Chapter 6
The Basketball Arbitral Tribunal—An Overview of Its Process and Decisions

Erika Hasler

Abstract In the course of its almost ten years of existence, the Basketball Arbitral Tribunal has grown from an innovative if not experimental mechanism to resolve contractual disputes quickly and cost-effectively into a well-established international sports tribunal. BAT proceedings put the flexibility of international arbitration under the Swiss *lex arbitri* to the users' best advantage, while the tribunal's awards, mostly decided *ex aequo et bono*, have gradually built a jurisprudence distilling equitable principles in relation to recurrent issues in the context of professional sports contracts.

Keywords BAT · FIBA · Sports arbitration · Chapter 12 PILA · *ex aequo et bono* · SFT · NYC

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E. Hasler (✉)
Lévy Kaufmann-Kohler, Geneva, Switzerland
e-mail: erika.hasler@lk-k.com

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6.1 Introduction

The Basketball Arbitral Tribunal (BAT), previously known as the FIBA Arbitral Tribunal or FAT, was established almost 10 years ago, in 2007, as an independent tribunal for the simple, quick and inexpensive resolution of contractual (i.e. non-disciplinary, non-technical and non-eligibility-related) disputes arising in the world of basketball.[1]

Seated in Geneva, Switzerland,[2] the BAT is composed of a President, Vice-President[3] and a roster of six arbitrators.[4] Its day to day work and the administrative aspects of proceedings are handled by the BAT Secretariat, based in Munich.

BAT arbitral proceedings are conducted under the BAT Arbitration Rules, the latest version of which was issued on 1 May 2014.[5] Furthermore, being all seated in Geneva in accordance with Articles 3.295 FIBA IR and 2.1 BAT Rules, BAT arbitrations are governed by the Swiss law of arbitration.

Switzerland has a dualist system for the law governing arbitration, meaning that international and domestic arbitrations are subject to two different regimes. International arbitrations are governed by Chap. 12 PILA (Articles 176–194), while domestic arbitrations are subject to the rules of Part 3 CCP (Articles

[1]See Article 3-289, under the heading Basketball Arbitral Tribunal (BAT), in Book 3, Chapter VII of the FIBA Internal Regulations (FIBA IR), further providing that FIBA, its Zones or their respective divisions cannot be directly involved in the disputes brought before the BAT. The name change (from FAT to BAT) was implemented on 1 April 2011, to better reflect the tribunal's independence from FIBA. Article 3-296 FIBA IR also stipulates that while the BAT's finances are guaranteed by FIBA, the tribunal is to be self-financing. For a comprehensive study of FIBA's dispute resolution mechanisms dealing with transfer and nationality disputes, disciplinary disputes, ad hoc (and technical) disputes as well as the BAT, see Zagklis 2013. On the FAT/BAT more specifically, see in particular Martens 2011 and Zagklis 2015b.

[2]See Article 3-295 FIBA IR.

[3]See Articles 3-297 and 3-298 FIBA IR on the roles of the BAT President and Vice-President, and Article 3-299 on the duties of the BAT President.

[4]The full list of BAT members and their profiles can be found at http://www.fiba.com/en/Module/c9dad82f-01af-45e0-bb85-ee4cf50235b4/4b2ba952-fe27-4a63-9f23-bc02e18215d8. Accessed 1 March 2016. The current President of BAT is Prof. Richard McLaren, a Canadian Barrister & Solicitor based in London, Canada, a member of the Faculty of Law, Western University Canada and CAS arbitrator with longstanding experience in sports law and dispute resolution. The six arbitrators currently on the BAT list are: Dr. Quentin Byrne-Sutton (Switzerland) (soon to be replaced by Ms Brianna Quinn, Switzerland & Australia); Prof. Dr. Ulrich Haas (Germany); Dr. Stephan Netzle (Switzerland); Raj Parker (England); Klaus Reichert, SC (Ireland); Annett Rombach (Germany). According to Article 3-299(b), BAT arbitrators are appointed by the BAT President "for a renewable term of two (2) years and shall have legal training and experience with regard to sport".

[5]The BAT Arbitration Rules are available at http://www.fiba.com/en/Module/c9dad82f-01af-45e0-bb85-ee4cf50235b4/3109bb9c-53bc-4cbc-99a8-a67e9f861277. Accessed 1 March 2016. According to Article 18.1 BAT Rules, the current version is applicable "to Requests for Arbitration received by the BAT Secretariat or by FIBA on or after [1 May 2014]". The previous versions of the FAT/BAT Rules were issued in 2007, 2009, 2010, 2011 and 2012.

353–399). Whether an arbitration is domestic or international depends on the domicile or habitual residence of the parties at the time of the conclusion of the arbitration agreement.[6] That said, the FIBA IR and the BAT Rules aim at eliminating this possible variance by stipulating that BAT proceedings "are governed by Chap. 12 [PILA], irrespective of the parties' domicile".[7]

Chapter 12 PILA is recognized for its liberal, arbitration-friendly character, and it is with these features in mind that the BAT seat was fixed in Geneva.[8] In particular, Chap. 12 stands out for its protectiveness of party autonomy, wide arbitrability of disputes, availability of provisional measures through arbitral tribunals, flexibility in matters of applicable law and hands-off approach to the review of arbitral awards by the courts.

By all standards, the BAT has been a successful 'experiment'. So much so that it is now a well-established arbitral institution and a significant presence in the landscape of sports dispute resolution.[9] More importantly, it has undeniably made a difference in the world of professional basketball, helping players, coaches and agents to keep clubs (and vice versa) to their contractual engagements.[10] A sports agent declared in 2011 that, by then, 99 % of his clients had a FAT/BAT clause in their contracts.[11] The BAT caseload statistics speak for themselves: from 2 requests for arbitration filed in 2007, the tribunal has gone on to register 150 in 2015, with the total number of requests filed adding up to 793 over that 9-year period.[12]

A further illustration of the interest of the BAT model is that it has recently been used as the template for a new arbitral institution, catering to parties in 'traditional' commercial disputes: the Court of Innovative Arbitration (COIA), created in 2015 and seated in Zurich, Switzerland.[13] The COIA shares many of the features of the BAT, and, like the BAT's, its stated goal is that of simplifying the

[6]Article 176(1) PILA.

[7]Articles 3-295 FIBA IR and 2.2 BAT Rules. The same wording is included in the BAT model clause as set out in Sect. 6.3 of the Preamble in the BAT Rules. This type of clause should satisfy the requirements of Article 353(2) CCP, which enables the parties to a domestic arbitration into opt out of the CCP regime and into Chap. 12 as the *lex arbitri*. That said, a BAT arbitration would generally be international within the meaning of Article 176(1) PILA in any event, at least so it would seem based on the actual experience so far, given that apparently there has been no BAT case involving Swiss-domiciled or Swiss-resident parties on either side, let alone on both (this can be verified the BAT website, where awards can be searched by the seat or domicile of the respondent, at http://www.fiba.com/bat/awards).

[8]Zagklis 2015b, p. 291. As reported ibid., in footnote 3, the BAT was the brainchild of Dirk-Reiner Martens, longstanding external counsel to FIBA and a well-known sports lawyer and arbitrator.

[9]As noted by Zagklis 2015b, p. 297, the BAT is now the second busiest sports tribunal after the CAS.

[10]See, e.g., Rosen 2011; Martens 2011, p. 57.

[11]Rosen 2011, quoting agent Brad Ames.

[12]Statistics available at http://www.fiba.com/en/Module/c9dad82f-01af-45e0-bb85-ee4cf50235b4/984a5df1-a490-49a5-8aa4-86d985e703d9. Accessed 1 March 2016.

[13]See http://coia.org/. Accessed 1 March 2016.

dispute resolution process while ensuring a fair outcome. It remains to be seen whether the COIA will be as successful as its basketball-specialized predecessor.

Meanwhile, notwithstanding its importance in contemporary sports arbitration, the BAT has been the object of surprisingly limited academic attention.[14] The YISA aims to fill that gap by launching a yearly digest of BAT jurisprudence, starting with its next (2016) issue. This article is but a prelude—a modest introduction to a more systematic and sustained study of basketball's arbitral *enfant prodige*.

In its first part, this introductory article provides an overview of BAT arbitration, covering the conduct of the proceedings from their commencement to the issuance of the award as well as the post-award phase and available remedies. The second part of the article focuses on selected aspects of the BAT's substantive jurisprudential output, with the aim of providing some insight into the actual results when disputes are decided according to the particular standard of *ex aequo et bono*.

6.2 BAT Arbitration—How Does It Work?

6.2.1 BAT Arbitration in a Nutshell

As just mentioned, the BAT was set up to offer simple, quick and inexpensive arbitration to resolve disputes arising in the dynamic environment of professional basketball. Accordingly, the BAT Arbitration Rules (BAT Rules),[15] which govern the proceedings before BAT tribunals, have a number of built-in features designed to facilitate the time- and cost-effective resolution of disputes.

In particular, the BAT Rules provide that, in the interest of speed, proceedings shall be conducted before a sole arbitrator (appointed by the institution from a closed list),[16] are subject to short time limits,[17] and, as a rule, limited to a single exchange of written submissions.[18] Hearings are held only if the arbitrator so decides after having consulted the parties.[19] Furthermore, the Rules stipulate that the proceedings shall in principle be conducted in English,[20] and that filings,

[14]For a list of the studies known to the author, please see the bibliographical references at the end of this article.

[15]The BAT Arbitration Rules currently in force are the 1st May 2014 version. They can be found on the BAT website at https://www.fiba.com/downloads/v3_expe/bat/BATArbitrationRules1May2014.PDF. Accessed 1st March 2016.

[16]BAT Rules, Preamble 0.2 and Article 8.1.

[17]BAT Rules, Preamble 0.2 and Article 7.

[18]BAT Rules, Preamble 0.2, and Article 12.1.

[19]BAT Rules, Preamble 0.2 and Article 13.1.

[20]Article 4 provides that: "1. The working language of the BAT shall be English. 2. Documents provided to BAT in a language other than English must be accompanied by a certified translation unless the Arbitrator decides otherwise. 3. The Arbitrator may decide, after consultation with the parties, to hold the proceedings in another language." .

notifications and communications, which must be in writing, can be made by email and fax.[21]

As to the merits, the BAT Rules[22] establish that, unless the parties have agreed otherwise, the dispute shall be decided *ex aequo et bono* rather than based on a specific national law, making it possible for arbitrators unfamiliar with the intricacies of different national legal systems to decide cases without the need for (costly and time-consuming) submissions and/or the involvement of experts on issues of local law.

The BAT Rules provide for the issuance of the final award within six weeks from the closing of the proceedings or the payment of the advance on costs, whichever occurs last.[23] To keep party costs under control, the Rules cap the contribution towards the prevailing party's "reasonable legal fees and other expenses incurred in connection with the proceedings" which the losing party will normally be ordered to pay.[24] Again to contain costs and for the sake of speed, only the dispositive part of the award (without the reasons) is issued, unless otherwise requested by a party, in cases where the amount in dispute is lower than € 30,000.[25] The same is true for cases valued between € 30,000 and € 200,000, if the respondent fails to pay its share of the advance on costs and the claimant so requests.[26]

Reportedly, the cumulative result of these features is that the average duration of BAT arbitrations is just above six months (2014 figures), and the cost/value ratio of cases a moderate 5.3 % (also in 2014).[27]

Finally, as discussed in more detail below, BAT awards are subject only to the limited legal remedies available under Chap. 12 PILA, and their enforcement can be sought via both the NYC and FIBA's ad hoc internal mechanism.

6.2.2 BAT Proceedings—Step by Step

BAT proceedings[28] are commenced with the filing of a request for arbitration, which should be accompanied or rapidly followed by payment of a 'non-reimbursable handling fee'. The amount of the handling fee depends on the monetary value

[21] Article 6.3 BAT Rules.

[22] Preamble 0.2, and Article 15.1 BAT Rules.

[23] Article 16.3 BAT Rules.

[24] Article 17.4 BAT Rules.

[25] Article 16.2.1(a) BAT Rules.

[26] Article 16.2.1(b) BAT Rules.

[27] For more details on these figures, see Zagklis 2015b, pp. 296–297.

[28] For a helpful overview of the main steps in a standard BAT arbitration, see the "Guide to Arbitration Procedures before the Basketball Arbitral Tribunal", available on the BAT website at http://www.fiba.com/en/Module/c9dad82f-01af-45e0-bb85-ee4cf50235b4/53eab3df-af21-4043-a4a6-5a264334ce65. Accessed 1 March 2016.

of the dispute, and can be calculated based on the scale set out in Article 17.1 BAT Rules.[29] Where the request for arbitration does not specify an amount, the fee is fixed by the BAT President based on the information available.[30] Failing payment of the handling fee, the arbitration will not proceed. If payment is still outstanding after the final time limit set by the BAT Secretariat to that effect, the request will be deemed withdrawn.[31]

The necessary contents of the request for arbitration are specified in Article 9.1 BAT Rules. To facilitate its filing and ensure that all the required elements are provided from the start, a pre-established template is available on the BAT website.[32] Should the request for arbitration as filed nonetheless be incomplete, the BAT Secretariat (or the arbitrator, once appointed) will invite the claimant[33] to provide the missing additional information or documents. Importantly, in view of the limitation to a single exchange of written submissions, the request must be accompanied by a copy of the contract containing the BAT arbitration clause and include a complete statement of the facts and legal arguments the claimant intends to rely on, as well as the (written) evidence in support and the relief sought.

The BAT Secretariat then forwards the request for arbitration to the BAT President for review. Provided he finds, on a *prima facie* basis, that there is a valid BAT arbitration agreement and that the request meets the requirements of the BAT Rules,[34] the BAT President proceeds to appoint an arbitrator from the BAT list.[35] According to Article 8.2 BAT Rules, "[b]efore proceeding with the arbitration, the [a]rbitrator shall send a written declaration of acceptance and independence to the BAT Secretariat. The parties shall be informed about the existence and content of such declaration". Article 8.3 BAT Rules specifies that the time limit to bring a challenge against the appointed arbitrator is "seven days after the ground for challenge has become known to the party making the challenge".[36] Meanwhile, the file is promptly transferred to the arbitrator.

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[29]Counterclaims are also subject to payment of a non-reimbursable handling fee. See footnote 39 below.

[30]Article 17.1 BAT Rules. As currently set out in the BAT Rules, the non-reimbursable handling fee ranges between a minimum of € 1500 (for cases where the amount in dispute is less than € 30,000) and a maximum of € 7000 (for cases involving an amount in dispute above € 1,000,000).

