



Basketball Arbitral Tribunal (BAT) as a ‘lawmaker’: the creation of global standards of basketball contracts through consistent arbitral decision-making

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Abstract

The ‘lawmaking’ of arbitral institutions has been a recurring issue in international arbitration. It is widely accepted that international arbitral tribunals do not have a *forum*, thus are relatively autonomous from the legal orders constituted by the states. Nevertheless, their adjudicative powers are always limited by the concept of international (transnational) public policy. Due to that arbitral institutions often aim at the creation of a consistent jurisprudence based on the universally accepted general principles of law. This has also been true for sport arbitration, where the ‘supreme court’ for sport CAS developed a set of principles called *lex sportiva*, governing transnational sport competition. Nonetheless, in sport, also BAT—established to solve contractual disputes in basketball—has become a true ‘lawmaker’. The uniqueness of BAT arbitration creates vast opportunities to unveil the general principles of law governing contractual relations in basketball. At the heart of it lies the default decisional standard *ex aequo et bono* that allows arbitrators for a certain degree of flexibility in their decision-making. In addition, a simple and flexible procedure equips them with a unique power over arbitration process. Finally, the voluntary character of BAT arbitration (unparalleled in sport arbitration) and its popularity within the basketball community reinforces arbitrators’ mandate to decide what is just and fair in basketball contracts. Due to that BAT established a significant presence in the landscape of sport arbitration and contributed to the development of contractual standards that global basketball relies on.

Keywords BAT · Sports arbitration · *Ex aequo et bono* · Arbitral lawmaking · International public policy · General principles of law

1 The *Leitmotiv*¹ of the creation of BAT

1.1 Ensuring the respect for basketball contracts

Ensuring the respect for the contract² has been a recurring issue in globalized basketball.³ In the post-Bosman era,

when the free movement of labour and services has become an everyday reality in sport, a significant number of players and coaches—with the substantial assistance of their agents—have been concluding employment contracts with

¹ This German word, literally meaning ‘the keynote’, seems to be the best fit to describe the idea underlying the creation of BAT, since BAT is the brainchild of Dr. Dirk-Reiner Martens, distinguished German sports attorney, a long-time CAS arbitrator and legal adviser of FIBA. See Blackshaw (2009), p. 65.

² Firstly and primarily discussed problem has been related to non-payment of salaries to foreign basketball players, coaches and agents. In particular, as American authors have been highlighting, it relates to the Americans that flood the international basketball market. Nonetheless, also the other nations have been affected. See Olenick et al. (2013), p. 1–2; Anthony (2013), p. 36.

³ Basketball is a truly globalized sport, well-known in most parts of the world, with over one billion fans, thus also one of the biggest beneficiaries of a free movement in sports. See Pledge Sports, 10 June 2017. <https://www.pledgesports.org/2017/06/10-most-popular-sport-s-in-the-world/>. Accessed 28 September 2018.

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basketball clubs worldwide. Different origins, legal backgrounds and bargaining power of the parties to basketball contracts led to a lack of equality of rights—both substantive and procedural—between them, which eventually became an issue. The basketball clubs have been frequently taking advantage of this situation and abusing their rights. The tendency not to respect the contracts with the players, coaches and agents became apparent.⁴ The basic foothold enabling the clubs to avoid their contractual obligations were the idiosyncrasies of national legal systems that worked to an advantage of the clubs and disadvantage to the international basketball players, coaches and their agents. Under one scenario, the mandatory national laws—often unknown to the players, coaches and agents—were taking over mutually agreed contractual provisions, as it was the law of the country where the basketball club was located that was chosen by default to govern the contractual relation.⁵ Under another, the most common one, the basketball clubs were assuming—usually correctly—that the complicated, foreign-language, long-lasting and often also costly local court proceedings would discourage their international employees to engage in litigation.⁶ In short, both the lack of specific legal knowledge and experience of the players, coaches and their agents, and the practical difficulties of taking a legal action in a foreign country contributed to an unfair advantage of the club. Thus, the credibility of global basketball market became questionable and dependent upon the existence of an effective system that could entrench the respect for the contract.

In order to answer this weighty problem, FIBA (*Fédération Internationale de Basketball*), the Swiss-based world basketball governing body,⁷ decided to step in. As a result,

⁴ In the early 2000s, a prominent basketball agent estimated that approximately 40% of all player contracts were breached. See Anthony (2013), p. 37. Said tendency had been especially visible among the clubs in Eastern and South-Eastern Europe. See Martens (2011), p. 57.

⁵ The provisions of Greek law may be used as an example. See Zagklis (2015a), p. 185.

⁶ An American basketball agent had spent nine years fighting one of the French teams for an outstanding amount of USD 150,000 for one of his clients in a French court. Another, even more remarkable example, is the one of NBA Hall of Fame member Dominique Wilkins, whom one of the Italian clubs was avoiding to pay the sum of USD 2.5 million, being aware of the complications of litigating for the claim in Italian courts. See Rosen D., For Americans Overseas, a Referee for Paychecks, 5 February 2011. <https://www.nytimes.com/2011/02/06/sports/basketball/06fiba.html>. Accessed 28 September 2018.

⁷ Under the traditional European model of sport FIBA has been granted a monopolistic position in basketball. Nevertheless said position is being challenged on the basis of EU Competition Law and currently there is an on-going governance conflict. See more Engelhard A., Milanovic L., An Overview of the Dispute Between FIBA & Euroleague—Is There an End in Sight?, 28 February 2018. <https://www.lawinsport.com/topics/articles/item/an-overview-of-the-dispute-between-fiba-euroleague-is-there-an-end-in-sight>. Accessed 28 September 2018.

the Basketball Arbitral Tribunal (BAT) was set up in 2007.⁸ Interestingly, the idea for creating BAT was triggered at a meeting with basketball agents. In return for the agents' regulations introduced by FIBA, imposing certain restrictions on the profession, the agents requested a dispute settlement mechanism that would '*compel the parties to players' contracts to adhere to these contracts*'.⁹ The key components of BAT—known as its 'mission statement'¹⁰—were enacted in Book 3, Chapter VIII, Section: General Principles, of FIBA Internal Regulations (FIBA IR). As Article 3-320 FIBA IR states:

FIBA established an independent tribunal, named the Basketball Arbitral Tribunal (BAT) for the simple, quick and inexpensive resolution of disputes arising within the world of basketball in which FIBA, its Zones, or their respective divisions are not directly involved and with respect to which the parties to the dispute have agreed in writing to submit the same to the BAT.

Thereafter, according to Article 3-322 FIBA IR: '*The BAT is primarily designed to resolve the disputes between the clubs, players and agents*'. Finally, in the Article 3-323 FIBA IR, it is recommended for the following arbitration clause to be included in basketball contracts—that in fact have been consistently done:

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

Footnote 7 (continued)

[://www.lawinsport.com/topics/articles/item/an-overview-of-the-dispute-between-fiba-euroleague-is-there-an-end-in-sight](https://www.lawinsport.com/topics/articles/item/an-overview-of-the-dispute-between-fiba-euroleague-is-there-an-end-in-sight). Accessed 28 September 2018; Montejó M., FIBA/Euroleague: Basketball's EU Competition Law Champions League-first leg in the Landgericht München, 15 June 2016. <http://www.asser.nl/SportsLaw/Blog/post/fiba-euroleague-basketball-s-eu-competition-law-champions-league-first-leg-in-the-landgericht-munchen-by-marine-montejo>. Accessed 28 September 2018.

⁸ See FIBA, BAT Presentation. <http://www.fiba.basketball/bat>. Accessed 28 September 2018; Martens Rechtsanwälte, Basketball Arbitral Tribunal, <http://martens-lawyers.com/en/basketball-arbitral-tribunal-en/>. Accessed 28 September 2018.

⁹ See Interview with Dirk-Reiner Martens. <http://martens-lawyers.com/en/interview-en/>. Accessed 28 September 2018.

¹⁰ Martens (2011), p. 54.

In principle, FIBA—in contrast, e.g. to FIFA—has opted for a ‘stay-away’ approach in relation to basketball employment contracts.¹¹ FIBA IR has neither imposed the content of the contracts, nor the choice of the dispute resolution mechanism. On the one hand, the players/coaches and the clubs can relatively freely decide about the form and terms of their contractual relationship. FIBA merely suggests the main points to be covered in the employment contract.¹² On the other—what should be emphasized—BAT’s jurisdiction is based on a completely voluntary agreement. FIBA only sets up the recommendation in this regard. This approach, despite being rather unique in the world of sport—since the global sport governing bodies lean towards imposing the arbitration clauses and even certain terms of the contracts, without true consent of the parties involved¹³—has turned out to be extremely successful. The main reason behind that was the wide acceptance of BAT on the basketball market. Despite vast majority of the cases so far were filed by the players, coaches and their agents,¹⁴ the basketball clubs have also used BAT against the adverse parties, failing to honour the contracts. As the mastermind staying behind BAT’s idea—Dr. Dirk-Reiner Martens—once encapsulated: ‘*This is not a court which is designed to help players; it is a court designed to help both sides to see the contracts respected*’.¹⁵ The objectives set out by FIBA led—through the legal practice of BAT—to the significant improvement in the credibility of the basketball market. In this regard, FIBA has proven to be able to fulfil well its governing role in the area of basketball.

The aforementioned foundations of BAT laid down by FIBA have been oriented at making it a fully independent body. Nonetheless, the basketball world governing body managed to secure certain basic influence over the functioning of BAT. Firstly, its impact on BAT is reflected in the Article 3-328 FIBA IR, empowering the FIBA Central

Board to appoint, for a renewable term of four (4) years the BAT President and BAT Vice President who play the decisive roles in BAT.¹⁶ Among number of functions assigned to the BAT President under Article 3-330 FIBA IR¹⁷ and BAT Arbitration Rules¹⁸ (BAT Rules), one of the key, specified in Article 3-330(b) FIBA IR, is the responsibility in establishing a list of at least five (5) BAT arbitrators for a renewable term of two (2) years and to (re-) appoint BAT arbitrators or remove them from the list.¹⁹ Secondly, according to Article 3-325 FIBA IR, FIBA’s Legal Commission is entitled to propose—alongside to BAT Secretariat—changes to the BAT Rules. Thereafter, the BAT President is empowered to approve these changes. Thirdly, what seems to be of a major importance for BAT to properly fulfil its mission, the Articles 3-331–3-333 FIBA IR provide for an independent enforcement system in support of honouring BAT awards. As a result, even though BAT was designed to be autonomous, FIBA’s role not only as the creator of BAT, but also as the guarantor of BAT’s authority, inevitably denotes certain anchoring of BAT within the institutional system of FIBA.²⁰

¹¹ In order to preserve the respect for contracts and contractual stability in football, FIFA takes relatively interventionist approach. The system is built on the Regulations on the Status and Transfer of Players (FIFA RSTP), which strictly regulate the contractual relationship between the players and clubs. Disputes are automatically referred to the internal dispute resolution system: the FIFA Dispute Resolution Chamber (FIFA DRC), that is supplemented by an appeal path to the Court of Arbitration for Sport (CAS). See Zagklis (2015a), p. 184.

¹² See Appendix 3 to Book 3 of the FIBA IR. <http://www.fiba.basketball/internal-regulations/book3/players-and-officials.pdf>. Accessed 28 September 2018.

¹³ See more Freeburn (2018), pp. 1–3.

¹⁴ One prominent basketball agent declared in 2011 that, by then, 99% of his clients had BAT clause in their contracts. See Rosen, *supra* n. 6.

¹⁵ See D-R. Martens [in:] Rosen, *supra* n. 6.

¹⁶ In general, according to Article 3-329 FIBA IR and Article 0.4 BAT Rules BAT, Vice President shall substitute for BAT President in case of latter’s inability to exercise the functions assigned to him under the BAT Rules, including instances of conflict of interest.

¹⁷ According to Article 3-330 FIBA IR, BAT President shall have the following duties: (a) ensuring proper functioning of BAT, among others, by setting up administrative guidelines and by approving amendments to BAT Rules, (b) establishing list of BAT arbitrators, (c) appointing arbitrators to individual cases, (d) establishing system of remuneration for BAT arbitrators, (e) the exercise other functions assigned by BAT Rules. See FIBA IR, Book 3, Chapter VIII. <http://www.fiba.basketball/fiba-internal-regulations-governing-the-bat-chapter-viii.pdf>. Accessed 28 September 2018.

¹⁸ Articles 0.2 and 8.1 (appointing arbitrators), 8.3 (ruling on the arbitrators challenges), 11.1 (*prima facie* determination if arbitration can proceed), 14.1 (deciding on the withdrawal of the Request for Arbitration), 16.1 (scrutiny of BAT awards and facilitating the development of case law), 16.4 (deciding on the confidentiality of the award), 17.1 (determining the applicable handling fee), 17.2 (determining the final amount of costs of arbitration) BAT Rules. See BAT Rules, 1 January 2017. <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>. Accessed 28 September 2018.

¹⁹ Currently BAT is composed of BAT President, BAT Vice President and 8 arbitrators, having roots in different jurisdictions, both in civil and common law systems, as well as having knowledge and experience in the field of sport. See FIBA, Composition of the BAT. <http://www.fiba.basketball/bat/composition.pdf>. Accessed 28 September 2018.

²⁰ BAT was previously known as FIBA Arbitral Tribunal (FAT) and has been renamed as of 1 April 2011 in order to accentuate its independence. Martens (2011), p. 54.

1.2 BAT as an innovative model of sports arbitration

The unprecedented success of BAT undeniably results from its innovative character. As Ian Blackshaw remarked: ‘*BAT is proving to be an effective and, therefore, popular body for resolving disputes in sport of basketball and, perhaps, this winning formula/model may be adopted by other sport bodies for the settlement of their disputes*’.²¹ In short, the mission of a cutting-edge arbitration model introduced with the establishment of BAT is presented as ‘*simplifying the dispute resolution system while ensuring a fair outcome*’.²² That is reflected in BAT Rules, where a number of built-in features designed to facilitate simple, quick, cost-effective and—most importantly—just dispute resolution, are contained.

The foundation for the BAT’s innovative model is grounded in the Swiss arbitration law. According to both the Article 3-326 FIBA IR and Article 2.2 BAT Rules, the seat of BAT shall be Geneva, Switzerland, and the arbitration proceedings before the BAT shall be governed by Chapter 12 of the Swiss Act on Private International Law (PILA), irrespective of parties’ domicile.²³ Chapter 12 PILA, related to international arbitration, is recognized for its liberal and arbitration-friendly character. It stands out for respect of parties’ autonomy, in particular by providing wide arbitrability of disputes, enabling the determination of the arbitral procedure whilst ensuring the due process requirements, giving the flexibility in the matter of law applicable to the merits of the dispute and limiting the possibility of review of arbitral awards by the courts.²⁴ All these features have been beneficially applied in BAT’s arbitration model. In practice, the use of BAT innovation to the full advantage of the parties to the basketball contract is dependent upon implementing the recommended standard arbitration clause, as provided both by the aforementioned Article 3-323 FIBA IR and Article 0.3 BAT Rules.

