

COVID-19 Guidelines

Issued on 20 April 2020 by the BAT President, Vice-President and Arbitrators

The world currently finds itself in an extraordinarily difficult situation due to the COVID-19 pandemic, the measures taken by governments to palliate its effects and the consequences of both on businesses and employees in all sectors of activity.

Inevitably, professional basketball has been significantly affected by the crisis, especially in that most competitions have been suspended or even terminated early. This, in turn, raises legal issues regarding contracts in professional basketball, in particular in employment relationships of players and coaches with clubs. Many parties to contracts in basketball have approached BAT, or FIBA, in the past weeks to inquire how such legal issues would be handled by BAT Arbitrators.

Of course, each case has to and will be judged on its merits by the respective BAT Arbitrator, taking into account all relevant circumstances and deciding *ex aequo et bono* unless otherwise agreed by the parties (Article 15 of the BAT Arbitration Rules). However, the BAT President, Vice-President and Arbitrators have decided that the truly exceptional situation created by the COVID-19 pandemic calls for an exceptional step on their part, with a view to providing the basketball community with greater legal certainty, thereby also facilitating amicable settlements.

For this purpose, the BAT President, Vice-President and Arbitrators, having collectively discussed pursuant to Article 16.1 of the BAT Arbitration Rules¹ certain substantive issues that arise as a result of the COVID-19 pandemic, set out in these Guidelines their shared views on what they would perceive to be just and fair solutions, under the *ex aequo et bono* standard, to those substantive issues.

For the avoidance of any misunderstanding, five caveats must be made:

- First, these Guidelines are of a temporary nature only, aiming to address the consequences of the COVID-19 crisis on contracts in basketball, in particular those consequences arising out of domestic championships being suspended or terminated early as a result of the pandemic.

¹ "In the interest of the development of consistent BAT case law, 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."

- Second, these Guidelines incorporate principles only, to which there may be exceptions depending on the circumstances of the individual case (including, e.g., applicable public health guidelines).
- Third, these Guidelines merely reflect a consensus reached by the BAT President, Vice-President and Arbitrators in their informal discussions on abstract legal issues. They are not binding rules of mandatory application and, as a matter of course, they do not affect each BAT Arbitrator's liberty of decision in deciding an individual BAT case.
- Fourth, these Guidelines do not amend or substitute for the BAT Arbitration Rules or other rules of procedure governing international arbitrations.
- Fifth, these Guidelines will be constantly reviewed and may be subject to adjustments depending on relevant developments.

That being said, the principles agreed on by the BAT President, Vice-President and Arbitrators are as follows:

I. Definition

1. In these Guidelines, the term "Lockdown Period" refers to the period starting on the date of suspension/termination of the relevant 2019/20 domestic championship and ending on the date on which the championship is resumed, or the original end date if it is not resumed.

II. Priority of Amicable Settlements

2. Amicable settlements are the preferred means of resolving disputes arising out of the COVID-19 crisis. Parties are under a duty to renegotiate in good faith the terms of their contract in order to resolve on an amicable basis contractual issues arising from the pandemic.
3. Any breach of this duty may be taken into account by the arbitrator when deciding the merits of the case and when deciding on arbitration costs, legal fees and other expenses.
4. Absent any general grounds for invalidity, amicable settlements entered into with a view to addressing the consequences of the COVID-19 crisis will be respected by the arbitrator. This is irrespective of whether the contents of the settlement are consistent with the further principles set out below.

5. Amicable Settlements entered into after the beginning of the Lockdown Period will be rebuttably presumed to have been executed by the parties with a view to addressing the consequences of the COVID-19 crisis.

III. New Contracts entered into after the beginning of the Lockdown Period

6. The principles enshrined in these Guidelines do not apply, in principle, to contracts entered into after the beginning of the Lockdown Period. These contracts will be rebuttably presumed to have taken into account the effects of the COVID-19 crisis. The same applies, in principle, to contracts that have been extended either by agreement of the parties or unilaterally by the club after the beginning of the Lockdown Period.

IV. Allocation of risk

7. Clauses simply providing for a “fully guaranteed” or “no-cut” contract do not allocate economic risks associated with the COVID-19 crisis to any of the parties to the contract.
8. The consequences of the COVID-19 crisis cannot be allocated to one of the parties only, absent any clear contractual language stipulating otherwise for events sufficiently similar to the current pandemic and its consequences on basketball competitions. Without such clear language in the contract, the adverse consequences of the COVID-19 crisis shall be shared by both parties according to their respective circumstances. Conversely, where the contract contains clear language on how to allocate risks such as the COVID-19 pandemic, the arbitrator will only depart from such agreement, in accordance with established BAT jurisprudence, if the effects of such risk allocation would be grossly inequitable.

V. Termination and term of contracts

9. The principle of pacta sunt servanda shall be generally upheld in a manner consistent with the standing jurisprudence of the BAT in times of the COVID-19 crisis. Consequently, a contract is not automatically terminated because of the pandemic. Neither does the COVID-19 crisis give either party just cause to unilaterally terminate the contract.
10. If the contract has been terminated by either party before the Lockdown Period, it will be rebuttably presumed that the contract was not terminated because of the COVID-19 crisis. In such case, the standing jurisprudence of BAT related to lawful/unlawful termination will apply.
11. When calculating damages for any unlawful termination not related to the COVID-19 crisis, the arbitrators will, in principle, not take into account the hypothetical impact that the COVID-19

crisis would potentially have had on the contract had it run its normal course. In particular, in case of any unlawful termination by a club that is unrelated to the COVID-19 crisis, the Guidelines on reductions of players' and coaches' salaries (no. 16 below) shall, in principle, not apply to the calculation of damages or outstanding remunerations under the contract. The onus of proof that the Guidelines exceptionally apply for reasons of equity shall be on the respective club. Elements that may be taken into account in this context are, in particular, the nature, the motive and the gravity of the contractual breach committed, the vicinity of the breach to the Lockdown Period and the behavior of the parties subsequent to the breach. In case there are reasons to deviate from the above principle, i.e. non-application of the Guidelines, preference should be given to deferring the maturity of some of the claims to the beginning of the 2020/21 season.