[31]Article 9.2 BAT Rules.

[32]Available at http://www.fiba.com/bat/process. Accessed 1 March 2016.

[33]For the sake of simplicity, the singular (claimant, respondent, party etc.) will be used throughout this paper, it being understood that BAT proceedings can, and relatively often do, involve multiple parties on one or both sides.

[34]Article 11.1 BAT Rules.

[35]As provided in Article 8.1 BAT Rules, appointments are made on a rotational basis. See footnote 4 above on the current composition of the (closed) BAT list of arbitrators.

[36]Article 8.3 further provides that challenges are decided by the BAT President after having heard all the parties and the arbitrator. For an example where this procedure was followed, see BAT 0464/13, *Manakian v. FC Bayern München e.V.*, Award of 4 August 2014, paras 3–9.

Once the handling fee has been paid, the BAT Secretariat fixes the advance on costs, to be paid by the parties in equal shares (subject to a different decision by the arbitrator).[37] In addition, the Secretariat forwards the request for arbitration to the respondent and informs it of the time limit to file an answer, and of the appointment of the arbitrator.[38] As for the request, the BAT rules set out the required contents for the answer.[39] Most importantly, any defence against BAT jurisdiction must be raised in the answer at the latest. Once it has "entered an appearance" on the merits of the case, the respondent is precluded from raising a jurisdictional objection, including in annulment proceedings against the award (Article 186(2) PILA).

At this stage, it is useful to note that, although it contains no express provision on this point, the Swiss *lex arbitri* recognizes the possibility that proceedings may be conducted by default where the respondent refuses to take part in the arbitration despite being duly notified of its commencement.[40] Article 14.2 of the Rules expressly provides for the power of arbitrators to "proceed with the arbitration and deliver an award" in such cases, which are relatively frequent before the BAT.[41]

As to the BAT's jurisdiction, the respondent's default cannot be taken as a failure to object within the meaning of Article 186(2) PILA. Swiss law requires that the arbitrator ascertain his or her jurisdiction *ex officio*, based on the record as it stands.[42] Moreover, the arbitrator's authority to proceed with the case by default is

[37]Article 9.3.1 BAT Rules, which also provides that the advance on costs, as fixed by the Secretariat taking into account the amount in dispute and the complexity of the case, may be further adjusted in the course of the proceedings (see, e.g., BAT 0468/13, *Matic v. Club Sportif Municipal Targoviste*, Award of 4 February 2015, para 29).

[38]Article 11.2 BAT Rules.

[39]Article 11.2 BAT Rules. It should also be noted that if the answer contains a counterclaim, the corresponding handling fee will have to be paid by the respondent (Article 17.1 BAT Rules). Failing that payment, the counterclaim will be deemed withdrawn (see, e.g., BAT 0702/15, *Club Sportif Sagesse Beirut v. Kahzzouh*, Award of 7 October 2015, paras 26–27).

[40]SFT decision of 26 November 1980, *Semaine Judiciaire* 1982, p. 613, at p. 621. See also Kaufmann-Kohler and Rigozzi 2015, paras 6.18–6.20 with further references.

[41]For instance, among the published awards issued in 2015, the author has noted that the following were rendered by default: BAT 0712/15, *Hamilton v. Saski Baskonia SAD*, Award of 6 October 2015, para 17 and *passim*; BAT 0651/15, *Macvan v. Galatasaray Spor Kulübü Dernegi*, Award of 27 May 2015, para 5 and *passim*; BAT 0566/14, *Caracter v. Sichuan Jingqiang Blue Whale Pro Basketball Club*, Award of 27 January 2015, para 17 and *passim*. See also BAT 0664/15, *Funiciello v. El Jaish Sports Club and Taggard*, Award (previously issued without reasons) of 6 December 2015, paras 8, 9 and 11, 21, 25 and *passim*, recording that both respondents had failed to participate in the proceedings having led to the award without reasons. In BAT 0539/14, *Dragovic v. BC Spartak St. Petersburg*, Award of 12 October 2015, para 12 et seq., the respondent ceased to participate after filing its answer to the request for arbitration.

[42]SFT 120 II 155, 162, adding (at 165) that subject to good faith principles, the respondent can still intervene and challenge the arbitrator's jurisdiction at any later stage (until the rendering of the award). See also SFT 4A_682/2012, decision of 20 June 2013, para 4.4.2.1 with references. Ex multis, BAT 0651/15, *Macvan v. Galatasaray Spor Kulübü Dernegi*, para 15.

subject to a duty "to make every effort to allow the defaulting party to assert its rights".[43] Accordingly, the BAT Secretariat ensures that all procedural acts are notified to the respondent throughout the proceedings, and appropriate time limits are set for that party to react at each step, which will be duly recorded in the award.[44] On the merits—as with jurisdiction—the fact that the respondent is defaulting cannot be taken as an admission of the claimant's claims: the arbitrator should satisfy him- or herself that the claims are well founded in fact and in law.

Be that as it may, the arbitrator will not proceed with the arbitration until the full amount of the advance on costs is received by the BAT. When the respondent is defaulting and more generally if one party fails to pay its share, the other party may substitute for it.[45] If full payment of the advance is not made within the final deadline fixed to that effect by the BAT Secretariat, the request for arbitration is deemed withdrawn.[46]

Once the answer has been filed (in cases where both parties participate) or at any appropriate stage, the arbitrator may then in his/her discretion decide whether one or more further (exchanges of) submissions are necessary.[47] The arbitrator may issue orders requiring the production of documents, responses by one or all parties to specific questions, and more generally give any directions he or she deems appropriate for the conduct of the proceedings.[48] In fact, given that as a rule there is no hearing, BAT arbitrators tend to issue procedural orders calling for additional submissions or soliciting answers to specific questions relatively often.[49] Conversely, unsolicited submissions are not normally taken into account.[50] That said, all procedural steps and decisions in the arbitration are subject to the fundamental due process requirements of Article 182(3) PILA,

[43]Ex multis, see BAT 0651/15, *Macvan v. Galatasaray*, paras 24–25.

[44]The same is true if the default occurs not from the outset, but later in the proceedings, e.g. after the answer has been filed (see, e.g., BAT 0539/14, *Dragovic v. BC Spartak St Petersburg*, para 38 and *passim*).

[45]Article 9.3 BAT Rules.

[46]Article 9.3.4 BAT Rules.

[47]Article 12.1 BAT Rules (see also Article 3.1, providing in general terms that "the Arbitrator shall determine in his/her sole discretion the procedure in the proceedings before him/her").

[48]Article 12.2 BAT Rules. Note that Article 14.2 BAT Rules, enabling the arbitrator to proceed and deliver the award in proceedings by default, also applies "if any party fails to abide by an order of procedure or by directions given by the [a]rbitrator".

[49]For a few recent examples, see, e.g., BAT 0630/14, *Kaukenas v. BC Zalgiris Kaunas*, Award of 1 October 2015, paras 27–34; BAT 0468/13, *Matic v. Club Sportiv Municipal Targoviste*, Award of 4 February 2015, paras 20–25; BAT 0477/13, *Denson & Goldansky v. Ramat Hasharon BC*, Award of 3 February 2015, para 8.

[50]Article 12.1 BAT Rules. See however, for instance, BAT 0468/13, *Matic v. Club Sportiv Municipal Targoviste*, paras 27–30 and 59, where, given the specific circumstances, the arbitrator allowed the filing of unrequested submissions, noting that both parties had consecutively filed numerous documents, some of which unsolicited, but neither had complained of such submissions, and that "the principle of due process does not allow the arbitrator to disregard the parties' submissions easily".

prescribing that "the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings".[51]

Article 12.3 BAT Rules authorizes arbitrators to "attempt to bring about a settlement to the dispute". Under Swiss law, it is accepted that arbitrators may act as settlement facilitators.[52] Nonetheless, it is important that the parties agree to the arbitrator playing such a role and that the modalities of his or her intervention in that capacity take into account the need to preserve the parties' due process rights and the arbitrator's impartiality and independence.[53] BAT arbitrators have on several occasions either accepted the parties' invitation to act as settlement facilitators[54] or taken the initiative to offer their assistance in finding an amicable settlement.[55] Where the attempt is successful, the agreed settlement can be incorporated in an award by consent, as briefly discussed below.[56]

Article 183(1) PILA enables arbitrators to order provisional or conservatory measures, as reflected in the text of Article 10.1 BAT Rules,[57] with the specification, in Article 10.3, that any request for such measures "can only be brought together with or after the filing of the request for arbitration".[58] So far, it would

[51]On these requirements in Swiss-seated international arbitrations, see, e.g., Kaufmann-Kohler and Rigozzi 2015, paras 6.21–6.38, and Berger and Kellerhals 2015, paras 1115–1131. Note in addition that, as stated in Article 3.2 BAT Rules, the parties' due process rights must be exercised in good faith: if a party fails to raise "without undue delay [an] objection to a failure to comply with any provision of these Rules, or any other rules applicable to the proceedings, any direction given by the Arbitrator, or the conduct of the proceedings, [it] shall be deemed to have waived its right to object in that respect".

[52]See, e.g., Kaufmann-Kohler and Rigozzi 2015, para 1.28.

[53]Ibid., paras 1.29–1.30; Berger and Kellerhals 2015, para 171.

[54]See, e.g., FAT 0092/10, *Ronci & Coelho v. WBC Mizo Pecs*, Award of 15 October 2010, paras 26–27; FAT 0069/09, *Ivezic & Draskicevic v. Basketball Club Pecsi Noi Kosariabda Kft*, Award of 27 May 2010, para 24.

[55]See, e.g., BAT 0468/13, *Matic v. Club Sportiv Municipal Targoviste*, para 34; BAT 0421/13 *Berzins & Bill A. Duffy International Inc, db BDA Sports Management v. BC VEF Riga*, Award of 21 February 2014, para 21; BAT 0154/11, *Gloger & Bill A. Duffy International, Inc. v. Club C.B. Atapuerca*, Award of 17 August 2011, paras 24–27.

[56]See Sect. 6.2.3.

[57]Article 10.1 BAT Rules provides that "[u]pon request, the [a]rbitrator may make an order for provisional and conservatory measures. In cases of extreme urgency, such orders can be made ex parte." Although this point is still debated in comparative law, and in the silence of the PILA, Swiss commentators tend to agree that arbitrators may grant provisional measures *ex parte* where appropriate (see, e.g., Kaufmann-Kohler and Rigozzi 2015, para 6.124 and the references provided). Article R37 CAS Code also provides for *ex parte* interim measures "in cases of utmost urgency", and "provided the opponent is subsequently heard".

[58]Given that interim relief can only be ordered by the arbitrator (Article 10.1 BAT Rules) and after the filing of the request for arbitration (Article 10.3), there is no provision for a so-called "emergency arbitrator" in the BAT Rules (Article R37 CAS Code, for instance, allows parties to file requests for provisional measures prior to the filing of the request for arbitration, provided the latter is filed within 10 days, and orders for provisional measures can be ordered by the President of the relevant Division prior to the appointment of a panel).

seem that parties in BAT arbitrations have rarely made use of the possibility to request provisional measures from BAT arbitrators,[59] possibly (at least in part) in view of the already expedited nature of the proceedings.[60]

As mentioned above, the BAT Rules provide that in principle there will be no evidentiary hearing, unless the arbitrator decides otherwise after consultation with the parties.[61] This is in line with Swiss law, which recognizes that the parties' right to be heard under Article 182(3) PILA does not include an absolute right to an oral hearing.[62] The parties may ask for a hearing in the request for arbitration and the answer[63] or at a later stage in the proceedings. Where one party requests a hearing and the other objects, in order to decide in favour of the hearing, the arbitrator will need to be persuaded that receiving the testimony of the proffered witness(es) (or other evidence) in person or orally might change his or her opinion on the dispute, or assist

[59]The author is aware of the following awards mentioning that the parties had lodged requests for provisional measures (which were not granted in view of the requesting party's failure to establish the existence of a risk of irreparable harm, as one of the customary conditions to be met in order to obtain interim relief): BAT 0439/13, *Burns, Hart Sports Management and Players Group v. SS Sutor Srl*, Award of 19 March 2014 (paras 41–42 and 80–81); BAT 0449/13, *Steele, Greig and Slay v. SS Sutor Srl*, Award of 20 March 2014 (paras 57–58, 97–98); BAT 0463/13, *Johnson v. SS Sutor Srl*, Award of 20 March 2014 (paras 32–33, 71–72). While both the BAT Rules and the PILA are silent on the substantive requirements to be met for the granting of provisional measures by arbitrators, commentators note the emergence of transnational standards in this respect, as reflected for instance in the UNCITRAL Model Law on International Commercial Arbitration of 2006 (Article 17A) and the UNCITRAL Arbitration Rules of 2010 (Article 26(3)). This is also illustrated by the contents of Article R37 CAS Code, which was recently amended to codify the CAS's consistent practice in point (see in particular Kaufmann-Kohler and Rigozzi 2015, paras 6.119–6.120). All the aforementioned provisions refer to the following (in principle, cumulative) conditions: (i) a risk of serious or irreparable harm, (ii) a likelihood that the applicant will succeed on the merits, and (iii) a balancing of the parties' respective interests whereby the harm caused to the opponent does not outweigh the harm the applicant seeks to avert by requesting the measure(s).

[60]In principle, under the Swiss *lex arbitri* the courts retain their jurisdiction to order provisional measures, in parallel to that of the arbitrators. However, similar to Article R37 CAS Code, Article 10.4 BAT Rules purports to exclude the courts' jurisdiction to deal with requests for provisional measures, by stipulating that "[i]n agreeing to submit their dispute to these Rules, the parties expressly waive any right to request provisional or conservatory measures from any state court". The validity of such a waiver of the parties' right to access the courts is not undisputed in CAS appeals cases, primarily on the ground that consent to arbitration under the CAS Code is not consensual in those instances (see, e.g., Kaufmann-Kohler and Rigozzi 2015, paras 6.107–6.108). While the author is not aware, as yet, of any decision on the validity of Article 10.4's very similar waiver, it could be argued that the latter should be upheld in view of the consensual character of BAT arbitration, provided also that the BAT arbitrator is in a position to order the relief sought.

[61]According to Zagklis 2015b, p. 294, as of the time of his writing, the BAT had conducted five hearings in total.

[62]See, e.g., SFT 117 II 346, 348.

