments of the Club to EJY LLC must be attributed to the Agency even

though no instructions have been produced which would demonstrate that such payments were considered to fully or partially cover the agent fee which the Player owed the Agency under the Representation Agreement or the Addendum.

149. Finally, the questions arises whether a reduction of the agent fee is justified based on the principle of *ex aequo et bono* and/or a violation of the principle of good faith, as claimed by the Player. The Player argues that the partnership between the Agency and Mr. Alex Yam is a violation of the exclusive Representation Agreement and that there was a conflict of interest as Mr. Alex Yam was acting together with the Agency on behalf of the Player but at the same time also in his capacity as the owner of EJY LLC as agent of the Club as mentioned in the RFA.

150. The Arbitrator does not consider the statement of the Player credible that he was unaware of the involvement of Mr. Alex Yam in the negotiation of the Employment Contract 2021/2022. It is very common in the basketball industry that an agent/agency collaborates with another agent, who is familiar with a foreign market and language. Furthermore, the following text message exchange between the Agency and the Player shows that the latter was aware of the business relationship between the Agency and Mr. Alex Yam:

14 September 2021 (i.e. four days after the signing of the Employment Contract 2021/2022)

Agency: *"Here is the info for tomorrow.*

*We need to send your actual passport + 2 passport photos via FedEx (overnight if possible but 2 day is ok):*

*Alex Yam  
[address]"*

26 November 2021

Player: *"Who's the Chinese agent out here?"*

Agency: *"Alex Yam?"*

*Player:* “Ok. Have you been in contact with him?”

*Agency:* “Yeah what’s up?”

*Player:* “Just seeing what’s going on... to keep everything squared away as far as payments once the physical is done”

151. Therefore, the Arbitrator does not consider a reduction of the agent fee justified and concludes that the Player owes the Agency an agent fee of USD 117,271.50 for the negotiation of the Employment Contract 2021/2022.
152. To put it simple: The Respondent contests the obligation to pay the agent fee owed under the Representation Agreement and the Addendum, pointing to inconsistent agreements and a confusing and untransparent network of relationships between the Club and several Chinese agents, who were allegedly paid by the Club on the Player's account and who then allegedly passed on these payments, at least in part, to the Claimant. The Arbitrator does not dispute that contracts between Chinese clubs and foreign players involving foreign agents can hardly be concluded and implemented without the support of local agents. Still, it is ultimately up to the Player to prove that he has fulfilled his financial obligations to his (in this case American) agent and to provide the corresponding proof of payment. The Player has not succeeded in doing so at least with regard to the agent fee due under the Employment Agreement 2021/2022. There is no evidence that the Agency was somehow involved in these payment arrangements, and it cannot be blamed of contributory fault.
153. The Arbitrator notes that the Claimant has requested to be awarded the agent fee net. However, neither the Representation Agreement nor the Addendum provide that the payments must be made “net”. Consequently, the Arbitrator dismisses the Claimant’s claim insofar.

### 6.2.2 Claim regarding the Agency Fee 2023/2024

154. The Player signed the Third Offer for a re-employment with the Club during the 2023/2024 season on 14 August 2023, and the Club and the Player signed the Employment Contract 2023/2024 on 11 September 2023.
155. The Agency argues that the Third Offer and the Employment Contract 2023/2024 were signed during the term of the Representation Agreement and that this entitles the Agency to an agent fee of 10% of the Player's net salary. The Player submits that the Employment Agreement 2023/2024 was signed after the termination of the Representation Agreement, which was validly terminated by notice of 27 July 2023, became effective on 11 August 2024 (considering the 15-day notice period), and that the Agency is therefore not entitled to an agent fee.
156. The Agency submits that the notice of termination was invalid because it did not comply with the agreed formal requirements. The term and termination of the Representation Agreement are regulated in clause IV., which reads as follows:
- “The term of this agreement shall begin on the date hereof and shall continue at least until the one year anniversary date. After the one year anniversary date, this contract shall continue and either party may terminate this agreement by sending fifteen (15) days written notice of termination to the other party by certified, registered, or overnight mail.”*
157. Even though the termination was not sent by “*certified, registered, or overnight mail*”, the Arbitrator finds that the Agency's objection regarding the formal validity of the termination notice cannot be upheld: First, there is no doubt that the Agency received the termination notice and read it, which was not denied by the Agency. Second, when it is clear and undisputed that a termination notice was received and read by the other party, there is no room to insist on a specific formality given that the sender bears the risk of incorrect (e.g., late) delivery if he chooses a different delivery method than agreed in the Representation Agreement. The Arbitrator therefore finds that the Player's termination of the Representation Agreement was formally valid (cf. also BAT 1853/22, para. 76). It was

also in time, as the Player has respected the 15-day notice period provided in clause IV of the Representation Agreement, and the termination became effective on 11 August 2023.

