

ARBITRAL AWARD

(BAT 1231/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Summit Sports Group LLC

c/o Neal Rosenshein, 7401 West 81st Street,
Los Angeles, CA, 90045, United

- Claimant -

represented by Mr. Juan de Dios Crespo-Pérez, attorney at law,
Avda. Reino de Valencia, 19-4^a y 6^a, 46005 Valencia, Spain

vs.

Mr. Michael James

- Respondent -

represented by Mr. Socrates Lampropoulos, attorney at law,
17 Pyrrou Str, 145 64 Athens, Greece

1. The Parties

1.1. The Claimant

1. Summit Sports Group LLC (hereinafter the “Agency”) is a professional agency located in Los Angeles, USA, representing and advising basketball players.

1.2. The Respondent

2. Mr. Michael James (hereinafter the “Player”) is a professional basketball player. He is a US citizen.

2. The Arbitrator

3. On 26 July 2018, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren OC, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Summary of the facts leading to this arbitration

4. On 19 August 2014, the Agency, represented by FIBA-registered agent Mr Neal Rosenshein, and the Player signed a representation agreement (the “Representation Agreement”). The Agency was entitled to a fee/commission (the “Agency Fee” of “Commission”) in the amount of 10% of the compensation received by the Player for each playing season covered by a player contract executed during the term of the Representation Agreement. The Agency and the Player agreed on a contractual term of 24 months from the date of the Representation Agreement (i.e. until 18 August 2016). The Representation Agreement renewed automatically for consecutive 24-month-periods unless written notice was given by either Party to the other with an advance notice of no less than 15 and no more than 30 days prior to the “*natural expira-*

tion date". This period was called "the Window Period" in the Representation Agreement. Notice by the Player outside of the Window Period triggered a penalty fee equal to the commission earned for the last contract negotiated by the Agency, or, if no new contract had been negotiated, a penalty fee equal to 10% of the Player's next playing contract.

5. On 12 February 2018, the Player signed an employment agreement with Greek club Panathinaikos Athens, valid from 12 February 2018 until the end of the 2017-2018 season. This agreement had been negotiated with the assistance of the Agency. On the same day, the Player notified the Agency by email that he terminated his relationship with the Agency.
6. On 12 July 2018, the Player signed an employment agreement with Italian Club Balacanestro Olimpia Milano ("Olimpia Milano") which had been negotiated with the assistance of another agent. On the following day, Olimpia Milano publicly announced that it had reached a multi-year agreement with the Player.
7. The Agency claims that when the Player signed the Player's contract with Olimpia Milano, the initial Representation Agreement was still in place after it had automatically been renewed because no party had terminated it within the Window Period. Therefore entitling the Agency to a penalty of USD 26,000.00 plus 10% of the total value of the Player's contract with Olimpia Milano.
8. The Player refers to article 157 FIBA Regulations according to which a contract between an agent and a player shall not exceed the period of 2 years but may only be renewed by a new written contract of the parties. The Representation Agreement therefore expired, *ipso jure*, on 19 August 2016 and the Agency was not entitled to any fees or commissions related to a contract signed by the Player thereafter.

4. The Proceedings before the BAT

9. On 19 July 2018, the Agency filed a Request for Arbitration in accordance with the BAT Rules, which was received by the BAT on the same date. A non-reimbursable handling fee of EUR 1,500.00 was received in the BAT bank account also on that day.
10. Upon inquiry by the Arbitrator, the Agency clarified by email of 16 August 2018 that Summit Sports Group LLC was to be considered as the Claimant in this arbitration, and not Mr Neal Rosenshein, whose name also appeared on the Request for Arbitration.
11. By Procedural Order of 17 August 2018, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. A time limit was fixed for the Player to file his Answer in accordance with Article 11.2 of the BAT Rules by no later than 14 September 2018. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 31 August 2018:

<i>"Claimant (Summit Sports LLC)</i>	<i>EUR 3,500.00</i>
<i>Respondent (Mr Michael James)</i>	<i>EUR 3,500.00"</i>

12. The entire Advance on Costs was paid by the Agency.
13. The Player submitted his Answer within the extended time limit of 24 September 2018.
14. On 15 October 2018, upon request of the Arbitrator, the Player submitted his new contract with Olimpia Milano to the BAT. Since this was a so-called league contract for notification of the agreement with the Federazione Italiana Pallacanestro, the Italian Basketball League (LBA) and the Italian Basketball Player Association (GIBA) (the "League Contract"), the Arbitrator asked the Player for a copy of the individual

player agreement. By email of 31 October 2018, the Player replied that he had not signed any private agreement with Olimpia Milano.

