



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0238/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Assist Sports LLC,

P.O. Box 458, 10514, Chappaqua, New York, USA

- Claimant -

represented by Mr. Juan de Dios Crespo Pérez, Ruiz-Huerta & Crespo SL

Avda. Reino de Valencia 19, 4^a, 46005 Valencia, Spain

vs.

SASKI BASKONIA S.A.D.,

Fernando Buesa Arena, Ctra. Zurbano S/N, Torre 12, 01013 Vitoria, Spain

- Respondent -

represented by its Chairman, Mr. José Antonio Querejeta Altuna

and by Mr. Juan José Seoane Osa, lawyer

1. The Parties

1.1 The Claimant

1. Assist Sports LLC (hereinafter referred to as "Claimant") is a company with its business address in New York, USA. It is represented – *inter alia* – by Mr. Eric Fleisher, a FIBA-licensed agent with licence no. 2010022689.

1.2 The Respondent

2. Saski Baskonia SAD (hereinafter referred to as "Club" or "Respondent") is a professional basketball club located in Vitoria, Spain. The Club is represented by its chairman, Mr. José Antonio Querejeta Altuna and by its lawyer Mr. Juan José Seoane Osa.

2. The Arbitrator

3. On 29 December 2011, the President of the Basketball Arbitral Tribunal (the "BAT") Prof. Richard H. McLaren appointed Prof. Dr. Ulrich Haas as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (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. On 13 April 2010, the Parties and Mr David Logan (hereinafter referred to as “the Player”) signed a “Standard Player’s Contract” (hereinafter also referred to as “the Contract”), according to which Respondent engaged the Player as a professional basketball player for three seasons, namely 2010/2011, 2011/2012 and 2012/2013.
5. Article 10 of the Contract provides as follows:

“Agent’s Fee: Club promises to pay the Agent fee to his agent above the net amount, free of taxes, of 232.500 E (two hundred thirty two thousand five hundred Euros), to be paid by the Club to Assist Sports, LLC. as follows: 2010-11 season: 70.000 E (seventy thousand E) on November 15, 2010; 2011-12 season: 77.500 E (seventy seven thousand five hundred E) on November 15, 2011; 2011-12 season: 85.000 E (eighty five thousand E) on November 15, 2012. All Agent fees paid to Agent shall be in net amounts, that is, free and clear of any local, national or any other taxes levied in Spain. Club will provide to Agent, at the same time the fee is paid, an Official certificate indicating that all applicable Spanish taxes, national and local, on the Salary and the Agency Fee were paid by Club on behalf of the Player and Agent. Club agrees to pay Agent a penalty of 100 E per day for each day Club is late after ten (10) days of required payment date pursuant to the schedule set forth above. The Club accepts that in the case any payments inclusive of Agency Fees described in this Contract will be delayed for more than thirty (30) days the Player or his Agent may present written notice to the President of Club by fax or mail at the Club’s address and/or to the Federation and to the League. Upon presentation of this notice Club here-in grants Player his release and makes him an UN-restricted free-agent world wide in addition all monies under this agreement are due and payable by way of acceleration as agreed in this agreement, upon this 30th day of non-performance. And the 100 E (One Hundred E) per day penalty as described here in shall continue to accrue daily, as a penalty. In addition all other benefits granted to Player as described in Paragraph 3 shall remain in the Player’s possession until Club meets and pays its debt or the controversy is settled in court or by arbitration. Examples are but not limited to Apartment and Automobile. Player shall not be denied his FIBA Transfer as agreed in this agreement under circumstances triggering acceleration. Club further agrees to pay Assist Sports, LLC. an Agent’s fee of ten percent (10%) of Player’s salary from any future renewal, modification or extension with Player within ten (10) days of signing. Club shall be obligated to pay a penalty of 100 E per day which shall continue to accrue

daily until such time that the fee has been received in full, in addition to any expenses Assist Sports, LLC. may incur in the collection of said fees from Club."