In regard to arbitrability of the disputes, BAT is primarily designed to resolve disputes between clubs, players, coaches and agents, in which FIBA is not directly involved. Thus, the majority of the legal disputes to be decided are related to the employment contracts that are not arbitrable under many national legal systems. However, in Switzerland, under

Article 177 (1) PILA, any disputes of ‘*financial interest*’ may be the subject of arbitration.

The arbitral procedure is governed by the BAT Rules, most recently updated on 1 January 2017, enacted within the framework of Chapter 12 PILA. Parties wishing to benefit fully from the BAT model need to recognize the BAT Rules. As a consequence, the BAT arbitration proceedings shall be conducted before a sole arbitrator appointed by the BAT President, in writing, in principle in the English language. The exchange of the correspondence within the arbitral proceedings is desired to be made paperless, namely by e-mail. Furthermore, the arbitrator appointed to solve the dispute is equipped, under a number of BAT Rules,²⁵ with a high level of procedural discretion, subject only to the limits related to action for annulment of the award, specified in the Article 190 of PILA. Said features are considered to be the main reason for a relative speed of the BAT proceedings, that last usually between 6 and 7 months.²⁶

BAT arbitration is fully self-financed, as it relies on the financial contribution of the parties. Payment of a non-reimbursable handling fee and advance of costs that are set up in relation to the disputed amount, is a prerequisite for conducting the arbitration and delivering the award.²⁷ Furthermore, to keep the parties costs under control, BAT 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. Finally, to lower the costs and increase the speed of the arbitration, only the dispositive party of the

²¹ Blackshaw (2009), p. 67.

²² Hasler (2016), p. 113–114.

²³ Switzerland has a dualist model for arbitration—international governed by Chapter 12 PILA and domestic governed by Part 3 Civil Procedure Code. Domicile or habitual residence of the parties at the time of conclusion of arbitration agreement decides which model will be applied. See Hasler (2016), pp. 112–113.

²⁴ More about Switzerland as a leading place for international arbitration see Kaufmann-Kohler and Rigozzi (2015), paras. 1.86–1.172.

²⁵ Article 1.2 (power to refuse to start proceedings), Article 1.3 (power to rule on jurisdiction), Article 3.1. (power to determine the procedure), Articles 4.2 and 4.3 (power to hold proceedings in language different than English), Article 6.4 (power to designate third party to receive any notifications and communication), Article 6.5 (power to request electronic copies of submission), Article 7 (procedural time limits are set by the arbitrator), Article 9.3.1. (power to decide on parties shares in advance of costs), Article 9.3.3. (power to hold proceedings until the full amount of costs is paid), Article 10.1 (power of the Arbitrator to order for provisional and conservatory measures), Article 1.1. (power to decide on exchange of submissions), Article 12.2. (power to issue procedural orders, in particular in respect of production of evidence), Article 12.3 (power to attempt to bring settlement to dispute), Article 0.2. and 13 (power to decide about the hearings), Article 14.2 (power to proceed with arbitration if the respondent does not participate in proceedings), Article 16.3 (Arbitrator shall endeavour to render BAT award within 6 weeks after completion of proceedings), Article 16.4 (power to decide about the confidentiality of the award), Article 16.6 (power to accept the settlement), Article 17.3 (power to decide on costs) BAT Rules. See FIBA, BAT Rules, 1 January 2017. <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>. Accessed 28 September 2018.

²⁶ Hasler (2018), p. 102; Zagklis (2013), p. 103.

²⁷ See Articles 9.2, 9.3.3 and 17 BAT Rules. See FIBA, BAT Rules, 1 January 2017. <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>. Accessed 28 September 2018.

award is issued, in cases where the amount in dispute does not exceed EUR 100,000. Party of the arbitration, however, is entitled to receive the reasons for an award if it files a request to that and pays the respective advance of costs.²⁸ The above-mentioned features result in the moderate cost-value ratio of cases around 6%.²⁹

BAT arbitration is also characterized by a limited possibility of an appeal.³⁰ Namely, according to the Article 3-321 FIBA IR and Article 16.5 BAT Rules, BAT awards shall be final and binding upon communication to the parties.³¹ The initial version of BAT Rules provided as a default for two-stage proceedings, with a possibility of an appeal to Court of Arbitration for Sport (CAS), what was also reflected in the recommended arbitration clause.³² Nevertheless, said option was abolished in 2010 and since then any appeals have been dependent upon the will of the parties, that should be articulated in the redrafted arbitration clause. Thus, the BAT awards are subject only to an annulment action in the Swiss Federal Tribunal (SFT), in accordance with the Articles 190-191 PILA. Said action, however, is very limited as it allows for a review of certain procedural issues and—as a principle—does not go to the merits of the award itself, unless the arbitration outcome is incompatible with international public policy.³³ Furthermore, it is a cassation remedy, meaning that in principle, the SFT can only confirm or annul the award and shall not issue a new decision on the merits. Due to that, the filing of an annulment action does not automatically prevent the enforceability of the award.³⁴ Finally, the right to action for annulment may be expressly waived by the parties—in the so-called waiver agreement—available under the Article 192(1) PILA, what occasionally happens in relation to the BAT awards, mainly because the previous version of model arbitration clause—before the CAS appeals were eliminated—included such a waiver.³⁵

²⁸ See Article 16.1 and 16.2 BAT Rules. See FIBA, BAT Rules, 1 January 2017. <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>. Accessed 28 September 2018.

²⁹ Hasler (2018), p. 102.

³⁰ This feature is typical for arbitration in general, as it decides about the speed of arbitral proceedings that is considered to be one of the advantages of arbitration. See Kaufmann-Kohler and Rigozzi (2015), paras. 1.44 and 7.198.

³¹ According to Article 16.5 BAT Rules, the awards shall be final and binding upon communication to the parties. If the award cannot be communicated to the parties, the award shall be final and binding if and when published on the website of FIBA. See FIBA, BAT Rules, 1 January 2017. <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>. Accessed 28 September 2018.

³² Blackshaw (2009), p. 65; Martens (2011), p. 56.

³³ Kaufmann-Kohler and Rigozzi (2015), paras 2.69 and 7.89.

³⁴ *Ibid.*, paras. 8.03–8.205.

³⁵ Validity of one such agreement was upheld by SFT in 4A_232/2012, decision rendered on 29 May 2012, para. 2. See Hasler (2016), p. 129.

BAT awards, being in principle genuine arbitral awards, may be enforced under the New York Convention (NYC).³⁶ However, considering that under the Article V(2)(a) NYC 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, the problem may arise in relation to the arbitrability of employment contracts. Therefore, FIBA, under the Articles 3-331–3-333 of FIBA RL, created an internal enforcement mechanism that enables to impose the disciplinary sanctions on the party failing to honour the BAT award.³⁷ Such mechanism does not provide for ‘classical’ enforcement solutions known under national laws that allow for the direct execution of the sums of money adjudicated in the court verdict, but equips both FIBA and member national basketball federations with internal association law tools that enable indirect enforcement of the BAT’s awards.³⁸ FIBA intervenes only after the award was issued and only on the request of the party prevailing in the BAT arbitration. To date, due to monopolistic and hierarchical structure of world basketball under the governance of FIBA, said internal mechanism has been a primary source of the enforcement of the BAT’s awards.³⁹ It is worth noting, however, that despite being effective in majority of cases, the enforcement of the BAT’s awards through this system faced certain controversies, caused—as it may be supposed—by the inconsistent policy of FIBA.⁴⁰ What shall be definitely praised, however, is not only the Article 3-331 FIBA IR itself, but also its provision *in fine*, enabling FIBA to extend disciplinary sanctions ‘*to natural or legal persons which are directly or indirectly linked to the first party, either from legal or a sporting perspective*’, thus offering to the parties concerned

³⁶ Convention on Recognition and Enforcement of Foreign Arbitral Awards done in New York, 10 June 1958. <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>. Accessed 28 September 2018.

³⁷ See FIBA, FIBA IR, Book 3, Chapter VIII. <http://www.fiba.basketball/fiba-internal-regulations-governing-the-bat-chapter-viii.pdf>. Accessed 28 September 2018.

³⁸ Similar sanctioning system under FIFA regulations was confirmed by SFT in 4P_240/2006 rendered on 27 March 2012. See Martens 2011, p. 57.

³⁹ In reality NYC very rarely comes into play. According to the information obtained by the author of present paper during the lecture of Dr. Dirk-Reiner Martens at ISDE in Madrid on 15 December 2017, so far it was used only in relation to 4 cases.

⁴⁰ Said inconsistent policy relates in particular to the dilatoriness and arbitrariness in sanctioning the clubs failing to honour BAT awards, what often allows the clubs—due to the calendar of basketball competition—to avoid the burdens of the sanction, as the one being used most often in practice is ban on registration of new players. See e.g. Ntими Papadopoulou, Open Letter regarding BAT 0546/14, 7 January 2016. <https://www.sportando.com/en/europe/croatia/187991/open-letter-from-ntimi-papadopoulou-about-bat-award-between-kk-zadar-and-romeo-travis.html>. Accessed 28 September 2018.

a special legal tool tailored for sport, that in principle is not available under the national legal systems.

Undeniably, the defining feature of BAT arbitration, its hallmark and the key to understand its innovation—both in respect of simplicity of arbitration as well as fairness of its outcome—is the principle *ex aequo et bono* as a decisional standard applicable to the merits. In principle, Article 187(1) PILA allows the parties to international arbitration to authorize the arbitral tribunal to decide their dispute *ex aequo et bono*. The arbitration under number of national laws in various countries is not any different. Thus, *ex aequo et bono* is a decisional standard well known to arbitration in general. Moreover, it is a distinctive feature of arbitration, since the courts in principle do not rule *ex aequo et bono*.⁴¹ Said decisional standard is also available in sport arbitration, among others in CAS. Nevertheless, the CAS Code provides for *ex aequo et bono* only in the context of ordinary proceedings (Article R45 *in fine* CAS Code) and not in appeals proceedings (Article R58 CAS Code). Said difference is explained by the fundamental purpose of sports regulations, which is to guarantee equal treatment to athletes worldwide, while *ex aequo et bono* decisions are considered not to achieve this purpose as they would allow the arbitral tribunal to depart from the solutions imposed by these regulations.⁴² In CAS practice, however, on the one hand, it is accepted that the arbitral tribunal could decide *ex aequo et bono* also under the appeal procedure, if the parties so agree and/or if it is inserted in the rules of sport federation,⁴³ but on the other hand, it is not common to have disputes decided *ex aequo et bono* in ordinary cases.⁴⁴ Interestingly, the number of cases that CAS decided *ex aequo et bono* are related to appeals from the BAT awards,⁴⁵ since the original version of the BAT arbitration clause provided for such an appeal and the parties still remain free to provide for an appeal before CAS, despite the default wording of the current version of said clause has done away with this option.⁴⁶ What is unique about the BAT arbitration is that it is the first arbitral

institution in sports (and in general⁴⁷) to offer such a decisional standard not as optional for the parties of the arbitration, but as a default one. In other words, the *ex aequo et bono* is the applicable decisional standard, unless the parties expressly decide otherwise. According to the Article 15.1 BAT Rules:

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

And, moving forward, as the Article 15.2 BAT Rules indicates:

If according to the parties' agreement 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 choice, according to such rules of law he/she deems appropriate.

It needs to be emphasized, that BAT jurisprudence on the matter of law applicable to the merits indicates that the default position of *ex aequo et bono* standard in BAT Rules have influenced arbitrators decisions in applying it also in other ambiguous situations, in particular when the contract contains both a choice of law clause and an arbitration clause, each calling for a different law, which is quite common in basketball. In general, as the BAT practice shows, if BAT had been expressly chosen by the parties as a dispute resolution forum, *ex aequo et bono* is the applicable standard before that forum, unless clearly decided otherwise by the parties.⁴⁸

In the very beginning of BAT arbitration, the *ex aequo et bono* principle met with considerable scepticism in the legal profession.⁴⁹ Lawyers, that present a strong inclination to rely in their legal practice on strict rules, seemed to feel uncomfortable in basing their legal arguments on the concept they considered rather vague. In the practical perspective, however, the reference to *ex aequo et bono* instead of certain national laws simplified the substantive legal framework by delocalizing the dispute, enabling the arbitrator to focus on the contract itself and consider on what is equitable in regard to the circumstances of the case,

⁴¹ The courts rule *ex aequo et bono* exceptionally and only if the national law governing merits explicitly so provides, e.g. Swiss law, under Article 4 of Civil Code. See Kaufmann-Kohler and Rigozzi (2015), para. 7.65.

⁴² Kaufmann-Kohler and Rigozzi (2015), paras. 7.83–7.84.

⁴³ Mavromati and Reeb (2015), para. 133.

⁴⁴ *Ibid.*, paras. 76 and 133.

⁴⁵ See e.g. CAS 2013/A/3099, CAS 2013/A/3126, CAS 2013/A/3263, CAS 2014/A/3524, CAS 2015/A/4288, CAS 2016/A/4851. <http://jurisprudence.tas-cas.org>. Accessed 1 October 2018.

⁴⁶ Hasler (2016), p. 129.

⁴⁷ The unprecedented success of *ex aequo et bono* arbitration at BAT triggered the launch of Court of Innovative Arbitration (COIA) in September 2015. The rules of COIA, however, do not make *ex aequo et bono* the default decisional standard, but include an advance authorization for the tribunal to apply it absent a choice of law agreement by the parties. See Article 16 of COIA Arbitration Rules. <http://coia.org>. Accessed 13 February 2019.

⁴⁸ See more Hasler (2016), pp. 123–124.

⁴⁹ Martens (2011), p. 55.

instead of manoeuvring in the jungle of specific provisions that he/she was not familiar with and that would have to be otherwise. Thus, it not only shortened the decision-making process, but paradoxically ensured also the equal footing of evaluation in the global perspective. Despite—both in general and in relation to BAT arbitration—*ex aequo et bono* indicates that the arbitrators should primarily focus on the individual characteristics of each case, it also leaves room for the development of consistent approach to certain repeatable issues.⁵⁰ The best example of that might be the BAT's jurisprudence, which—what will be discussed in details hereunder—demystified *ex aequo et bono* by decoding the general principles of law related to basketball contracts. In short, the advantages of choosing such a decisional standard by far outweighed its disadvantages. As a result, the *ex aequo et bono* has become the standard desired by the BAT users and to date the parties insisted on applying national law only in about 3% of the cases.⁵¹

Last but not least, the feature that not only decides about BAT's innovative character, but first and foremost makes it credible is its voluntary nature. In the era when the main sports arbitral institution in the world, namely CAS, as well as multiple others—both at the international and national level—has been facing a well-founded criticism related to its compulsory character (forced arbitration),⁵² BAT has been following a completely different path. Usually in sports, because of its monopolistic structure, athletes have no other choice but to 'voluntarily' agree on the arbitration clause that is imposed in the internal regulations of sport governing bodies. The idea of BAT's jurisdiction is, however, based on a truly voluntary agreement.⁵³ Thus, none of the parties to basketball contracts is forced to choose BAT as the forum for the resolution of their potential dispute.⁵⁴ Furthermore, due to FIBA's 'hands-off' approach reflected in the foundations of BAT, there are no major concerns of BAT being a true arbitration.⁵⁵ The most convincing proof of that can be found at the basketball market itself—in over 11 years⁵⁶ of its existence BAT has proven to be so appealing that numerous agents uncompromisingly have been insisting on the

arbitration clause in favour of BAT in the contracts of their clients—not only in regard to foreign players, but also to the local ones. In other words, nowadays there seems to be no better alternative in settlement of basketball disputes.

