

Basketball:

A legal jump ball

Analyzing the role of conditions precedent in professional employment contracts

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Introduction

In the dynamic world of sports, where talent and performance are the currency of success, the employment contracts governing the relationship between athletes and organizations play a pivotal role.

Amidst the intricacies of these agreements lies a crucial legal concept that often shapes the terms of engagement – the condition precedent. The term “*condition precedent*” refers to a condition or event that must occur before certain rights or obligations within the contract take effect. A condition precedent is in a way similar as – but not the same as – a “*resolutive condition*”. The latter operates after the contract is in effect and, when triggered, leads to the automatic termination of the contract. Both conditions are however tools used in contract drafting to introduce flexibility and manage risks.

In the context of employment contracts, including those in professional sports, the legitimacy of both the concept of the condition precedent and the concept of the resolutive condition is often debated. In The Netherlands, for example, some legal experts argue that a condition precedent and a resolutive condition do not comply with national employment laws and are thus null and void. The validity of condition precedents and resolutive conditions is not guaranteed in international sports law either. For example, it follows from the well-established jurisprudence of the FIFA Dispute Resolution Chamber (“DRC”) that the validity of employment contracts cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer

of a player.² On the other hand, a relegation clause that is described in the form of a true resolutive condition, and not as a unilateral right of a club to terminate the contract upon relegation, can be deemed valid by the DRC.³

Sports law is, however, not limited to football law alone. Within the expansive field of sports law, the legal framework governing basketball stands as a distinct and dynamic domain. This is especially true because the jurisprudence of the Basketball Arbitral Tribunal (“BAT”) is an important part of basketball law. Simplistically put, the BAT is the go-to arbitration tribunal when it comes to contractual disputes between professional basketball clubs, players, coaches and basketball agents.⁴ As a result, the BAT, quite frequently, deals with different kinds of conditions precedent. Unlike the DRC, the BAT is not bound by the rules and regulations of a sports federation. The BAT, in fact, issues awards by applying the principle of *ex aequo et bono*. *Ex aequo et bono* is a Latin term meaning “*according to what is just and good*”. In legal contexts, it refers to a principle whereby a decision is made based on fairness, equity, and good conscience rather than strict adherence to legal rules or precedent.

Taking this into account and the importance of the concept of conditions precedent in sports employment contracts, it is interesting to analyze the jurisprudence of the BAT on this subject. Although it would be interesting also to analyze the jurisprudence of the BAT on the subject of resolutive conditions, this article will solely focus on the intricacies of common conditions precedent in basketball employment contracts.

The Basketball Arbitral Tribunal

As stated, the BAT serves as a specialized forum for the

² De Weger, *The jurisprudence of the FIFA Dispute Resolution Chamber* (T.M.C. Asser Press, 2016).

³ *Ibid.*

⁴ This applies only when there is a valid jurisdiction clause in favor of the Basketball Arbitral Tribunal. The jurisdiction of the BAT will not be discussed in more detail in this article.

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resolution of disputes within the realm of professional basketball. The BAT offers a structured and impartial platform for the resolution of various conflicts, including contractual disputes between players, agents, and clubs.

Functioning as an independent arbitral body, the BAT operates under its own set of rules and procedures, providing a streamlined and efficient process for parties involved in basketball-related disputes. One of the reasons why the BAT can offer an efficient procedure, is the fact that it deals with disputes on the basis of the principle of *ex aequo et bono*. This allows arbitrators great flexibility, both when it comes to procedural issues and when it comes to the merits of a case. The principle of *ex aequo et bono* is often negatively stereotyped. It is often contended that a tribunal that decides *ex aequo et bono* can act outside the law and that the outcome of a procedure can in no way be predicted.⁵ This, however, is not accurate and the BAT has proved as much. In fact, the jurisprudence of the BAT shows a high level of consistency.

