Applying the applicable law: The ex aequo et bono provision of the FAT Rules

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Abstract: One of the characteristics of arbitration is the freedom of the parties to choose the applicable law, i.e. the law governing the merits of the dispute. According to the FAT Rules (art. 15.1) "*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"*. In fact in almost all the cases ruled by FAT, the parties choose the application of *ex aequo et bono*.

Key Words: Sports Arbitration; FIBA Arbitral Tribunal (FAT); Applicable Law; *ex aequo et bono*.

I. Introduction

Arbitration is an, alternative to litigation, process of resolving disputes[1] covering issues of any kind and becoming, day by day, more and more popular. One of the characteristics, contributing to its popularity, is the freedom of the parties to choose the applicable law, i.e. the law governing the merits of the dispute.

A freedom existing not only in the ad-hoc, but also in the institutional arbitration, such as the arbitration held by the FIBA Arbitral Tribunal (hereinafter FAT), which has, however, shown its preference to the *ex aequo et bono* doctrine.

Aim of this paper, is to examine the way FAT applies this doctrine throughout the four years of its function. And in particular to see if FAT applies its own jurisprudence, according which the *ex aequo et bono* doctrine allows the arbitrator to "*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".*

II. The FIBA Arbitral Tribunal

In May 2007, FIBA established[2] FAT, an independent Arbitral Tribunal in an attempt 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 FAT*"[3].

The seat of FAT[4] is Lausanne, Switzerland and therefore based on Swiss Law and in particular Chapter 12 of the Swiss International Private Law Act of 18 December 1987. This Act, the *lex arbitri*[5], is the law governing the arbitrations conducted by FAT, dealing with matters, such as the arbitration agreement, the appointment of the arbitrations and –among others– providing for the "*applicable law*".

Article 187 reads as follows:

"*1. The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected.*

2. The parties may authorize the arbitral tribunal to rule according to equity".

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[1] It should not however been classified as a method of Alternative Dispute Resolution (ADR) since although arbitration presents an alternative to litigation, it is nonetheless fundamentally the same in that the role of both the Judge and the Arbitrator is judgmental. They both not propose or even help parties to find the best solution to their dispute, but rather make a binding decision. See, inter alia, Redfern and Hunter *Law and practice of International Commercial Arbitration*, Sweet & Maxwell third edition (1999) 1-51 with further reference to Carrol and Dixon, Alternative Dispute Resolution Developments in London, *The International Construction Law Review,* [1990 Pt 4] 436 at 437.

[2] For further information on FAT visit http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16809/selNodeID/16809/pres.html

[3] See FIBA' Internal Regulations 2008 and 2010 under L.2.1.1, available (the latter) at http://www.fiba.com/downloads/Regulations/170310_FIBA_Internal_Regulations.pdf

[4] See op.cit under L.2.3.

[5] For the meaning of *lex arbitri* see Redfern and Hunter, Op.cit 2-06.

Based on those provisions, the FAT Arbitration Rules (hereinafter “the Rules”) provide that[6]: “*Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono [...]”*.

III.The *ex aequo et bono* doctrine

As it is generally accepted[7] the arbitrator, when asked to decide *ex aequo et bono* may either:

a. Apply the relevant rules of law ignoring formalistic rules or rules which appear harsh or appear to operate harshly or unfair to the certain case, or
b. Decide according to the general principles of law, or even
c. Ignore completely any rules of law and decide the case on its merits as those strike to him.

The FAT Rules provide[8] that, when deciding *ex aequo et bono* the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law”*[9].

According to the constant jurisprudence of FAT[10], in line with the jurisprudence of the Federal Swiss Court of Switzerland:

«*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 at 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 sur l’arbitrage[11] *(Concordat)*[12] *under which Swiss courts have held that arbitration* en équité *is fundamentally different from arbitration* en droit*:*

‘When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.’[13]

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”*[14]*. 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’».*

Furthermore, FAT accepts[15] that:

«*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*[16]*. Under the PIL, the only limit to the arbitrator’s freedom in deciding a dispute* ex aequo et bono *is international public policy*[17]*. When the parties authorize the arbitrator to decide ex aequo et bono, the arbitrator is required to decide ex aequo et bono*[18]*. That said, this duty does not prevent the arbitrator from referring to the solution which arises from the application of the law before reaching*