2 BAT as a 'lawmaking' institution

2.1 The idea of arbitral 'lawmaking' and sports arbitration

The primary role of courts and judges is to adjudicate the legal disputes.⁵⁷ That is true both in domestic and in international legal orders, as well as under civil- and common law systems. No different, also the mandate of arbitral institutions and arbitrators is to arbitrate. Eventually, the consent of the parties to the dispute allows the arbitration to 'step into the shoes' of courts and judges. Nonetheless, in common law jurisdictions by virtue of *stare decisis* doctrine, higher courts and their judges are empowered to develop general rules of law in the adjudicating process. In other words, they create precedents that are being called as authoritative or binding, since the lower courts within the same jurisdiction are obliged to adhere to them. As a result, a 'judge-made law' is born. Under civil law systems, in contrast, there is no *stare decisis* doctrine, at least in common law meaning. In certain countries, consistent decisions of higher courts may though—under specific conditions—bind lower courts.⁵⁸ In general, however, in civil law jurisdictions said decisions may bind only informally, not on the basis of authority, but through persuasive argumentation. As a result, the outcome of the given adjudicating process is often being called as a persuasive precedent, while the collection of these precedents—taking into account they are being developed through consistent decision-making—referred to as *jurisprudence constante*. In short, we may talk about *de iure* and *de facto stare decisis* doctrine. While under the former the courts follow the precedents due to legal obligation, under the latter without being legally bound to do so.⁵⁹ Interestingly, despite different legal value, the authoritative and persuasive precedents may lead to the same effect, namely consistent decision-making based on legal principles unveiled within the adjudicating process.

In international arbitration, the 'common-law-like' doctrine of *stare decisis* is not in force.⁶⁰ Nonetheless the arbitrators quite commonly refer to and rely on the decisions and argumentation presented in earlier arbitral cases. Moreover, it has been argued that the solutions that the arbitrators

⁵⁰ Zagklis (2015a), p. 188.

⁵¹ Ibid., p. 187.

⁵² See *inter alia* Duval and Van Rompuy (2016), pp. 246–276.

⁵³ Martens (2011), p. 55.

⁵⁴ Nevertheless certain national basketball federations, e.g. in Poland, have made BAT jurisdiction mandatory in relation to basketball contracts.

⁵⁵ BAT's status was confirmed by SFT in 4A_198/2012 rendered on 14 December 2012. See Zagklis (2013), p. 123.

⁵⁶ The first request for arbitration was filed on 29 May 2007, while the first arbitral award was rendered on 16 August 2007. See FIBA, BAT Awards. <http://www.fiba.basketball/bat/awards>. Accessed 28 September 2018.

⁵⁷ Bentolila (2017), para. 1.

⁵⁸ Ibid., para. 2.

⁵⁹ Kaufmann-Kohler (2007), p. 358.

⁶⁰ Ibid., p. 357.

create in individual cases not only tend to be generalized, constituting *de facto* precedents, but said generalization is a necessity for certain types of disputes and for the sake of the rule of law.⁶¹ Naturally the arbitrators cannot create laws *per se*, since they simply apply legal rules that prevail in national- or international laws or general principles of law. However, as Gabrielle Kaufmann-Kohler remarked, what is truly striking about international arbitration is the arbitrators' broad discretion in determining and applying the law that governs the merits of any particular case and, in regard to that, their inclination to 'transnationalise' said laws in order to remove a given dispute from the manacles of possibly inadequate national laws.⁶² *Prima facie* the freedom of arbitrators in the decision-making process may seem as clearly opposite to the very idea of precedent. It shall be remembered, however, that the decisions of arbitrators remain subject to international (transnational) public policy. Said demarcates the limits of the arbitration, in order to have it legitimized in the forum that may be potentially called to set aside or enforce the arbitral award. As a result, as Dolores Bentolila noticed, the tension between freedom and constraints in arbitral decision-making leads to consistent arbitral solutions on a wide range of procedural and substantive issues.⁶³ Thus, also the process of 'transnationalising' laws applicable to the merits in a given case may lead to creation of 'transnational laws' governing similar cases, in particular in institutionalized communities.

The prime example of the aforementioned process is sports with CAS arbitration and its strong reliance on past precedents that results in a coherent corpus of law named *lex sportiva*.⁶⁴ It is believed that the credibility of the whole monopolistic system of sport—established by international sport-governing bodies exercising their power in almost every corner of the world and every piece of sport competition—is dependent on the certainty, predictability, thus also consistency of the jurisprudence in order to guarantee an equal treatment of the interested parties and adhere to the rule of law.⁶⁵ After all, in sport 'the level playing field' and abiding by the rules shall be regarded as the highest values.

Under BAT arbitration, the *ex aequo et bono* as a default law applicable to the merits of the dispute *prima facie* does not foster the consistent jurisprudence and—as a result—the development of stable legal solutions. The longstanding

formula that has been repeatedly quoted in BAT awards, emphasizing that the arbitrators '*instead of applying general and abstract rules (...) must stick to the circumstances of the case at hand*', may reflect such an approach.⁶⁶ Nonetheless, it shall be remembered that the arbitrators deciding the dispute *ex aequo et bono* are always limited by the concept of international (transnational) public policy, embodied in Article 190(2)(e) PILA, constituting the only substantive legal ground for setting aside the arbitral award of international tribunal. Thus, the general principles of law have to be always taken into account in order for the outcome of a given arbitration to attain a worldwide acceptance. Furthermore, the development of consistent jurisprudence has been enshrined in Article 16.1 *in fine* BAT Rules. Eventually only the predictable arbitration may contribute to the improvement in the credibility of the basketball industry. Due to that the process of 'transnationalising' laws related to the merits of the dispute seems to be anchored not only in the requirements of a particular case, but in the general needs of institutionalized basketball community.

2.2 The *ex aequo et bono* standard as a substantive basis for BAT's 'lawmaking' process

2.2.1 The notion of *ex aequo et bono* and BAT's jurisprudence

In the most basic meaning, the decisional standard of *ex aequo et bono* holds that the dispute should be decided according to what is equitable and good. The decision maker who is authorized to decide *ex aequo et bono* is not bound by any legal rules and may instead follow equitable principles.⁶⁷ Undeniably *ex aequo et bono* is a concept historically well-established, one may even say that it lies at the very foundation of the idea of arbitration, since it envisions consensual resolution of disputes, away from the rigours of law.⁶⁸

⁶⁶ See Hasler (2018), p. 105.

⁶⁷ See Garner et al. (2004), pp. 600–601.

⁶⁸ The notion of *ex aequo et bono* originated in medieval times as a body of principles constituting a system of justice based on equity. Due to one tradition equity constituted a legal system parallel to common law. Its aim was to bring a relief to people against harsh and often unfair judgments of king's courts. Due to another tradition equity constituted a basis of the medieval merchant law—*lex mercatoria*. It was 'the law' of commercial practice, quite apart from 'the law' of princes. In the wake of international trade, the rationale staying behind it was to use an informal, time- and cost-effective process in order to achieve the results that were fair to the parties—not according to the law of the land, but in the light of merchant usages and practice. Thus, decision-making based on equity was intended to be market sensitive, informal and responsive to the dynamics of the particular trade, region and parties. See more on the understanding of *ex aequo et bono* Manarkis (2011), pp. 177–178; Trakman (2008), pp. 621–642.

⁶¹ Bentolila (2017), paras. 512–513, 667; Kaufmann-Kohler (2007), p. 368.

⁶² Kaufmann-Kohler (2007), p. 364.

⁶³ Bentolila (2017), para. 512.

⁶⁴ The notion of *lex sportiva* has been a subject of numerous academic and legal debates, and there is no one clear and commonly agreed understanding of it. Nevertheless it is commonly agreed that it was developed within CAS jurisprudence. See e.g. Siekmann (2012), pp. 367–368 and 388.

⁶⁵ Kaufmann-Kohler (2006), pp. 376 and 378.

Nowadays, however, it is far too often avoided on grounds that it operates outside of law, or is deemed to be contrary to law. As a distinguished American Judge Richard Posner once said: ‘*There is a very strong formalist tradition in the law*’, while admitting at the same time: ‘*A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?*’.⁶⁹ These words may—to a certain extent⁷⁰—epitomise the idea of *ex aequo et bono*, since ignoring the laws that are often ‘not reasonable’ is the very nature of it. The significance of *ex aequo et bono* is underestimated in particular in taking into account the valuable role it can play in international (transnational) relations, where the choice of laws to solve the dispute has often been a challenge.⁷¹ On the one hand, it may be considered as a practical equivalent of natural justice. On the other hand, it appears to be ideally suited to resolving disputes arising on the globalized markets, between the parties who are engaged in complex relationships and in the emerging areas of law. BAT jurisprudence, related to contractual relations in globalized basketball, has been one of the clearest examples how *ex aequo et bono* can revitalize the settlement of disputes and contribute to the contractual fairness. What is interesting, based on BAT’s jurisprudence is that, had the national system of law been applied instead of ruling *ex aequo et bono*, the arbitration awards would have turned out differently in only few exceptional cases, and even then only marginally differently.⁷² In fact, *ex aequo et bono* does not operate outside the law, as one could imagine.

The concept of *ex aequo et bono* in relation to BAT’s jurisprudence was explained in details—in line with the jurisprudence of SFT—in the reasons to BAT’s first award.⁷³ Since this explanation has been consistently evoked in all BAT awards, it has become a foundation of every BAT arbitration based on *ex aequo et bono*. In this regard, it shall be also treated as a beacon for sport attorneys interested or

involved in international basketball relations. According to that:

Unlike *an amiable compositeur* under French law, an arbitrator deciding *en équité* according to Article 187(2) PIL will not begin with an analysis of the applicable law and of the contract to possibly moderate their effects if they are too rigorous. He/she will rather ignore the law and focus exclusively on the specific circumstances of the case in hand. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal *sue l’arbitrage* (Concordat), under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit*: “When deciding the dispute *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 “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules he/she must stick to the circumstances of the case”. This is confirmed by the provision in Article 15.1 of the FAT Rules in fine that the arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”. It is generally acknowledged that the arbitrator deciding *ex aequo et bono* is not required to apply mandatory provisions of the law that would otherwise be applicable to the dispute. Under the PIL, the only limit to the arbitrator’s freedom in deciding a dispute *ex aequo et bono* is international public policy. When the parties authorize the arbitrator to decide *ex aequo et bono*, the arbitrator is required to decide *ex aequo et bono*. That said, this duty does not prevent the arbitrator from referring to the solution which arises from the application of the law before reaching a decision *ex aequo et bono*, in particular to “guide or reinforce” his/her own understanding of fairness.⁷⁴

In essence, an arbitrator deciding the dispute *ex aequo et bono* should primarily focus on the assessment of the terms of the contract and take into account the circumstances surrounding the case, i.e. parties’ overall relationship, respective situations and conducts, as well as any other relevant circumstances, without consideration of any pre-existing general norms.⁷⁵ As a consequence, the arbitrator is not

⁶⁹ See Liptak A., An Exit Interview with Richard Posner, Judicial provocateur, 11 September 2017. <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>. Accessed 1 October 2018.

⁷⁰ The legal philosophy of Richard Posner is based on a pragmatic reasoning with a particular attention to current public policy and efficiency of the outcome. Thus, in principle, seems to be distant from the concept of *ex aequo et bono*, since the latter includes the contextual analysis with moral foundations, i.e. may be based on the tests of morality, ethics, culture, social standards, law and even religion. See *inter alia* Posner (2007), pp. 10–11.

⁷¹ More on the law applicable to the merits in international arbitration held in Switzerland. See Kaufmann-Kohler and Rigozzi (2015), paras. 7.01–7.89.

⁷² Martens (2011), p. 55.

⁷³ Said explanation was provided by distinguished sport arbitrator Prof. Ulrich Haas in FAT 0001/07 rendered on 16 August 2007.

⁷⁴ See FAT 0001/07, paras. 6.1.1–6.1.2. FIBA, BAT Awards. <http://www.fiba.basketball/bat/awards>. Accessed 1 October 2018.

⁷⁵ Hasler (2016), p. 133.

bound by any rule of law, even a mandatory one, and is given a high degree of flexibility.⁷⁶ Actually this degree of flexibility to depart from the law allows to distinguish arbitration as *amiable compositeur* and arbitration *ex aequo et bono*.⁷⁷ Nevertheless, the arbitrator is empowered to depart from the contract when its application could result in an unfair, unjust or inequitable outcome.⁷⁸ Otherwise, since deciding the disputes *ex aequo et bono* delocalizes the contract—evoking Gunther Teubner concept—the paradox of a self-validating contract could arise.⁷⁹ It is the explicit consent of the parties to the arbitration agreement that empowers the arbitrator to take a decision based on ‘*general considerations of justice and fairness*’ under the circumstances, apart from otherwise applicable legal provisions. In regard to that an important question should be raised: does the will of the parties to have their dispute solved *ex aequo et bono* entitle the arbitrator to full freedom in deciding what is equitable under the circumstances of a given case? Asking differently—citing Gabrielle Kaufmann-Kohler and Antonio Rigozzi—‘*how to access what is fair an just?*’.⁸⁰

It is generally accepted that nothing prevents an international arbitrator ruling *ex aequo et bono* from first applying the law—a tendency common to many lawyers—prior to ascertaining that a result is fair and equitable.⁸¹ Thus, an arbitrator may reach out to relevant rules of law ignoring formalistic rules or rules which appear harsh or appear to operate harshly or unfair to the certain case.⁸² The arbitrator may also completely ignore any rules of law and decide the case on its merits, as appeal to him. Nevertheless, in any case an arbitrator’s discretion should not be considered as unlimited. In the light of the Article 190(2)(e) PILA arbitrator’s decision-making process shall not, in principle, go beyond the limits sets by the concept of international (transnational) public policy.

Basically under every national legal system, the incompatibility of a domestic arbitral award with the public order (*ordre public*) constitutes one of the legal grounds to set aside that award. No different, under the Article V(2)(b) NYC, the recognition or enforcement of a foreign arbitral award may be refused in the country where recognition and enforcement is sought, if this award is contrary to the public policy of that country. The concept of public policy encompasses the basic principles of law, to a certain extent even mandatory laws, either way the foundations of a given

national system, thus is considered to be domestic. The specificity of international arbitration in contrast to domestic arbitration calls for a different approach. Since—as it is widely accepted—international arbitral tribunals do not have a *forum*, international arbitrators deciding a given dispute do not have a domestic legal order to evoke. Nonetheless, international arbitrators do not act in a legal vacuum and are not called upon to decide as if they did not belong to this world.⁸³ Due to that the concept of—using Pierre Lalive’s terms—a ‘*transnational or truly international public policy*’ is applied for the purposes of evaluating the process and outcome of international arbitration.⁸⁴ It is not as broad as domestic public policy, since it comprises the most fundamental principles of legal order, innermost core values of the legal system.⁸⁵ In other words, it reflects the basic legal principles common to civilized nations.