[63]See Articles 9.1 and 11.2 BAT Rules.

him or her in understanding the case.[64] This test will generally also involve a balancing of the overarching objectives of fairness and cost-effectiveness, which are both deeply ingrained in the BAT 'principles of procedure'.[65] As stipulated in Article 13.3 BAT Rules, the arbitrator can make the holding of a hearing conditional upon the payment of an additional advance on costs by one or both parties.[66] Moreover, pursuant to Article 13.2, the arbitrator is free to decide that the hearing will take place by telephone or video conference, and if it is to be held in person, where it shall take place.[67]

Once the arbitrator is satisfied that the parties' evidence and submissions on the record provide a sufficient basis for deciding the case, he or she will normally "declare the exchange of documents complete" and invite the parties to file "detailed accounts of their costs". Each party's cost submission will then be forwarded to the opposing side with an invitation to submit comments, if any, within a short deadline.

6.2.3 The Applicable Law and the Making of the Award

As noted above, one of the distinctive features of BAT arbitration resides in the applicable decisional standard on the merits. Indeed, the default solution under the BAT Rules is that the dispute will be decided not according to a particular law, but *ex aequo et bono* (often translated as "according to what is equitable and good").[68]

More precisely, Article 15.1 BAT Rules (as reflected in the BAT model arbitration clause)[69] provides that

> [u]nless 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.

On the other hand, pursuant to Article 15.2 BAT Rules, if

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[64]The process whereby the arbitrator reaches this conclusion is often referred to, in the Swiss jurisprudence on arbitration, as an 'anticipated assessment of the evidence' (*appreciation anticipée des preuves; antizipierte Beweiswürdigung*), which arbitrators are entitled to conduct in order to decide whether to admit evidentiary requests (including offers of evidence).

[65]See for instance the arbitrator's reasoning in BAT 0542/14, *Pancotto v. SS Felice Scandone Avellino SpA*, Award of 24 October 2014, paras 39–41, and BAT 0462/13, *Maresca v. Basket Juvecaserta srl*, Award of 13 June 2014, paras 37–40.

[66]For example, in cases BAT 0230/11, *Zouros v. BC Zalgiris Kaunas,* Award of 9 July 2012, and 0231/11, *Kantzouris v. BC Zalgiris Kaunas*, Award of same date, the arbitrator decided to make the respondent's request for a hearing by video conference conditional upon the payment of an additional advance of € 5000, to be paid by that party alone. The request for a hearing was subsequently withdrawn and the parties were given the opportunity to file additional written submissions instead.

[67]For instance, in BAT 0256/12, *Mr Coach and Agency v. Club*, Award of 13 December 2012, paras 18–22, the arbitrator, having heard both parties on the respondent's request for a hearing, decided that a hearing in person would be held in Munich.

[68]Black's Law Dictionary (2009), 9th ed.

[69]See also the BAT model clause at the beginning of the Rules, Preamble 0.3, providing, in fine, that the "arbitrator shall decide the dispute *ex aequo et bono*".

> according to the arbitration clause the Arbitrator is not authorized 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.

This wording is in keeping with Article 187(1) PILA[70] as it recognizes the autonomy of the parties to choose the rules governing the merits of their dispute (whether directly, as envisaged in Article 15.2, first limb, or indirectly, e.g. by reference to a set of arbitration rules containing a choice of law clause, as provided in Article 15.1) but also to the extent it provides that failing such a choice, it is for the tribunal to determine the applicable law.[71] Article 187(2) PILA further provides that the parties may "authorize the arbitral tribunal to decide *ex aequo et bono*", which is exactly what the BAT model clause and Article 15.1 BAT Rules do.[72]

In practice, the vast majority of BAT arbitrations are decided *ex aequo et bono*. In most cases this is so because the arbitration clause contains an express provision to that effect.[73] However, there are also cases where determining the *lex causae* requires a closer analysis of the parties' intent, for instance where the contract contains both a choice of law clause and an arbitration clause, each calling for the application of a different law. Indeed, it is not so rare for basketball contracts to incorporate a "classic" BAT arbitration clause providing that the arbitrator shall decide any dispute arising from or related to the contract *ex aequo et bono*, alongside a choice of law clause stipulating that the contract shall be "governed" or "construed, interpreted and enforced according to the laws of" a given country,

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[70] Article 187(1) PILA reads as follows: "The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, absent such a choice, according to the rules of law with which the case has the closest connection".

[71] Although the language of Article 187(1) PILA is slightly more restrictive as it postulates that in such cases the arbitrator shall apply the so-called "closest connection" test to determine the applicable rules of law, rather than the ones he or she deems appropriate.

[72] As is systematically recalled under the heading "Applicable Law" in BAT awards decided *ex aequo et bono* (see, ex multis, BAT 0644/15, *Vougioukas v. Galatasaray Spor Kulübü Dernegi*, Award of 13 July 2015, paras 26–27) "[t]he 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* [the Swiss statute that governed both international and domestic arbitration before the enactment of the PILA], 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". 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'" [references omitted]. In technical terms, and even though the two expressions are often used interchangeably, the decisional standard of *ex aequo et bono* should be distinguished from *amiable* composition (as recognised, e.g., under French law, pursuant to Article 1478 CCP). When acting as *amiables compositeurs*, arbitrators establish what the solution would be under the applicable (rules of) law and then adjust it if they consider the result to be unfair.

[73] Very often, the relevant contracts reproduce the BAT model clause, quoted in footnote 69 above.

or similar wording to the same effect.[74] In such cases, BAT arbitrators tend—where the contents of the relevant clauses and possibly other circumstances[75] so permit—to resolve the conflict by holding that

> the parties' common intention [in referring to a national law] was to account for the mandatory rules of local labour law […] to regulate such matters as working hours, safety, insurance, etc. as long as they did not become contentious, but that [as made clear by the terms of the relevant arbitration clause] any disputes deriving from the performance of the Parties' obligations under the contract would be decided *ex aequo et bono* if submitted to the [BAT].[76]

A similar approach, adopted in some other cases, has been formulated as follows:

> the parties did not intend to deviate from the principle that any dispute relating to the [contract] should be decided *ex aequo et bono*. The reference to [the relevant national law]

[74]See, e.g., FAT 0046/09, *Mahoric & Jakse v. BC Kyiv*, Award of 26 February 2010, paras 40–41 (choice of law clause providing that the contract "shall be governed by the laws of Switzerland"); FAT 0071/09, *Papadopoulos v. Fortitudo*, Award of 31 August 2010, paras 65–66 (choice of law clause providing that the contract "shall be construed, interpreted and enforced according to the laws of Italy"); FAT 0104/10, *Pavetic v. GS Trogylos Basket Priolo*, Award of 15 March 2011, paras 6, 53–55 (choice of law clause providing that the contract was to be "regulated by Italian and European Community law"); FAT 0118/10, *Bracey v. Achilleas Kaimakliou BC*, Award of 23 March 2011, paras 53–56 (choice of law clause providing that "[t]he laws of Cyprus shall govern this Agreement"); BAT 0631/14, *Valdeolmillos Moreno v. Comité Olìmpico Mexicano (COM, Asociación Deportiva Mexicana De Baloncesto (ADEMEBA), Liga Nacional de Baloncesto Profesional (LNBP), Instituto Veracruzano Del Deporte (IVD)*, Award of 30 October 2015, paras 87–89 (choice of law clause providing that the contract "shall be interpreted and enforced in accordance with the laws of Mexico"). For other similar examples, see FAT 0041/09, *Panellinios KAE BC v. Kelley*, Award of 12 November 2009, paras 55–59; FAT 0062/09, *Harper* et al. *v. Besiktas Jimnastik Kulübü*, Award of 26 March 2010, paras 51–54; FAT 0063/09, *Fisher & Entersport Management Inc. v. KK Vojvodina Serbijagas*, Award of 19 February 2010, paras 43–46; FAT 0082/10, *Benson & Paris v. Shanxi Zhongyu*, Award of 31 August 2010, paras 53–55; FAT 0083/10, *Ilievski v. KK Union Olimpija Ljubljana*, Award of 23 July 2010, paras 34–36; BAT 0139/10, *Sampson & Octagon v. Samahang Basketbol NG Pilipinas Inc.*, Award of 31 October 2011, paras 33–35; BAT 0172/11, *Jusup & Ivic v. KK Zadar*, Award of 6 October 2011, paras 45–47; BAT 0247/11, *Ignerski & Stanley v. Besiktas Jimnastik Kulübü*, Award of 3 September 2012, paras 53–56; BAT 0544/14, *Allred & Greig v. Halcones UV Promotora Deportiva A.C. & Halcones de Xalapa A.C.*, Award of 11 December 2014, paras 79–80; BAT 0562/14, *Zouros v. BC Zalgiris Kaunas*, Award of 3 March 2015, paras 48–49; BAT 0563/14, *White v. Guaiqueries De Margarita BBC*, Award of 30 April 2015, paras 39–40; BAT 0603/14, *Sarkis v. Amchit Club*, Award of 13 May 2015, paras 30–33; BAT 0702/15, *Club Sportif Sagesse de Beirut v. Khazzouh*, paras 45–48; BAT 0708/15, *Cousin Jr. & Fleisher v. BC Krasny Oktyabr*, Award of 5 January 2016, paras 31–33.

[75]One such circumstance is the fact that the parties have argued their case before arbitrator in reliance on *ex aequo et bono* principles rather than by reference to the law designated in the choice of law clause. At any rate, Swiss law admits that a choice of law clause can be concluded (or amended) by conduct (see, e.g., Kaufmann-Kohler and Rigozzi 2015, paras 7.27 and 7.76). See, for example, FAT 0046/09, *Mahoric & Jakse v. BC Kyiv*, para 41; BAT 0563/14, *White v. Guaiqueries De Margarita BBC*, paras 39–40; BAT 0702/15, *Club Sportif Sagesse de Beirut v. Khazzouh*, paras 45–48.

[76]FAT 0062/09, *Harper* et al. *v. Besiktas Jimnastik Kulübü*, paras 51–54; FAT 0071/09, *Papadopoulos v. Fortitudo*, paras 65–66; FAT 0082/10, *Benson & Paris v. Shanxi Zhongyu*, paras 53–55; FAT 118/10, *Bracey v. Achilleas Kaimakliou BC*, para 55; BAT 0172/11, *Jusup & Ivic v. KK Zadar*, paras 45–47; BAT 0247/11, *Ignerski & Stanley v. Besiktas Jimnastik Kulübü*, para 56; BAT 0702/15, *Club Sportif Sagesse de Beirut v. Khazzouh*, paras 45–48.

> may at best be understood as a declaration that the [contract] has validly been concluded and is binding under [the relevant law] but not as a choice of law. It does not in any way affect the Arbitrator's mandate to decide the dispute *ex aequo et bono*.[77]

In yet other cases, the arbitrator found that "the contents of the mission conferred upon him by the parties to the contract derive first and foremost from the part of the contract that is directly addressed to him, i.e. [the arbitration clause], which says that the 'arbitrator shall decide the dispute *ex aequo et bono*'", which however did not render void the provision stating that the contract was to be interpreted and enforced in accordance with a given national law. The arbitrator's competence being limited to the resolution of disputes "arising from or related to the present contract", the choice of law clause referring to national law remained applicable whenever an authority other than the BAT would be called upon to interpret or enforce the contract's provisions.[78] In general, the analysis and findings as to the *lex causae* in all these cases turned on the fact that the parties had expressly chosen BAT as the forum for the resolution of their contractual disputes and *ex aequo et bono* as the applicable standard before that forum in case of dispute.

Conversely, there have been a few instances where the parties, even though they opted for BAT arbitration, had exclusively chosen a national law as the law applicable to the merits, instead of retaining the default choice of ex aequo et bono. In such cases, BAT arbitrators have applied the law chosen by the parties, in accordance with their mandate under Article 15.2 BAT Rules (and Article 187(1) PILA).[79]

Finally, there have been a few cases where the parties had made no express choice of law but simply referred to arbitration in accordance with the BAT Rules. In such instances, the parties' agreement has been construed as incorporating a

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[77]See, e.g., BAT 0708/15, *Cousin Jr. and Fleisher v. BC Krasny Oktyabr*, para 33; BAT 0603/14, *Sarkis v. Amchit Club*, paras 30–33; 0544/14, *Allred & Greig v. Halcones UV Promotora Deportiva A.C. & Halcones de Xalapa A.C.*, para 80.

[78]See, e.g., BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM)* et al., para 89, referring to BAT 0107/10, *Kelati & Maravilla v. Olympiacos Piraeus BC*, Award of 13 April 2011, paras 46–47.

[79]See, e.g., FAT 0057/09, *Podkovyrov v. Slupskie Towarzystwo Koszykowki Sportowa Spolka Akcyjna*, Award of 15 March 2010, paras 40 and 46, where the arbitration clause provided that "[a]ll disputes should they arise shall be under Polish law and in the FIBA arbitral tribunal (FAT) courts" with no reference to *ex aequo et bono*, and the parties confirmed their preference for a decision based on Polish law; FAT 0034/09, *Tucker & Pro One Sports Management Inc. v. BC Kyiv*, Award of 3 May 2010, paras 58–60, where the parties provided, alongside a FAT arbitration agreement from which the mention of *ex aequo et bono* had been removed, for their contract to be "interpreted and enforced in accordance with the laws of Switzerland", or FAT 0095/10, *Shabalkin v. "Khimki" Basketball Club*, Award of 24 September 2010, paras 29 and 40, where the relevant agreement contained a provision for disputes to be "brought to [sic] Arbitration Court of FIBA", no mention of *ex aequo et bono*, and a clause referring to "the acting legislation of the Russian Federation" which was to govern sanctions "in the event of non fulfilment of the commitments envisaged [therein]". For a more recent example, see, e.g., BAT 0589/14, *Dean v. SS Felice Scandone SpA*, Award of 7 January 2015, paras 41 and 49, where the underlying contract contained a clause designating Swiss law as the *lex causae and* expressly excluding the arbitrator's power to decide *ex aequo et bono*.

choice of law in favour of *ex aequo et bono* principles, in view of the fact that the BAT Rules (selected by the parties to govern the arbitration) so provide.[80]

As to the making of the award, Article 189(1) PILA provides that the arbitral award "shall be rendered in conformity with the procedure and form agreed by the parties". Absent a specific agreement, Article 189(2) provides that the award "must be in writing, reasoned, dated and signed". Article 16.1 BAT Rules, which embodies "the procedure and form agreed by the parties" when they opt for BAT arbitration (absent any further specific agreement on this matter), follows Article 189(2)'s prescriptions, providing that the arbitrators shall issue "a written, dated and signed award with reasons". However, this general rule is subject to Article 16.2 BAT Rules, which reads as follows:

> 16.2.1 By agreeing to submit their dispute to arbitration under these Rules, the Parties agree that,
>
> (a) where the value of the dispute does not exceed € 30,000, the Arbitrator will issue an award without reasons
> (b) where the value of the dispute is between € 30,001 and € 200,000, and a Respondent fails to pay its share of an advance on costs, upon request by a Claimant, the Arbitrator may decide to issue an award without reasons and reduce the advance on costs […]
>
> 16.2.2 If Article 16.2.1(a) applies or if the Arbitrator decides to issue an award without reasons in accordance with Article 16.2.1(b), the Arbitrator shall deliver reasons only if a party
>
> (a) files a request to that effect at any stage from when the Request for Arbitration is filed until no later than ten (10) days after the notification of the award without reasons; and
> (b) pays the respective advance on costs as determined and within the time limit set by the BAT Secretariat.