6. On 11 November 2011, Mr Eric Fleisher on behalf of the Claimant sent an invoice for the first of the scheduled payments foreseen in Art. 10 of the Contract in the amount of EUR 70,000. The payment was effectuated by the Club.

7. On 3 August 2011 the Player wrote a letter to Mr Eric Fleisher which reads as follows:

"Dear Mr Fleisher

I am writing this letter to inform you that I no longer wish to have you represent me as my agent. I will no longer need your services in anything regarding myself and any basketball contractions or negotiations. This will begin effective immediately. I appreciate your understanding."

8. On 24 August 2011, the Club and the Player – without the knowledge and/or intervention of the Claimant or Mr Eric Fleisher – agreed to terminate the Contract with immediate effect (hereinafter referred to as "Termination Agreement"). The Termination Agreement reads - *inter alia* - as follows:

"Release from contractual obligations between: Caja Laboral Vitoria ("Club") and between: David Logan ("Player")

....

C. Terms of Release

- 1. This agreement shall serve as a complete and unconditional release of Player by Club regarding any and all agreements in which Player and Club are both parties in interest.*
- 2. Neither the Player nor the Club shall have any duty or obligation to one another under any agreement previously entered into in which the Player and Club are both parties.*
- 3. Any previous existing duties or obligations owed by the Player to the Club and vice-versa are hereby terminated, null and void. Similarly, any obligations of the Club to Player's agent, and vice-versa, regarding the playing contract between Club and Player are hereby terminated, null and void.*

4. *Player shall not be required to perform in any basketball related duties (including media, public relations, etc) on behalf of Club.*
 5. *Club shall not be required to pay to Player any amount of salary, bonus, or other compensation stipulated in any existing contract, including but not limited to the 2011/ or 2012/13 playing contract.*
 7. *In exchange for the amount provided by Player to Club, specified above in C.6, Club shall grant to Player his FIBA Letter of Clearance within twenty-four (24) hours of the Player's request for such letter.*
 8. *This Agreement shall take full and complete effect upon the payment by Player to Club fully described in C.6 above.*
 9. *The club Saski Baskonia SAD with this agreement has no type of responsibility neither with the player nor with his agents. With this agreement the club does not have and is exempt from responsibilities and obligations with the player, previous agents and current agents."*
9. No more payments related to the Agent fee as foreseen in Art. 10 of the Contract were effectuated by the Club.

3.2 The Proceedings before the BAT

10. On 9 December 2011, Claimant's counsel filed a Request for Arbitration (with several exhibits) on behalf of Claimant and in accordance with the BAT Rules. The non-reimbursable fee of EUR 3,000 was received in the BAT bank account on 5 December 2011.
11. On 11 January 2012, the BAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as Arbitrator in this matter; invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules no later than by 2 February 2012 (the "Answer"); and fixed the amount of the Advance on Costs to be paid by the Parties no later than by 26 January 2012 as follows:

<i>"Claimant (Sport Assist LLC)</i>	<i>EUR 4,500</i>
<i>Respondent (Saskia Baskonia)</i>	<i>EUR 4,500"</i>

12. On 1 February 2012, the BAT Secretariat confirmed receipt of Respondent's share of the Advance on Costs (in the amount of EUR 4,480). Furthermore, it informed Claimant that its payment in the amount of EUR 3,500 was received but that its share of the Advance of Costs was EUR 4,500. It, therefore, requested the Claimant to effect payment of the outstanding amount by no later than 8 February 2012.
13. On 6 February 2012, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. Furthermore, the Arbitrator granted both parties a further round of submissions.
14. Within the (extended) deadline granted by the Arbitrator the Claimant filed its further submissions (including a statement of the legal costs incurred). With letter dated 26 March 2012 the Respondent was granted a deadline of 2 April to respond to Claimant's additional submissions.
15. By letter dated 30 March 2012, Respondent filed its Rejoinder which – contrary to the original Procedural Order – did not contain an account of costs incurred. With letter dated 12 April 2012 Respondent was granted a deadline of 16 April to comment on Claimant's costs.
16. On 13 April 2012, Respondent objected to Claimant's submission of (additional) legal fees in the amount of EUR 3,000. By letter dated 23 April 2012, Claimant clarified that its request for EUR 3,000 as legal fees was only part of his original request for a total amount of minimum EUR 20,000 as legal fees and expenses. By letter dated 25 April 2012, Respondent stated that it had no further comments on Claimant's account of costs and provided clarifications on its own account of costs.