[6] See art. 15 of all the versions (2007, 2008 and 2010) FAT Rules, available (the 2010 version) at http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16809/selNodeID/16809/pres.html
[7] See, inter alia, Redfern and Hunter, Op.cit, 2-72.
[8] Art. 15.1 of the Rules.
[9] The power, however, to decide the dispute *ex aequo et bono* does not include the right to create a right that was not decided by the parties to a contract. See FAT Decision 0073/10 (Sloboda Tuzla BC Crvena Zvezda BC), par. 60.
[10] See the relevant analysis by the Arbitrator Mr Ulrich Haas in the first award of the FAT (0001/07 Ostojic & Raznatovic vs BC PAOK), which (partially or fully) is reconfirmed by all the following awards of FAT, available at http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16810/selNodeID/16810/fat-awards.html
[11] Which, as explained in the Award, is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL, while today, the Concordat governs exclusively domestic arbitration.
[12] Reference by the Award to *P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PIL*
[13] Reference by the Award to *JdT 1981 III, p. 93* with the notice that the quotation was freely translated in English by the Arbitral Tribunal.
[14] Reference by the Award to *POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626*.
[15] Supra note 9.
[16] Reference by the Award to *ATF 107 Ib 63, 66*.
[17] As explained in the Award, under the Concordat, an award ex aequo et bono can be set aside in case of “evident violation of equity” (Art. 36 let. f Concordat).
[18] Reference by the Award to *P.A. KARRER, op. cit., No. 302 ad Art. 187 PIL, p. 1725*.

a decision ex aequo et bono[19]*, in particular to "guide or reinforce" his/her own understanding of fairness*[20]*».*

IV. General Principles applied by FAT

In line with, the above mentioned, jurisprudence of the Federal Swiss Court of Switzerland and in accordance with its Rules[21], the FAT Awards refer to generally accepted principles of law[22]:

a. Pacta sunt Servanda

It is evident by the mere reading of its jurisprudence that FAT takes into account the, well known, principle of "*pacta sunt servanda*", a principle characterized in one of its awards[23] as "*of paramount significance for the Arbitrator when assessing the behavior of the parties*". As acknowledged by FAT[24] "*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, honestly, and the integrity of dealings would all but vanish. It is just fair that when parties enter into the sort of contracts which they did in this matter, then the provisions of such contracts should be observed*". Therefore, all parties should act according to the contract, honoring their obligation, and in particular those that can be characterized as "key obligation" (such as e.g. for the player to follow the club' program, or for the club to timely pay the salary)[25].

However, given, that the contract is based on the will of the parties, they –at any time– can alter one or more of its terms, or even annul the whole contract either *de jure* (by signing a new contract), or *de facto*, evincing their intention not to be bound by its terms[26].

In case of termination of the contract, by signing a new one, it is of extreme importance to explicitly state the consequences of the breaching of that new contract. Would it be the cancelation of the latter agreement and therefore the restoration of the original agreement or the breach of the new (and only) contract? The answer in such a case is not straightforward and can only be given based to the implied will of the parties in connection with the facts of the relevant case[27].

b. Right to unilateral termination of the contract

On the other hand, the principle of "*pacta sunt servanda*" cannot always be considered as a "*shelter*" for the party asking for its application. The fact that the parties have signed a contract, even a "*guaranteed non – cut*"[28] one does not mean that the said contract cannot be in certain cases, rightfully, terminated. Although, in most of the cases, when faced with a "*guaranteed non – cut*" contract terminated by one of the parties (most of the times by the team) for (alleged) reasons such as "*lack of performance*"[29] or "*bad behavior*"[30], the award was in favor of the player just because "*pacta sunt servanda*", a contract can be terminated if the parties were negligent in fulfilling their duties prior of the contract. Such a duty is the duty of the player to inform (prior to the contract) its employer (the club) of any existing medical problems that could jeopardize its contractual obligations[31].

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[19] Reference by the Award to *ATF 110 Ia 56, 58*

[20] Reference by the Award to *JdT 1981 II 93.*

[21] Art. 15.1 providing for the application of "*general considerations of justice and fairness*". Supra note 6.

[22] And, when necessary, to national laws, see FAT Decision 0012/08 (Burlacu vs Avellino BC), par. 6.1.2 in which the Arbitrator referred to the Italian Civil Code (art. 2380bis Codice Civile) to solve the matter of the representation of an Italian public limited company (s.p.a.).

[23] See FAT Decision 0066/09 (Albert vs AEP Olimpias Patras), par. 84.

[24] See FAT Decision 0065/09 (Mikhalevskiy vs Bikov), par. 43, 0059/09 (Mrcela, Draskicevic vs BC Dunav), par. 53.

[25] See FAT Decision 0062/09 (Harper, Sports International Group Inc vs Besiktas JK), par. 63.

[26] See FAT Decision 0007/08 (Thompson, Stanley vs WBC Spartak Moscow Region), par. 6.2.5.

[27] See FAT Decision 0056/09 (Branzova vs BC Nadezhda), ch. 8.1, in which the FAT ruled against the restoration of the original agreement. Further discussion for that matter in chapter V of this article.

[28] A contract that usually contains a provision like the following: *"This is a guaranteed no-cut contract. The Club agrees that this contract is no-cut, which means that neither the Club nor any assignee thereof, nor the League can terminate this contract should any injury or illness befall the Player or in the event the Player fails to reach an expected level of performance".*

[29] See FAT Decision 0050/09 (Dabovic vs Besiktas JK), par. 46.

[30] See FAT Decision 0059/09 (Mrcela, Draskicevic vs BC Dunav), par. 27.