Article 16.2.1(a) of the BAT Rules was introduced in 2011, in response to demands by users involved in lower value cases, mostly female players and lower

[80]FAT 0075/10, *Tamir & Krayn v. Seastar Apoel Nicosia Basketball Club*, Award of 23 June 2010, para 40 ("any dispute […] shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules […]"); FAT 0143/10, *Tapoutos v. Basketball Club PAOK KAE*, Award of 3 May 2011, para 37 (here, the arbitration clause simply provided for "arbitration by FAT of FIBA"). More recently, see, e.g., BAT 0477/13, *Denson & Goldansky v. Ramat Hasharon BC*, paras 26 and 32, where the contract provided that it was to be "governed by and interpreted in accordance to the FIBA Regulations, the FIBA Arbitral Tribunal […]", and BAT 0539/14, *Dragovic v. BC Spartak St. Petersburg*, paras 42 and 47, where the contract stipulated that any dispute would be submitted to the BAT and "resolved in accordance with the [BAT] Arbitration Rules by a single arbitrator […]".

division clubs, for whom reducing the costs of the proceedings would be critical in order to gain access to BAT arbitration.[81] Article 16.2.1(b) was added in 2014, giving the claimants in disputes of moderate value, where the claims are quite often not contested, the possibility to lower the cost of pursuing their case by requesting the issuance of the award without the reasons.[82] Overall, the changes introduced in Article 16.2 have significantly reduced the costs and length of BAT arbitral proceedings.[83]

As indicated in Article 16.1 last sentence, before signing the award, the arbitrator must submit the final draft to the BAT President for review.[84] In his 'scrutiny' of the award, the BAT President "may make suggestions as to [its] form", and "without affecting the arbitrator's liberty of decision, may also draw his/her attention to points of substance".[85]

At that stage, the BAT President also determines the costs of the arbitration,[86] which will be allocated by the arbitrator in the finalized award[87] taking into account the parties' relative success in the arbitration (i.e. "the relief(s) granted

[81]As noted by Zagklis 2015b, p. 297, "[t]he total costs for these cases have decreased by at least 30 % merely by applying a lower handling fee (€ 1500) together with a cap on the advance on arbitration costs (€ 5000). The arbitrator does not spend the time required to render a reasoned award unless a party requests a reasoned award and pays an additional advance on costs".

[82]Ibid. According to the same author, "this new rule will speed up BAT proceedings even more and further lower costs by requir[ing] fewer reasoned awards in situations in which the claim is uncontested".

[83]Ibid.

[84]Where the award is to be rendered without reasons, the arbitrator submits a standard summary form setting out the underlying reasons together with the unreasoned draft for the President's scrutiny.

[85]Similar provisions, calling for the scrutiny of the award by an internal institutional body prior to its issuance, can also be found in the CAS Code (Article R59(2), providing for scrutiny by the CAS Secretary General), and, in commercial arbitration, the ICC Rules of Arbitration (Article 33 entrusting the ICC Court with this task). Article 16.1 in fine also contains a provision allowing the BAT President to "consult with other BAT arbitrators on issues of principle raised in the award".

[86]The costs of the arbitration include "the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator" (Article 17.2 BAT Rules). As stated in the cost section of BAT awards, the BAT President fixes the arbitration costs by "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 decision on costs will be updated in Article 16.2 cases where a party subsequently requests the issuance of a reasoned award (to take into account the additional advance on costs paid for that purpose). Where the advances paid by the parties exceed the costs determined by the BAT President, the BAT will reimburse the excess in accordance with the arbitrator's decision on the relative allocation of the costs.

[87]Article 17.2 BAT Rules provides that "the final account of the arbitration costs may either be included in the award or communicated separately to the parties", however to the author's knowledge the latter possibility is rarely used.

compared with the relief(s) sought"), as well as their procedural conduct and financial resources.[88]

The award contains a final section (the so-called operative or dispositive part) setting out the arbitrator's decisions with regard to each of the parties' prayers for relief, the allocation of the arbitration costs and of the parties' legal expenses. Where Article 16.2.1 BAT Rules does not apply, the operative part of the award is preceded by a summary of the relevant facts and the proceedings, and sections presenting the parties' respective positions and arguments, evidence adduced and requests for relief, as well as the reasons for the arbitrator's determinations, including on jurisdiction and the applicable law.[89]

According to Article 16.6 BAT Rules,

> [i]f the parties reach a settlement after the [a]rbitrator has been appointed, the settlement shall be recorded in the form of a consent award if so requested by the parties and if the [a]rbitrator agrees to do so.

It is generally accepted, including under Swiss law, that arbitrators can issue awards by consent (also referred to as awards "on agreed terms") setting out the terms of an amicable settlement reached by the parties, thereby providing them with an enforceable instrument to implement their agreement.[90] It is also generally recognized that the arbitrator should satisfy the parties' request for a consent award, unless the terms of the settlement breach fundamental rules of public policy.[91] Accordingly, when issuing an award by consent, BAT arbitrators ascertain the arbitrability of the underlying dispute in light of Article 177(1) PILA and verify that the parties' settlement does not contravene international public policy within the meaning of Article 190(2)(e) PILA.[92]

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[88]See Article 17.3 BAT Rules. In setting out the exact amounts to be paid as a result of the determination and allocation of costs, the arbitrator takes into account the advances on costs paid by the parties. The non-reimbursable handling fee paid by the claimant (or counterclaimant), when (partially) successful, is considered as part of its legal fees and other expenses to which the other party shall (as a general rule) contribute in accordance with the allocation decided by the arbitrator. There have also been cases where the arbitrator decided, in view of the specific circumstances, not to apply the general rule, and thus that each party would bear its own costs (see, e.g., BAT 0468/13, *Matic v. Club Sportiv Municipal Targoviste*, paras 103–104).

[89]In Article 16.2.1 cases, where the award is rendered without reasons, the dispositive part is preceded by a paragraph stating that "[u]pon providing both parties with an opportunity to be heard, having ascertained his/her jurisdiction and considered the factual and legal arguments as well as the requests for relief submitted in this case, the Arbitrator decides as follows", and followed, after the indication of the seat, the date and the arbitrator's signature, by a "Notice about Request for Reasons" recalling Article 16.2.1's criteria and Article 16.2.2's requirements, and setting out the applicable advance on costs in case a party wishes to lodge a request for reasons.

[90]See, e.g., Kaufmann-Kohler and Rigozzi 2015, paras 7.105 and 7.109.

[91]Ibid., para 7.109, with further references.

[92]See, e.g., the awards in cases BAT 0243/11, *Court Side v. Kasnye Krylia Samara*, Award of 2 February 2012, para 11; BAT 0224/11, *Bavcic, MEGA Basketball LLC, BeoBasket Ltd. v. KK Union Olimpija Ljublijana*, and 0225/11, *Djordjevic, MEGA Basketball LLC, BeoBasket Ltd. v. KK Union Olimpija Ljublijana*, both of 9 March 2012, para 7.

Once it is finalized and signed, the award is notified to the parties by the BAT Secretariat, by email or fax enclosing a (pdf) copy of the signed original and indicating that "further copies will be forwarded by courier".

According to Article 16.4 BAT Rules, "BAT awards are not confidential unless ordered otherwise by the arbitrator or the BAT President". As reported by Zagklis, more than 90 % of BAT awards are posted on the FIBA website,[93] albeit sometimes in redacted form.[94]

In line with Article 190(1) PILA, Article 16.5 BAT Rules stipulates that the award is "final and binding" upon communication to the parties. Under Swiss law, the award acquires *res judicata* effect and becomes enforceable as from that moment.[95] The moment the award is communicated to the parties is also the starting point of the strict 30-day time limit for the filing of an action for annulment pursuant to Articles 190–192 PILA, as discussed in the following section.

6.2.4 Remedies Against BAT Awards

Pursuant to Article 16.5 BAT Rules, BAT awards are deemed made at the seat of the BAT, Geneva (regardless of where the proceedings were held and/or the award signed). For Swiss-seated tribunals like the BAT, the court having supervisory jurisdiction over the award is the SFT, Switzerland's Supreme Court. BAT awards are subject to the (limited) remedies available under Chap. 12 PILA. More specifically, the parties may seek the annulment of the award in accordance with Articles 190–191 PILA, unless they have expressly waived their right to do so pursuant to Article 192(1) PILA.[96]

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[93]Zagklis 2015b, p. 294. The awards can be found at http://www.fiba.com/bat/awards. Accessed 1 March 2016.

[94]See, e.g., BAT 0213/11, *Player v. Club*, Award of 30 January 2013.

[95]Kaufmann-Kohler and Rigozzi 2015, paras 7.187–7.188; Berger and Kellerhals 2015, paras 1633 and 1637. In Switzerland, arbitral awards are deemed equivalent to a court judgment and immediately enforceable upon their issuance, without further formalities. In other words, there is no requirement to register or have a judgment entered upon the award by the local courts, as may be the case in other countries. Nevertheless, Article 193 PILA provides for the possibility to deposit the award with the Swiss court at the seat (in BAT's case this would be the Geneva court, namely the *Tribunal de première instance*) and/or request a(n optional) "certificate of enforceability" from the same court or the arbitral tribunal.

[96]Article 192 PILA reads as follows: "If none of them has its domicile, habitual residence, or a business establishment in Switzerland, the parties may, by an express statement in the arbitration agreement or by a subsequent written agreement, exclude any action for annulment in full or limit it to one or the other of the grounds listed in Article 190(2) PILA". For a detailed study of the waiver under Article 192(1) PILA, see Kaufmann-Kohler and Rigozzi 2015, paras 8.49–8.75. An agreement to waive the right to seek the annulment of the award does not affect a party's right to resist the enforcement of the award (indeed, if the award is to be enforced in Switzerland, Article 192(2) PILA provides that the NYC applies by analogy).

It is not so infrequent to come across Article 192(1) waiver agreements (also referred to as 'exclusion agreements') with respect to BAT awards.[97] This may be due to the fact that the original FAT model clause included such an agreement, at a time when FAT awards were subject to appeal before the CAS.[98] As the possibility to lodge appeals before the CAS was eliminated from the BAT Rules (in their May 2010 version), so was the waiver agreement regarding the annulment action before the SFT. The parties remain free to provide, in their contracts, for appeal before the CAS (whether instead or in addition to the annulment action before the SFT) and/or to waive their right to bring an annulment action, however, the default solution proposed in the BAT Rules has done away with these options.[99]

Assuming the right to seek the annulment of the award has not been waived, the time limit to bring the action is 30 days from the notification of the award.[100] In view of the fact that many BAT awards are issued without reasons by operation of Article 16.2.1 BAT Rules, it is important to note here that the SFT, faced with one such award in 2012 (in a case where the applicant had not made use of the possibility of requesting the issuance of the reasoned version), has clearly held that by agreeing that the award be issued without reasons, the parties do not waive their right to seek its annulment under Article 190(2) PILA.[101] Moreover, in cases subject to Article 16.2.1 BAT Rules, unless the applicant waives the right to request the reasons for the award, the 30 day time limit to file an application for annulment only starts running from the notification of the reasoned award.[102]

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[97]The validity of one such agreement was upheld by the SFT in one of the two challenges against a BAT award that were brought before it: SFT 4A_232/2012, decision of 29 May 2012, para 2.

[98]See Preamble 0.3, and Article 18 of the FAT Rules in their versions of 15 March 2007, 9 December 2007, and 30 May 2009.

[99]For a recent example where the arbitration clause provided for appeal to the CAS and included a waiver of the action for annulment before the SFT, see BAT 0593/14, *Tomas v. Fenerbahce Spor Kulübü*, Award of 3 February 2015, para 21. For a case where the parties did not provide for appeal and nonetheless waived the action for annulment, see BAT 0539/14, *Dragovic v. BC Spartak St Petersburg*, para 42.

[100]Article 100(1) SCA. In this regard, it is important to note that under Swiss law, communication to the parties' counsel of record is considered equivalent to communication to the parties directly (see SFT 4P.273–283/1999, decision of 20 June 2000, para 5b), meaning that the time limit starts running from that moment.

[101]SFT 4A_198/2012, decision of 14 December 2012, para 2.2, albeit also noting that, realistically, the chances of success of the applicant would be considerably reduced in such a scenario.

[102]Article 100(1) SCA states that the time limit to bring an action for annulment runs from the notification of the "complete decision". That said, the parties can bring an action for annulment upon receipt of the sole operative part of the award, specifying that they will complete their application once the full decision is available. This possibility may be used, for instance, to request an immediate stay of the tribunal's award, which, as just noted, is binding and enforceable as from its notification, even if limited to the operative part (indeed, the *res judicata* effect and enforceability only attach to the operative part of the award in any event).

The limited (and exhaustive) grounds upon which the annulment of the award may be sought are set out in Article 190(2)(a)–(e) PILA, which reads as follows:

> 2. [the award] may only be challenged:
>
> (a) if the sole arbitrator was not regularly appointed or the arbitral tribunal was not regularly constituted;
> (b) if the arbitral tribunal wrongly accepted or denied jurisdiction;
> (c) if the arbitral tribunal has ruled beyond the claims submitted to it or failed to decide one of the claims;
> (d) if the principle of equal treatment of the parties or their right to be heard in adversarial proceedings has not been complied with;
> (e) if the award is incompatible with public policy.

