

Brief Analysis on COVID-19 Guidelines Issued on 20 April 2020 by the Basketball Arbitral Tribunal (BAT)

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I. Introduction

As a result of the outbreak of COVID-19, BAT President, Vice-President and Arbitrators have established a set of Guidelines on what they would perceive to be just and fair solutions, under the *ex aequo et bono* standard followed by this basketball arbitral tribunal.

As a premise, it should be understood that those Guidelines are temporary and they address contractual issues that raised a result of the suspension and/or termination of domestic competitions due to COVID-19. Moreover, they are neither mandatory nor binding and there might be exceptions depending on each individual case.

In this sense, we will briefly address those Guidelines and provide some additional comments in order to clarify certain issues.

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II. Summary of the Guidelines and Comments

Lockdown Period: *“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.”*

A. *Priority of Amicable Settlements*

The encouraged first solution proposed by the BAT is for the parties to amicably settle any contractual issue or dispute arising out of COVID-19 by renegotiating contracts in good faith and/or by settlement agreements.

This tribunal actually advice that in case of dispute, the arbitrators will evaluate whether the parties duly negotiated an amicable solution, in order to decide on the merits of the cases, procedural costs, etc. Hence, parties are strongly recommended to at least attempt to find a mutual and reasonable solution in good faith to any matter concerning terms of contracts, before taking any unilateral decision.

In cases of settlement agreements, BAT will respect such agreements (with limited space for analysis).

B. *New Contracts entered into after the beginning of the Lockdown Period*

These Guidelines do not apply to contracts entered and/or extended (by agreement or unilaterally) after the beginning of the Lockdown Period, as they are presumed to have been made taking into account the effects of COVID-19.

Consequently, any agreement (e.g. supplementary agreement or similar) entered by the parties after the suspension or termination of the national competitions is not covered in principle by the scope of these Guidelines (see in particular guidelines on reduction of salary, section E below).

C. *Allocation of risk*

It is also suggested that the adverse consequences from COVID-19 should be shared by the parties (clubs and players/coaches), unless there is a clear provision in the contracts setting out a scenario similar to pandemic and its potential consequences (e.g. force majeure clauses addressing the case of pandemic).

In this sense, the BAT advice that even the contracts with “fully guaranteed” or “no-cut” clauses are not exempted from the considerations above, being thus able to be affected to some extent depending on the circumstances given in each specific case.

D. Termination and term of contracts

The principle of *pacta sunt servanda* will be considered in a consistent manner with the case law of the BAT during COVID-19. In essence:

- A contract could not be terminated automatically because of COVID-19;
- COVID-19 will not give just cause to terminate contracts.

For that reason, if contracts are terminated before the Lockdown Period, it will be presumed they were not terminated because of COVID-19 and the BAT will issue a decision without taking into consideration the effects of the pandemic when calculating the damages, as the Guidelines will not apply. The terminating party has the *onus* to prove that Guidelines are applicable anyway as a matter of equity. Some elements that will be considered are: the nature, gravity and motive of the breach, the vicinity of the termination to the Lockdown Period and the behavior of the parties after the breach, among others.

Apart from that, if domestic leagues are extended, the contracts (unless it is agreed that the contracts end before the end of the original 2019/2020 season, or unless grossly inequitable) should continue until the last game of the season. On the other hand, if before the Lockdown Period the player/coach had entered into a contract for the season 2020/2021 with another club, and the contract with his former club overlaps with the new contract, all parties are requested to find an amicable solution.¹

BAT therefore takes a very strong position in case of contracts terminated because of COVID-19 without negotiating with players and/or contracts terminated before the Lockdown Period, as otherwise COVID-19 could be used as an excuse by many stakeholders in order to terminate contracts.²

E. Effects on the contractual obligations of clubs

Importantly, clubs during the Lockdown Period should pay attention to the following:

- i. Allowances: clubs shall continue providing the benefits set in the contracts (e.g. accommodation, car, meals, insurance, etc.), always the players/coaches use them in good faith during the Lockdown Period;
- ii. Bonuses:
 - Bonuses that fell due before the Lockdown Period are still owed, but its payment shall be delayed to the beginning of 2020/21 season;

¹ However, differently from the guidelines issued by FIFA, the BAT does not provide any reference on which club would have preference to keep a player when the respective seasons (of the former club and new club) overlap. FIFA, for instance, recommends that – unless otherwise agreed by the parties – the former club should keep a player until the season ends.

² In our view, considering the content of the Guidelines, we deem the BAT will take similar strong positions against those parties that unilaterally amend the terms of the contracts as a result of COVID-19 without a prior reasonable negotiation in good faith.

- No bonus are paid during the Lockdown Period;
 - No competition bonuses in domestic/international competitions in the season 2019/20, unless the competitions are completed after the Lockdown Period.
- iii. Salaries: The payment of salaries must be adapted since (i) the obligation of players/coaches to provide services is largely suspended, and (ii) the pandemic has affected to the finances and (iii) to the premises on which the contracts were entered.

Hence, during the Lockdown Period the salaries may be reduced as follows:

- Salaries up to EUR 2,500/month - Reduction by 0-20%;
- Salaries above EUR 2,500/month - Reduction by 50% as a starting point.³

However, when deciding which exact % of reduction, the following non-exhaustive criteria should be considered:

- Overall amount of salary. Lower salaries = lower reduction;
- Financial situation of the club due to COVID-19;
- Individual situation of the player/coach as living costs, family, etc.;
- If parties have tried to amicably settle in good faith (section A above);
- Equality or balanced solutions among all or similar team members;
- Proportionality and reasonableness. How the club will use the saved money.

In fact, the parties have the burden of proof regarding the reason of each reduction. Hence, even though the parties are suggested to reach mutual and amicably agreements, in case the clubs have to finally take unilateral decisions they should carefully take into consideration all the above-mentioned elements prior applying any decrease in the salary of its employees.

Moreover, in case the domestic competition 2019/20 resumes after the Lockdown Period, the remaining salaries of that season should be also reduced, but the reduction must be lower than the one applied during the Lockdown Period and shall not exceed 50%.⁴

On the other hand, although outstanding salaries before the Lockdown Period are not subject to those reductions, the maturity of up to 50% of any outstanding salary may be postponed to the beginning of 2020/21 season if the club proves that it is necessary in order to avoid bankrupt.

Finally, clubs should apply to any financial assistance applicable under the respective jurisdiction in order to reduce the damage suffered by players/coaches as a result of the COVID-19 related pay cuts. This is another factor that will be considered in case of dispute.

³ But subject to adjustment upwards or downwards (see below).

⁴ On the other hand, if the national competitions are finally resumed and clubs obtained all the income (or great part of it) that they would have received in case no suspension of the competition would have taken place, clubs are recommended to return players/coaches all the remuneration (or a proportional part) that was previously reduced during the Lockdown Period.

F. *Effects on the contractual obligations of players*

Obviously obligation of players to provide sporting services during the Lockdown Period shall be suspended (unless permitted otherwise by the respective health authorities). Then, non-sporting services should not be suspended, except to the extent inconsistent with the applicable health regulations.

It is also required that players must stay fit and healthy during the Lockdown Period and participate in the activities arranged by their clubs and that are permissible in the respective jurisdiction (e.g. video meetings, on-line trainings or activities, individual or group training sessions, etc.).

G. *Agent Agreements*

The present Guidelines should analogously apply to other actors such as agents, to the extent deemed appropriate.

If you would like to know more information about the subjects covered in this publication, please contact:



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