4. The Positions of the Parties

4.1 Claimant's Position

17. Claimant submits the following in substance:

- According to the Contract, Respondent's obligation to pay the full amount of the Agent fee agreed upon is unconditional and independent from whether or not the Player remains under contract with Respondent or with Claimant, because the Agent fee is designed to remunerate Claimant for the services provided by it until the conclusion of the Contract. Therefore, whether or not Player provides his services to Respondent for the full duration of the contract is of no importance to the matter in dispute.
- The Contract contains distinct and independent obligations between Respondent and the Player and between Claimant and Respondent. These contractual obligations can only be amended or terminated through mutual consent of the respective debtor and creditor of the obligation in question, since *"as a general rule, contracts have legal effects only between the parties who participate in the conclusion of the contract."* This follows – according to the Claimant – from *"the principle of relativity of contracts."*
- The Termination Agreement was signed by Respondent and Player only, without any involvement or knowledge of Claimant and/or Mr Eric Fleisher.

18. In its Request for Arbitration, Claimant requests the following relief:

"to condemn the Club to pay the Claimant the net fee scheduled on 15th November 2011 of EUR 77.500

To recognize the right of the Claimant to the third instalment agreed in the contract of 88.500 € due to be paid on the 15th of November 2012.

To condemn the Club to pay the Claimant a penalty of EUR 100 per day from 25th November 2011 until such day that the above mentioned amount is entirely paid to the Claimant.

To condemn the Club to pay legal fees and expenses incurred by the Claimant in connection with the proceeding, in a range of a minimum of EUR 20.000.”

4.2 Respondent's Position

19. Respondent submits the following in substance:

- The Contract does not foresee a right for the Claimant to receive a total Agent fee in the amount of EUR 232,500 regardless of the relationship between the Player and the Club. This is evidenced by the fact that the Contract does not provide the payment of a lump sum, but rather a payment in three instalments that correspond to individual seasons for which the Player is scheduled to render his services to the Club.
- Furthermore, the Agent fee is calculated on the basis of the remuneration paid by Respondent to the Player, i.e. 10% of the Player's net salary. It follows from this that the Agent fee is only due inasmuch as the Player is entitled to his remuneration. However, the obligation to pay a remuneration to the Player has ceased to exist at the time of the signing of the Termination Agreement.
- It follows from the wording of the Contract – according to the Respondent – that the Agent fee is only due for as long as Claimant acts as an agent for the Player. Once this relationship was terminated, no further obligations could arise between Claimant and Respondent, since Claimant did no longer “provide any type of service to the Player or the Club.”
- Finally, Respondent submits, that it follows also from the wording of the Termination Agreement that it is no longer under any obligation towards Claimant in respect to

the Agent fees. The Termination Agreement explicitly states the *“the player exempts the Club from any responsibility and payment by terminating his contract with the Club and terminating his contractual relationship with the Agent. The exemption from responsibility is a consequence, directly and necessarily, from the termination of the contract signed between the Club and the player.”*

20. In its Answer, Respondent requests the following relief:

“To reject all the requests made by the Claimant.

To condemn the Claimant to pay the full amount of the arbitration cost and all the arbitrator’s fees.

To condemn the Claimant to pay the legal fees and expenses incurred by the Club in connection with the proceeding, within a range of a minimum amount of 20,000.00 € (euros)”

5. Jurisdiction

21. 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).

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

5.1 Arbitrability

23. 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) PILA¹.