Under Article 190(2)(e) PILA, the SFT distinguishes between procedural and substantive dimensions of international public policy. The violation of the former occurs ‘*when generally recognised fundamental [procedural] principles have been breached causing at intolerable conflict with one’s sense of justice, such that the decision appears contrary to the values accepted in a state abiding by the rule of law*’, while the latter refers to violating ‘*principles of substantive law in such a serious way that it is no longer consistent with the legal system and the accepted set of values*’.⁸⁶ This general understanding is being clarified through an evolving list of specific principles pertaining to international (transnational) public policy, developed in SFT jurisprudence that the international arbitral tribunals having their seat in Switzerland must abide by. Among such principles one finds, *inter alia*, the doctrine of sanctity of contracts (*pacta sunt servanda*), the rules of good faith (*bona fides*), the prohibition against abuse of rights, the prohibition against discriminatory and spoiliatory measures, the protection of persons lacking legal capacity and the principle of *res judicata* related to a prohibition of taking the same action between the same parties.⁸⁷

From the above two simple conclusions can be drawn in relation to BAT arbitration: firstly, an arbitrator deciding the

⁷⁶ Kaufmann-Kohler and Rigozzi (2015), para 7.67.

⁷⁷ Ibid., para 7.70.

⁷⁸ Ibid., para 7.72.

⁷⁹ Teubner (1997), p. 14.

⁸⁰ Kaufmann-Kohler and Rigozzi 2015, para 7.68.

⁸¹ Ibid., para 7.71.

⁸² Redfern and Hunter (2015), paras. 3.192–3.194.

⁸³ Lalive (1987), p. 270.

⁸⁴ Pierre Lalive distinguishes the terms of ‘international’ and ‘transnational or truly international’ in relation to the concept of public policy, since the former one is said to be developed within the relations between the state actors, while the latter may be related as well to the relations between non-state actors, e.g. individuals or business organisations, on the international arena. See more Ibid., pp. 258–316.

⁸⁵ Kaufmann-Kohler and Rigozzi (2015), para. 8.188.

⁸⁶ Ibid., paras. 8.191 and 8.198.

⁸⁷ For a comprehensive discussion on the general principles of law in international arbitration see Bentolila (2017), paras. 5.04–5.05; Kaufmann-Kohler and Rigozzi 2015, paras. 8.188–8.205.

basketball dispute *ex aequo et bono* shall attach the proper importance to the general principles of law; secondly, the SFT jurisprudence can be helpful in finding the principles that need to be particularly followed. As a matter of fact—as discussed in details below—BAT arbitrators not only follow these principles—that usually entail not only equitable, but also reasonable solutions to a given case—but also try to find their basketball-specific dimension.

2.2.2 The *ex aequo et bono* and the application of the general principles of law

It is generally accepted that *ex aequo et bono*, as a comprehensive legal concept utilized in international arbitration, needs to encompass the general principles of law.⁸⁸ These principles, after all, lie at the very foundation of every legal system and are indispensable to its operation. The roots of general principles reach out to the concepts of natural law, while today their positive footing can be found in national systems of law as well as in international law. They are enshrined in different cultural and legal traditions, in particular can be traced both in civil- and common law systems. General principles are thus the predicates to the rule of law; they are not the inventions of the positive law, but they are antecedent to it. As Ronald Dworkin noticed the principle is ‘a standard that is to be observed (...) because it is a requirement of justice or fairness or some other dimension of morality’.⁸⁹ Despite a universal system of values that is reflected in general principles of law may be seen as a remote ideal, their common application in international adjudication and arbitration denotes their practical significance, thus quite opposite seems to be true.

Identifying the general principles of law for the purposes of international legal environment entails locating the common denominator of different national laws. As Charles Kotuby and Luke Sobota remarked, said process—on the frontline of which are international judges as well as arbitrators—typically proceeds in three stages. First, the tribunal drills down vertically into established legal rules to extract the underlying legal principle. Second, it moves horizontally among a variety of national legal systems to determine whether that principle is universally recognized. Third, before being elevated to the international plane, the principle may undergo further modification to suit the peculiarities of international (transnational) law.⁹⁰ In short, after identifying that a principle is truly general in its nature and acknowledged by the legal systems of civilized nations, the tribunal needs to ascertain that the principle can operate

independently in the international realm, separately from national legal order, thus is truly delocalized. Said comparative analysis is often supplemented by an intuitive presumption, since the general principles of law express the core values lying at the foundation of every civilized legal system. The general principles of law, as they are derived from the interaction of legal systems and create new laws that guide transnational interactions, may thus be seen as an illustration of transnational legal process.⁹¹ The power to apply general principles seems to emanate from the very essence of international commercial arbitration between private parties, as the application of ‘transnational laws’ can isolate certain peculiarities of national laws that hinder the fair resolution of an individual case. Thus, a necessity for the general principles in international arbitration seems to be discernible.⁹²

The importance of general principles of law is well recognized in sports arbitration. In particular, it has been enshrined in the jurisprudence of CAS.⁹³ Things are no different in the BAT arbitration, despite substantial differences between CAS and BAT in regard to the law applicable to the merits of a dispute. The general principles of law have been embodied in BAT’s jurisprudence and consistently applied. Interestingly, under CAS arbitration the general principles of law were often applied with regard to the specificity of sport, what have lead to the development of *principia sportiva*, principles that are dedicated to sport.⁹⁴ Having in mind the nature of *ex aequo et bono*, BAT arbitrator is empowered to decide the case not only according to the general principles of law, but also applying the trade usages and customs relevant in the basketball industry, provided that the arbitrator considers them as adequate to reach a fair solution of the given dispute. Therefore, under BAT arbitration the general principles of law are applied in the specific context of basketball, where the practices of the parties of arbitral proceedings shall not be overlooked. Due to this, BAT arbitrators seem to have an exceptionally strong mandate to act as *de facto* ‘lawmakers’ and develop a series of general principles (standards) of basketball contracts.

⁸⁸ Kotuby and Sobota (2017), p. 6.

⁸⁹ See Dworkin (1967), p. 23.

⁹⁰ Kotuby and Sobota (2017), p. 18.

⁹¹ *Ibid.*, p. 29.

⁹² *Ibid.*, pp. 36 and 44.

⁹³ See Article 17 of Arbitration Rules Applicable to the CAS ad hoc division for the Olympic Games; Article 17 of Arbitration Rules Applicable to the CAS Anti-doping Division. Also R45 *in fine* of CAS Arbitration Code related to CAS Ordinary Procedure, as related to *ex aequo et bono*, allows for the use of general principles of law as a decisional standard. Finally in the light of CAS jurisprudence also R58 of CAS Arbitration Code related to CAS Appeal Arbitration Procedure allows for use of general principles of law.

⁹⁴ Casini (2012), pp. 158–160.

2.3 Merely ‘jurisprudence’ or a true ‘case law’—Article 16.1 *in fine* BAT rules as a procedural facilitator of creating the common standards of basketball contracts

A coherent approach to basketball disputes is not embodied under BAT’s ‘mission statement’. Nonetheless, looking at the Article 16.1 *in fine* BAT Rules one may convincingly say that ‘*the development of consistent BAT case law*’ has been BAT’s ambition since the very beginning. Over the years of BAT’s existence, its practice has fully endeavoured to fulfil said ambition.

As aforementioned, one of the basic differences between the civil- and common law systems of law concerns the power of judicial lawmaking. The legal purists would say that said difference is reflected—despite strong arguments to claim quite opposite⁹⁵—in the terminology related to the outcome of the adjudicating process. While under the former system said outcome, in the form of collectively considered persuasive (non-binding) precedents, has been traditionally called as ‘jurisprudence’, under the latter the collection of authoritative (binding) precedents, as forming a body of law within a given jurisdiction, is usually defined as a ‘case law’. In this regard, the literal interpretation of Article 16.1 *in fine* BAT Rules, operating with a phrase ‘*case law*’, may denote the will of the rule makers to facilitate development of a true body of law within BAT’s jurisdiction. Nevertheless, also the functional interpretation of the other phrases in that article leads to the same conclusion. Eventually,

the Arbitrator shall give a written, dated and signed award with reasons. Before signing the award the Arbitrator shall transmit a draft to the BAT President who may make suggestions as to the form of the award and, without affecting the Arbitrator’s liberty of decision, may also draw his/her attention to points of substance.

and—moving forward—‘*the BAT President may consult with other BAT Arbitrators, or permit BAT Arbitrators to consult amongst themselves, on issues of principle raised by a pending case*’.

It needs to be noted that under the original version of BAT Rules, that were in force until the recent change dated 1 January 2017,⁹⁶ only the BAT President himself could consult BAT arbitrators on issues of principle, and such consultations would occur only at a late stage, once the

award was fully drafted and before the final scrutiny of the BAT President. The new version of the BAT Rules opens up the possibility to BAT arbitrators—upon BAT’s President approval—to seek the views of their colleagues on unsettled questions of general interest at any stage of the arbitral proceedings. Said solution is rather unique in sports arbitration, since even under CAS Code, despite CAS Secretary General has the power ‘*to draw attention of the Panel to fundamental issues of principle*’, there is no provision for CAS arbitrators to consult between themselves on such issues.⁹⁷ Said procedural solution is supplemented by the well-established practice of BAT. Firstly, BAT holds—what resembles CAS practice—annual meetings for its arbitrators, where recent case law and any questions or significant developments that may arise from it, are discussed collectively.⁹⁸ In this regard, it shall not be overlooked however that BAT—in contrast to CAS—consists of a very narrow group of arbitrators, carefully chosen by BAT’s President. As Article 3-330(b) *in fine* FIBA IR indicates, the arbitrators shall have a legal training and experience with regard to sport. Secondly, the newly appointed BAT arbitrators, before taking their duties, obtain a special legal training oriented at making them familiarized not only with the procedural aspects of BAT arbitration, but also with the specificity of basketball contracts, disputes and the existing case law.⁹⁹ It is also worth noting that the majority of current BAT arbitrators have been trained in the common law countries.¹⁰⁰ Therefore—although they are undoubtedly fully conscious that they are not operating under a *stare decisis* doctrine—the understanding of law they acquired in the native legal systems may naturally influence their adjudicating process, namely by solving a given dispute having in mind the existing precedents. Finally, the rule of publication of BAT awards—despite certain deficiencies that will be highlighted at a later stage—only favours the development of a coherent corpus of law. Close to ninety-five (95%) of the BAT awards have been published on the FIBA website, since according to Article 16.4 BAT Rules ‘*awards are not confidential unless ordered otherwise by the Arbitrator or the BAT President*’.¹⁰¹ Having in mind that to date BAT has been deciding in over 1200 cases, the existence of the body of ‘case law’ has become an undeniable fact.

⁹⁷ Hasler (2018), p. 105.

⁹⁸ *Ibid.*, p. 106.

⁹⁹ Information obtained by the author of present paper during the lecture of Dr. Dirk-Reiner Martens at ISDE in Madrid, 15 December 2017.

¹⁰⁰ See FIBA, Composition of BAT 2018. <http://www.fiba.basketball/bat/composition.pdf>. Accessed 13 February 2019.

¹⁰¹ See Hasler (2018), p. 109; Martens (2011), p. 56; Zagklis (2013), p. 125.

⁹⁵ The terms ‘jurisprudence’ and ‘case law’ as related to the collection of judicial precedents are often used as synonyms. See Garner et al. (2004), pp. 229 and 871.

⁹⁶ See Comparison between old and new BAT Rules. FIBA, Comparison between 2014 and 2017 BAT Arbitration Rules. <http://www.fiba.basketball/bat/comparison-between-2014-and-2017-bat-arbitration-rules.pdf>. Accessed 1 October 2018.

Due to the above, the parties to the basketball contracts have been encouraged to refer to said ‘case law’ in support of their arguments in BAT proceedings. However, despite the doctrines of precedent are being developed in relation to international arbitration,¹⁰² the SFT has denied that arbitral decisions—including CAS awards—can have an effect of binding precedents.¹⁰³ Thus, also the BAT awards are still considered to be only ‘persuasive authorities’.¹⁰⁴ Nonetheless, it is not unfounded to say that BAT’s ‘case law’ impacts the day-to-day operation of basketball market in such a way, that basketball contracts are drafted with reference to it. After all, the high degree of similarity in basketball contractual disputes and the small number of specialized BAT arbitrators dealing with them leads to harmonized and widely acceptable legal conclusions.¹⁰⁵ In general, aiming at the creation of a ‘case law’ has contributed not only to the predictability and efficiency of BAT system, but primarily resulted in equal treatment and legal certainty, thus also legal security in the world of basketball.¹⁰⁶ As a result, the outcome of BAT arbitration—regardless of being called ‘jurisprudence’ or ‘case of law’—seems to fulfil the role of a true body of law.

2.4 Deficiencies of BAT’s ‘lawmaking’ process

One of the greatest challenges to BAT arbitration has been finding the right balance between simplicity, speed and cost-efficiency on the one hand, and the interest in developing consistent ‘case law’—thus also justice of the system—on the other. Having in mind that *ex aequo et bono* is not only a default decisional standard according to the BAT Rules, but also the most desired one by the parties of the dispute in practice, the arbitrators are equipped with a powerful tool that enables them to be *de facto* ‘lawmakers’. Therefore, the accessibility to their legal reasoning, in other words the transparency of their ‘lawmaking’, should be viewed as a necessity. Nonetheless, over many years of BAT’s existence, the value of the efficiency of BAT proceedings overbalanced the value of publication of BAT awards, what was reflected in BAT Rules. As a result, BAT’s function as a contractual standard-setter in basketball has been undermined.

Since the very beginning of BAT in May 2007, the default solution of BAT Rules obligated the arbitrator to issue an

award along with summary reasons.¹⁰⁷ As a result, the ‘case law’ was heavily developed in the first years of functioning of BAT, when all the awards were issued and published with reasons. At that time also most of the standards governing basketball contracts that are regularly evoked to date—both by the claimants and respondents during the arbitration process, as well as by the arbitrators in their reasoning—were coined. However, following the needs articulated by certain actors of the basketball market—especially those of female players and lower division clubs—to decrease the costs of arbitration, the BAT Rules were amended in May 2010 to allow the arbitrators to issue awards without reasons in disputes with a value below EUR 30.000 (so-called low-value cases). Due to that the costs of those cases decreased by at least of 30%, mainly by applying a lower handling fee along with a cap at the advance of costs.¹⁰⁸ In addition, the arbitrator did not have to spend extra time necessary to render reasoned award, unless the party requested it and covered additional advance on costs. The time-and-cost-efficiency-success of ‘low-value cases’ triggered another amendment to BAT Rules in May 2014. This time the claimant was allowed to request the arbitrator to issue an award without reasons in cases, in which the value of the dispute was between EUR 30.000 and EUR 200.000 if the respondent failed to pay its share of the advance of costs.¹⁰⁹ Thus, the claimant was granted flexibility to decide whether he wanted to keep the costs down by requesting an award without reasons. At the same time, both parties had an option to request an award with reasons and to pay the additional advance on costs.