As is apparent from the above wording, Article 190(2) PILA's grounds are in essence directed at the procedural aspects of the arbitration, they do not go to the merits of the award itself, save where its result contravenes international public policy (Article 190(2)(e)), an exception which is interpreted very narrowly by the SFT.[103]

It should also be noted that the filing of an action for annulment does not entail an automatic stay of the enforceability of the award. If the applicant wishes to obtain such a stay, it must request an order to that effect from the SFT.[104] The requirements and related case law are quite strict.[105]

Finally, annulment under Article 190(2) PILA is by essence a 'cassatory' remedy, meaning that the SFT can only confirm or annul the award (in whole or in part), but not issue a new decision on the merits of the dispute in lieu of the tribunal.[106] There are only two exceptions to this principle: if the annulment action is brought on the ground that there was an irregularity in the appointment or composition of the tribunal (Article 190(2)(a) PILA) or that the tribunal lacked jurisdiction (Article 190(2)(b) PILA), the SFT can deal with that objection directly. It may thus uphold a challenge against an arbitrator, order his or her removal, and direct that a newly appointed arbitrator must rehear the case when the annulment is sought on Article 190(2)(a)'s ground, and, in cases brought under Article 190(2)(b) PILA, it may make a ruling on the arbitrator's jurisdiction (in addition to annulling or upholding the award).[107] Aside from these two scenarios, if the application for annulment is upheld, the SFT will normally remand the case to the arbitrator who rendered the award, for him or her to render a new decision. In so

[103]For a more detailed discussion of the contents and meaning of these grounds and the conduct of annulment proceedings before the SFT in sports matters, see Hasler and Hafner 2016, Sect. 17.2.2.4. See also Kaufmann-Kohler and Rigozzi 2015, paras 8.03–8.205; Berger and Kellerhals 2015, paras 1672–1880, and Rigozzi 2010.

[104]Article 103(1) and (3) SCA.

[105]For a discussion of the SFT's practice in this respect, see in particular Kaufmann-Kohler and Rigozzi 2015, paras 8.92–8.99, with further references.

[106]This is reflected by the fact that the provision governing the action for the annulment of awards in the SCA, Article 77, excludes the application of Article 107(2) SCA, which enables the SFT to rule on the merits upon annulment of a lower court's decision.

[107]SFT 136 III 605, 615–616.

doing, the arbitrator will have to take into account the reasons for annulment as set out in the SFT's decision.[108] In this regard, it is important to note that, because the defects that can be corrected by means of an action for annulment under Article 190(2) PILA are almost exclusively of a procedural nature, the parties may well end up with the exact same decision on the merits once the (procedural) defect(s) identified in the SFT's decision has/have been corrected.

In addition to the action for annulment, the SFT has held that the remedy of revision is available against international arbitral awards, even though the PILA does not mention it.[109] Revision is an extraordinary remedy, enabling the parties to request that the tribunal's decision be reconsidered even though it has become final. Given that it interferes with the fundamental principle of finality, revision is only available on very narrow grounds covering exceptional situations, namely when it is established that the award was influenced to the detriment of the requesting party by a crime or a felony,[110] or where the requesting party has discovered, after the issuance of the award, relevant and material (pre-existing) facts or conclusive evidence on which it was unable to rely in the course of the arbitration proceedings.[111] Requests for revision are naturally rare and, to the author's knowledge, none has been filed to date with regard to a BAT award.

6.2.5 The Enforcement of BAT Awards

BAT awards can be enforced under the NYC.[112] In this regard, one important issue needs to be highlighted: although employment disputes, which form the bulk of the BAT's docket, are arbitrable in Switzerland (under Chap. 12 PILA),[113] they are not in many other countries (in fact, this was one of the reasons for the choice of Switzerland as the seat of the BAT).[114] This may create difficulties at the enforcement stage, because Article V(2)(a) NYC provides that the recognition and enforcement of a foreign award may be refused by the courts of the countries under the laws of which the subject matter of the dispute is not arbitrable.

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[108]SFT 4A_54/2012, decision of 27 June 2012, para 2.2.3 and the references.

[109]The SFT came to this conclusion in a 1992 decision (SFT 118 II 199). In that same decision, the SFT held that the revision of awards would be subject to the rules governing the revision of the its own decisions and that it would be the court of competent jurisdiction to deal with applications for the revision of awards rendered in Switzerland.

[110]Article 123(1) SCA.

[111]Article 123(2)(a) SCA.

[112]The seat of the BAT also determines the 'nationality' of BAT awards for the purposes of the NYC, meaning that they will be recognized and enforced as Swiss awards in other NYC countries.

[113]See Article 177(1) PILA, which provides that "any dispute involving a pecuniary [viz. economic] interest may be the subject matter of an arbitration".

[114]On this point, see, e.g., Martens 2011, p. 56, paras 3.2 and 7.

In reality, the NYC rarely—if ever—comes into play with regard to BAT awards, given that FIBA has addressed this and other potential hurdles in the enforcement process by setting up an ad hoc internal mechanism under Articles 3–300 to 3–302 FIBA IR.[115] Pursuant to Article 3-300, FIBA can impose sanctions on a party that fails to honour a BAT award, ranging from fines of up to CHF 150,000 to targeted bans (e.g. on international transfers for players, on the registration of new players for clubs, and on participation in the relevant international competitions for both players and clubs), it being understood that any such sanctions can be applied cumulatively and multiple times.[116]

In practice, the award creditor can file a request for sanctions against the recalcitrant debtor with FIBA, following which the award debtor is given an opportunity to be heard and (ideally) proceed to implement the award before the FIBA Secretary General takes a decision.[117] Decisions rendered pursuant to Article 3–300 FIBA IR can be appealed before the FIBA Appeals Panel.[118] For follow-up purposes, the BAT website includes a section entitled 'Sanctions' listing the clubs and players that have been sanctioned in accordance with Article 3–300 FIBA IR, and flagging those which are subject to pending sanctions.[119]

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Having completed our overview of the BAT process, the second part of this article will focus on the merits, attempting to offer a sampling of the concrete reasoning and the decisions rendered by BAT arbitrators in accordance with the standard of *ex aequo et bono*.

6.3 BAT Arbitration—What Does It Mean?

6.3.1 Deciding Sports Disputes Ex Aequo et Bono

As explained by Martens,[120] the (relatively unusual) choice of providing for arbitration *ex aequo et bono* as the default rule in BAT arbitration was dictated by the

[115]Martens 2011, pp. 56–57.

[116]Article 3-300 FIBA IR. See also Articles 3-70 and 3-71 FIBA IR with regard to the licence restrictions that apply to sanctioned players and clubs. Article 3-300 in fine adds that the sanctions it provides for "can be extended, in FIBA's sole discretion, to natural or legal persons which are directly or indirectly linked to the first party, either from a legal or sporting perspective (e.g., different entity under a similar name, etc.)".

[117]Article 3-301 FIBA IR, adding that "upon request by FIBA, the national member federation to which [the award debtor] is affiliated shall actively and promptly take all necessary measures to ensure that [the award debtor] fully honours the BAT award within a time-limit fixed by FIBA. If a national federation fails to comply with the present Article, FIBA may impose disciplinary sanctions on [it] […]".

[118]Article 3-302 FIBA IR.

[119]http://www.fiba.com/bat/sanctions. Accessed 1 March 2016.

[120]Martens 2011, p. 55.

overall objective of maximizing the speed of the decisional process whilst ensuring the fairness of the outcome. On the one hand, the reference to "considerations of justice and fairness" in lieu of a specific national law (which most often will be foreign to the arbitrator and/or at least one of the parties) simplifies the substantive legal framework, and on the other, it calls for a decision that is 'just', i.e. equitable and appropriate to the specific circumstances of the case to be decided. In essence, an *ex aequo et bono* decision will be based on the arbitrator's interpretation of the terms of the contract, which will also take into account the parties' overall relationship, respective situations and conducts, as well as any other relevant circumstances, in order to reach a fair and adequate solution in the dispute at hand.[121]

Although the BAT *ex aequo et bono* clause was initially "met with considerable skepticism in the legal profession",[122] it has quickly become the expected decisional standard for the tribunal's users.[123] It has also clearly achieved the desired result of allowing BAT arbitrators to decide the matters in dispute simply, efficiently and fairly, without having to deal with 'battles of legal experts', and extensive research in the intricacies of the multitude of different national laws they would otherwise be required to apply from one case to the next.[124]

Interestingly, while—as just seen—the very notion of a decision *ex aequo et bono* requires that disputes be determined on a case by case basis, as a specialized tribunal dealing exclusively (and on a large scale) with certain types of disputes, the BAT has developed a series of principles with regard to various recurrent concepts, arguments, claims and defences. In turn, the systematic publication of the awards rendered (to which the parties and arbitrators can then cite as 'persuasive authorities' on the same issues arising in later cases) has favoured the emergence of a consistent case law on several important questions. The existence and development of this body of jurisprudence contributes to the predictability (and therefore the efficiency) of the BAT system, ultimately enhancing legal security in the world of professional basketball.[125]

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[121]Note that, as illustrated by the excerpts reproduced below, the relevant circumstances may also include general legal principles that are well established in the relevant context. In other words, a mandate to decide *ex aequo et bono* does not necessarily exclude that the arbitrator may consider the relevant or otherwise applicable legal rules (including, as the case may, general principles of law or trade usages); it only entails that the arbitrator is not bound to apply the law (as in arbitration 'ex lege'). For a study of the history, understanding and practice of *ex aequo et bono* in international commercial and investment arbitration, see Trakman 2012. On *ex aequo et bono* arbitration in Switzerland, see in particular Sykora (2011).

[122]Martens 2011, p. 55.

[123]As noted by Zagklis 2015b, p. 294 (footnote 19): "decisions rendered under *ex aequo et bono* principles have become so popular that parties only insisted on national law in about 3 % of the cases to date".

[124]Martens 2011, p. 55. It is also worth noting, as Martens does (ibid.), that the decisions rendered in many of the cases decided *ex aequo et bono* correspond by and large to the solution that would have obtained under the otherwise applicable national laws (were it not for the BAT clause). For a review of the outcome of some BAT awards rendered *ex aequo et bono* see, in addition to the discussion in the following section, Anthony 2013.

[125]For a perceptive study of the role of BAT jurisprudence in creating principles governing basketball contracts, see Zagklis 2015b, pp. 184-188.

The following section offers some illustrations of this phenomenon, one of the main areas of interest in the study of BAT arbitration. It features examples of substantive principles developed in the BAT case law (covering various issues, from the concept of 'guaranteed no-cut contracts' to the defence of hardship), captured in the form of direct quotations for the sake of brevity and immediacy. As stated at the outset of this paper, this first (and selective) compendium will be followed by a more systematic analysis of the BAT case law on various (other) issues, both procedural and substantive, which will be published in the form of a regular digest in the future issues of the YISA.

6.3.2 Examples from the BAT Case Law

6.3.2.1 The Concept of "Guaranteed no-Cut Contracts"

So-called no-cut or unconditionally guaranteed contracts are widely used (and particularly necessary) in basketball due to both the high rate of injuries for players and the high expectations of clubs when it comes to players' and coaches' performances. There are many variations as to how the "guaranteed no-cut" principle is expressed in basketball contracts, however some of the more common clauses in players' agreements are as follows:

> Contract Guarantee: Club agrees that this Agreement is unconditionally guaranteed contractual Agreement and that Player's Guaranteed Compensation and bonuses and the Agent Fee are fully guaranteed, due and payable, **including but not limited to in the event of Player's injury, illness, death, and/or lack of skill**.[126]

> […] The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club shall not have the right to suspend or release the Player in the event that **the Player does not exhibit sufficient skill or competitive ability, or in the event that an injury, illness or death shall befall the Player.** For the avoidance of doubt, in the event that the Player sustains an incapacitating injury or illness during the term of his Contract that renders the Player incapable of performing in some or all of the Club's remaining games or should the Club simply elect to replace Player with another player, Club agrees to meet all payment obligations to Player and Agent as though Player had performed in all games and met all obligations in this Agreement.[127]

> Club agrees that this Agreement is an unconditionally guaranteed contractual Agreement […] The Club shall not have the right to suspend or release the Player in the event that **the Player does not exhibit sufficient skill or competitive ability, or in the event that an injury or illness shall befall the Player unless otherwise stated in the Agreement.** Accordingly, in such event, Club agrees to meet all payment obligations to the Player and Agent as though the Player had performed in all games and met all obligations in this Agreement. Without limiting any other rights of Player, if the Club rescinds this

[126]BAT 0284/12, *Appel & Wasserman Media Group v. Samsun Basketball Kulübü*, Award of 15 October 2012, para 7.

[127]BAT 0668/15, *Familia Basket Schio slr SSD v. Ogwumike*, Award of 26 August 2015, para 7.

> Agreement without a legal cause, the Club is obligated to pay to the Player as an indemnity all salary compensation, benefits and bonuses contained in this Agreement. **This clause will operate even in case of injury, illness or lack of skills of the Player**."[128]

Similar wording is employed in the contracts of coaches:

> …the agreement is [sic] unconditionally guaranteed contractual Agreement and (…) the coach's guaranteed compensations and bonuses are net and fully guaranteed, due and payable, including but not limited to **in the event of Coach's injury, illness, death and/or lack of skill.** Thailand Basketball agrees that this agreement is a no-cut guaranteed agreement, and that Thailand Basketball shall not have the right to suspend or release the Coach **in the event that the Coach does not exhibit sufficient skill or competitive ability, or in the event that an injury, illness or death, occurred during the terms of this contract, shall befall the Coach**.[129]

> The guaranteed net Compensation above is vested in and owing to the Coach upon the completion of the execution of this Agreement and is **not contingent upon anything**. The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club shall not have the right to suspend or release the Coach in the event that **the Coach's performance or the Club's performance is not satisfactory to the Club.** […] Should the Club elect to replace the Coach with another Coach at any time during the term of the Agreement, the Club shall continue to pay the Coach its (sic) guaranteed net Compensation […] for the full term of this Agreement at the times and the amounts specified above. In such an event **Coach shall be free to seek employment as a head coach with another club and shall be under no obligation to mitigate his damages** and should he be hired as a Head Coach the Coach's compensation with the new club shall reduce Club's obligation to pay the Coach its compensation and bonuses required herein by the amount the Coach receives as its compensation for its new club.[130]

> The CLUB GUARANTEE the AGREEMENT TO THE COACH, and all monies contracted as per Art. 3 and Art. 15 are hereby irrevocably guaranteed and shall be paid by the CLUB to both COACH and AGENT. THE CLUB CANNOT RESCIND THIS AGREEMENT AND SUBSTITUTE THE COACH, FOR **TECHNICAL REASONS OR POOR PERFORMANCES**.[131]

BAT arbitrators have interpreted the concept of a guaranteed contract as follows:

> "Guaranteed" means that the agreed salary payments are in principle due and cannot be reduced by the Club because the player is unable to provide his services because of sickness or injury or because the Player's performance did not meet the Club's expectations or because of lack of success of the Club's team…[132]

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[128]BAT 0644/15, *Vougioukas v. Galatasaray Spor Kulübü Dernegi*, para 31.