The BAT considers the principle of *pacta sunt servanda* to be an integral part of the legal concept of *ex aequo et bono*.⁶ *Pacta sunt servanda* is a fundamental principle in contract law, emphasizing that agreements must be honored. Translated as “agreements must be kept”, it underscores the importance of parties fulfilling their contractual obligations. This principle ensures stability, predictability, and trust in legal relationships, forming the cornerstone of contractual integrity. As a result of the fact that the BAT applies this principle rather strictly, the wording of a contract is considered the starting point for BAT arbitrators when accessing the dispute at hand.⁷ However, it is of particular importance for the doctrine of *pacta sunt servanda* that there is clarity as to the methods by which the content of the obligations concerned are duly ascertained.

An arbitrator of the BAT may, thus, look at the rationale of a contract.⁸ This, however, does not mean that a BAT arbitrator can easily depart from the wording of a contract. A BAT arbitrator cannot replace any contractual agreements by his or her own considerations of fairness and justice. Only in exceptional circumstances, a BAT arbitrator may adjust or disregard certain contractual clauses.⁹

Taking this into account, it may not come as a surprise that the BAT accepts conditions precedent to be a valid part of agreements. However, it follows from the well-established jurisprudence of the BAT that conditions precedent must be formulated in an unambiguous language in order to be valid. Vague or ambiguous conditions precedent are often interpreted narrowly by the BAT. This approach can easily be justified, given the fact that non-fulfilment of a condition precedent can have serious consequences for employees, or rather, for players and coaches.¹⁰

Medical examinations

In the realm of professional basketball, medical examinations play an important role. The process of a medical examination involves a thorough assessment of a player's physical health to ensure their ability to meet the demanding rigors of the sport. From a legal standpoint, the medical examination is often embedded in player contracts as a condition precedent, requiring the athlete to pass the examination before the contractual relationship is deemed effective. In fact, the passing of a medical examination is the most common condition precedent in professional basketball. Unsurprisingly, the BAT jurisprudence on this particular condition precedent is rather extensive.

In one of its earliest awards, the BAT considered that good health and playing condition are an essential basis of every player's contract, even if such condition is not explicitly mentioned in the contract itself. The BAT thus, consistently, has accepted that a “*medical examination clause*” in the employment contracts of new players is a legitimate means to protect a club's interests.¹¹ In an award that followed shortly after, the BAT reinitiated such reasoning. However, the BAT also held that a club must rely on objective and comprehensible medical reasons in order not to engage a player.¹² With the legitimacy of the medical examinations as a condition precedent confirmed, the BAT jurisprudence mostly revolves around the question of whether the condition precedent is or is not fulfilled. What it basically all comes down to, is the answer to the question: would a reasonable person find that the player passed the medical examination or not?

Clubs are granted a certain margin of appreciation when it comes to evaluating the health of a new player. As a general rule, one may conclude that this margin of appreciation should not be interpreted too narrowly. However, it may depend upon a case-by-case basis how wide the margin of appreciation actually is. In the case of *Kelati v. Olympiacos*, the BAT arbitrator granted the club a rather wide margin of appreciation. The BAT arbitrator, deciding *ex aequo et bono*, found it justified to grant that wide margin of appreciation

⁵ Leon Trakman, “Ex Aequo et Bono: Demystifying an Ancient Concept”, in: *Chicago Journal of International Law*, vol. 8, no. 2, available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1669&context=cjil> (accessed 1 March 2024).

⁶ E.g. BAT Award 318/12 (*Lessort v. BC Crvena Zvezda*).

⁷ E.g. BAT Award 1313/18 (*Hogue v. Karsiyaka*) and BAT Award 756/15 (*Stoll & Fleischer v. Halcones Rojos de Veracruz*).

⁸ E.g. BAT Award 478/13 (*Curtis v. Asesoft Ploiesti*), BAT Award 535/14 (*Daniels v. Liaoning Hengye*) and BAT Award 1525/20 (*Swann v. Juve Caserta*).

⁹ E.g. BAT Award 634/17 (*Lakovic v. Felice Scandone*) and BAT Award 1124/17 (*Zubic v. Trabzonspor*).