In general, these changes significantly reduced the costs and length of BAT proceedings.¹¹⁰ Nevertheless, a statistical analysis of all cases under the May 2010 and May 2014 versions of BAT Rules showed that the amount of reasoned awards decreased significantly, as more than a half of awards were issued without reasons.¹¹¹ Despite vast majority of BAT awards are posted on the FIBA website, due to amendments made in May 2010 version of BAT Rules, public availability of the majority of them has been restricted only to the operative part of an award, while the reasons for the arbitrators’ decision have remained unknown to date. On the one hand, the financial constraints in regard to issuance of a reasoned award significantly reduced the chances of the party unhappy with BAT arbitration award in potential

¹⁰² See generally Bentolila (2017), Kaufmann-Kohler (2007).

¹⁰³ Decision of SFT in 4A_110/2012, rendered on 9 October 2012, para. 3.2.1. See Hasler (2018), p. 106.

¹⁰⁴ See e.g. Hasler (2016), s. 133.

¹⁰⁵ Zagklis (2015a), p. 188.

¹⁰⁶ Hasler (2016), p. 133.

¹⁰⁷ Article 16.1. of FIBA Arbitral Tribunal (FAT) Arbitration Rules, version May 2007.

¹⁰⁸ Zagklis (2013), pp. 127–128.

¹⁰⁹ Zagklis (2015b), p. 105.

¹¹⁰ Hasler (2016), p. 126.

¹¹¹ FIBA, BAT Statistics 2007–2015 and Information on New BAT Arbitration Rules. <http://www.fiba.basketball/bat/process>. Accessed 1 October 2018.

annulment action in front of SFT.¹¹² Thus, the parties of a given dispute might have had a feeling of being deprived of their fundamental rights. On the other hand, the discussed situation undeniably had influenced negatively the transparency of the arbitration process and, in turn, of BAT's 'case law'. Thus, also the predictability of BAT's system, not mentioning its authority as a body facilitating the creation of common standards of basketball contracts, suffered. In light of the above, a clear position of Kaufmann-Kohler and Rigozzi, supported by the views of doctrine and SFT, seems to be worth presenting: "*An arbitral tribunal deciding ex aequo et bono must render a reasoned award. (...) It must state that it decides ex aequo et bono, review the parties' positions, and explain why the solution reached is fair*".¹¹³ Taking into consideration BAT's role in shaping the basketball market, it could be concluded that the reasoned awards should be better positioned in BAT Rules.

It needs to be noted that the authorities responsible for the enactment of BAT Rules seem to have realized the problem, as one of the objectives of the latest amendment of BAT Rules was to provide users again with more publicly accessible 'case law'.¹¹⁴ In order to adjust to the needs of the market, the May 2017 version of BAT Rules outlines that in disputes up to EUR 100.000 the default position is that a reasoned award can be requested by each party subject to payment of an additional advance of costs and in disputes exceeding the amount of EUR 100.000 a reasoned award will be rendered in all cases. The threshold for awards with mandatory reasons was thus lowered from 200.000 to 100.000 in relation to the May 2014 version of BAT Rules. As, in most years of the BAT's existence an average case value of BAT proceedings falls between EUR 180.000 and EUR 220.000,¹¹⁵ the current solution aims at bringing an answer to the collapse reported under May 2010 and May 2014 versions of BAT Rules. In consequence, a moderate increase in the number of reasoned awards is expected. Thus, it is considered that under 2017 version of BAT Rules a measured trade-off between two objectives that are of interest to BAT users, namely cost control and accessibility of BAT 'case law', has been made.¹¹⁶

Without any doubts under optimal scenario, all the awards should be issued with reasons. Nonetheless, the possibility to accomplish this objective, while maintaining the cost and time efficiency results of BAT, seems to be easier in theory than in practice.¹¹⁷ It does not mean, however, that further studies on BAT statistics resulting in more diversified and flexible solutions in the BAT Rules should be given up. At this point, however, one remedy to improve the access to BAT Jurisprudence seems to be available immediately, namely taking into consideration that according to the Article 16.1 BAT Rules the arbitrator before issuing the award shall transmit a final draft of the award to the BAT President, and in praxis this draft is provided with a memorandum setting out the underlying reasons for the BAT's President scrutiny,¹¹⁸ the redacted forms of reasoned awards in past cases could be made publicly available, provided these cases were not ordered to be confidential. After all, the aforementioned rule—by allowing the BAT President and the arbitrators to consult among themselves on issues of principle raised by the pending case—values highly the development of consistent BAT 'case law'. And the prerequisite for the fulfilment of that is to make the 'case law' accessible not only to the arbitrators, but primarily to the actors of basketball market, as their contractual rights and duties are affected. In this regard, it seems to be a paradox that the BAT arbitrators evoke in their reasoning the argumentation of the awards that have not been published on the FIBA website¹¹⁹ or that have been published, but without reasons.¹²⁰ Furthermore, despite some may say that the available BAT awards have already established the core of 'case-law' that is well-known nowadays, it shall not be forgotten that new legal problems are arising. Thus, in the name of legal security of the basketball industry, BAT should provide for a clear explanation to these problems, either through developing existing 'case law'—what in many instances is actually happening—or creating new precedents. After all, evoking famous concept of Dworkin, BAT jurisprudence can be considered as a chain novel, and the arbitrators as the novelist writing the new chapters, by interpreting the previous ones.¹²¹

Last but not least, it is worth mentioning—as Bentolila remarked—that the accessibility of the past arbitral awards, which is crucial in creating general standards of conduct through arbitral decision-making process, is dependent not

¹¹² Although from the formal standpoint the reasons to the award are not necessary to start the annulment action based on Article 190 of PILA, the absence of reasons makes it virtually impossible to challenge an award before SFT. See Kaufmann and Rigozzi (2015), para. 7.126 referring to the decision of SFT in 4A_198/2012, rendered on 14 December 2012.

¹¹³ Kaufmann-Kohler and Rigozzi (2015), para 7.75.

¹¹⁴ See FIBA, Information on new BAT Arbitration Rules. <http://www.fiba.basketball/bat/process>. Accessed 5 December 2017.

¹¹⁵ Zagklis (2013), p. 104.

¹¹⁶ Hasler (2018), p. 109.

¹¹⁷ In 2016, the average costs in cases with awards without reasons was EUR 4.231, while in cases with awards with reasons EUR 9.581. Information obtained by the author of present paper during the lecture of Dr. Dirk-Reiner Martens at ISDE in Madrid, 15 December 2017.

¹¹⁸ Hasler 2016, p. 126.

¹¹⁹ See e.g. BAT 1028/17, para. 131, referring to BAT 0835/16.

¹²⁰ See e.g. BAT 1157/18, paras. 87-88, referring to BAT 0738/15 and BAT 0427/13.

¹²¹ Dworkin (1986), pp. 228–238.

only on the publication of awards. Arbitrators belong to a community and a competitive market place in which they share their experience through other means, such as publications and conferences. Although their papers and presentations will be abstract and general, rather than concrete and detailed as arbitral awards are, they allow arbitrators to share past arbitral decisions as well as ways of interpreting certain rules and deciding certain issues in a wide range of matters.¹²² Undoubtedly, the above is also true in relation to BAT arbitrators, thus their activity in this regard, that could demystify reasoning in certain awards, seems to be desired to a certain extent. Moving forward, the same kind of activity may be expected from legal scholars and practitioners, since BAT's arbitration is still far too seldom discussed.

3 The general principles of basketball contracts according to BAT's jurisprudence

3.1 *Pacta sunt servanda* and *bona fides* as points of departure in the evaluation of basketball contracts

The foundation and underlying idea of a contract is the freedom of the parties to enter into an agreement and to determine its contents. It is embodied under the freedom of contract principle enshrined in basically every legal system.¹²³ Freedom of contract is a prerequisite for another key principle of the law of contracts, namely *pacta sunt servanda*, indicating that the contracts that have been freely and voluntarily agreed on should be respected and fulfilled. *Pacta sunt servanda* also means that contractual obligations should be carried out honestly and loyally, according to the good faith and mutual intentions of the parties.¹²⁴ Thus, the freedom of contract principle is subject to good faith (*bona fides*), fair dealing and other mandatory rules established by these principles.¹²⁵ Parties to the contract shall 'play fair' in their relations and are prohibited from abusing their rights. This seems to be especially important when one realizes that in today's complex reality the conditions, under which the contractual autonomy is exercised, are often flawed.¹²⁶ The freedom of contract principle needs to be counterbalanced by aforementioned principles, constituted in order to protect

one party against the other. When it comes to interpreting and performing contractual obligation, the overarching principle is then *pacta sunt servanda bona fide*—only under the principle of good faith the contracts can be considered as fully honoured.

The case-by-case analysis of the BAT's jurisprudence shows that the contract is always a starting point and that the arbitrators seek to evaluate the parties' behaviour on the basis of what they have agreed on.¹²⁷ Such an approach is compatible with the prevailing view under Swiss law indicating that in arbitration based on *ex aequo et bono* the tribunal first and foremost shall apply the contract.¹²⁸ As it was clearly stated in BAT's jurisprudence: '*The principle of pacta sunt servanda is one of the leading principles in BAT jurisprudence*'¹²⁹ and '*the principle of pacta sunt servanda is of a paramount significance for the Arbitrator when assessing the behaviour of the parties*'.¹³⁰ The BAT arbitrators emphasized the significance of said principle in numerous cases, usually by evoking the following phrases in the reasons to their decisions:

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 observed¹³¹; 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.¹³²

The principle *pacta sunt servanda*, however, does not mean that an arbitrator is not entitled to depart from the contract by any means. The validity of the contract can be always questioned on the basis of commonly accepted defects of consent.¹³³ As it was confirmed in one of the BAT awards:

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

¹²² Bentolila (2017), paras. 424–425.

¹²³ Smits (2014), p. 10.

¹²⁴ Kotuby and Sobota (2017), p. 91.

¹²⁵ See The Principles of European Contract Law 2002, Article 1:102 (1). <https://www.trans-lex.org/40020>. Accessed 4 October 2018; UNIDROIT Principles of International Commercial Contracts 2016, Article 1.1 and Article 1.7. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. Accessed 4 October 2018.

¹²⁶ Smits (2014), p. 12.

¹²⁷ Ibid., p. 185.

¹²⁸ Kaufmann-Kohler and Rigozzi 2015, para 7.72.

¹²⁹ BAT 0318/12, para. 80.

¹³⁰ FAT 0066/09, para 84.

¹³¹ FAT 0065/09, para 43.

¹³² BAT 0650/15, para 33.

¹³³ Smits (2014), pp. 159–172.

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.¹³⁴

Additionally, the departure from the contract is necessary when one of the parties commits a serious breach, making the continuation of the contract impossible.¹³⁵

What seems to be of a special interest, however, is that the nature and purpose of *ex aequo et bono* empowers an arbitrator to disregard the strict meaning of the contract when its application could result in an outcome that would be unfair, unjust or inequitable.¹³⁶ It is generally agreed that in addition to express terms a contract may contain implied terms, which stem from: the intention of the parties, the nature and purpose of the contract and, most importantly, good faith and fair dealing.¹³⁷ Thus, although the wording of the contract is always a point of departure, both the intent of the parties and rationale of a contract in the field of sport needs to be taken into account and may prevail over wording if the wording seem to stay in opposition to them. As the reasons to one of the BAT awards clearly state:

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. (...) in principle the clear wording of a contract is to be upheld. 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 (...) 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.¹³⁸

The principle of good faith (*bona fides*) extends both to the true intention of the parties and to the purpose of the contract itself. Furthermore it calls for fairness in the formation, performance and interpretation of the contract. This principle—by some considered the highest norm of contract law,¹³⁹ even a *Magna Carta* of international commercial law¹⁴⁰—has been a recurring theme in BAT arbitration. The arbitrators evoked good faith, also similar in meaning fairness principle, on many occasions, both interpreting the terms of the contract¹⁴¹ and evaluating the attitude and actions of the parties.¹⁴² Thus, only the contractual clauses and behaviour of the parties that were exercised in a good faith may be given legal protection. Due to that also the parties often invoke to the good faith—or the lack of it, bad faith (*mala fides*), in other party's performance—while supporting their arguments in BAT arbitration. The decisional standard of *ex aequo et bono* seems to have empowered the BAT arbitrators to treat the principle of good faith as a benchmark in applying other principles governing the basketball contracts.

3.2 The performance under the contract and contract's termination

3.2.1 The notion of 'guaranteed no-cut' contracts

In BAT arbitration, the clauses related to the so-called guaranteed no-cut contracts are a recurring theme. First introduced by American agents,¹⁴³ eventually they were picked up by their European colleagues. They aim at protecting the interest of the clients (and also the agents themselves) and preventing the negative consequences of an early termination of the contract by the club, e.g. due to the injury of the player or lack of expected performance by the player or coach. In short, the idea behind that was to make the fixed

¹³⁴ BAT 0318/12, para. 80.

¹³⁵ Hasler (2016), p. 143.

¹³⁶ Kaufmann-Kohler and Rigozzi (2015), para 7.72.

¹³⁷ See The Principles of European Contract Law 2002, Article 6:102. <https://www.trans-lex.org/40020>. Accessed 4 October 2018; UNIDROIT Principles of International Commercial Contracts 2016, Article 1.7 and Article 4.1. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. Accessed 4 October 2018.

¹³⁸ BAT 0535/14, paras. 48, 50, 51.

¹³⁹ Smits (2014), p. 137.

¹⁴⁰ Kotuby and Sobota (2017), p. 88.

¹⁴¹ See e.g. FAT 0017/08, para. 49.

¹⁴² See e.g. FAT 0021/08, para. 70.

¹⁴³ Consecutive NBA-NBPA Collective Bargaining Agreements have been always providing for specific compensation protections (Article II Section 4 under CBA of 19 January 2017) that to the certain extent have been copied to 'guaranteed no-cut' clauses in basketball contracts under BAT jurisdiction. See NBPA, CBA, 19 January 2017. <https://nbpa.com/cba/>. Accessed 4 October 2018.

term basketball contracts as unconditionally guaranteed, and to ensure that the all previously agreed monies would be paid by the club in full, regardless of the circumstances.