[129]BAT 0429/13, *Coppa v. Basketball Sport Association of Thailand*, Award of 23 December 2013, para 56.

[130]FAT 0046/09, *Mahoric & Jakse v. Kyiv.*, para 5. See also FAT 0057/09, *Podkovyrov v. STKSSA*, para 5, where the contract expressly provided that all amounts were guaranteed (Article 3) but that the Club would have a right of termination "in case of 7 defeats on the way".

[131]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM) et al.,* para 10.

[132]BAT 0644/15, *Vougioukas v. Galatasaray Spor Kulübü Dernegi*, para 31.

> The purpose of Clause 9 of the Player Contract is to protect the Player's salary claims in certain cases where the Player does not perform as expected (or at all). Clause 9, first and second paragraph, makes clear that the Player's salary shall be fully guaranteed and cannot be affected by poor performance, diminished skills, injury or similar impairments to the Player's performance. The Club shall not be able to escape its payment obligations merely because it is unhappy with the Player's performance or because the Player no longer plays a role in its sporting strategy. The Player's right to demand payments on an accelerated basis in case of a unilateral rescission of the Player Contract flanks the salary guarantee that Clause 9 provides on behalf of the Player.[133]

However, and despite the broad wording of these contracts, it is generally recognized that they do not provide for full immunity for coaches or players in circumstances where their behaviour does not warrant protection:

> The guarantee of the salary is however not absolute but subject to certain explicit or implied exceptions: No salary can, e.g., be claimed in case of a justified termination of the Player Contract by the Club, which can also be concluded e contrario from Article 11, last sentence, of the Player Contract.
>
> Another exception concerns a player's duty to mitigate his damages. It has been consistent jurisprudence by the BAT based on generally accepted principles of the law of damages and also labour law that after an unjustified termination of the player contract by the club, the player has an obligation to take reasonable efforts to find a new club and that his alternative earnings shall be deducted from the compensation otherwise due by the club.[134]

In view of these stated exceptions, it is worth considering some common grounds for termination and the related BAT jurisprudence, as well as the BAT's approach to the concept of mitigation.

6.3.2.2 Common Grounds for Termination

a. Injury

Termination on the ground of injury is a very frequent scenario in BAT cases. The resulting awards have developed into a well-established case law, covering not only the principles to be applied to the termination of a contract following injury, but also the steps that both clubs and players are expected to take at the outset of their relationship in order to protect themselves.

As stated in the BAT 0502/14 award:

> The BAT already dealt with the issue of pre-existing injuries in several cases.[135] According to that jurisprudence, **the question who has to bear the consequences of an injury is a question of risk allocation**. **The Parties signed the Employment Contract as a guaranteed contract** (Clause 3.1: "The Club agrees that this Agreement is a no-cut

[133]BAT 0487/13, *KC Callero & Andrews v. SS Sutor Srl*, Award of 3 September 2014, para 66.

[134]BAT 0644/15, *Vougioukas v. Galatasaray Spor Kulübü Dernegi,* paras 32–33.

[135]Referring to BAT cases 0014/08, 0162/11, 0190/11, 0213/11 and 0318/12.

guaranteed agreement. – In case that Player gets injury during practising or games while carrying his obligations under this contract and that will bring him to being unable to perform in some or all rest games of the team, Club agrees to pay all salary as if Player would participate in all games.") **which assumes the Club to take the risk of any injury.**

However, risk allocation presupposes an informed decision by the Club when it accepts the Player, in other words a "guaranteed contract does not protect cheating".[136] In this context, **clubs are responsible to take reasonable measures to reduce the risk of undetected pre-existing injuries, e.g. by high standard medical examination consistent with best practice in the basketball industry**[137] and by **research of publicly available sources on the player's health condition.**[138] In the present case, the Club has not submitted evidence in regard to any specific questions asked to the Player. However, **Clause 1.4 of the Employment Contract provided the following obligation for the Player**:

"1.4 By signing this Contract **the Player is obliged to declare about current or previous injury or illness which might reduce his capability to perform at his best possible level**. The club does not fulfil its obligations (including financial one) for the consequences of the previous injuries or illnesses, that become apparent during the term of this contract including for the period of the player's disablement."

The Player's obligation under the Employment Contract to reveal – sua sponte – any significant and serious injury (Article 1.4. of the Employment Contract: "which might reduce his capability to perform at his best possible level") **is in line with BAT jurisprudence**.[139] According thereto **an injury is "significant and serious" within the above meaning if the Club would not have executed the contract had it known of the injury.**

According to general standards and in line with BAT jurisprudence, the **burden of proof for any fact lies with the party which derives its arguments from it**. In the present case the Club submits that it rightfully terminated the Employment Contract. Consequently, the **Club has to prove that the Player's [Player's body part] problems already pre-existed when the Employment Contract was entered into, that the injury was likely to affect the Player's basketball performance during the term of the Employment Contract and that the Player knew of such significant and serious injury.**[140]

As is clear from the above, clubs will have a high burden of proof when it comes to justifying termination on the basis of an allegedly 'hidden' injury, as also noted in the following award:

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[136]Referring to BAT 0154/11, para 77.

[137]Referring to BAT cases 0213/11, 0263/12 and 0318/12.

[138]Referring to BAT cases 0190/11 and 0213/11.

[139]Referring to BAT cases 0014/08, 0039/09, 0066/09, 0162/11 and 0213/11.

[140]BAT 0502/14, *Banic v. Unics Kazan Basketball Club*, Award of 30 April 2015, paras 80–83. See also BAT 0213/11, *Player v. Club*, para 97 et seq. (where a parallel was made with "*warranty issues that arise when goods are sold insofar as the respective duties and rights of the seller and the buyer. For example, what does it mean/contractually imply if a product is sold in the condition "as is", what is the responsibility of the seller for so-called "hidden defects", is the degree of responsibility different if the defect was known to the seller, what are the duties of the seller to inspect the goods upon delivery and what are the consequences if no inspection is made or if detected defects are not immediately invoked*").

> [...] the Respondent says that its position was justified as the Claimant had an injury which she hid. This is a very serious allegation and would require compelling proof that the Respondent had: (1) carried out a timely and thorough medical examination (consistent with best practice in the basketball industry) at which a series of specific questions had been put by the doctor or relevant practitioner; and (2) that the alleged injury complained of would not have been apparent to such a professional properly carrying out such an examination; and (3) answers given by the Claimant to the questions posed were knowingly incorrect and misleading.
>
> This is a heavy burden for any club and rightly so. A professional basketball club makes a significant investment in its players and it is therefore incumbent on a club to thoroughly examine a potential player as it is very well known (and reflected in virtually every professional basketball contract) that once the medical is passed, contract sums are usually guaranteed. This is the well-established practice and no well-informed club could be in any doubt about it. In short, if a club does not perform a thorough enough medical examination, then it must bear the later consequences.[141]

The award in BAT 0213/11 provides an example of the precautionary steps that have been recommended for clubs in BAT jurisprudence:

> [...] there is e.g. the possibility for the club to undertake basic research in advance regarding the player's playing history, particularly that of the prior season, to try and determine if the player has missed games, and, if so, whether it was for reasons of injury/illness, as well as to put precise oral and written questions to the player in that respect during the medical examination. Those questions can very easily be formulated to include soliciting information about any chronic or even isolated problems with muscles, tendons, and more generally articulations. A club may need to be even more cautious in this respect if a player has been on the circuit for many years and is of a certain age because that would tend to increase the risk of pre-existing medical conditions.
>
> If the club does not do its "homework" in advance in that respect and/or fails to undertake a thorough medical examination and within a procedure that obliges the player to carefully reflect upon prior injuries/illnesses, to make any corresponding disclosures and to sign his/her declaration in that connection, this may amount to a form of contributory fault/negligence which impacts the club's right to criticize the player's lack of candidness and characterise it as a breach of duty.[142]

Finally, it is important to note that in the event that a club intends to terminate a contract following an injury, it should do so without delay to ensure that the termination is deemed to have been in good faith:

> Indeed – given how simple it would have been to research her playing history and undertake a more in-depth medical examination in light of the clinical symptoms that appeared during the very first games – the Club's medical staff could not in good faith ignore the symptoms of a possibly serious underlying problem because the Club wished to benefit from the Player's skills on the court and at the same time deem the contractual guarantees

[141] BAT 0263/12, *Jujka and TP Sports Ltd v. Miejski Miedzyszkolny Klub Sportowy Katarzynki Torun "Energa"*, Award of 11 October 2011, paras 38–39.

[142] BAT 0213/11, *Player v. Club*, paras 109–110.

> in case of injury to have become inapplicable. Nor could the Club blindly rely on the Player's explanations, except by being negligent.[143]

b. Other Grounds

There are, of course, other recurrent themes when it comes to the termination of a contract in basketball.

Insofar as clubs' termination of coaches and athletes are concerned, cases often arise in relation to an alleged lack of skill of the coach or player (that is not protected by an appropriate guarantee clause) and allegedly recurrent and/or serious breaches of the agreement by the coach or player.

When it comes to players and coaches terminating their contracts, the most obvious—and common—complaint is non-payment of salaries and other amounts.

Whether a party can immediately terminate a contract will, of course, depend on certain basic principles, such as: (i) whether the party has complied with its obligation to give notice of a breach and, if possible, to allow time for the breach to be rectified; (ii) if not, whether the breach is nevertheless sufficiently serious to warrant immediate termination; and (iii) whether the termination is in fact directly related to the alleged breach.

6.3.2.3 The Requirement to Give Notice

One of the clearest principles emerging from the BAT case law is that the parties must take a good faith approach to the termination of a contract.

Central to this question is whether the offending party has sufficiently been put on notice of the breach and, if possible, given an opportunity to rectify it prior to the contract being terminated:

> Furthermore it is a general principle of law – based on fairness – that alleged contractual breaches must normally be preceded by a formal notice of breach, which gives the other party a chance to conform its acts/behaviour and/or explain its position, before termination for cause can be resorted to; and it is a general principle in disciplinary matters that for reasons of fairness sanctions need to be foreseeable, progressive and proportional.[144]

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[143]BAT 0668/15 and 0693/15 (consolidated), *Familia Basket Schio srl SSA v. Ogwumike & Sports International Group Inc. v. Familia Basket Schio*, para 82. See also BAT 0213/11, *Player v. Club*, para 111: "*Finally, it goes without saying that if a club discovers during the entry medical examination what it deems to be a problematic pre-existing medical condition, or at a later stage, i.e. after that examination, what it deems to be an unfairly undisclosed pre-existing medical condition of the player, the club must invoke this without delay to prevent being estopped from doing so; since it would be unfair to rely, on the one hand, on the possibility that the player may nevertheless be able to perform or become apt to play, and, on the other hand, reserve the possibility of invoking at a later stage the known medical problem*".

[144]BAT 0130/10, *Thomas et al. v. Baloncesto Fuenlabrada*, Award of 8 June 2011, para 145.

a. Notice Prior to a Club's Termination of a Coach or Player

In relation to the notice requirements imposed on clubs that wish to terminate a coach or player, it has been held that:

> […] the Arbitrator finds that the less obvious, serious and damaging the alleged violations of the Player Contract by the Player are, the more the Club is required to notify and hear the Player before it takes the ultimate action and dismisses him prior to the agreed term of the agreement. There can be no question that the three reported incidents, which did not, on their own, justify a termination of the Player Contract, would have obliged the Club to timely notify and warn the Player and to hear him before it terminated the Player Contract. That did not happen. The Arbitrator finds that under the circumstances, the unilateral termination of the Player Contract was not justified.[145]

'Notice' requirements will often be expressly set out in the contracts themselves,[146] and are said to:

> […] [echo] general principles of contract law – based on considerations of fairness – which require that before a contract is terminated for cause the other party must be given fair notice of the alleged breach/violation and be given the possibility of curing it, unless the breach is so serious that immediate termination is warranted.[147]

BAT arbitrators have also held that even where the underlying contract does not expressly require notice prior to termination, general considerations of fairness do:

> […] even assuming that the Coach violated his professional duties, the early termination of a contract is only the last resort in case the relationship between the parties becomes unbearably distressed. If the misconduct is reparable, the party who is allegedly in breach of the contract must be warned and given an adequate opportunity to adjust its behaviour and to resume the execution of its contractual obligations. In the case at hand, no such warning has been issued by the Respondents. They did not provide any proof, either verbally or written, that they requested Claimant to return to Mexico and to continue to work as a head coach for the National Team.[148]

Furthermore, it is important to note that BAT arbitrators will generally prefer *contemporaneous* evidence that a coach or player was put on notice of alleged breaches in a timely fashion:

> […] there is no contemporaneous evidence that during such period, i.e. between the end of September 2013 and February 2014, the HBF ever complained to the Coach or put him on notice that he was failing to perform any contractually specified or implied duties,

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[145]BAT 0640/14, *Smith & Wasserman Media Group v. Galatasaray Spor Külübü Dernegi*, Award of 27 July 2015, para 48.

[146]See, for example BAT 0535/14, *Daniels v. Liaoning Hengye Basketball Club*, Award of 7 August 2014, para 33, where the Agreement in question stipulated that "*Club has the unilateral right to terminate the contract with the player if the player still violates any reasonable rules of Club and any rules of CBA League set by Chinese Basketball Association after Player and his Agent have previously been warned by Club two times in writing of same violation and given a chance to cure*".

[147]Ibid., para 34.

[148]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM) et al.,* para 111.