158. The Agency then argues that it is still entitled to an agent fee for the 2023/2024 season as it negotiated the conditions of the employment on behalf of the Player and the latter terminated the Representation Agreement before signing the Employment Contract 2023/2024 in bad faith. The Respondent replies that the Agency was not able to ensure the inclusion of two essential conditions (i.e., a net-salary of USD 1,500,000.00 and a clause according to which the Club is obliged to pay the agent fee) and that, therefore, he had good reasons to terminate the Representation Agreement before he signed a “better deal” than the one which was negotiated by the Agency. The Player argues that the Claimant is therefore not entitled to an agent fee for the 2023/2024 season.

159. Clause III of the Representation Agreement provides the following compensation regulation:

*“For any playing contract signed by the Player with a team outside the NBA during the term of this agreement, the Agent shall receive an agent fee of 10% of the Player's negotiated base net salary for each year while Player is under contract with the team. In negotiating the Player's contract, the Agent shall include a clause according to which the Agent collects his fee directly from the team and the fee shall be in addition to the salary paid to Player by the team. The fees outlined in this paragraph shall apply to any and all contracts entered into by the Player during the term of this contract and all buy-out payments, renewals, resignings, extensions, or modifications of any contracts entered into by the Player during the term of this player-agent contract.”*

160. As the Employment Contract 2023/2024 and the Third Offer were signed after the termination of the Representation Agreement, the question arises as to whether the Agency is nevertheless entitled to a compensation because it initiated the re-employment of the Player by the Club, effectuated an interesting offer, and conducted initial negotiations.

161. The Parties submitted witness statements to describe the negotiation process. The witness statement of a Club's representative reads as follows:



*“The team negotiated with the players in July 2023, and the first offer was not signed. About 15 days later, the player told us that he had a new Chinese agency. So we made another offer after negotiating with the new agency. The player accepted the new offer and signed the contract with the team on August 14.”*

162. The main parts of the witness statement of Mr. Alex Yam read as follows:

[...]

*After obtaining the 2021/2022 contract for Noah Vonleh, I also was very involved with the negotiations between Pensack Sports and Shanghai Juss regarding a contract for Noah Vonleh for the 2023-2024 season.*

*In early July of 2023, I met with Pensack Sports and Noah Vonleh in Las Vegas and also met with the Shanghai Juss head coach and translator regarding the deal for Noah Vonleh. It was then clear that an official offer from the club was imminent and that a deal was close to being completed. In July of 2023, all indications were that Pensack Sports and I had a deal completed for Noah Vonleh to return to Shanghai Juss for the 2023/2024 season. Throughout mid-July of 2023, Pensack Sports informed me that Noah Vonleh agreed to the contract offer from Shanghai Juss for a net salary of \$1,400,000 but that we were just waiting for his signature on the contract. I was also able to help secure Noah Vonleh, upon his requests, a salary advance of \$200,000 (advances are extremely rare in the CBA) and an NBA out clause in his offer of \$1,400,000 from Shanghai Juss.*

[...]

163. The Player refers to this unfulfilled condition that the agent fee should be paid by the Club as set out in clause III of the Representation Agreement. Neither the First nor the Second Offer negotiated by the Agency provided for a corresponding clause. The Agency argues that there was an oral agreement between the Agency and the Club that the latter would pay the agent fee. The question of whether this is true or not can be left open because also the Third Offer (negotiated by the Player, respectively, his new agent) did not contain any provision obliging the Club to pay the agent fee on behalf of the Player either. In addition, according to Article 7.1 of the Employment Contract 2023/2024, the agent fee shall be borne by the Player, as also provided for in the previous Employment Contract 2021/2022. Furthermore, by cutting out the Agency before signing with the Club, the Player prevented the Agency from signing a separate agreement with the Club under which the latter would have paid the Agency its agent fee. In addition, the Arbitrator notes that the Agency has submitted that it had orally agreed with the Club to

sign such separate agreement after an employment contract is signed with the Player. Therefore, the Arbitrator considers the Player's accusation that the Agency was not able to include such a clause into the First and Second Offer to be irrelevant, as the Player, respectively, his new agent could not include such a clause into the Employment Contract 2023/2024 either.

164. The Arbitrator however follows the Player's argument that the annual net salary as finally proposed by the Third Offer was USD 100,000.00 higher than the Second Offer negotiated by the Agency. On one side, by comparing the First and the Second Offer, the Arbitrator notes that the Club was willing to accept an advance salary payment of USD 200,000.00 and a NBA-buy-out-clause as wished by the Player. In other words, the Agency was able to guarantee at least some of the Player's wishes for the 2023/2024 season. On the other side, according to the Third Offer signed on 14 August 2023, the Club is obliged to pay a net salary of USD 1,500,000.00. However, according to Articles 4.1 and 4.5.2 of the Employment Contract 2023/2024, the Club is obliged to pay a monthly salary of USD 251,997.00, respectively a season salary of total USD 2,267,973.00. According to Article 4.7 of the Employment Contract 2023/2024, "[a]ny tax related to the abovementioned salary of [Player] within Chinese territory shall be withheld and remitted by [Club]". The Arbitrator therefore concludes that the net season salary for the 2023/2024 season was USD 1,500,000.00 (and the gross salary USD 2,267,973.00). This means that the Player, respectively his new agent was indeed able to secure a higher salary (i.e., USD 100,000.00 more than offered by the Club in the First and Second Offer) than the Agency.
165. The Arbitrator notes the Agency's doubts about the authenticity of the copy of the Employment Contract 2023/2024 provided in this procedure. While the Agency particularly questions the authenticity of the copied pages (pages 2, 46 and 48, which contain information about the agent), the Agency does not dispute that the Player was able to negotiate a higher salary. The salary information is not to be found on the copied pages 2, 46 and 48 (but on pages 9 et seqq.), and there is no reason to doubt the net salary of USD

1,500,000.00. There is no need, therefore, to admit a further copy of the already submitted contract.