¹⁰ A. Paulauskas, *Key Principles On Player Contracts From the Basketball Arbitral Tribunal (Part 1 – Formation)*, in: Lawinsports, 26 May 2022, available at www.lawinsport.com/topics/sports/basketball/item/the-basketball-arbitral-tribunal-s-key-principles-on-player-contracts-part-1-formation?category_id=159 (accessed 1 March 2024).

¹¹ BAT Award 66/09 (*Albert v. Olimpias Patras*).

¹² BAT Award 107/10 (*Kelati v. Olympiacos Piraeus*).

given the circumstances of that particular case. These circumstances included that the club only had a short timeframe to conduct the medical examination, that the player signed a so-called guaranteed contract and the club thus had to consider the impact of a medical problem for the whole duration of the contract and the vast economic impact that the contract would have on the club. The BAT arbitrator thus lowered the standard in such a way that the medical examination is deemed failed if there is a certain risk that the player will be unable to play basketball. In the case of *Kelati v. Olympiacos*, the BAT arbitrator found that the club had proved such a risk existed and that the club, therefore, did not surpass its margin of appreciation when the club failed the player for the medical examination.

In later jurisprudence, the BAT took a slightly more stringent approach. This happened in the case of *Kitchen v. Haapel*¹³, for example. In this case, the BAT arbitrator established that failing the player for his medical examination was unjustified. The medical experts had, in no way, indicated that the player was unable to play basketball, but had merely suggested that the player was more likely to get injured if he had to deal with an intensive schedule such as the club's, given a prior injury that the player had suffered whilst playing for the same club. The arbitrator decided that, in fairness, the club's preoccupation that the player might have physical problems again, was not enough to fail the player for the medical test.

An even stricter approach was warranted in the case of *Holman v. Tianjin Ronggang BC*¹⁴. The facts of this case were as follows. The player played for the club in the 2017-2018 basketball season. During one of the matches in that season the player suffered an injury. The player started rehabilitation in his home country. In May 2018, discussions began between the club and the player about re-hiring the player for the 2018-2019 season. After several weeks of negotiation, the parties came to an agreement. Part of the agreement was that the player would have to undergo a medical examination upon his arrival at the club. In this respect, the player's contract set forth detailed requirements of the timing and scope of the medical examination, including notification of its result, as well as the legal consequences of a failed medical examination. When the player arrived at the club in September 2018, the player underwent the medical examination. During this examination, it was concluded that the player had sport injuries and could, therefore, not fulfill the obligations he had based on the player's contract. The player then rejected the club's conclusion and a second medical examination was conducted. It followed from that second examination that the player was able to return to the game of basketball despite his injuries, provided that the player would receive the proper support and good guidance of a physical therapist. The club, however, rejected the outcome of the second medical examination. The question then arose as to whether the club

rightfully failed the player for the medical examination.

In this instance, the BAT considered, in line with its earlier jurisprudence, that, in assessing whether "*objective and comprehensible medical reasons*" justify a club's decision to fail a player on his medical examination, the club enjoys a margin of appreciation. The margin of appreciation provides a club with a certain discretion in its evaluation of the impact of a medical problem on the player's physical ability to play at the desired level. However, in the case of *Holman v. Tianjin Ronggang BC*, the margin of appreciation was, significantly, narrower than in other cases, because the club was well aware of the player's previous injury when it re-hired him. The club possessed further medical details about the player due to his previous occupation with them. Due to this enhanced awareness, the club's leeway, in evaluating the player's physical condition, is somewhat constrained. Specifically, the club cannot justify its decision to declare the player unfit based on information that was already known at the time of re-signing the player.