> whether it be in relation to limited actions such as the participation in HBF board/committee meetings or broader tasks.[149]

Finally, it has been expressed (and is self-evident) that *written* notices should be served so as to make it clear to the offending party that the breach is serious and to provide proof of notice in any subsequent proceedings:

> […] the Arbitrator would also like to point out that written, as opposed to oral, notices serve a purpose because they usually have more impact on the person receiving the warning and also serve as proof. In a context such as professional basketball, if clubs wish to ensure proof that notices/warnings have been given, they can serve written notices on the Player but also copy the Player's agents/representatives by email and/or fax/post.[150]

b. Notice Prior to Termination for Non-payment

Importantly, notice requirements are not solely aimed at clubs. Players and coaches will also be required to provide adequate notice prior to terminating a contract, in particular for non-payment. Often such warning requirements will be stipulated in the contract, for example in the following terms:

> In case of scheduled payments not being made to the Player or Agents by the Club within forty-five (45) days of the scheduled payment date, the Player will have right to request terminating this agreement unilaterally by serving a written notice to the Club. In case of the scheduled payments not being made within the next seven (7) days after such a written notice is received by the Club, the Player will have right to terminate this agreement unilaterally by serving the Club a final written notice of termination. In this case, the Player shall immediately be entitled to all salaries under this agreement and shall have no further obligations to the Club. The Club shall retain no rights to the Player except for the obligation to pay all salaries and earned bonuses under the terms of this agreement. Upon receipt of a request from the Turkish Basketball Federation to issue the Player's Letter of Clearance, the Club must authorize the federation to do so unconditionally within twenty four (24) hours without charging a transfer fee.[151]

In addition to the express terms of the agreement, it is clear from BAT jurisprudence that a player's termination on the basis of non-payment will be even more solid where he or she acts in a clear and fair manner:

> Those written communications in February-March 2013 establish that although the Claimants were systematic and rigorous in invoking and applying this particular term of article 5 of the Contract, they did so in a fair manner by making it clear from the outset that they intended to invoke it and by putting the Club on formal notice on three occasions in an explicit fashion (quoting the clause in question).

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[149]BAT 0584/14, *Trinchieri v. Hellenic Basketball Federation*, Award 21 November 2014, para 73.

[150]BAT 0535/14, *Daniels v. Liaoning Hengye Basketball Club*, para 40. It has also been suggested that clubs ought to have players countersign written notices in order to prove that they have in fact been received (see BAT 0568/14, *Johnson v. Zhejiang Chouzhou Professional Basketball Club Company Ltd*, Award of 18 December 2014, para 89).

[151]BAT 0278/12, *Korstin v. Besiktas Jimnastik Kulübü Dernegi*, Award of 31 August 2012, para 47.

> Moreover by first putting the Club on notice that the Player would suspend his performance upon the delay in payment of the Agent's fee reaching 30 days and by actually enforcing that term (the Player stopped playing) before enforcing the right to terminate, the Claimants made it obvious that they were serious and that termination would follow if the payment was not received. Thus, in good faith the Club could and should have felt warned.[152]

With that said, it must be noted that when interpreting the notice requirements, the fact that a party has in the past accepted late payments will not necessarily constitute a waiver of his or her right to terminate the agreement for late payment, but rather be seen as a question of fact to be determined in light of the particular circumstances of the case.[153]

Finally, and while notice requirements may be enforced strictly,[154] BAT has also held that termination provisions referring to non-payment do not necessarily encompass situations where just "*any* payment was late by more than 30 days, no matter how substantial or insubstantial the outstanding amount".[155] Although such situations will be considered on a case by case basis, the general approach should take into account the parties' intentions:

> The Arbitrator is not convinced that the Parties indeed intended to allow for an early and immediate termination of the Coach Contract in case of payment default on the most negligible amount, as the wording of Clause 14 c) might suggest. Such understanding would run directly counter to the core premises of immediate contract termination for "just cause", against the background of which the termination options for a late or non-payment must be considered.[156]

6.3.2.4 Immediate Termination

The principle of *pacta sunt servanda* is an overriding consideration in any equitable review of the termination of a contract. Its significance has been expressed as

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[152]BAT 0396/13, *Gaffney & Ayesa v. Club Joventut Badalona SAD*, Award of 16 October 2013, paras 74–75.

[153]See BAT 0278/12, *Korstin v. Besiktas Jimnastik Kulübü Dernegi*, para 49. To the contrary, see BAT 0720/15, *Millage v. Torku Konyaspor Basketbol Kulübü*, Award of 4 December 2015, paras 48–49.

[154]See, for example, BAT 0291/12, *Drucker & Beobasket Ltd v. Sutor Basket Montegranaro srl*, Award of 20 November 2012, paras 67–68: "*Article 7 of the Coaching Agreement entitles the Coach to terminate the Coaching Agreement with immediate effect after the Club's contractual payments were not received by the Coach within 30 days from the due date. […] Then, the Coach must notify the Club that the Coaching Agreement would be deemed terminated if no payment was received within another 5 days. […] The Arbitrator accepts that the Coach was not prohibited from sending his termination notice before the expiration of the 30-day time limit of Article 8 of the Coaching Agreement. However, also in that case, the termination notice could only lead to the termination of the Coaching Agreement if the due payments had not arrived at the Coach's bank account on or before 35 days upon the due date, i.e. on or before 14 January 2012. […] The Agent's email of 3 January 2012 may have brought the Club to pay the due December 2011-salary. However, it did not terminate the Coaching Agreement*".

[155]BAT 0383/13, *Dikeoulakos* et al. *v. CSM Targoviste*, Award of 22 January 2014, para 78.

[156]Ibid., para 79.

follows:

> The principle of pacta sunt servanda is one of the leading principles in BAT jurisprudence. A signed contract is deemed valid and enforceable unless a party demonstrates (i) that it was in fundamental error regarding specific facts which must be considered in good faith to be an essential basis of the contract, (ii) that it was induced to enter into the contract by fraud of the other party, or (iii) that it signed the contract under duress from the other party.[157]

> It is a matter of universal acceptance that pacta sunt servanda, i.e., that parties who entered into contracts are bound by their terms. Observance of obligations entered into is a fundamental and integral matter common throughout all civilized nations and legal systems. Without such a principle, commerce, honesty, and the integrity of dealings would all but vanish. It is just and fair that when parties enter into the sort of contracts which they did in this matter, then the provisions of such contracts should be observed.[158]

BAT cases are therefore often decided by reference to this principle:

> The doctrine of pacta sunt servanda (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) – is the principle by which the Arbitrator will examine the merits of the claims.[159]

An exception to the *pacta sunt servanda* rule will obviously be where a party has committed a breach that is so serious as to render the continued performance of the contract impossible. That said, BAT arbitrators have consistently held that only a particularly serious breach of contract qualifies as "just cause" to immediately terminate the relationship between the parties:

> Early termination of a contract is the last resort if the relationship between contractual parties becomes distressed. In principle, therefore, an employment contract cannot be prematurely terminated based on a simple breach of obligation. Only a particularly serious breach of contract qualifies as "just cause".[160]

> […] it is up [to] the Respondents to demonstrate that the Coach violated his professional duties in a way that made it impossible for the Respondents to maintain the contractual relationship any longer.[161]

> In order to constitute a repudiatory breach of contract (and thus give rise to a right of termination on behalf of the aggrieved party), the Arbitrator considers that the breach must be fundamental (or constitute a breach of a fundamental term) and evince an intention, on the part of the party in breach, not to perform his obligations under the contract in some essential respect.[162]

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[157]BAT 0318/12, *Hunter & Priority Sports and Entertainment v. Polisportiva Dinamo SRL*, Award of 15 October 2013, para 80.

[158]FAT 0065/09, *Mikhalevskiy v. Bikov*, Award of 12 April 2010, para 43.

[159]BAT 0650/15, *Jawai & Wasserman Media Group v. Galatasaray Spor Kulübü Dernegi*, Award of 30 July 2015, para 33.

[160]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM) et al.*, para 107 (referring to BAT 0383/13).

[161]Ibid., paras 106–107.

[162]BAT 0471/13, *Filipovski v. KK Union Olimpija Ljubljana*, Award of 28 April 2014, para 61.

6.3.2.5 Termination in Relation to the Specific Breach Relied upon

In addition to the requirement that only serious breaches allow for termination of a contract, it is also necessary for the party who terminated the agreement to establish that the breach in question was actually the motivating factor for the termination. This has been expressed by a BAT arbitrator as follows:

> […] it would be necessary for the Respondent to demonstrate that:
>
> (i) the breach of contract was sufficiently serious so as to constitute a repudiatory breach of contract (in the sense of providing the aggrieved party with the right to terminate the contract); and
> (ii) the Contract was terminated on the basis of the Claimant's repudiatory breach of contract (and not for some other reason).
>
> […] The Arbitrator also notes that the Termination Letter dated 28 April 2013 pursuant to which the Respondent terminated the Contract does not mention any of the Alleged Breaches (or indeed any misconduct on the part of the Claimant).
>
> Moreover, the Respondent has not provided any documentary evidence of notice being given to, or concerns being raised with, the Claimant in relation to any of the Alleged Breaches (or the Claimant's conduct more generally), despite being specifically requested for such evidence in the First Procedural Order. Therefore, based on the evidence before him, the Arbitrator accepts the Claimant's assertion that the Respondent first raised concerns in writing about the Alleged Breaches in its Answer, submitted in the course of these proceedings.
>
> In these circumstances, the Arbitrator finds that the Contract was not terminated on the basis of the Alleged Breaches committed by the Claimant (which in any event are not capable of constituting repudiatory breaches of contract).[163]

6.3.2.6 Ancillary Claims

BAT arbitrations often feature claims for payments in addition to the specified salary of the player or coach. In order to succeed with any such claims, parties will be required to produce directly relevant evidence and to specify and substantiate each of their claims. Furthermore, it should be kept in mind that BAT has established a particularly high threshold when it comes to amounts claimed for damages to a party's reputation.

a. Requirement of Specificity/Substantiation

For each and every claim of a party, the BAT requires: (i) directly relevant evidence; and (ii) specificity and substantiation.

[163] Ibid., paras 55 and 62–64.

This has been described as follows:

> In line with consistent jurisprudence of BAT, the claimant must prove the existence and the quantum of the damage claimed.[164]

By way of example, a 2014 case involved a request for a lump sum payment covering items as diverse as 'economic damages', 'employment damages', 'reputational damages' and 'tax damages'.[165] Despite being invited by the Arbitrator to "*'specify exactly' how the lump sum [was] calculated/composed in relation to the different heads of damages claimed*" the coach failed to do so. As a result, the BAT Arbitrator held that:

> This claim is unsubstantiated. In particular, Claimant has not submitted in what respect and in what amount he suffers damages. […] The same is true for all other heads of damages the Coach claims. […] Claimant alludes to certain types of damages allegedly incurred, but only in vague terms and in effect failing to specify the individual heads of damages or to provide any meaningful calculation.[166]

Furthermore, any claims submitted by the parties must be supported by clear and convincing evidence which proves not only the existence of the claim, but also the precise amounts in question.[167] That being said, there may be exceptions to this rule in situations where a party faces challenges in providing an exact calculation of damages:

> In that relation, it is noteworthy that it is not uncommon under rules and principles of damage law, to allow a judge or arbitrator some discretion in evaluating the quantum of the damage if the exact amount cannot be established because the nature of the damage or the circumstances render the proof particularly difficult, providing the claiming party substantiates the facts leading to the existence of the damage and gives certain indications as to the quantum.
>
> Furthermore, in keeping with the jurisprudence of the BAT, the Arbitrator finds that the ex aequo et bono clause in the Contract allows for a special indemnity to be fixed as compensation for damages, in order to adequately compensate a party that has convincingly evidenced the existence of damages, while at the same time its nature and/or the particular factual circumstances surrounding the damaging event(s) make the substantiation of the amount difficult or impossible.[168]

It is important to note, however, that even in circumstances where the arbitrator exercises his or her discretion, the amount fixed shall be compensatory rather than punitive and:

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[164]BAT 0345/12, *FC Bayern München e.V. v. Foster*, Award of 20 March 2013, para 83.

[165]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM)* et al.

[166]Ibid., paras 118–122.

[167]See BAT 0502/14, *Banic v. Unics Kazan Basketball Club*, where the five invoices produced did not correspond to the timing of the player's medical treatment, nor to the amounts charged for it. The arbitrator held that he was "*not able to determine how the Player arrived at the amount claimed and whether he is entitled to any reimbursement. The Arbitrator finds that the claim for reimbursement of medical expenses is unsubstantiated and rejects the Player's request*" (paras 107–109).

[168]BAT 0334/12, *Scafati Basket v. Marigney*, Award of 27 March 2013, paras 78–79.

> […] shall be determined with the aim of estimating an amount which is as close as possible to what the actual damage suffered was, bearing in mind all the relevant facts and evidence.[169]

b. Damages to Reputation

With respect to reputational damages claims, the BAT has established a high threshold, both in terms of the damage which can be held to be compensable and the evidence required to establish it.

As to the former, it has been stated that:

> In respect of Claimant's claim pertaining to immaterial damage, loss of reputation, honour and public image, the Arbitrator only notes as follows: In principle, national legislations are rather restrictive in awarding immaterial damages. The underlying idea is that – in principle – there is no rational standard for calculating such damages. Of course, there are plenty of exceptions to this rule. In particular inasmuch as fundamental legal interests are concerned (life, health, physical, safety, freedom of movement, sexual self-determination etc.), most jurisdictions will allow for some kind of compensation of immaterial damage.
>
> The Arbitrator finds that – absent any specific provision in the Contract and deciding ex aequo et bono – restrictive principles should apply when it comes to compensation of immaterial damages. In the case at hand, Claimant submits that he suffered damages in relation to his reputation, honour and public image. The Arbitrator finds that quite frequently unlawful behaviour of the contractual partner will result in a reputational damage. However, the damage to someone's reputation and honour must be of serious impact, beyond what is seen as normal, in order to qualify as existential impairment. […]
>
> In any event, the Arbitrator finds that the Respondents' behaviour was not such as to have reasonably caused a serious impairment of Claimant's life that would warrant a compensation. Thus, the respective claim is dismissed.[170]

With respect to a club's claim for such damages,[171] another award held that:

> It is true that if the exact amount of damages cannot be established, the Arbitrator shall assess them in his discretion, but it is still up to the claiming party to demonstrate the facts leading to the asserted loss and give certain indications about the quantum of the loss. […] the Arbitrator finds no documentary support of Claimant's allegation that the Club's image was affected and how such loss of reputation should be measured.[172]

[169]Ibid., para 86.

[170]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM) et al.*, paras 123–125.

[171]The club suggested that it suffered negative effects with respect to its "*image with the supporters, the media and the world of basketball*" (see BAT 0093/10, *ASD Pallacanestro Femminile Schio v. Braxton*, Award of 11 October 2010, paras 79–82).

[172]Ibid.