The ‘guaranteed no-cut’ clauses in the contracts of both players and coaches have been exercised in a variety of forms. Nevertheless, despite wording differences between these clauses—most of which are usually of a minor importance—the essential meaning can be reproduced from the following phrase:

The Club agrees that this Agreement is a no-cut [unconditionally] guaranteed agreement, and that the Club shall not have the right to suspend or release the Player [Coach] in the event that the Player [Coach] does not exhibit sufficient skill or competitive ability, or in the event that an injury, illness or death shall befall the Player [Coach] unless otherwise stated in the Agreement. (...) Club agrees to meet all payment obligations to the Player [Coach] and Agent as though Player [Coach] had performed in all games and met all obligations in this Agreement.¹⁴⁴

The understanding of the discussed clauses by BAT arbitrators has been clear and consistent. In one of the cases, the arbitrator explained that the notion of ‘guaranteed no-cut’ contract shall be understood as follows:

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.¹⁴⁵

In another one, this notion was interpreted in the following way:

“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.¹⁴⁶

At the same time, BAT has presented a consistent approach in regard to the extent of this notion:

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.¹⁴⁷

It should be noted that BAT’s approach allowing for a justified termination of the contract—thus theoretically in opposition to unconditional ‘no-cut guaranteed clause’—has not been based only upon the existence of a contractual clause allowing for a pre-mature termination due to certain circumstances, but on a general principle of contract law allowing for a termination of the contract due the occurrence of a fundamental breach (non-performance). Thus, the notion of ‘just cause’ for termination of the contract will be addressed next.

3.2.2 The notion of ‘just cause’—right to unilateral termination of the contract

The general principle of contract law, which can be found under different national legal systems, allows for unilateral termination of a contract due to a major breach (fundamental breach, repudiatory breach, fundamental non-performance).¹⁴⁸ In short, contracts can be terminated only upon the existence of a ‘just cause’. As it was evoked in the reasons to one of the BAT verdicts, the notion of ‘just cause’—also specified as valid reasons, good cause, legal cause—in its essence *‘is considered to be (...) any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship’*.¹⁴⁹

While evaluating the right of a party to the contract to unilaterally terminate it, BAT arbitrators have consistently held that only a particularly serious breach of a contract can constitute a ‘just cause’.¹⁵⁰ As explained in one of the BAT cases:

Early termination of an employment contract can principally not be based on every breach of obligation by one of the parties. Rather, because early termination of a contract is the last resort if the relationship between the parties becomes distressed, the breach of contract must amount to a certain degree of seriousness in order to justify “just cause” for the termination.¹⁵¹

In another one, an arbitrator noted:

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

¹⁴⁴ For a comprehensive overview of the wording of ‘guaranteed no-cut’ clauses see Hasler (2016), pp. 134–135.

¹⁴⁵ BAT 0487/13, para. 66.

¹⁴⁶ BAT 0644/15, para. 31.

¹⁴⁷ BAT 0644/15, para. 32.

¹⁴⁸ Smits (2014), pp. 230–236.

¹⁴⁹ FAT 0034/09, para. 67.

¹⁵⁰ Hasler (2016), p. 143.

¹⁵¹ See BAT 0383/13, para. 80.

part of the party in breach, not to perform his obligations under the contract in some essential respect.¹⁵²

In order to justify the unilateral termination of the contract, the party needs to demonstrate that:

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 the Contract was terminated on the basis of the Claimant's repudiatory breach of contract (and not for some other reason).¹⁵³

Thus—in line with the general principle of law and BAT's jurisprudence indicating that '*the burden of proof for an alleged fact rests on the party who derives rights from the fact*'¹⁵⁴—the party exercising this right shall prove that the breach in question not only was a fundamental one, but also that it was a decisive factor for the termination.

In practice, the parties to the basketball contracts have been evoking different grounds for the termination of the contract. On the players', coaches' and agents' side usually it is the non-payment of the salaries and other contractual amounts. On the club's side, the alleged lack of skills or lack of expected performance by the player or coach and the injuries are the most common. Thus, it is interesting to see under what circumstances—if at all—a contract can be terminated in the abovementioned situations.

3.2.3 Lack of (expected) performance and injuries as commonly evoked grounds of contract's termination

The main reason for implementing the 'no-cut guaranteed' clause into the basketball contract is to protect the player's or coach's (and the agent's) compensation in case of unilateral termination of the contract by the club due to alleged lack of skills or injury. Having that in mind a question should be raised: does the lack of protection by an appropriate guarantee clause enable the club to terminate the contract in case the player or coach do not perform as expected?

As mentioned the 'guarantee no-cut' wording of the contract originates from the American agents. It needs to be emphasized that common law systems, in principle, regard any contract as containing guarantee.¹⁵⁵ In relation to basketball contracts, this would mean that a player or coach not being able to perform on a level expected by the club could become liable for non-performance, thus—provided that

the non-performance level was serious enough, e.g. in relation to the level of performance presented earlier that could have been objectively measured—the club's termination due to that reason would be justified. Nevertheless, it stands to reason that the general use of the said clauses in basketball contracts resulted in the recognition of a general practice in basketball, under which the alleged lack of skills shall not be treated as a valid reason to terminate the contract with the player or coach or even to cease or reduce the payments. As it was clearly outlined in one BAT award:

based on the terms of the Player Contract and considerations of *ex aequo et bono*, which are in accordance with standard contractual practice in basketball, the Club had no right to retain salary payments or even terminate his employment because of its unhappiness with the Player's sporting performance.¹⁵⁶

Said position seems to correspond with a distinction of contractual obligations between *obligation de résultat* and an *obligation de moyens*—known under most civil law systems and thus placed among general principles of contract law¹⁵⁷—that show typical degree of duties in contract. While the former entails the duty to achieve specific results, the latter concerns the duty to give best efforts. This distinction seems to be especially useful in basketball, as the player or coach under the employment contract should not be obliged to guarantee a specific sporting result,¹⁵⁸ as the said result is not fully dependent of them, but on a variety of different circumstances, e.g. the performance of other players on the team, the performance of the opponents, the transfer policy and market position of the club. Furthermore, it shall not be forgotten, that the unpredictability of the sporting result is the essence of sport in general and no one can be obliged to guarantee it. Due to that the players and coaches are 'only' bound to give their best efforts, i.e. such efforts as would be made by a reasonable person of the same kind in the same circumstances, taking into account the particular nature of the contract, the intentions and interests of the parties and standards of the profession.¹⁵⁹

As far as injuries are concerned, BAT has developed a coherent approach indicating the principles that need to be applied in case of termination of the contract due to an

¹⁵² BAT 0471/13, para. 61.

¹⁵³ BAT 0471/13, para. 55.

¹⁵⁴ See e.g. FAT 0066/09, para. 84.

¹⁵⁵ Smits (2014), p. 214.

¹⁵⁶ BAT 0791/15, para. 61.

¹⁵⁷ Smits (2014), p. 213.

¹⁵⁸ Nevertheless it needs to be noted that the basketball contract may contain both duty to give best efforts (compensated under the salary) and a duty to achieve specific result (compensated under the bonuses for specific achievements, e.g. game bonuses).

¹⁵⁹ See Articles 5.1.4. of UNIDROIT Principles of International Commercial Contracts 2016. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. Accessed 4 October 2018.

injury, as well as the precautionary steps that both the player and the club need to undertake at the commencement of their contractual relationship in order to protect themselves.¹⁶⁰ In general, as it was held in one of the first BAT awards:

Good health and playing condition is an essential basis for every player's contract, even if such condition is not explicitly mentioned in the player's contract itself. The employer may rely on the expectation that a new player can be fielded according to the information provided by the player about his health prior to the signing of the contract and the needs of the team. It is the primary duty of any new player to disclose to the employer, prior to the signing of a player's contract, any pre-existing medical condition which would prevent him from fulfilling his contractual obligations and playing with the team as provided by the agreement. If a new player is hiding a pre-existing medical condition, he is deceiving the employer and the employment agreement lacks of an essential condition.¹⁶¹

Thus, on the one hand, even under a 'guaranteed no-cut' clause, the player shall reveal his medical and physical condition prior to the contract, as '*guaranteed contract does not prevent cheating*'.¹⁶² Such an obligation concerns in particular significant and serious injury, i.e. such that would prevent the club from executing the contract had it known of the injury. On the other hand, it is the club's obligation to undertake any necessary measures to check player's health condition in order to detect any injuries, in particular by performing a high standard medical examination consistent with best practice in the basketball industry and research all publicly available resources.¹⁶³ As it was explained in one of BAT awards, any allegations in relation to player's injury require compelling proof that the club 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.¹⁶⁴

Failure of the club to do its homework concerning the player's health condition—both in doing the research in advance regarding the player's playing history, as well as undertaking medical examination—may amount in BAT's opinion '*to a form of contributory fault/negligence*'.¹⁶⁵ In addition, provided the aforementioned precautionary steps had been undertaken, the club may step down from the contract '*if such withdrawal is communicated in a timely manner*',¹⁶⁶ thus shall not '*benefit from Player's skills on the court and at the same time deem the contractual guarantees in case of injury to become inapplicable*'.¹⁶⁷

3.2.4 The requirement to give notice before the termination of the contract and the proportionality of the undertaken measure

In the light of BAT's jurisprudence, the last step before exercising the termination of the contract by one party is to give the other party a notice. Even when the said duty arises from the contract itself, it is said to be an emanation of good faith approach to the termination of the contract, thus is also considered as a general principle of contract law. As BAT clearly stated:

It is a generally accepted contractual principle that before terminating a contract for just cause, the party invoking a breach must put the other party on reasonable notice thereof, in order to afford that party the possibility of curing the breach¹⁶⁸;

The foregoing contractual provision requiring notices of breach and time to cure them echoes 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.¹⁶⁹

¹⁶⁰ Hasler (2016), p. 136.

¹⁶¹ FAT 0066/09, para. 78.

¹⁶² FAT 0154/11, para. 77.

¹⁶³ Hasler (2016), p. 137.

¹⁶⁴ BAT 0263/12, paras 38–39.

¹⁶⁵ BAT 0213/11, para 110.

¹⁶⁶ FAT 0066/09, para 78.

¹⁶⁷ BAT 0693/15, para 82.

¹⁶⁸ FAT 0017/08, para 52.

¹⁶⁹ BAT 0535/14, para 34.

It needs to be emphasized that the obligation to give notice, thus behave in a clear and fair manner concerns both parties to the contract, even when the contract provides otherwise.¹⁷⁰ The notice requirements are thus not related only to the clubs, but also to players and coaches, that are obliged to communicate their will in a clear and fair manner, in particular in case of non-payment.¹⁷¹

In general, termination should be the last resort in the contractual relations between the player or coach and the club. The general principle of proportionality, which according to BAT *'requires that any other available measures have been exhausted before the most extreme sanction is applied'*,¹⁷² have been consistently applied in BAT's jurisprudence. In particular, when a club decided to terminate the contract with the player or coach and it was not a measure proportionate to the alleged breach of the contract by the player or coach, BAT ruled against the club's decision. BAT took such a clear position since basketball clubs frequently invoke allegedly recurrent minor breaches of the contract by the player in order to justify the termination, while usually it is only an excuse of the club, as the real reason for terminating the contract is dissatisfaction with player's performance.¹⁷³

3.3 The compensation

3.3.1 Damages—the principle of full compensation

Termination of the contract brings serious consequences to both parties. In particular, attention needs to be paid to the cases of terminating the contract by the player due to the breach of the club, e.g. non-payment of salaries or termination of the contract by the club without 'just cause', e.g. due to an alleged breach of the contract by the player, since these are relatively frequent under BAT jurisdiction. In both instances, the question of the damages and due compensation for the non-breaching party arise.

In this regard, BAT has developed—by reference to the applicable general standards of contract law¹⁷⁴—a consistent approach. First, it shall be noted that the termination of the contract is definitive for the parties:

As a general principle, a notice of termination of a labour agreement is final, binding and puts an end to the employment contract if the content of the notice is

unambiguous and if it is understood by the employee as an expression of the will of the employer to terminate the employment. An employee cannot be compelled to continue to offer his services to an employer who is no longer willing to solicit these services.¹⁷⁵

Moreover, the salary that had been earned till the moment of termination needs to be paid:

Since the notice of termination terminates the contractual relationship only for the future, and not retroactively, the Club must make all payments which it should have made according to the Contract until the date of termination.¹⁷⁶

However: *'In cases in which the employer terminates a contract without just cause its obligation to pay salary is replaced by an obligation to pay compensation to the employee'*.¹⁷⁷ Likewise, in cases when the player or coach terminated the contract with a just cause:

since the Club was in breach of its contractual duties and thereby provoked the contract termination, it is liable for damages. As a general principle, the Player can claim damages in the amount of the salaries agreed upon in the contract.¹⁷⁸

At the same time, in line with a well-established line of BAT's jurisprudence *'the claimant must prove the existence and the quantum of the damage claimed'*.¹⁷⁹ The position of BAT concerning the amount of damages can be summarized in a following way: *'As a matter of principle and in the absence of any provision about damages, the Arbitrator shall award the sum which would restore the injured party into the economic position that he or she expected from performance of the contract'*.¹⁸⁰ Therefore: *'the amount of the indemnity awarded shall not be punitive in nature but compensatory, and it shall be determined with the aim of estimating an amount which is as close as possible to what the actual damage suffered was'*.¹⁸¹

In light of the above it needs to be noted that in principle the full compensation shall be awarded, meaning that all the consequences of non-performance or an illegal act should be erased. This requires the compensation not only—as indicated above—of direct loss (*damnum emergens*), but also of lost opportunity (*lucrum cessans*). As far as the latter

¹⁷⁰ For a comprehensive analysis on this matter see Hasler 2016, pp. 139–142.

¹⁷¹ Ibid., p. 141.

¹⁷² FAT 0038/09, para. 68.

¹⁷³ Manarkis (2011), p. 184.

¹⁷⁴ Bentolila (2017), para. 5.05[A]; Kotuby and Sobota (2017), pp. 143–151.

¹⁷⁵ FAT 0008/08, para. 76.

¹⁷⁶ FAT 0034/09, para. 68.

¹⁷⁷ FAT 0008/08, para. 76.

¹⁷⁸ BAT 0155/11, para. 62.

¹⁷⁹ FAT 0041/09, para. 78.

¹⁸⁰ FAT 0021/08, para. 72.