15. By Procedural Order of 28 November 2018, the BAT Secretariat acknowledged receipt of the entire Advance on Costs fully paid by the Agency. It also closed the written proceedings and invited the Parties to submit their account of costs until 4 December 2018. Due to a clerical error, also the Player's Answer was forwarded to the Agency only on 4 December 2018. On the same day, the Agency asked for an opportunity to comment on the Answer and provide further written evidence.
16. On 5 December 2018, the Agency submitted unsolicited comments to the Player's Answer together with 30 exhibits, before the BAT had responded to the Agency's request of 4 December 2018.
17. By Procedural Order of 6 December 2018, the Arbitrator invited the Player to respond to the Agency's comments until 17 December 2018. He also notified the Parties that he would now issue a reasoned award since the amount in dispute clearly exceeded EUR 100,000.00, which had become clear only after the player contract with Olimpia Milano had been disclosed. The BAT Secretariat also requested that the Parties pay an additional Advance on Costs by no later than 17 December 2018:

<i>"Claimant (Summit Sports LLC)</i>	<i>EUR 2,000.00</i>
<i>Respondent (Mr Michael James)</i>	<i>EUR 2,000.00"</i>

18. The entire additional Advance on Cost (and an additional handling fee of EUR 1,500) was timely paid by the Agency.
19. By email of 17 December 2018, the Player protested against the alleged preferential treatment of the Agency by the BAT (given the Agency's unsolicited submission of 5 December 2018) and asked for an extension of the time limit to submit his comments. The BAT then invited the Player to comment on the Agency's unsolicited submission until 15 January 2019.

20. By Procedural Order of 15 January 2019, the BAT extended the Player's time limit to respond to the Agency's comments until 30 January 2019. Upon receipt of the Player's comments, the written proceedings were closed. Both Parties submitted their Accounts of Costs.
21. By letter of 1 March 2019, the BAT requested the payment of an additional amount of EUR 4,000 on account of the non-reimbursable handling fee, which was entirely paid by the Claimant.

5. The Positions of the Parties

5.1. The Agency's Position

22. The Agency submits that the Parties had signed a Representation Agreement on 19 August 2014.
23. According to Clause 3, the Representation Agreement was automatically renewed by 24 months if it was not formally terminated by either party during a so-called Window Period, i.e. a period between 30 and 15 days prior to the natural expiration date of the Agreement. Neither party submitted a termination notice during the Window Period 2016. Hence, the Representation Agreement continued to be in force until 18 August 2018.
24. The Player sent a termination notice by a text message already approximately six month *before* the next Window Period 2018, namely on 12 February 2018. However, such notification was irrelevant because (i) the Player was not entitled to terminate the Representation Agreement with immediate effect, and (ii) the termination notice did not meet the formal requirements of Clause 3 of the Representation Agreement.
25. The Player's notice could only be understood as a simple communication of his intention not to renew the Representation Agreement after the expiration of the first extension by 24 months, i.e. 18 August 2018. Hence, the Representation Agreement "natu-

rally” expired on 18 August 2018.¹ Also after the termination notice of 12 February 2018, the Agency worked hard to find a new employment for the Player.

26. The Player argues that the Representation Agreement automatically expired after two years, i.e. on 18 August 2016, because article 3-157 of the FIBA Internal Regulations governing Agents requires a new written contract to extend an existing player-agent agreement beyond a duration of two years. An automatic extension was therefore not valid. The Agency finds this argument not acceptable: Non-compliance of contractual provisions with the FIBA Internal Regulations does not lead to the invalidity of contractual provisions but, if at all, to sanctions according to the FIBA Regulations which are however not for the Arbitrator to determine. Hence, the automatic extension of the Representation Agreement by two more years was valid, and the Representation Agreement continued to be effective beyond 18 August 2016.
27. This is also supported by the fact that the Parties continued cooperating also after 18 August 2016. This continuing cooperation was not limited to the representation of the Player towards NBA teams, as submitted by the Player, but to all clubs worldwide. It was actually the Agency which represented the Player in the negotiations with Panathinaikos Athens which eventually led to the signing of a player contract on 12 February 2018.
28. The consequences of a non-renewal notice which does not comply with the formal requirements of article 3 of the Representation Agreement are clear: The non-renewal notice is not effective, and the non-compliant notice gives rise to a penalty payment as established in article 4 of the Representation Agreement.
29. The commission for the Agency as determined in the “last contract negotiated by the Agency” (i.e. the player contract with Panathinaikos” signed on 12 February 2018)

¹ See e.g. para. 57 and 76 of the Request for Arbitration. The Agency also refers to 19 August 2018 as the “natural expiration” date (see e.g. para. 87 of the Request for Arbitration).

amounted to USD 26,000 for the Agency. That is the penalty amount due by the Player to the Agency.