12. If a domestic championship extends its 2019/20 season beyond the original end date to compensate (at least partially) for the Lockdown Period, the contracts between its participating clubs and their players and coaches will remain in force until the date of the last match of the respective club for that season, unless it is clear from the contract that the parties had intended for the contract to expire before the end of the (original) 2019/2020 season, or unless it would otherwise be grossly inequitable.
13. If, before the Lockdown Period, a player or coach has entered into a contract for the 2020/21 season with another team and the extended term (no. 12 above) of his or her contract for the 2019/20 season results in both contracts overlapping in time, the player/coach, the old club and the new club shall seek in good faith to solve the problem by amicable settlement, taking account of the interests involved in a proportionate and equitable manner.

VI. Effects on the contractual obligations of clubs

During the Lockdown Period, a club's contractual obligations towards its coaches/players shall be adapted as follows:

14. *Amenities* (such as car, housing, meals, health insurance): The Club shall continue to provide any amenities as provided for under the contract, provided that the player is making use of them in good faith, is dependent on them and to the extent they are proportionate.
15. *Bonuses*: Bonuses that fell due before the Lockdown Period continue to be owed, but their maturity shall be deferred to the beginning of the 2020/21 season in the relevant domestic championship. No bonuses shall accrue during the Lockdown Period. No bonuses shall accrue

based on the placement of the club in its domestic and international championships for the 2019/20 season unless the relevant championship is completed after the Lockdown Period.

16. *Salaries*: The obligation of clubs to pay salaries to players and coaches must be adapted to take into account that

- during the Lockdown Period, the players' and coaches' obligation to provide services is largely suspended (see no. 18, 19 below for players) and that
- the COVID-19 crisis has disrupted the financial framework and presumptions based on which the contracts were executed between the parties.

Based on the above considerations, it is fair and just that the obligation of the club to pay salaries during the Lockdown Period be subject to a general reduction as follows:

a) The size of the salary reduction will depend on the player's/coach's monthly salary, with the following scale guiding the arbitrators' assessment of the equitable reduction:

First EUR up to EUR 2,500/month	Reduction by 0-20%
Every EUR exceeding EUR 2,500/month	Reduction by 50% as a starting point, but subject to adjustment upwards or downwards (see below)

When deciding the precise percentages to apply in an individual case, the arbitrator will take into account in particular the following (non-exhaustive) criteria:

- the overall amount of the salary, keeping in mind that, in principle, lower salaries shall be submitted to a lower reduction than higher salaries;
- the financial situation of the club as a result of the COVID-19 crisis;
- the individual circumstances of the player/coach, in particular his or her reasonable living costs and the extent to which he or she is financially responsible also for others;
- whether the parties have complied with their duty pursuant to no. 2 above of these Guidelines and, more generally, have acted in good faith. A club will not have acted in good faith if it discriminates against a player/coach compared to its other similarly-situated players/coaches; and
- the principle of proportionality and reasonableness, in particular how the club will use any liquidity saved through the salary reduction.

- b) It is the duty of the parties to substantiate and provide the necessary evidence to determine the appropriate salary reduction in an individual case.
 - c) If the relevant domestic championship resumes its 2019/20 season after the Lockdown Period, the monthly salaries due under the contract for the remainder of that season shall be reduced adequately to account for the fact that the club's income will usually be lower than in a normal season despite the season being resumed. However, such reduction shall be lower than the reduction applied during the Lockdown Period and shall not exceed 50%.
 - d) For the avoidance of doubt, salaries that became due before the Lockdown Period are not subject to the above reduction. However, the maturity of up to 50% of any such outstanding salaries may be deferred to the beginning of the 2020/21 season in the respective domestic championship, provided that the club substantiates and proves that such deferral is necessary to avoid insolvency.
17. Clubs are under a duty of care towards their players and coaches. In particular, clubs shall apply for any and all financial help available in the applicable jurisdiction in order to ease any consequences arising for its player/coaches because of COVID-19-related pay cuts. A breach of this duty shall be taken into account when deciding on a reduction or deferral of the player's/coach's claim.

VII. Effects on the contractual obligations of players

18. The obligation of players to provide sporting services shall be suspended during the Lockdown Period, except and to the sole extent applicable public health guidelines so permit. Obligations in respect of non-sporting services shall not be suspended except to the extent inconsistent with applicable public health guidelines.
19. Players are under an obligation to stay fit and healthy during the Lockdown-Period (to the extent possible under the conditions prevailing in the relevant country) and to participate in any scheduled team activities that are permissible in the relevant jurisdiction, e.g. team meetings by videoconferencing or, subject to applicable public health guidelines, individual or group training sessions.

VIII. Agent Agreements

20. While these Guidelines focus on contractual relations between clubs and their players/coaches, arbitrators will seek to draw on the principles herein also for contractual relations with other actors, in particular agents, to the extent deemed appropriate.