166. Although the Arbitrator recognises the fact that the Player and/or his new agent was able to guarantee a higher salary for the 2023/2024 season than the Agency did, the Arbitrator agrees with the Agency's submission that it would not be fair and equitable if the Player could profit from the Agency's services (e.g. negotiating the First and Second Offer, several phone calls between the Player and the Agency concerning a potential employment for the 2023/2024 season), terminate the Representation Agreement shortly before signing the Employment Contract 2023/2024 and still avoid his liability to compensate the services provided by the Agency. Based on the principle of *ex aequo et bono* and the fact that the Player was able to obtain a better contract than the one the Agency had negotiated, the Arbitrator finds it fair and equitable that the Agency is entitled to the half of the otherwise agent fee due, i.e. 5% "*of the Player's negotiated base net salary*".
167. Therefore, the Player is obliged to pay 5% of his net salary for the 2023/2024 season to the Agency, i.e. USD 75,000.00.

### 6.2.3 Interest

168. The Agency requests the BAT to order "*interest of 5% per annum to be calculated as the BAT deems appropriate*" on the agent fees 2021/2022 and 2023/2024.
169. The Representation Agreement does not contain a regulation concerning interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Agency and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

170. As to the date from which the interest for the outstanding amounts starts to run, the Arbitrator orders interest from the date of the signature of the Employment Contract 2021/2022 (i.e. from 10 September 2021 for the agent fee 2021/2022) and of the Employment Contract 2023/2024 (i.e. from 11 September 2023 for the agent fee 2023/2024).

## **7. Conclusion**

171. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the Player shall pay the Agency outstanding agent fees of USD 192,271.50, together with interest at 5% per annum on the amount of USD 117,271.50 or any outstanding balance (as may be the case from time to time) thereof from 10 September 2021 until payment in full and on the amount of USD 75,000.00 or any outstanding balance (as may be the case from time to time) thereof from 11 September 2023 until payment in full.

## **8. Costs**

172. In respect of determining the arbitration costs, Article 17.2 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). [...]"*

173. On 30 May 2024, the BAT President determined the arbitration costs in the present matter to be EUR 10,004.91.

174. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 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."*

175. Considering the requests for relief and the outcome of the case, it turns out that the Claimant prevailed by a bit more than 60% of the claimed amount (total claimed amount: USD 117,271.50 plus USD 140,000.00 = USD 257,271.50; total awarded amount: USD 117,271.50 plus USD 75,000.00 = USD 192,271.50). The Arbitrator therefore concludes that 75% of the arbitration costs (i.e., EUR 7,503.70) shall be borne by the Respondent and 25% by the Claimant. Therefore, the Respondent shall reimburse EUR 7,503.20 to the Claimant.

176. In relation to the Parties' legal fees and expenses, Article 17.3 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."*

177. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute from EUR 200,001.00 to EUR 500,000.00 (*in casu* USD 257,271.50, which is approx. EUR 241,700.00) is EUR 15,000.00.

178. The Claimant claims legal fees in the total amount of EUR 14,437.50. It also claims for the expense of the non-reimbursable handling fee in the amount of EUR 6,000.00. The Player requests a contribution to his legal fees of EUR 15,000.00.

179. Taking into account the factors required by Article 17.3 BAT Rules, the maximum awardable amount prescribed under Article 17.4 BAT Rules (EUR 15,000), the non-reimbursable handing fee paid by Claimant, the work done by legal representatives and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that the Respondent shall pay a contribution to the Claimant's legal fees and expenses in the amount of EUR 8,000.00.

## **9. AWARD**

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

- 1. Mr. Noah Vonleh shall pay Pensack Sports outstanding agent fees of USD 192,271.50, together with interest at 5% per annum**
  - a) on the amount of USD 117,271.50 or any outstanding balance (as may be the case from time to time) thereof from 10 September 2021 until payment in full, and**
  - b) on the amount of USD 75,000.00 or any outstanding balance (as may be the case from time to time) thereof from 11 September 2023 until payment in full.**
- 2. Mr. Noah Vonleh shall pay Pensack Sports an amount of EUR 7,503.20 as reimbursement for its arbitration costs.**
- 3. Mr. Noah Vonleh shall pay Pensack Sports an amount of EUR 8,000.00 as a contribution towards its legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 14 June 2024

Stephan Netze  
(Arbitrator)