30. When the Player signed a new player contract with Olimpia Milano without the representation of the Agency while the Representation Agreement was still in force, he violated the Exclusivity Clause of article 5 of the Representation Agreement.
31. The mere fact that a contract was negotiated during the term of the Representation Agreement without the inclusion of the Agency entitled the Agency to a compensation of 10% of the value of the negotiated contract.
32. In April 2017, the Agency started negotiations of a contract between the Player and Olimpia Milano. However, the Player did not involve the Agency in the further contract negotiations in 2018 but the Agency learned of the conclusion of the new player contract only on or around 12 June 2018. The Agency then requested the Player to disclose the new player contract – however without success.
33. The Agency learned of the value of the negotiated contract not before the Player submission of the contract version which an Italian club must submit to the FIP and which the Player submitted in this arbitration upon request of the Arbitrator. This version indicates a duration of one year and a value of EUR 1,496,157.00. However, this League Contract is only a simulated form agreement which must be submitted to the FIP for administrative purposes. Before, the parties usually sign a detailed long-form agreement which has been requested by the Arbitrator, but which has not been submitted by the Player.
34. Olimpia Milano itself officially announced that it had reached a “multi-year” agreement with the Player. The media reported a contract of three years for the total amount of USD 5,9 Mio. On 23 July 2018, the Player himself confirmed that he had signed a USD 5,9 Mio, 3-year contract with Olimpia Milano.
35. In the Request for Arbitration, the Player also submits in the alternative, i.e. in the event the Arbitrator should evaluate the Representation Agreement was terminated

by the Player on 12 February 2018, that the Player terminated the Representation Agreement in bad faith and breached Clause 3.

5.2. The Agency's Request for Relief

36. The Request for Arbitration as amended by the Agency's Comments of 5 December 2018 contains the following Request for Relief:

"Without prejudice to the possible requested assistance of state judiciary authorities, Summit Sports Group herein respectfully requests that the BAT issues a decision as follows:

- a. To accept this claim;*
- b. To decide that Michael James violated the Agreement;*
- c. To issue a decision requiring Michael James to:*
 - i. Pay the Claimant the net amount of USD 26,000.00 (Twenty Six Thousand US dollars) net as compensation due to the improper non-renewal notice, plus five percent (5%) per annum interest rate, starting from 12 February 2018 until its effective and entire payment; and*
 - ii. Pay the Claimant the net amount equal to USD 590,000.00 (Five Hundred Ninety Thousand US dollars) net as compensation due to the violation of the exclusivity clause of the Agreement, plus five percent (5%) per annum interest rate, starting from 13 July 2018, until its effective and entire payment;*
- Or, in case the BAT decided the Player terminated the Agreement*
- iii. Pay the Claimant the net amount of USD 26,000 (Twenty Six Thousand US dollars) net as compensation due to the improper non-renewal notice, plus five percent (5%) per annum interest rate, starting from 12 February 2018 until its effective and entire payment; and*
- iv. Pay the Claimant the net amount equal to USD 590,000.00 (Five Hundred Ninety Thousand US dollars) net, plus five percent (5%) per annum interest rate, starting from 12 February 2018 until its effective and entire payment.*
- d. Further to article 17.3 of the BAT Arbitration Rules that the Respondent bear the entirety of the costs of this arbitration;*
- e. Further to article 17.4 of the BAT Arbitration Rules that the Respondent pays the legal fees of the claimants with respect to this procedure in the amount of EUR 14,900.00 (Fourteen Thousand Nine Hundred Euros) net;"*

5.3. The Player's Position

37. The Player relies on article 157 of the FIBA Regulations (Chapter IV players' agents), which stipulates that *"...the duration of a contract shall not exceed a period of two (2)*

years but may be renewed through a new written contract of the parties..." Hence, the Representation Agreement expired on 18 August 2016.

38. After the expiration of the Representation Agreement, the Parties did not sign a new representation agreement, but only an agreement limited to the Player's representation in compensation negotiations with NBA teams (the "NBPA Agreement"). This agreement could be terminated at any time upon 15 days' notice. With regard to negotiations with non-NBA teams, the Player was free to seek the services of any other agent of his choice and choose the best offer.
39. During the 2017/2018 season, the Player played in the USA, first with the Phoenix Suns and thereafter with the New Orleans Pelicans. The New Orleans Pelicans released the Player on 9 February 2018. At the same time, the Player received an offer from Panathinaikos Athens through a Greek agent and signed a player contract on 12 February 2018. The Agency received a share of 7% of the commission because it had contributed to the successful negotiations, as well.
40. On the same day, the Player informed the Agency that their relationship *"had run its course and reached its stopping point."* According to the NBPA agreement, which was the only existing contract between the parties at that time, the notification of 12 February 2018 was sufficient to terminate the remaining business relationship between the parties.
41. At the time of the notification, the Agency knew there was no valid representation agreement, which is supported by various text messages sent by the Agency, by which it asked the Player to meet, talk and extend their business relationship for future seasons. Also, in the Request for Arbitration, the Agency states that *"...the Agent expressed his intention to renew the Agreement for the next two years, considering that the Agreement was expiring on 18 August 2018..."*.
42. The Player disputes that the Agency continued working for him also after the notice of termination of 12 February 2017. In fact, the Player never saw any of the alleged text messages, emails, faxes, financial proposals, or drafts of agreements with the teams.