¹⁸¹ BAT 0334/12, para. 86.

is concerned BAT arbitrators' position is clear, as they are stating: *'it is just and fair that the Claimants receive some compensation for the lost opportunity that they suffered due to unjust termination'*¹⁸² or *'there is, in fairness no reason why the Claimant should not be indemnified for the lost opportunity'*¹⁸³

Last but not least, BAT also emphasized that the party requesting the damages must prove both *'the damage claimed and the causal connection'*.¹⁸⁴

3.3.2 The duty to mitigate damages

The duty of the injured party to mitigate the damage is recognized in a number of national legal systems¹⁸⁵ as well as in the international domain, both in uniform restatements of contracts¹⁸⁶ and as a transnational arbitration rule.¹⁸⁷ It is also a principle enshrined in BAT arbitration, what may be exemplified by the following 'case law' excerpt:

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.¹⁸⁸

The duty to mitigate is considered as another exception to the 'no-cut guaranteed' clause, which is supposed to prevent an unjust enrichment by the injured party.¹⁸⁹ Thus, BAT has consistently claimed—in line with generally accepted principles of the law of damages and also labour law and even counter to an express contractual solution suggesting otherwise—that after an unjustified termination of the player's or coach's contract by the club, the player or coach have 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.¹⁹⁰ Such an approach is, in BAT's opinion, *'keeping with the rationale of an employment contract in the field of sport, in terms of basic fairness/*

balance of consideration'.¹⁹¹ Furthermore, the party that does not make best efforts to mitigate damages, e.g. by finding an employment with a salary adequate to the sports level, thus contributes to the scale of damage, may be deprived of the part of compensation he or she would have been owed otherwise. In such a case, the arbitrator is entitled to reduce the compensation.¹⁹²

3.3.3 Contractual penalties

In multiple cases, BAT addressed the issue of contractual penalties arising out of penalty clauses placed into basketball contracts. In BAT's jurisprudence, a contractual penalty has been specified in particular as a form of penalty for the late payments,¹⁹³ i.e. *'a flat fee for each day of late payment which is cumulatively calculated without limitation as long as the [Player, Coach, Agent] has not been paid'*.¹⁹⁴ In regard to the amount of contractual penalty due BAT has consistently applied the principle of proportionality, thus admitted that said measure shall not have a greater effect than it is necessary to achieve its objectives.¹⁹⁵ Bearing in mind that the contractual penalty is current in case of a late payment: *'In principle, a contractual penalty should not be disproportionate to the compensation whose payment is secured by the contractual penalty'*.¹⁹⁶ Due to that, in line with the general principles of law related to the matter of contractual penalties,¹⁹⁷ BAT has undertaken the following approach:

In most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.¹⁹⁸

In one of the cases, BAT arbitrator set out various considerations that should be taken into account when determining the appropriate amount for a contractual penalty:

¹⁸² FAT 0017/08, para. 57.

¹⁸³ BAT 0252/12, para. 91.

¹⁸⁴ FAT 0041/09, para. 82; FAT 0043/09, para. 61.

¹⁸⁵ E.g. Article 44.1. Swiss Code of Obligations, § 254 German Civil Code (BGB), Article 362 Polish Civil Code.

¹⁸⁶ See The Principles of European Contract Law 2002, Article 9:504. <https://www.trans-lex.org/40020>. Accessed 4 October 2018; UNIDROIT Principles of International Commercial Contracts 2016, Article 4.4.8. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. Accessed 4 October 2018.

¹⁸⁷ Bentolila (2017), paras. 580–581.

¹⁸⁸ BAT 0155/11, para. 8.

¹⁸⁹ Zagklis (2015a), p. 186.

¹⁹⁰ Hasler (2016), p. 148.

¹⁹¹ BAT 0535/14, para. 52.

¹⁹² BAT 1157/18, para. 74.

¹⁹³ Although under most legal systems contractual penalties may be applied as a form of protection of pecuniary obligations, under certain systems, e.g. in Poland, they can be specified only in relation to non-pecuniary obligations.

¹⁹⁴ FAT 0036/09, para. 53.

¹⁹⁵ Manarakis (2011), p. 183.

¹⁹⁶ FAT 0037/09, para. 59.

¹⁹⁷ Smits (2014), pp. 226–227.

¹⁹⁸ FAT 0036/09, para. 53.

(a) The arbitrator accepts that a contractual penalty shall constitute a credible deterrent against deliberate withholding of due payments; (b) A contractual penalty in the form of a flat fee, applying equally to small or large sums, may be problematic and may call for adjustment depending on the circumstances; (c) the contractual penalty should be capped. Only under exceptional circumstances (e.g. if the period of default clearly exceeds one year or if the behaviour of the debtor calls for a higher sanction), such cap shall exceed the compensation whose payment is secured by the contractual penalty. (d) The Arbitrator should also take a behaviour of the parties into account: the duty to mitigate one's own damage requires that contractual penalties should be reduced if the creditor deliberately delays the enforcement proceedings.¹⁹⁹

As under different legal systems contractual penalties may be either more of a 'dissuasive' or more of a 'penal' nature, it is also worth to note that BAT stands by the former by clearly admitting that: *'the penalty clause is (...) to prevent late payments under existing contract. (...) once the employment relationship was terminated by the Player, penalty payments ceased to accrue'*.²⁰⁰ Thus, in principle the penalty for late payment is due at earliest, from the date that a payment was due, until the termination of the contractual relationship. Nevertheless, in another line of BAT's jurisprudence, the said penalty is deemed to be due until, at the latest, the date of Request for Arbitration.²⁰¹

The issue of contractual penalties is related also to the fines, that may imposed by the clubs on players and/or coaches, based either directly in the Player's/Coach's contract or—usually—in the internal regulations of the club (often called also as the 'club rules'), related to the discipline within the club, that constitute an integral part of parties' agreement, provided that are referenced to in the Player's/Coach's contract.²⁰² In this regard, as said club rules often provide for both the fines, as well as an club's option to terminate the contract in case of a certain breach of club's discipline, the principle of proportionality has to be emphasized. As BAT stated in one of the awards:

Arbitrator finds that clause (...) of the Contract does not mandatorily require terminating the contract in

case of non-compliance with Internal Regulations but leaves room for other sanctions. Clause (...) provides, e.g. for "monthly fines" or the termination of the contract in case of breach of these Internal Regulations.²⁰³

3.3.4 Interest

Another general principle of contract law reflected in BAT's jurisprudence concerns the matter of interest. As late payments give rise to interests in order that the creditor be placed in a financial position he or she would have been had the payments be made on time, it is normal and fair that interest is due on the late payments.²⁰⁴ Therefore, in the series of BAT awards it has been consistently held that even in case when the basketball contract *'does not explicitly provide the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems'*.²⁰⁵ Another opinion of BAT also leads to the same conclusion: *'Payment of interest is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interest'*.

As far as the rate of the interest is concerned, BAT recognized—invoking to the Swiss statutory rate—that the interest at 5% *per annum* is *'reasonable and equitable'*.²⁰⁶ Said rate is awarded by BAT, in case the contract does not stipulate otherwise. In situations when the rate is directly determined in the contract, however, BAT arbitrators have accepted interest rates up to 10% *per annum*, but explained that it was very high and at the limit of what was compatible with the *ordre public*. In regard to that it has been agreed that interest rates are supposed to compensate for the hardships endured by an obligee and not to sanction the obligor for the belated payments. Therefore, the arbitrators have power to reduce the interest rates specified in the contract, to the maximum rate, which was accepted in previous BAT jurisprudence.²⁰⁷ At the same time, BAT have held that *'had the parties wanted to introduce a sanction, they could have agreed on penalties for belated payments'*, which can be higher in the *per annum* period, than interests.²⁰⁸ Thus, the penalties for late payments and interests for late payments may be awarded concurrently, however:

There is no room to claim interest during a period for which late payment penalties are already awarded to the Claimant because this would constitute an inad-

¹⁹⁹ FAT 0036/09, para. 55, similar FAT 0172/11, para. 62.

²⁰⁰ FAT 0155/11, para 69, FAT 0100/10, paras. 46–47.

²⁰¹ BAT 1028/17, para. 131, referring to BAT 0439/13.

²⁰² See FAT 0038/09, paras. 65–67; BAT 0952/17, paras. 7–8, 22, 52; BAT 1028/17, paras. 11, 70, 96, 102.

²⁰³ FAT 0038/09, para. 67.

²⁰⁴ Zagklis (2015a), p. 186.

²⁰⁵ FAT 0041/09, para. 83.

²⁰⁶ FAT 0009/08, para. 92.

²⁰⁷ BAT 1157/18, paras. 87–88.

²⁰⁸ BAT 0439/13, para. 88; BAT 1157/18, para. 87.

missible double compensation for damages due to late payment.²⁰⁹

Since the penalties for belated payments are awarded usually latest till the termination of the contract, the interest, in principle are owed since then until the actual date of the payment of the overdue amounts of compensation. Nonetheless, as BAT arbitrator stated in one of the awards ‘*in fairness, there is no reason for the interest thus awarded to be compounded in any manner*’,²¹⁰ despite compound interest are consistent solution in international arbitration.²¹¹

3.3.5 The principles of *Verwirkung* and *venire contra factum proprium*

In its jurisprudence BAT recognized, the *Verwirkung* concept as one of the general principles of law²¹²—rooted in the principle of legal certainty²¹³—thus applicable under *ex aequo et bono* arbitration.²¹⁴ At the same time, widespread differences in the various legal systems in relation to the legal nature of said principle had been noticed, what the following phrase reflects:

While some legal systems derive the principle of “*Verwirkung*” from the prohibition of an unlawful exercise of a right and, thus, qualify the principle as a matter of substantive law, other legal systems consider the “*Verwirkung*” principle to be a tacit waiver of the right to assert, or a procedural prohibition of asserting the claim in question.²¹⁵

As to the essence, it has been emphasized that said principle requires two prerequisites:

(a) that the creditor has failed during a significant period of time to exercise his right and (b) that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his right or claim in the future.²¹⁶

As far as the principle *venire contra factum proprium* is concerned, BAT stated that it is:

widely recognized in many civil law systems. It has a close relative in the common law world, namely estoppel. While there are differences, the general principle remains essentially the same, namely that one’s conduct or statements of intent concerning existing contractual rights can lead to a prohibition on the invocation of such rights. Given the widespread acceptance of this general principle, it would appear just and equitable to the Arbitrator that such a doctrine be given force by means of *ex aequo et bono* in the context of BAT arbitration.²¹⁷

Both principles have been equated in BAT jurisprudence,²¹⁸ since both lead to the same effect on the issues raised in the aforementioned BAT cases, namely the time limit of the claims. Therefore, beside the aforementioned prerequisites, in order for these principle to function properly, the findings related to ‘*the significant period of time*’ had to be made. In this regard, interestingly, the arbitrators did not take the guidance in national laws either on a comparative basis or in relation to the national laws most closely connected to the dispute at stake.²¹⁹ Instead, while determining the time conditions for the operation of such principles BAT established a two-step test. At first, the context of professional basketball has to be taken into account:

In professional basketball contractual arrangements revolve around seasons running from early September to late May (subject to variations). There appears to be considerable movement of players during the off-season each year and frequently a team’s make-up can vary from one season to the next. Some contracts are for one year; others for two years (as in this case) and others for three years. It is obviously a matter of considerable commercial importance to a professional basketball team that its financial affairs from prior seasons do not overhang unduly into subsequent seasons.²²⁰

As a result, a standard providing for limitation between 1 and 2 years from the event giving the reason to the dispute has been established.²²¹ Secondly, however, the arbitrator needs to consider also the circumstances of the given case.²²² Due to that, the truly exceptional individual conditions may

²⁰⁹ FAT 0009/08, para. 93.

²¹⁰ BAT 0439/13, para. 89.

²¹¹ Bentolila (2017), paras. 586–592.

²¹² See e.g. UNIDROIT Principles of International Commercial Contracts 2016, Article 10.1. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. Accessed 4 October 2018.

²¹³ BAT 1082/17, para. 59.

²¹⁴ BAT 0480/13, para. 88, referring to BAT 0107/10.

²¹⁵ BAT 0107/10, para. 55.

²¹⁶ BAT 0107/10, para. 56; BAT 0480/13, para. 89; BAT 0593/14, para. 38.

²¹⁷ BAT 0121/10, para. 92.

²¹⁸ BAT 0121/10, para. 76; BAT 0480/13, para. 8.1.

²¹⁹ BAT 0121/10, para. 88; BAT 0480/13, para. 90.

²²⁰ BAT 0121/10, para. 93.

²²¹ BAT 0593/14, para. 41, referring to BAT 0107/10, BAT 0121/10 and BAT 0480/13.

²²² BAT 0121/10, para. 94.

still cause set time restrictions to be either shortened, or extended.

3.4 Multiple contractual bonds

3.4.1 The notion of image contracts—a need for an uniform approach

Probably the most controversial issue in European basketball and a problem that BAT faces frequently is the one concerning the existence of multiple contractual bonds between the parties. Even though the basketball contracts under *ex aequo et bono* regime have been delocalized in the light of national laws related to private relationship, the national public laws—in particular on tax and obligatory social and health insurance issues—remain in force in relation to these contracts. Therefore, the parties to basketball contracts, in order to optimize their tax obligations and reduce public insurance burdens, instead of relying only on one contractual bond covering all parts of the compensation (salary, bonuses and other forms of taxable income), split compensation on additional contractual bonds. The so-called image rights contracts constitute one of the frequently used bonds.

Under the discussed mechanism—in principle, since different combinations are exercised²²³—the player or coach signs an initial employment agreement with the club, where all of his or her compensation is specified in amounts net of all taxes and social insurance charges. This agreement is usually called a ‘main agreement’ or a ‘master agreement’.²²⁴ Afterwards or simultaneously three additional agreements are concluded: (1) the regular employment contract (sometimes also called the ‘league contract’, since it is necessary for the registration of the player in competition) between the player or coach and the club that provides for a much lower compensation than an initial contract and that is reported both to the league and tax/social insurance authorities, (2) first image rights contract, where the player or coach assigns his image rights to a image rights company that is usually located in the jurisdiction providing for advantageous tax rates in relation to income arising from licensing of the image rights, (3) second image rights contract, where the image rights company assigns the image rights, previously assigned by the player or coach, to the club. Such a complex scheme provides *de iure* for a tripartite contractual relation,

²²³ For a comprehensive overview of these combinations see Diathesopoulou T., Image Rights in Professional Basketball (Part I): The ‘in-n-out rimshot’ of the Basketball Arbitral Tribunal to enforce players’ image rights contracts., 7 November 2014. <http://www.asser.nl/SportLaw/Blog/post/image-rights-in-professional-basketball-the-in-n-out-rimshot-of-the-basketball-arbitral-tribunal-to-enforce-players-image-rights-contracts-by-thalia-diathesopoulou>. Accessed 4 October 2018.

²²⁴ See e.g. BAT 0174/11, para. 6; BAT 0155/11, para. 23.

established on a series of bipartite agreements, thus also the money flow follow accordingly.²²⁵ Nevertheless, provided that in most of the cases there is no economic rationale behind it²²⁶ and the only reason for that is to implement tax and social insurance evasion scheme,²²⁷ said contractual relation is being done *pro forma*, without true intention of changing player’s or coach’s rights and obligations under the initial agreement. Therefore, *de facto* only a bipartite contractual relation is in force. The problem arises when under said mechanism the club does not perform its contractual duties, namely fails to pay for licensing the image rights of the player or coach.

In a series of cases, BAT has found the clubs liable for the breach of image rights contract and the subsequent outstanding payment for the player.²²⁸ Therefore, it acknowledged the fiction of the tripartite contractual scheme by using interdependent bipartite contractual bonds. As all the contracts constituting the said construction usually do not define how they should interrelate and not all of them contain a BAT arbitration clause, BAT had to interpret the common intention of the parties to guarantee the payment of the full salary to the player specified in the initial agreement and decide whether the subsequent contracts actually supersede²²⁹ the initial contract or rather play a supplementary role in organizing the payments for the player or coach. In order to answer these questions, BAT has established a test combining following criteria:

- (i) The Club and the Player are parties to the Main Player Contract containing the [BAT] arbitration clause.
- (ii) The terms of the Main Player Contract include all the essential elements of agreement between the Club and the Player with respect to the latter’s right to remuneration (...) and the details regarding the services that the Player must render to be entitled to his full remuneration, including the timeframe and games involved.
- (iii) It is clear from those terms

²²⁵ Usually the image rights contract contains the significant amount of the salary due to the player, higher than the regular employment contract. However in certain jurisdictions only a small amount, e.g. in Spain fifteen percentage (15%), can be paid ‘through’ image rights contract.