Such an approach has been followed in various other cases such as BAT 0298/12,[173] BAT 0212/11,[174] BAT 0584/14,[175] BAT 0543/14,[176] and BAT 0190/11.[177]

Finally, as shown in the award in FAT 0040/09, causation must be established before any claim for reputational damages can be accepted:

> With respect to the "punitive" damages requested by the Player as compensation for the possible negative effect on her reputation and contractual opportunities in Turkey caused by the article posted on Internet, the Arbitrator finds there is no evidence that the Club was involved in any manner with the publication of the article in question and cannot therefore in all fairness be deemed responsible. Accordingly, the corresponding claim for compensation by the Player is rejected.[178]

6.3.2.7 The Duty to Mitigate and Other Defences

Finally, it is worth noting two common responses to claims: (i) the duty to mitigate; and (ii) hardship or economic difficulties. While the former response is consistently upheld and applied by the BAT, the latter holds little weight as a justification for the failure to pay players and coaches.

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[173]Where it was held at para 120 that: "*the Arbitrator finds that there is insufficient evidence of her image and reputation having suffered in a durable manner for any amount of compensation to be awarded in that connection*".

[174]Where it was held at para 49 that: "*The Claimant seeks image damages. The Arbitrator finds that this claim is not well founded. Apart from the fact that no proof has been adduced to support this claim, it is clear from the fact that the Claimant's reputation and skill have been recognised by Spartak Moscow for the 2011-2012 season that her reputation and image have not been adversely affected by the Respondent's actions*".

[175]Where it was held at para 83 that: "*With respect to the Coach claim for moral damages, the Arbitrator finds that the Coach has not established that his image or reputation suffered in any manner from his replacement by another coach, among others because it is frequent in team sports for a coach to be replaced for the sake of seeking new synergies, or proven the existence of any causality between the termination and any form of lost profit or other financial damage. Consequently, the claim for moral damages will be rejected*".

[176]Where it was held at para 52 that: "*With regard to the damages claimed by the Player for moral prejudice, the Arbitrator finds that no moral prejudice or corresponding financial damage have been established by the Player, and that the circumstances do not indicate any prejudice to her career or reputation was caused by the Club, bearing in mind also, once again, that the Player herself chose not to even try and find a new contract abroad*".

[177]Where it was held at para 87 that: "*The Club requests that the Player must pay a penalty at the discretion of the Arbitrator because he damaged the reputation of the Club when he constantly disregarded the Coach's instructions. However, the Club does not specify, let alone prove, the asserted reputational damage any further. The Arbitrator finds that this counterclaim is unsubstantiated and must be dismissed*".

[178]*Hornbuckle et al. v. Besiktas Jimnastik Kulübü*, Award of 29 October 2009, para 73.

a. The Duty to Mitigate

The duty to mitigate is one of the most clearly established principles in the BAT case law:

> […] according to the consistent jurisprudence of the BAT,[179] a player is under the duty to take all reasonable steps to mitigate the damage. Therefore, any other payments a player received (or might have – acting with due care – received) during the contractual period for which compensation is sought must be deducted from the amount claimed as damages.[180]

> […] a player or a coach whose contract has been prematurely terminated has an obligation to mitigate the damage of the Club. They must actively look out for a new source of income and may not remain passive.[181]

As to the duty of a player to mitigate her or his damages, the BAT has noted that:

> Another exception [to a guaranteed salary] concerns a player's duty to mitigate his damages. It has been consistent jurisprudence by the BAT based on generally accepted principles of the law of damages and also labour law that after an unjustified termination of the player contract by the club, the player has an obligation to take reasonable efforts to find a new club and that his alternative earnings shall be deducted from the compensation otherwise due by the club.[182] A player shall not profit from the early termination of the player contract but rather be put into the same economic situation as if that player contract would have correctly been fulfilled. The Arbitrator shall thus award the sum which would restore the injured party into the economic position that such party expected from performance of the contract. On the other hand, the injured party is obliged to mitigate the damage. In addition, any advantages which the injured party may have gained as a consequence of the breach (e.g. salaries otherwise earned) must be taken into account when calculating the compensation due.[183] The Arbitrator concludes that the Player must accept that the income he earned with [his new club] during the remaining season 2014/2015 shall be deducted from the compensation due by the Club. This alternative income concerns any earnings agreed between the Player and his new club, including bonus payments.[184]

BAT arbitrators will take into account various factors in assessing whether a player has adequately mitigated his or her position including (but not limited to): whether the player was under time pressure to conclude a new agreement due to the timing of the termination;[185] whether the player has provided sufficient infor-

[179]Referring to BAT 0129/10; FAT 0043/09.

[180]BAT 0155/11, *Kikowski v. KK Union Olimpija Ljubljana*, Award of 8 August 2011, para 8.

[181]See BAT 0257/12, *Orlando & DoubleB Management sas v. Besiktas Jimnastik Kulubu Dernegi*, Award of 3 August 2012, para 71.

[182]Referring to FAT 0005/08 p. 19; FAT 0014/08, para 68; FAT 0024/08, para 48–50; BAT 0237/11, para 56–59; BAT 0289/12, para 44; BAT 0535/14, para 53.

[183]Referring to FAT 0014/08, para 68.

[184]See BAT 0644/15, *Vougioukas v. Galatasaray Spor Kulübü Dernegi*, paras 33–34.

[185]See, for example, BAT 0501/14, *De Mondt & Stainier v. Kayseri Kaski Spor Kulübü*, Award of 14 August 2014; BAT 0497/13, *Jonusas & UAB East Players v. Basket Juvecaserta s.r.l.*, Award of 1 July 2014, para 65.

mation about his or her negotiations with other clubs and efforts to conclude a new contract (and, if so, what those efforts were);[186] and whether the player was forced for some reason to enter into a contract with inferior financial conditions or should have made greater efforts to conclude a contract with higher financial compensation.[187]

With regard to coaches, the BAT has recognized that "it may be more difficult for coaches to find alternative employment than for players".[188] BAT Arbitrators will, nevertheless, also look into factors such as: the timing of the termination (i.e. whether it is before the start of the season and, if not, the remaining time under the contract);[189] whether the coach has a "credible explanation" for agreeing to a significantly lower salary;[190] and whether the coach has submitted any evidence "to suggest that he attempted to obtain a higher salary".[191]

Finally, it is worth noting that even an express contractual provision suggesting that there is no duty to mitigate may not be accepted as binding by the BAT:

> This raises the question of whether the wording of a contract must always be decisive in determining the parties' respective rights and obligations or whether the circumstances surrounding its execution and performance as well as principles of fairness may sometimes lead to a different result.
>
> As noted in a prior BAT case (BAT 0421/13), in which a practically identical exclusion of the duty to mitigate and right to offset was contractually stipulated, in principle the clear wording of a contract is to be upheld.

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[186]See, for example, BAT 0501/14*, De Mondt & Stainier v. Kayseri Kaski Spor Kulübü*. See also BAT 0303/12, *Markota & Xl Agency v. Union Olimpija Ljubljana*, Award of 8 May 2013, para 79: "*It is simply not sufficient for a player to spend well over half a professional season playing for the sake of playing, yet take no steps to mitigate his financial position*". See also BAT 0385/13, *Liatsos & Antoniou v. BC AEL Limassol*, Award of 22 January 2014, para 59.

[187]See, for example, BAT 0501/14, *De Mondt & Stainier v. Kayseri Kaski Spor Kulübü*; FAT 0024/08, *Sakellariou & Dimitropoulos v. Avellino*, Award of 11 May 2009, paras 48–49: "*In view of Claimant 1's admitted skills and potential, the Arbitrator holds that Claimant 1 should have made further efforts to find a new employment, even with terms substantially lower than in the Contract, instead of returning to an amateur level within less than one month after his release from the Contract. Indeed, Claimant 1 did not present any explanation why a promising young player receiving a monthly salary of EUR 4000 at the beginning of the season accepts shortly thereafter to join an amateur club and to render his services for more than six months in return of no salary at all*".

[188]BAT 0542/14, *Pancotto v. Felice Scandone SpA*, para 59. See also BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM)* et al., para 115, referring to BAT 0256/12, para 170; BAT 0231/11, para 67: "*it is notoriously difficult for a (assistant) coach to find a coaching position during an ongoing basketball season*"; and BAT 0256/12, paras 169–170: "*mitigation is much more difficult for a coach than a player. A team needs many players, but only one head coach. Thus, Claimant 1 would certainly not find it easy to readily secure alternative employment*".

[189]BAT 0631/14, *Valdeolmillos Moreno v. Comité Olímpico Mexicano (COM)* et al., para 115.

[190]BAT 0542/14, *Pancotto v. SS Felice Scandone SpA*, para 58.

[191]Ibid., paras 58–59.

> However, in many legal systems and to different degrees, a contractual clause which is unfair due to the circumstances in which it was negotiated or which produces unfair consequences due to changes in circumstances (under the principle "rebus sic stantibus") may sometimes be deemed invalid or its consequences tempered by the courts examining the circumstances. Furthermore, in a number of legal systems, e.g. under Swiss law, when interpreting a contractual provisions in light of all the circumstances, the wording of the contract is an important but not the only element which must be examined and weighed in seeking what the true intention of the parties was, i.e. in determining whether and in what manner there was a meeting of the minds.
>
> In addition, in this case the parties to the Agreement expressly agreed that any dispute in front of the BAT must be decided "ex aequo et bono", which means that even if the wording of a contractual provision is clear, its content may nevertheless in certain circumstances be deemed intrinsically unfair and unjust.
>
> Bearing in mind the foregoing legal context and principles, which assist the Arbitrator in his ex aequo et bono assessment of the case, the Arbitrator has some doubt regarding whether an advance, complete and unconditional exclusion of the duty to mitigate and of the right for a club to request the offset of any amounts earned by a player under a new contract with another club for the exact same period of time (the latter exclusion being much more far reaching), is in keeping with the rationale of an employment contract in the field of sport, in terms of basic fairness/balance of consideration.
>
> Indeed, an employment contract of the sort is not a commercial contract entered into for pure profit; it is intended to ensure a fair remuneration in exchange for a player's duty to perform as best as possible as an athlete. Moreover, athletes often earn high salaries for their performance, and contracts such as the Agreement which are fully guaranteed already offer a significant degree of protection to the player. Therefore, unless the complete and unconditional exclusion of the duty to mitigate damages and of the right to set off duplicated earnings is interpreted to be a form of sanction for an abusive termination, it is not easy to consider that a clause of such type equitably fits with a contract of this nature.
>
> Thus, the Arbitrator finds that, except where strong evidence is adduced that the parties to a fully-guaranteed player's contract discussed, understood and accepted all the consequences of such a far-reaching exclusion, it may not be automatically upheld as expressing the clear common intent of the parties, and its fairness may be evaluated ex aequo et bono in light of all the circumstances of the particular case, e.g. taking into consideration in what manner the contract was negotiated, in what manner it was terminated and by which party, in what financial and personal (for the player) position the respective parties were at the time, what financial and other impact the termination had on each of them, how easy it was/would have been for the player to find a new contract without suffering other possible consequences in terms of reputation/convenience, how much money is involved overall, etc.[192]

b. Defences Based on Economic Difficulties

Finally, in disputes arising from the non-payment of players, BAT arbitrators have shown an unwillingness to accept financial difficulties as a defence.[193]

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[192]BAT 0535/14, *Daniels v. Liaoning Hengye Basketball Club*, paras 48–54.

[193]See, for example, BAT 0258/12, *Entersport v. Men's Basketball Club Dynamo Moscow*, Award of 25 June 2012, para 43: "*The alleged economic difficulties are certainly regrettable but they do not release the Club from its contractual obligations*", and BAT 0242/11, *Vrbanc v. KK Cibona Zagreb*, Award of 31 August 2012, para 48: "*financial difficulties faced by a club is no defence to a claim by a player for unpaid and overdue salary payments*".

Indeed, in a case in which the club's defence was based on financial hardship caused by the global economic crisis, the arbitrator held that this was neither unforeseeable when concluding a contract, nor was there any 'good faith' requirement for a player to reduce his salary where a club's financial situation had changed dramatically:

> With regard to the Respondent's submissions as to the application of the cited provisions of the [Greek Civil Code] in this case more generally, and again without needing to make formal findings on these points based on national law in light of his obligation to decide this dispute ex aequo et bono, the Arbitrator:
>
> - is not persuaded that a global financial crisis, a national recession, or financial difficulties particular to a specific person or organization, are necessarily extraordinary or unforeseeable; and
> - is not persuaded that any requirement of good faith between a player and his club would require the player to accept reduced payments or would excuse the club for making reduced payments simply because the club's financial circumstances had changed, even if they had changed dramatically.[194]

Further, the arbitrator held that it was not necessary to decide such cases on the basis of national law or the UNIDROIT Principles[195] as the BAT jurisprudence on the subject was both well-established and appropriate:

> It is well established in BAT jurisprudence that financial difficulties faced by a club provide no defence to a claim by a player for salary payments which are due and unpaid. The Arbitrator does not find that the Respondent's submissions on this point in relation to Greek law and other principles help him to reach a conclusion in this case which departs from the BAT jurisprudence. As explained above, the Arbitrator must decide this dispute ex aequo et bono, and that is what he has done. The Arbitrator finds that the existing BAT jurisprudence applies in this case. In disputes before the BAT, financial hardship – even if caused by a global or national financial crisis – is not a defence or answer to claims for amounts due and unpaid under contracts.[196]

Finally, BAT arbitrators have held that it is a player's right not to accept payment by instalments in such cases:

> The Respondent has proposed that it might pay the Claimant the money it owes him in instalments. The Arbitrator is unaware of any attempt having been made to do so to date. The Arbitrator notes the Claimant's statement that the letter in which that arrangement was proposed (i.e. the Respondent's response to the Procedural Order) was the first time the Respondent suggested such an arrangement in a lengthy period of correspondence, and that in the circumstances the Claimant declines to agree to such an arrangement. That is the Claimant's right.[197]

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[194]See BAT 0314/12, *Papaloukas v. Olympiakos*, Award of 15 July 2013, para 76.

[195]UNIDROIT Principles of International Commercial Contracts 2010 (http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.).

[196]BAT 0314/12, *Papaloukas v. Olympiakos*, paras 76–78.

[197]See BAT 0350/12, *Labovic v. BC Krasnye Krylia Samara*, Award of 10 June 2013, para 44. See also BAT 0166/11, *Fox v. BC Kalev Cramo*, Award of 17 August 2011, para 46.

With that said, one could imagine a situation in which a player's outright refusal to accept (only marginally) late payment by way of instalments could be held to be unreasonable in the circumstances. Thus, players should approach termination of a contract cautiously in such cases.[198]

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[198]For example see BAT 0383/13, *Dikeoulakos* et al. *v. CSM Targoviste*, para 79 (as discussed above).