There was never a proposal from a Chinese team, as asserted in the Request for Arbitration.

43. The Player also disputes that the Agency was negotiating with Olympia Milano already in 2017. There is no evidence of any such negotiations. It is therefore not entitled to any commissions related to the respective contract with the Player.
44. Finally, the Player denies that he had signed a three-years contract with Olimpia Milano. The contract runs for one year because the Player wanted to keep his options for another contract with an NBA team for the following seasons open. The gross salary amounts to EUR 1,496,157.00, as reflected also in the League Contract, which corresponds to a net salary after fiscal deductions of EUR 813,254.07. A League Contract was signed but no “detailed agreement”, “to avoid bureaucratic difficulties with the IRS.”

5.4. The Player’s Request for Relief

45. The Answer contains the following Request for Relief:

“The Respondent herein respectfully requests the FIBA Arbitral Tribunal to issue a decision as follows:

- *To declare that the representation agreement dated August 19, 2014 was not renewed.*
- *To declare that the Respondent has no payment obligation whatsoever towards the Claimant.*
- *To dismiss any request for compensatory damages or commission fees and/or any other motions for relief submitted by the Claimant.*
- *To order the Claimant to pay the full costs of this arbitration and a contribution towards the Respondent’s legal and other costs and, accordingly, impose to Claimant the overall payment of five thousand (5.000) euro as legal costs or any other amount the BAT considers equitable.”*

6. Jurisdiction

46. 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).
47. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
48. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
49. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 9 of the Representation Agreement (i.e. the agreement on which the present claim is based), which provides for the standard BAT arbitration clause:

“9. Governing Law

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

50. The Representation Agreement is in written form and thus the arbitration agreement meets the formal requirements of Article 178(1) PILA.
51. The Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in the above-mentioned Clause of the Representation Agreement cover the present dispute. The jurisdiction of the BAT has not been disputed in this proceeding.

52. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Agency's claims.

7. Applicable Law – *ex aequo et bono*

53. 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".

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

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

55. In Clause 9 of the Representation Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.
56. 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 of 1969² (Concordat),³ under which Swiss courts have held that "*arbitrage en équité*" is fundamentally different from "*arbitrage en droit*":

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

³ KARRER, in: Basel commentary to the PILA, 3rd ed., Basel 2013, Article 187 PILA N 290.

“When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁴

57. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand”.⁵

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

8. Findings

8.1. The term of the Representation Agreement

59. Undisputedly, the Representation Agreement was signed on 19 August 2014 for an initial term of two years, i.e. until 18 August 2016. Neither party notified the other of its desire not to renew the Representation Agreement. The Parties disagree on whether the Representation Agreement was therefore “automatically renewed”.
60. The Representation Agreement contains the following provisions regarding the “*Terms and Renewals*”:

3. Terms and Renewals:

This Agreement shall begin on the date hereof and will lapse twenty four (24) months thereafter. This Agreement shall thereafter be deemed automatically renewed for subsequent periods of twenty four (24) months unless written notice is given by either Party to the other with an advance notice of no less than fifteen (15) and no more than thirty (30) days prior to the natural expiration date of the Agreement (“the WINDOW PERIOD”).

⁴ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁵ POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

Such non-renewal communication must be sent only via registered mail with return receipt to the addressed exclusively to the domicile respectively elected by the parties under Paragraph 7 herein. Should the permanent address of one of the parties change during this Agreement, both parties have to make the new information available to the other party.

Failure by either Party to fully and timely comply with the above requirements will result in the non-renewal notice not being valid and enforceable against the other Party and this Agreement shall remain in full force and effect.

4. Improper Non-Renewal Notice Penalty:

Should PLAYER notify REPRESENTATIVE in any manner outside the above mentioned WINDOW PERIOD that he does not intend to renew this agreement upon its expiration, REPRESENTATIVE has the right to immediately collect a penalty fee equal to the commission earned for the last contract negotiated by REPRESENTATIVE on PLAYER's behalf from PLAYER. If no contract has been negotiated by REPRESENTATIVE on PLAYER's behalf, REPRESENTATIVE has the right to collect a penalty fee equal to 10% of PLAYER's next playing contract.