²²⁶ It needs to be noted that the image rights contracts—in the light of certain national laws—are not illegal itself, but only if they are concluded without a real economic purpose. Also certain jurisdictions establish a cap on the image rights payments to professional athletes.

²²⁷ Said scheme is especially beneficial for the club, as it allows offering a *de facto* higher net salary to the player, than under the regular tax/social insurance regime of the country where the club is located and, as a consequence, to hire a higher level player.

²²⁸ Diathesopoulou (2014), *supra* n. 223.

²²⁹ The Clubs are often invoking the principle *lex posteriori derogat legi priori*, see FAT 0115/10, para. 36.

of the Main Player Contract that, irrespective of any modalities that would be agreed upon in other agreements as to the mode and schedule of payments, the Parties' common intent under the Main Player Contract was that the Club itself was fully guaranteeing to the Player the payment of a total salary (...) by the end of the season (...) (iv) It follows that the broad terms of the arbitration clause in the Main Player Contract (...) necessarily encompass and were intended by the Parties to cover any disputes relating to the non-payment by the end of the season (...) of any part of the Player's total guaranteed salary (...) stipulated in the Main Player Contract.²³⁰

In addition, on a multiple occasions BAT had emphasized the necessity to establish a link between all the contracts:

even if the Player was deemed to be a party to the Image Rights Contract, this would still not affect [BAT's] jurisdiction over the claim for Image Payments in the Main Player Contract. The reason is that the Main Player Contract and the Image Rights Contract are closely linked, with the Main Player Contract being the primary agreement (...) Therefore, the validity of the Image Rights Contract and the Club's obligations thereunder are contingent upon the continuation of the contractual relationship between the Player and the Club; such contractual relationship was established and regulated by the Main Player Contract.²³¹

What seems especially interesting, in one of the cases BAT concluded that the only case in which the club would not be found liable for breach of image rights contract would be the case where the image rights contract explicitly provided an waiver of the player's claims against the club relating to image rights.²³²

In regard to the above, it shall be noted that in some BAT cases the arbitrators dissented from the well-established line of jurisprudence related to the interpretation of the parties' true intent and relied on the formal aspects of the image contracts, what only complicated bringing the claims for the injured parties.²³³ Such an approach seems to be questionable considering both the essence of *ex aequo et bono* and the purposes for its adaptation under BAT arbitration. As Thalia Diathesopoulou convincingly noted, it is contrary to general considerations of justice and fairness (thus also to general

principle of good faith) to consider that the club could take an unfair advantage of a tax and social insurance optimizing structure to no longer guarantee amounts in fact due to the player.²³⁴ After all, BAT originated from the necessity to guarantee that players, coaches and their agents will not be the victims of the clubs that use the legal loopholes, thus in fact abuse their contractual rights to an unfair advantage of the other party.

3.4.2 General (standard) terms and conditions of contracts

3.4.2.1 The FIBA regulations on player's agents The general terms and conditions of the contracts have been a concept well known to a number of national jurisdictions.²³⁵ It is related to standard pre-formulated terms of the contract, which one party presents to the other upon the entering into the contract. Since the party pre-formulating the standard terms is often a monopolist at a given market, the other party has little or no ability to negotiate more favourable terms, thus is placed in a 'take it or leave it' position. Due to that the standard terms and conditions are considered to be *contrat d'adhésion*.

Under BAT's jurisprudence, the discussed concept has been primarily explored in relation to aforementioned FIBA IR, regulating the activities of players' agents, and its influence on the terms of individually negotiated agency agreements, concluded between said parties. Since FIBA licenced agents are obliged to comply—under disciplinary sanctions—with FIBA IR, they shall also observe certain conditions while formulating the contractual relationship with the players, in particular to make use—to the extent possible—of the master agreement between agents and players, as provided in FIBA IR.²³⁶ As a result, the agency agreements often contain a reference to FIBA IR, thus, the former can be treated as general terms and conditions of the contract. Said has been confirmed in one of the BAT awards: '*The FIBA Internal Regulations apply to contractual relationship of the Parties by reference, like general terms and conditions*'.²³⁷ Nonetheless, at the same time the BAT arbitrator admitted:

They do, however, not trump the individually agreed terms of the Agency Agreement, but apply only subsidiary, where there is no specific provision in the

²³⁰ See FAT 0115/10, para. 44; FAT 0105/10, para. 49, FAT 0071/09, para. 61, FAT 0067/09, para. 66, BAT 0413/13, para. 61.

²³¹ FAT 0115/10, para. 41.

²³² Diathesopoulou (2014), *supra* n. 223, referring to FAT 0115/10, para. 64.

²³³ See e.g. BAT 0413/13, BAT 0884/16 and BAT 1128/17.

²³⁴ Diathesopoulou (2014), *supra* n. 223.

²³⁵ See e.g. German Civil Code (BGB), § 305–310; Articles 384–385 of Polish Civil Code.

²³⁶ See Chapter 9 and Appendix 1 to FIBA IR Book 3. <http://www.fiba.basketball/internal-regulations/book3/players-and-officials.pdf>. Accessed 4 October 2018.

²³⁷ BAT 0541/14, para. 49.

Agency Agreement. In case of discrepancy, the terms of the Agency Agreement must, however, prevail.²³⁸

Moving forward, it has been noticed:

non-compliance of a contractual provision with the FIBA Internal Regulation does not lead to the invalidity of that contractual provision, but, if at all, to sanctions according to (...) FIBA Internal regulations, which is, however, not a matter of the Arbitrator's mandate of jurisdiction.²³⁹

Subsequent BAT awards lead to the same conclusion, by invoking to the *pacta sunt servanda* principle and the concept of *ordre public*:

The rights and duties of contractual parties are determined by the contents of their agreement (*pacta sunt servanda*). The terms of their agreement are binding and enforceable as long as they do not violate public policy principles. (...) any violations of the FIBA Internal Regulations do not *per se* invalidate the contractual arrangements between a player and an agent/agency. In this context, the Arbitrator notes that the consequences of a violation of the FIBA Internal Regulations are dealt with in (...) FIBA Internal Regulations. According thereto, violations by an agent may result in disciplinary sanctions (warning, reprimand, fine, withdrawal of the agent's licence) to be imposed by the respective adjudicatory bodies of FIBA. However, the relevant rules do not provide for the nullity of the agreement.²⁴⁰

3.4.2.2 The national league regulations and its influence on player's contracts A similar approach to the one concerning FIBA IR has been presented in relation to the legal nature of national league regulations, provided by national basketball federations, national leagues and players' unions. Namely, as BAT noticed in one of the cases:

one cannot assume that when the Player and the Club signed the League Contract – the “standard forms and conditions” provided by the (...) Basketball Federation, the (...) League and players' union – they wanted to set aside their individually negotiated agreement contained in the Player Contract.²⁴¹

In order to reach this conclusion, the arbitrator noticed that *'it is a standard form document which any player playing professional basketball (...) must sign in order to be eligible*

*for registration. Furthermore, 'it is the player's contract that contains detailed arrangements on all aspects of the parties' relationship, including salaries and bonuses, payment schedules, other benefits (...), medical care, taxes, club rules, agency fees etc.'*²⁴² Thus, despite the fact that the parties executed more than one contract, and although the league contract was concluded after the player's contract, the presumption *jus posterior derogat priori*—indicating at the most recent contract as the prevailing one—may be rebutted. Interestingly, said conclusion influences BAT jurisdiction—the basketball federation/league provisions on the dispute resolution system are thus preceded by the individually negotiated BAT arbitration clause.²⁴³

In general, BAT jurisprudence indicates that the individually negotiated contracts take over any general forms and conditions, in case of any discrepancies. The standard forms prevail only when the individual contract clearly states so.²⁴⁴

4 In quest for standardized contracts in global basketball

4.1 Individually versus collectively bargained conditions of employment in basketball

Considering that the imbalance of power between the parties has been an inherent characteristic of individually negotiated employment relationship in basketball, one of the ways to offset it is the unionization of basketball players at national levels and their engagement in collective bargaining enabling the determination of equal employment conditions for the whole industry. The importance of collective actions in professional basketball may be best exemplified with the role that the National Basketball Players Association (NBPA) has played in bargaining the employment conditions of basketball players in American professional basketball league, namely the National Basketball Association (NBA). As a result, a Uniform Players' Contract, that includes 'arms length bargained' standard terms of employment of basketball players in the NBA, has been formed.²⁴⁵ Nevertheless, such a way of solving the imbalance issue has not been common in other parts of the world.

Despite basketball employment market shares certain common features globally, collective bargaining of employment conditions on the international (transnational) level

²³⁸ Id.

²³⁹ Ibid., para. 50.

²⁴⁰ BAT 0792/15, para. 45; BAT 0901/16, para. 70.

²⁴¹ BAT 0765/15, para. 78.

²⁴² Ibid.

²⁴³ Ibid., paras. 67–80.

²⁴⁴ Said conclusion can be drawn from BAT 0326/12, paras. 62–63.

²⁴⁵ For the detailed provisions of the CBA and the Uniform Players' Contract see NBPA, CBA, 19 January 2017. <https://nbpa.com/cba/>. Accessed 3 October 2018.

is difficult to accomplish, as in principle the competence to regulate employment relations is being exercised at the national level. Thus, also the standard terms of employment collectively bargained depend on the position of the parties under the employment laws of each country. Also the European Union (EU) has a limited competence to regulate the labour relations. The extent to which collective labour rights are promoted and protected in the national legal systems of the EU member states differ markedly and it is challenging to achieve political consensus at European level on regulating this area.²⁴⁶ Although the protection of players' rights on the equal level worldwide (or at least in certain areas of basketball competition, e.g. Europe) seems to be desired, the national peculiarities hinder satisfying that goal through collective bargaining. Nonetheless certain initiatives aiming at organizing the basketball players at the European level have been undertaken, e.g. the one of *Union des Basketteurs Européens* (UBE), supported by the European Commission.²⁴⁷

It stands to reason that BAT, due to its inherently universal approach to the employment relations in basketball, may be treated—to a certain extent—as a facilitator of establishing the equal conditions of employment worldwide. Naturally, as an adjudicative body, BAT cannot serve as substitute for players' unions, or organisations of clubs and/or leagues. The role of the collective bargaining process in mitigating the imbalance in the basketball employment relations should thus not be marginalized. Nonetheless, since applying general principles of law to the basketball contracts is oriented *inter alia* on the protection against abuse of rights in the contractual relations, the outcome of BAT arbitration is in many instances similar to the outcome of collective bargaining. Therefore, as BAT enables to premise basketball contracts on the globally acceptable standards, *de facto* it helps to establish the uniform contract in basketball. Actually, said process may be treated as already on-going, since many basketball agents use the same template contract for their players, filled in with the standard clauses that have passed the test of BAT's proceedings.²⁴⁸

4.2 BAT as a true 'lawmaker' in basketball

The uniqueness of BAT arbitration can be measured in numerous ways. One of them, undeniably, concerns the development of consistent 'case law' by BAT and—as a

result—its actual 'lawmaking' authority in relation to the standards of basketball contracts. Before alleging that BAT arbitrators establish a coherent body of law, the peculiarities of BAT decision-making process should be taken into account. It would be probably more safe to say that under the *ex aequo et bono* concept, due to its inherent constraints related to international (transnational) public policy, the BAT arbitrators do not exactly create the law, but rather unveil general principles of law. Nonetheless, at the same time BAT's jurisprudence is not merely an amalgam of general principles of law, since these principles are applied in the relevant context. Thus, the specificity of basketball needs to be often included and said principles must be tailored to basketball disputes. In order to answer that specific need, BAT uses the restricted number of specialized arbitrators and prepares them—through equipping with certain procedural tools, as outlined in Article 16.1 of BAT Rules, as well as annual meetings and qualified legal training—to satisfy these expectations. Furthermore, there is a basketball community staying behind BAT. Even though BAT has not been able to wipe out completely the customary practice in international basketball of not honouring the contracts, it has proved to be effective in solving the disputes based on these contracts.²⁴⁹ The increasing acceptance of the jurisdiction of BAT—measured, for instance, in the evenly growing number of requests for arbitration filed to BAT each year²⁵⁰—seems to best confirm that BAT is considered to be a trustworthy institution. All the more does that the reliance on the standard of basketball contracts developed within BAT's 'case law'. In order to achieve a full satisfaction, however, BAT needs to continue improving the accessibility to its jurisprudence. At the same time, FIBA needs to guarantee consequent honouring of the BAT awards. After all, the quality of any 'legal system' is measured in the certainty of its laws, transparency of the 'lawmaking' process as well as the power of enforcement.

Last but not least, it is worth asking whether BAT awards could become a source of *lex sportiva*. As Allan Erbsen once noticed: '*Lex sportiva is now an umbrella term label that encompasses several discrete methodologies of lawmaking, distilling a medley of variables into an oversimplified motto*'.²⁵¹ *Lex sportiva* has always been considered as integrally connected with CAS arbitration, being an outcome of its *de facto* 'lawmaking' activity. Interestingly, in a number of cases BAT arbitrators evoked CAS awards related to

²⁴⁶ See more O'Leary (2017), pp. 138–166.

²⁴⁷ See Union des Basketteurs Européens, Project to organize European players accepted by EU Commission, 5 December 2017, <http://ubeyplayers.com/news/project-to-organize-european-players-accepted-by-eu-commission/>. Accessed 3 October 2018.

²⁴⁸ See Zagklis (2015a), pp. 186–187.

²⁴⁹ Anthony (2013), p. 48.

²⁵⁰ See FIBA, BAT Statistics 2007–2015. <http://www.fiba.basketball/bat/process>. Accessed 10 December 2017.

²⁵¹ Erbsen (2012), p. 92.

contractual disputes in football. On some occasions, BAT followed concepts developed in relation to football,²⁵² on the others rejected the reasoning of CAS and followed its own path.²⁵³ At any times, however, BAT arbitrators reached their decisions taking into account the peculiarity of *ex aequo et bono* principle. Thus, it would be hard to establish any precedent style connection between BAT and CAS arbitrations. Nowadays, though, there is a broad disagreement about what sources of law and what forms of legal reasoning may *lex sportiva* may encompass. Thus, this path may be eventually open for BAT arbitration.²⁵⁴ At the moment, however, BAT's primary focus is to explain how to access justice and fairness in basketball, through decoding standards of basketball contracts in its unique 'lawmaking' process.

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²⁵² See e.g. BAT 0383/13, para. 80; BAT 0480/13, para. 91; BAT 0641/15, para. 81.

²⁵³ See e.g. BAT 0314/12, para. 76; BAT 0702/15, para. 67.

²⁵⁴ See more Zagklis (2015a), p. 188.