5.2 Formal and substantive validity of the arbitration agreement

24. Art. 12 of the Contract contains an arbitration clause that reads as follows:

“Jurisdiction in Case of Dispute: Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

25. This arbitration clause included in the Contract and signed by all three parties to the Contract fulfils the formal requirements of Article 178(1) PILA.
26. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Art. 12 of the Contract

¹ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

clearly covers the present dispute.² Furthermore, the Arbitrator, when interpreting the arbitration clause, takes note of Article 18.2 of the BAT Rules, according to which any reference to FAT shall be understood as a reference to the BAT.

27. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by either Claimant or Respondent. In view of all the above, the Arbitrator, therefore, holds that he has jurisdiction to decide the present dispute.

6. Applicable Law

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

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

29. 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.”

30. Article 12 of the Contract provides in relation to the applicable law as follows:

“... The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

² See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

31. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.
32. 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 1969³ (Concordat),⁴ under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage en droit”:

“When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁵

33. 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.”⁶

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

7. Findings

35. In essence Claimant requests the payment of the (outstanding) Agent fee (7.1), the declaration that it is entitled to the 3rd and final instalment of the Agent fee due on 15 November 2012 (7.2) and the payment of late payment penalties (7.3).

³ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

⁴ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁵ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁶ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

7.1 Is Claimant entitled to the Agent fee in the amount of EUR 77'500?

36. It is undisputed that the Claimant and Respondent are parties to a valid contract that has been entered into on 13 April 2010. It is further undisputed that the Contract regulates the legal relationship between Player and Respondent on the one side and between Claimant and Respondent on the other side. Even though the heading of the document qualifies the Contract uniformly as “Standard Player’s Contract”, it is rather obvious that the rights and obligations described therein for the various parties are distinct as to their legal nature. Payments to be made by Respondents to the Player are nominated in the Contract as “salary” for the “rendering of services to the club”. Payments to be made by Respondent to Claimant are qualified as “Agent fee”.
37. The typical activity of an agent is, to act as an intermediary for one or more principals by helping the principal to locate a contractual partner and to enter into an agreement with him. It is for this activity that an agent – usually – can claim a fee (c.f. e.g. BAT 0036/09, marg. no. 45; BAT 0014/08 marg. no. 80 et seq.). The latter is to be paid by the principal. However, the parties are free to agree that the agent fee is to be borne by the contractual partner of the principal. The usual practice is that the agent fee becomes due with the signing of the main contract (between the principal and the third party). This is also reflected in BAT jurisprudence. The Arbitrator in the matter 0024/06 held in marg no. 59 inter alia:

“The Arbitrator finds that, as a matter of principle, the agent fee is due in full because it relates to services already provided in the past. That service consisted in the placement of a player who would be ready to play for a three years term.”

38. In the case at hand it is undisputed that the Claimant has assisted the Club and the Player in locating and contracting with each other. Therefore, Claimant can claim his fee with the signing of the main contract (“Standard Player Contract”), unless the parties have agreed something to the contrary. In the case at hand Claimant and Respondent have agreed on a “payment schedule” according to which an amount of

EUR 70,000 is to be paid on 15 November 2010, an amount of EUR 77,500 shall be paid on 15 November 2011 and a final instalment (EUR 85,000) to be paid on 15 November 2012. According to the wording of the Contract the payment of these various amounts is not subject to any condition. In particular, according to Art. 10 of the Contract the 2nd and 3rd instalments are not conditional upon the Claimant rendering any further or additional services (to the Player or the Respondent). Therefore, in the Arbitrator's view it is irrelevant whether – after the signing of the Contract – Claimant was and remained the agent of the Player or not. This view is backed also by the last sentences in Art. 10 of the Contract according to which the agent is granted an additional 10% in case of modification, extension or renewal of the Contract. In order to earn even this additional agent fee Claimant is not required to provide any additional services. Instead, it suffices that Claimant became causal for the conclusion of the *original Contract*.