61. According to the Player, these clauses are irrelevant and not enforceable because they contradict article 3-157 of the FIBA Internal Regulations governing Agents (2013) which requires a new written contract to extend an existing player-agent agreement beyond a duration of two years. The same provision is included also in the current version of the FIBA Internal Regulations in Article 3-307: *"The duration of a contract [between an agent and a player] shall not exceed a period of two (2) years but may be renewed through a new written contract of the parties."*
62. According to standing BAT-jurisprudence, non-compliance of contractual provisions with the FIBA Internal Regulations does not lead to the invalidity of contractual provisions but, if at all, to sanctions according to the FIBA Regulations which are to be determined by FIBA and not the Arbitrator.⁶ Hence, Clause 3 of the Representation Agreement which provides for an automatic extension of the Representation Agreement by two more years, was valid and enforceable. To prevent an extension of the Representation Agreement, one of the Parties would have had to notify the other of its intention not to renew it. In the absence of such a notice to that effect, the Repre-

⁶ See, e.g. BAT 0541/14, *Duffy International v. Doellman*, para. 46 – 50.

sensation Agreement was renewed and continued to be effective beyond 18 August 2016. Also, the NBPA Agreement was still in place. There is at least no evidence on record that the NBPA Agreement had been terminated, which would, however, not be relevant in this case, since the NBPA Agreement had a different scope than the Representation Agreement and did not replace or supersede the Representation Agreement.

63. The Player argues that the Agency itself was in belief that the Representation Agreement was no longer effective since there were no activities related to clubs outside of the NBA after 18 August 2016. The Arbitrator disagrees: Also after 18 August 2016, the Player relied on the services of the Agency, and the Player's assertion that he solicited services of other agencies on the free market remained unproven. It would therefore be unacceptable to somehow construe a non-renewal of the Representation Agreement by implied consent or by "passivity" of the Agency.
64. On 12 February 2018, the Player sent a text message to the Agency with the following wording:

"I feel like this relationship has ran its course. You and summit are my family so this is tough to even do but our partnership I think has reached its stopping point. I thank you guys for everything and I hope things go well for you guys moving forward without the representation of summit. Thanks again. Love you guys."
65. The Agency took this message as a notice of termination of the (extended) Representation Agreement, while the Player argues that this note was intended to terminate the NBPA Agreement, but not the Representation Agreement which expired already by 18 August 2016.
66. At the date of the notice of termination, both agreements (i.e. the Representation Agreement and the NBPA Agreement) were still valid, as found before (see para. 62). The wording of the termination notice leaves little room for a different understanding than the Player intended to terminate the entire co-operation with the Agency and not a particular contract. The notice of termination does however not contain any allegation of a material breach of contract by the Agency to explain an immediate termination. During this arbitration, the Player has raised some accusations against the

Agency, based on events dating back to the year 2016. The Arbitrator finds that these accusations (even if they were true) were late and cannot justify an immediate termination for just cause.

67. The Player's text message of 12 February 2018 must therefore be understood as a termination notice with respect to the NBPA Agreement which could be terminated at any time upon 15 days' notice, and as the Player's declaration of will not to renew the Representation Agreement, whose first renewal period expired on 18 August 2018.
68. The Agency draws the attention to the fact that the termination notice was served outside of the Window Period, which began only 30 days before the expiration date and ended 15 days later. However, the Agency does not claim that the disregard of the Window Period invalidated the termination notice, as this is stipulated by the last paragraph of Clause 3 of the Representation Agreement, but accepts that the Representation Agreement was not renewed after the 18th of August 2018. The Arbitrator therefore does not have to review the enforceability of the last paragraph of Clause 3 of the Representation Agreement. It is however a different matter whether the disregard of the Window Period may justify a penalty, as claimed by the Agency.
69. As an intermediate result, the Arbitrator finds that the Representation Agreement was signed on 19 August 2014, renewed by 19 August 2016 and expired on 18 August 2018.

8.2. Is the Agency entitled to compensation as a consequence of the signing of the contract between the Player and Olympia Milano?