Taking this into account, one must conclude that, passing a medical test, is a valid condition precedent that can be included in the employment contracts of basketball players. However, whether the player passes the medical test, and thus fulfils the condition precedent, is to be analyzed on a case-by-case basis. In this case-by-case analysis, it must be considered that basketball clubs hold a certain margin of appreciation when determining if a player passed or failed the medical tests. Nevertheless, there are a few more conclusions to be drawn from the BAT jurisprudence. First, in the event that a club fails a player on his medical examination, the club must immediately provide the player with detailed reasons and explanations as to why he failed the tests. Any medical reports must be provided in English or another language that the player can understand, because this will grant the player a fair opportunity to discuss the content of a medical report and contest it. Not providing this detailed information may lead to the conclusion that a club has wrongfully failed a player for his medical examination and, by doing so, becomes liable to pay damages to the player.¹⁵ Secondly, and notwithstanding the above, according to the BAT jurisprudence, the player and the club also have ancillary duties, such as the duty of care and a duty to act in good faith. For these reasons, it follows from the BAT jurisprudence that a player also has the obligation to provide a club with correct and relevant medical information. Such information should not only include any information about injuries that may prevent the player from playing basketball at the required level, but also information about the rehabilitation progress. In short: a player must not mislead a club by misrepresenting injuries, the recovery progress or the ability to play after an injury.¹⁶ In the event that a player breaches this obligation, for example, by misrepresentation or concealment of relevant facts, the club is considered

¹⁵ E.g. BAT Award 346/12 (*Fisher v. Fujian SBS Xunxing BC*).

¹⁶ BAT Award 66/09 (*Albert v. Olimpas Patras*), BAT Award 1363/19 (*Holman v. Tianjin Ronggang BC*), BAT Award 1030/17 (*Olympiacos v. Larkins*) and BAT Award 477/13 (*Denson v. Ramat Hasharon BC*).

¹³ BAT Award 783/15 (*Kitchen v. Haapel*).

¹⁴ BAT Award 1363/19 (*Holman v. Tianjin Ronggang BC*).

deceived and may withdraw from the contract.¹⁷

Visas and permits

When an employee fails to obtain the appropriate visa to work in a specific country, it leads to a multitude of legal complications, potentially invalidating employment contracts due to the inability to fulfill the legal requirements for employment. To mitigate risks in this respect, it is not uncommon to include a condition precedent in an employment contract that stipulates that a player (or coach) must obtain the required visas and permits to work in a specific country before the employment contract comes into effect.

The BAT deals with this type of condition precedent in a similar way as it does with medical examination clauses, meaning that, because of the far-reaching consequences that the non-fulfilment of a contractual condition precedent has for the player's employment situation, an extensive interpretation beyond clear language of the disputed provision must be rejected. In cases related to visas and work permits, this stringent approach is even more justified because an employee's influence on the issuance of a working visa is, at best, limited.¹⁸ Considering that and other BAT jurisprudence, one may conclude that the main responsibility for obtaining the proper documentation lies with the club. As such, it can be expected from a club to take a player or coach "by the hand" regarding any actions that are required in order to obtain the right visas and permits. In the event that a club fails to do so, the club does not act in good faith and may thus not rely on a condition precedent in the contract.¹⁹

Conclusions

The jurisprudence of the Basketball Arbitral Tribunal (BAT) on conditions precedent in basketball employment contracts reveals a nuanced and pragmatic approach, underlining the importance of clear, unambiguous contractual language. Medical examinations, visa and work permit requirements, as commonly included conditions precedent, illustrate the delicate balance between the interests of clubs and players.

The BAT decisions, rooted in the principle of *ex aequo et bono* and guided by the doctrine of *pacta sunt servanda*, emphasize fairness and equity whilst upholding contractual integrity. This balance is pivotal in ensuring that conditions precedent serve their intended purpose without unfairly disadvantaging either party.

Ultimately, the BAT consistent jurisprudence in this area contributes significantly to the stability and predictability of contractual relationships in professional basketball, fostering a legal environment in which the rights and obligations of all parties are respected and upheld.

¹⁷ BAT Award 783/15 (*Kitchen v. Haopel*).

¹⁸ BAT Award 361/13 (*Hardy jr. v. Felice Scandone Avellino*).

¹⁹ BAT Award 750/15 (*Maljkovic v. Koraskaski Club Cedevita*) and BAT Award 1525/20 (*Swann v. Juve Caserta*).