39. Furthermore, Art. 10 of the Contract does not – at least not explicitly – make the payment of the Agent fee contingent upon whether or not Player continues rendering his services to the Club. Such a condition cannot be read into the Contract implicitly by the sheer fact that the Agent fee is calculated on the basis of the salary owed to Player. The fact that an agent is paid a certain percentage of the value of the employment contract (calculated on the basis of the total salary to be paid to the employee) is standard practice (c.f. e.g. BAT 0036/09, marg. no. 45). Thus, this fact by itself is no indication that the contracting parties wanted to make the Agent fee contingent upon the Player remaining under contract with the Respondent. The question which remains to be answered is, thus, whether such a condition may be inferred from the fact that Art. 10 of the Contract provides for a payment schedule in relation to the Agent fee. In a previous BAT decision (BAT 0024/08), the Arbitrator examined this question and found as follows:

“57 The agent fees claimed by Claimant 2 have been agreed because of his services which undisputedly led to the conclusion of the Contract. The agent fees

consist of three annual instalments payable on 30 September 2008, 2009 and 2010. The Respondent failed to pay any of the instalments.

58 According to Article 9 of the Contract, the agent fees are due because Claimant 2 assisted the Respondent “in locating and contracting with Player”. The payment of the three instalments has not explicitly been made contingent upon whether Claimant 1 was still playing with the club or whether the Contract was still in force on 30 September of the respective year. On the other hand, the fact that the payment dates of the agent fees instalments correspond with the commencement of the new season cannot be completely disregarded.

59 The Arbitrator finds that, as a matter of principle, the agent fee is due in full because it relates to services already provided in the past. That service consisted in the placement of a player who would be ready to play for a three years term. If the player had left the club without just cause before the end of the contractual term, the Respondent might have been entitled to reduce the compensation accordingly. Given that in this case Claimant 1 was willing to fulfill his contractual obligations but, due to the Respondent’s breach, had no other option but to terminate the contract, there is no reason why Claimant 2 should be held responsible for early termination and be penalised with a reduction of his fees.”

40. In the above decision, the Arbitrator contemplated the possibility that the parties to the contract might have shifted some of the risks in connection with the execution of the contract to the agent. At the end of the day, the Arbitrator did not have to decide the issue because in any event, the type of risk that materialized in that case was not of such nature to be borne by the agent. The Arbitrator finds that the case at hand does not differ in that respect from the case 0024/08. It was the pure and sole decision of the Club whether to refer the Player to his contractual obligations under the Contract or to terminate the latter. This type of risk connected with the execution of the Contract is - in any event - not to be borne by Claimant. To conclude, the Arbitrator finds that the obligation to pay the Agent fee came into existence once the Contract was concluded and that this obligation was not terminated by the fact that Player seized to provide his sporting services to Respondent.
41. The Termination Agreement has not altered the payment obligations of Respondent towards Claimant arising under the Contract. It is within the autonomy of the contractual parties to change, alter or terminate certain or all obligations arising out of their legal relationship. However, it is only the parties to the agreement that can

dispose of their obligations. It follows from this principle that the Termination Agreement entered into by Respondent and Player cannot change the obligations arising out of the Contract between Claimant and Respondent. Anything to the contrary would be a contract to the detriment of a third party, a concept unknown in most legal systems and incompatible with notions of equity. Since Respondent and Player did not act with the explicit or implicit consent or authority of Claimant when signing the Termination Agreement, the consequences thereof can also not be attributed to Claimant based on the latter's will.

42. To conclude, the Arbitrator is of the view that Respondent is under a duty to pay the 2nd instalment of the Agent fee in the amount of EUR 77,500.

7.2 Is Claimant entitled to a declaration that Respondent must pay the Agent fee due on 15 November 2012?

43. In view of the above, the Respondent is not only under an obligation to pay the 2nd, but also the 3rd instalment of the Agent fee. However, unlike the 2nd instalment the 3rd instalment is not due yet. In principle, a creditor may not claim monies that are not due. A creditor that files a claim in that respect – in principle – lacks legal interest. Things are, however, different, if the debtor prior to the obligation becoming due clearly and unambiguously contests the obligation. In such circumstances, a creditor has a legal interest to clarify the legal uncertainty surrounding the claim and need not wait until the alleged obligation falls due. This is exactly the situation in the case at hand. Respondent has contested any obligation to pay the Agent fee as of termination of the agency agreement and/or the Contract. Hence, Claimant has a legal interest in pursuing the claim – by way of a declaratory judgement – even though the claim is not due at this point in time.