70. The Representation Agreement regulates the compensation of the Agency's services as follows:

2. Compensation for Services:

The PLAYER shall pay an agent fee/commission (hereinafter the "Commission") to REPRESENTATIVE in the amount of ten percent (10%) on the compensation received by the PLAYER for each playing season covered by a player-contract executed during the term of this Agreement. The Commission will not be due from the PLAYER if REPRESENTATIVE is paid the fee by the Club or Team to which the

Player is signed. In computing the Commission payable pursuant to the terms in this paragraph, the fee due REPRESENTATIVE shall include base salary and signing bonuses received by the PLAYER from his Team or Club. PLAYER is aware of the practice of certain teams and clubs paying the REPRESENTATIVE a fee for his contract services rendered on behalf of PLAYER, and the PLAYER hereby consents to such a practice. If a Club has contracted to pay REPRESENTATIVE'S Commission and fails to do so, PLAYER will not be liable for the Commission. Any commission to be paid by a club is in lieu of commission from the PLAYER. To be clear, the PLAYER shall not be responsible for any commission that a team is contracted to pay, and falls to pay.

71. The Agency claims that the Player executed a contract with Olimpia Milano while the Representation Agreement was still in place. According to Clause 2 of the Representation Agreement, it was therefore entitled to the Commission of 10% of the compensation received by the Player. The Player refers to the League Contract which bears the date of 30 August 2018, i.e. a date *after* the expiration of the Representation Agreement. In this case, Clause 2 would not apply.
72. It is true that the League Contract which the Player submitted on the Arbitrator's request bears a date after the expiration of the Representation Agreement which was the 18th of August 2018. However, there are overriding reasons supporting the view that the Player and Olimpia Milano reached a valid and binding agreement well before the expiration date:
 - a. The agreement between Olimpia Milano and the Player was announced already on 13 July 2018. On 25 July 2018, the Player passed the medical entry examination and participated in the first training session. On 28 July 2018, the Player gave his first interview as a member of the Olimpia Milano team. All these facts strongly indicate that the Player and Olimpia Milano had come to an agreement already in July 2018. Whether or not the player contract was formally signed only after 18 August 2018, does not matter. There are no formal requirements when it comes to the validity of a player contract. Even an oral agreement would be valid.
 - b. It is extremely unusual in professional basketball not to sign an individual and detailed player agreement which governs e.g. the terms of the salary payments and bonuses, the costs borne by the club for housing, car or medical treatment, cer-

tain duties of conduct and provisions on the term and termination of the player contract, as well as a dispute resolution clause. None of this has been addressed in the League Contract. The Arbitrator also does not accept the Player's explanation why there was no such individual player contract ("*...following the advice of his US accountants, he decided to sign only the Italian uniform contract in order to avoid bureaucratic difficulties with the IRS*"). There is no reasonable explanation why an individual player contract might bring the Player into any difficulties with the tax authorities, while a League Contract, which leads to many more questions, would not. In fact, there are numerous BAT awards concerning foreign players in Italy which prove the common practice of signing a League Contract, whose main purpose is to be submitted to the Italian league, while at the same time signing a detailed and negotiated individual employment contract and also at times, a separate contract on image rights. The Arbitrator is not convinced, at least based on the reasoning provided by the Player, that in his case the only contract existing is the League Contract. The Player must accept that the fact that refusal to submit the individual agreement (or present convincing evidence as to the non-existence of such individual agreement or that the agreement was executed following the expiry of the Representation Agreement) is not favourable to the Player and his submissions to the contrary.

73. The Arbitrator therefore concludes that Olimpia Milano agreed to hire the Player and on the terms of such engagement before the Representation Agreement with the Agency had expired. According to Clause 2 of the Representation Agreement, the Agency is therefore entitled to a Compensation.
74. Clause 2 of the Representation Agreement does not require that the player contract which has been concluded during the term of the Representation Agreement was concluded with the assistance of the Agency: The latter is entitled to the commission for any player contract which was signed during the term of the Representation Agreement.

75. This result would not be different if the Player Contract would have been signed only after the expiration of the Representation Agreement. According to the Exclusivity Clause 5 of the Representation Agreement, the Compensation of the Agency becomes also due if the Player successfully negotiated a new player contract without the Agency while he was still bound by the Representation Agreement, even if the act of signing took place only after the expiration of the Representation Agreement:

“5. Exclusivity Clause:

PLAYER expressly acknowledges and accepts that during the term of this Agreement, REPRESENTATIVE shall be the sole and only person and/or entity entitled to act in the name of and on behalf of the PLAYER in connection with any of the representation services listed under Paragraph 1 above.

If during the term of this Agreement, PLAYER or anyone else on his behalf negotiates a Contract for the PLAYER, PLAYER shall owe REPRESENTATIVE such compensation that shall amount to ten percent (10%) of the total value of the Contract that PLAYER or any third party on his behalf has negotiated with any club. Should PLAYER violate this clause or give improper non-renewal notice to REPRESENTATIVE, damages will be limited to 10% of the value of player's previous Contract or

REPRESENTATIVE, at its own option, may choose to work with third party representatives in carrying out the services listed under Paragraph 1 above and may share fees with said third parties as REPRESENTATIVE sees fit.”

76. It is obvious that the negotiations with Olimpia Milano started well before the expiration of the Representation Agreement – in any event before the club and the Player went public and announced their cooperation on 13 July 2018. The Player therefore must compensate the Agency, irrespectively of the date of signing.

8.3. Is the Agency entitled to a compensation for the “improper renewal notice”

77. According to Clause 4, the Agency shall be entitled to a penalty if the Player notifies his intent not to renew the Representation Agreement outside of the Termination Period. Curiously, this penalty shall apply only if the Player notifies the Agency about the non-renewal of the agreement outside of the Window Period, but not the other way round. In addition, it is difficult to understand why an early termination notice by the Player shall be sanctioned at all. The Parties remain bound by the Representation

Agreement until its expiration. The Agency would remain entitled to a compensation if the Player concluded a new agreement with a new club without the involvement of the Agency based on Clause 2 and/or 5 of the Representation Agreement.

78. The Agency accepts the validity of the Player's non-renewal notice, despite it was sent outside of the Window Period. It seems therefore paradoxical to still claim a penalty for an act of the Player with the only flaw of having been sent too early.
79. While the Arbitrator respects the principle of *pacta sunt servanda*, he also takes the right to review penalty clauses and to reduce a penalty amount if it seems disproportionate or simply disregard it if it seems grossly unfair under the circumstances. In the present situation, there is no reasonable justification for the penalty, since the penalty applies unilaterally to one party only and since the Agency actually *accepted* the termination notice as a termination notice as per 18 August 2018. The penalty may have been justified if the termination notice would have been considered valid *ex nunc*, which might have deprived the Agency from claiming a commission related to next contract with Olimpia Milano. The Arbitrator finds it however inappropriate under the circumstances to claim both, the penalty and the Commission.
80. The Arbitrator therefore rejects the Agency's penalty claim.

8.4. The quantum of the Compensation for either signing or negotiating during Representation Agreement

81. The Arbitrator has held before that the Agency is entitled to a Commission relating to the player contract between the Player and Olimpia Milano, irrespective of the Agency's involvement in the negotiations or the signing of the contract.
82. According to Clause 2 of the Representation Agreement, the commission amounts to ten percent (10%) on the compensation received by the Player for each playing season covered by a player-contract executed during the term of this Agreement. A similar compensation is due to the Agency according to Clause 5, if during the term of this

Agreement, the Player or anyone else on his behalf negotiates a contract for the Player, namely ten percent (10%) of the total value of the contract with the new club.

83. The contract value, which is the basis for the calculation of the Agency's commission, corresponds to the sum of the Player's annual compensation during the term of the new contract. However, the Agency and the Player rely on different annual salary amounts and different terms of the player contract:
- a. The Agency relies on the public statements of the Player and Olimpia Milano which refer to a "multi-year contract" of three years. Some media clips speak of a two years contract with an extension option of one more year. The Player himself twittered on 23 July 2018: *"I signed three years in @OlimpiaMI1936 so that should tell you."*
 - b. In this arbitration, the Player asserts that he signed a one-year contract only because he wanted to keep his options to switch to an NBA club open.
 - c. The Player submits that he was assured of an annual salary of EUR 1,496,157.00 (gross) of which he would be paid EUR 813,253.07 (net, after taxes), as confirmed by Olimpia Milano's financial director. This is in line with the League Contract, which states that the amount indicated in the form (i.e. EUR 1,496,157.00) must be understood *before-tax*.
 - d. On 12 and 13 July 2018, media reported that the Player would earn 6 Mio USD. Moreover, on 23 July 2018, the Player himself re-tweeted a third-party tweet which had reported that the Player had signed a USD 5,9 million, 2+1 years employment contract. In this re-tweet, the Player added the words *"Somebody pay that man!!!!!!"* to the report about his salary. This can only be understood as the Player having confirmed the veracity of the re-tweeted report on his salary.
 - e. In his second submission, the Player then asserts without further evidence that he was indeed seeking for a two-year contract with a third-year option and an annual salary of 1,5 Mio USD. When he did not receive such an offer, he decided to

go for a one-year contract and to examine offers from NBA teams after the end of the season 2018-2019. That is why he ended with a simple one-year contract and a gross salary of EUR 1,496,157.00.