7.3 Late payment penalties

44. Art. 10 of the Contract provides for a “*penalty of 100 E per day for each day the Club is late after 10 (10) days of required payment date pursuant to the schedule set forth above.*” This constitutes a contractual penalty, i.e. a flat fee for each day of late payment which is cumulatively calculated without limitation as long as the Agent fee has not been paid. BAT Arbitrators have frequently dealt with such kind of clauses in the past. As a general rule, two principles can be derived from that jurisprudence.
45. First, penalty clauses are interpreted in respect to their applicability as to time in a restrictive way in order not lead to excessive results. On several occasions, BAT Arbitrators have decided that such clause – absent any indications to the contrary in the contract – is intended such that the penalty payments only accrue between the date of late payment and the date that the respective obligation is or can be terminated (BAT 0100/10 marg. no. 47 et seq.; 0109/10, marg. no. 55 seq.). However, this jurisprudence cannot be applied in the case at hand, since Art. 10 explicitly stipulates otherwise and orders late payment penalty to apply also once the obligation of the Player to render his services is terminated. The latest point in time, however, BAT Arbitrators are prepared to accept late payment penalties to accrue is the filing of the request of arbitration (BAT 185/11, marg. no. 65). The latter, however, only applies if the creditor has pursued his claim in a diligent timely manner.
46. Second, BAT Arbitrators have repeatedly held that penalty clauses are subject to judicial review. In BAT 0036/09 (marg. no. 53 et seq.) the Arbitrator held:

“In most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.”

47. In view of the above, the Arbitrator holds that late penalty payments accrue from 25 November 2011 until the filing of the request of arbitration, i.e. 9 December 2011. The total amount due under the late penalty clause is, thus, EUR 1,500 (15 x EUR 100). When subjected to the principles of judicial review the Arbitrator holds that this amount is fair, equitable and, thus, not excessive.

8. Costs

48. 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 legal fees and expenses incurred in connection with the proceedings.

49. On 6 July 2012 – considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration, which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR8,980.

50. Considering that Claimant prevailed with all of his claims but his request for late payments penalties and that the financial situation of the Parties does not compel otherwise, the Arbitrator holds it fair that 75% of the costs of this arbitration be borne by Respondent and 25% by Claimant and that Respondent be required to cover its own legal costs as well as 75% of Claimant’s (reasonable) legal costs. In the Arbitrator’s view EUR 10,000 would be a reasonable amount in view of the complexity of the case. 75% of this amount equals EUR 7,500.

51. Given that both Claimant and Respondent paid their share of the Advance on Costs of EUR 4,500.00 and EUR 4,480 respectively (in total 8,980), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) Respondent shall pay EUR 3,375 to Claimant, being 75% of the arbitration costs advanced by the latter.
- (ii) Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 3,000.00 when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence, considering also that the further amount of EUR 7,500.00 for Claimant's legal fees and expenses is reasonable, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 10,500.00.

9. AWARD

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

- 1. Sasaki Baskonia SAD is ordered to pay to Assist Sports LLC agent fees in the amount of EUR 77,500.00.**
- 2. Sasaki Baskonia SAD is declared liable to pay to Assist Sports LLC agent fees in the amount of EUR 85,000.00 on 15 November 2012.**
- 3. Sasaki Baskonia SAD is ordered to pay to Assist Sports LLC late payment penalties in the amount of EUR 1,500.00.**
- 4. Sasaki Baskonia SAD is ordered to pay to Assist Sports LLC the amount of EUR 3,375.00 as a reimbursement of the advance on arbitration costs.**
- 5. Sasaki Baskonia SAD is ordered to pay to Assist Sports LLC the amount of EUR 10,500 as a contribution towards its legal fees and expenses. Sasaki Baskonia SAD shall bear its own fees and expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 13 July 2012

Ulrich Haas
(Arbitrator)