84. There are two hypotheses to explain the different statements. First, the Player and Olimpia Milano could have agreed on a one-year contract with two extension options and increasing salaries. Second, the total contract value of USD 5,900,000.00 could be explained by an additional image rights contract with either Olimpia Milano itself or a different entity. In the latter case, as the Representation Agreement was still in place when the contract with Olimpia Milano was concluded, it would have been the Player's legal obligation to include the Agency in the negotiations and to disclose the terms of any additional agreement on image rights. He has not done so. Even during this arbitration, he did not bother to provide the full employment agreement (or at least a memo listing the full terms of the agreement) but alleged that there was only a League Contract, which does not appear plausible.
85. Based on the information provided by the Parties, the Arbitrator finds it most likely that the Player and Olimpia Milano agreed on a two-year contract which could be terminated early by the Player after one year (especially if he got an offer from an NBA club) and renewed upon agreement by both Parties for a third year. The overall compensation for three years would amount to USD 5,9 Mio (corresponding to approx. EUR 5,077,000.00 at an exchange rate of 1,162), which consisted of a fixed annual salary of USD 1,738,535.00 / EUR 1,496,157.00 in the first year and increasing salaries in the following years.
86. When it comes to the question of whether the agreed payments must be understood as net or gross amounts, the Arbitrator relies on the instruction in the League Contract submitted by the Player, which reads as follows: "*The Club undertakes to pay the Player the following amounts to be intended before-tax [...]*".
87. According to Clause 2 of the Representation Agreement, the Agency is entitled to a commission of 10% of the compensation received by the Player for each playing sea-

son covered by a player contract executed during the term of that agreement. In computing the Commission, the fee due to the Agency shall include the base salary and signing bonuses received by the Player from his team or club (see clause 2 of the Representation Agreement). The compensation does not include a percentage of performance-based bonuses or image rights compensations which the Player might obtain from other sources than from the club.

88. The Arbitrator therefore finds that the Player must pay the Agency an amount of 10% of the annual salary for the season 2018-2019 and 2019-2020. Since the Arbitrator deems the third season subject to a new Agreement, he finds that no Commission for any further year of employment with Olimpia Milano shall become due to the Agency. On the other hand, the Commission shall be due irrespective of whether the Player remains employed with Olympia Milano until the end of the 2019-2020 season and irrespective of the reasons which may lead to an earlier termination or non-renewal of the contract with Olimpia Milano.
89. To avoid further proceedings and discussions of the exact amounts, the Arbitrator bases the calculation of the compensation for the lost Commission on an annual salary of EUR 1,692,333.00 (which is 1/3 of the full amount of USD 5.9 Mio gross). Considering a tax deduction of approx. 40%, the average annual net salary can be expected to be EUR 1,020,000.00, even though the effective salary may be lower in the first season and higher in the following seasons. As set out above, the Arbitrator bases the calculation of the Commission on a contractual term of two years which leads to an overall Commission of **EUR 204,000.00**.

8.5. Interest

90. The Agency is requesting default interest at the applicable Swiss statutory rate on the awarded amounts. The Swiss statutory default interest rate is 5% p.a.
91. Agent fees and commissions usually become due upon signing of a player contract. The Commission 2018-2019 therefore became due on 7 October 2018. Interest of 5%

on EUR 169,233.30 is due since 8 October 2018. The rest of the Commission will become due upon receipt of this Award.

9. Cost

92. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
93. On 21 March 2019 – considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “[t]he fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,000.00.
94. Considering the circumstances, the outcome of this arbitration and the procedural behaviour of the parties, the Arbitrator finds it fair that the Player shall bear the full arbitration costs. Given that the Advance on Costs of EUR 11,000 was paid entirely by the Agency, in application of Articles 17.3 of the BAT Rules the Arbitrator decides that the Player shall reimburse EUR 11,000.00 to the Claimant.
95. The Claimant claims legal fees and costs in the amount of EUR 19,900 (without the handling fee of EUR 7,000). The maximum legal fees and costs in cases with an amount in dispute from EUR 500,001 to EUR 1,000,000 amounts to EUR 20,000. The amount in dispute is at the lower end of the bandwidth. In addition, only a part of the claimed amount has been awarded to the Claimant. The Arbitrator therefore finds that

the Respondent shall reimburse the Claimant with an amount of EUR 14,500, including the non-reimbursable handling fee.

10. AWARD

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

- 1. Mr. Michael James is ordered to pay to Summit Sports Group LLC the amount of EUR 204,000.00 (net) plus interest of 5% p.a. on EUR 102,000.00 since 8 October 2018.**
- 2. Mr. Michael James is ordered to pay to Summit Sports Group LLC the amount of EUR 11,000.00 as a reimbursement of its advance on arbitration costs.**
- 3. Mr. Michael James is ordered to pay to Summit Sports Group LLC the amount of EUR 14,500.00 as a reimbursement for its legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 12 April 2019

Stephan Netzle
(Arbitrator)