[31] Provided that the player was aware of those problems. See FAT Decision 0014/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 62 - 63. Further discussion for that matter in chapter V of this article.

As accepted by FAT[32] *"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. Under such circumstances and subject to the terms of the employment agreement, the employer may step down from the contract"*[33].

c. Obligation for notice before the termination of the contract

However, following another generally accepted contractual principle, also acknowledged by FAT[34] "*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 breach*".

d. Consequences of breach of contract

And thus, because breaching a contract is not merely a "violation" of the principle of *pacta sunt servanda*, but it comes with consequences; namely: damages[35], i.e. monetary compensation. Damages, to which is entitled "*only the non–breaching party*" and not the one at fault. When, however, it comes to the consequences of the early termination "*the Arbitrator must look at all the circumstances of the case and take the behavior of both parties, which eventually lead to the termination, into account*"[36].

e. Damages: Calculation of the monetary compensation due - Obligation of the injured party to mitigate the damage

The calculation of the monetary compensation is actually not an easy task. The arbitrator should be extremely conscious and careful, since[37] "*the compensation for damages is not the result of a mathematical formula, but follows from an overall assessment*".

As FAT constantly accepts[38] "*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 the performance of the contract*", while at the same time the claimant "*can only request such damage which he actually suffered*"[39]. To that end "*any advantaged which the injured party may have gained as a consequence of the breach (e.g. salaries otherwise earned) must be taken into account when calculating the compensation*"[40]. And thus, because, as constantly accepted by FAT[41] the injured party should not find itself in a better position as a consequence of the other' party breach of contract than without said breach.

Therefore, the arbitrator should examine both parties behavior and in particular it should examine the "duty" of the injured party "*to mitigate the damage*"[42] by seeking alternative opportunities of employment, provided of course that that party is in position to seek such an employment. As accepted by FAT, that party is not in such a position in case of injury[43], or, simply, because the time of the breach of the contract by the one party made it extremely difficult for the other party to find a comparable employment[44].

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[32] See FAT Decision 0066/09 (Albert vs AEP Olimpias Patras), par. 78, see also FAT Decision 0039/09 (Capin vs Azovmash BC), par. 55.

[33] Provided -as accepted by the award- that "*such withdrawal is communicated in a timely manner*".

[34] See FAT Decision 0017/08 (Lugtenburg, Kukic vs Sekularac), par. 52.

[35] See inter alia FAT Decision 0014/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 68.

[36] See FAT Decision 0027/08 (Dalmau, Paris vs Ural Great BC), par. 72.

[37] See inter alia FAT Decision 0014/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 72, 0021/08 (Varda, Vimic vs Zalgirio Remejas), par. 76.

[38] See inter alia FAT Decision 0021/08 (Varda, Vimic vs Zalgirio Remejas), par. 72.

[39] See inter alia FAT Decision 0043/09 (Gomis vs Fenerbahce BC), par. 61, 0041/09 (Panellinios BC vs Kelley), par. 82.

[40] See inter alia FAT Decision 0014/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 68.

[41] See inter alia FAT Decision 0005/08 (Pavic vs AEK BC), par. 6.2.4,

[42] See inter alia FAT Decision 0012/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 68, 0009/08 (Smith vs Lukoil Academic Sofia BC), par. 79.

[43] See FAT Decision 0010/08 (Grgurevic vs AEP Olimpias Patras), par. 71, 0009/08 (Smith vs Lukoil Academic Sofia), par. 79.

[44] See FAT Decision 0014/08 (van de Hare, Glushkon, Hammink vs Azovmash BC), par. 74.

However, "*the duty to mitigate one's own damage requires that contractual penalties should be reduced if the creditor deliberately delays the enforcement proceedings*"[45]. Pursuant to this "duty" FAT reduced the claim for contractual penalty because –among other reasons– the claimant in that particular case "*waited for more than 14 months before filling his claim with the FAT*"[46].

f. Burden of proof

Damages, and/or any other relief can only be awarded, in line to another generally accepted principle, to the party that proves the alleged facts of the case; "*the burden of proof for an alleged fact rests on the party who derives rights from the fact*"[47]. Therefore, if e.g. the claimant requests damages suffered due to unjust dismissal by the respondent, it is the claimant who must prove both "*the damage and the causal connection*"[48].

g. Proportionality

The general principle of proportionality, arising in various areas of law, and requiring that a measure must not have any greater effect than is necessary for the attainment of its objectives, or, -to use the wording of FAT[49], "*requires that any other available have been exhausted before the most extreme sanction is applied*" is also taken into account by FAT.

In particular, FAT uses this principle to interpret terms of the contract among the player and the team. Interpretation that, actually, determines the awards, since when FAT finds that the principle of proportionality was not taken into account by one of the parties, it rules in favor of the other.

In line to that, FAT has ruled:

i. that[50] a term of a (binding for the player) Regulation[51] providing as one of the sanctions against the player the termination of its contract "*does not mandatorily require terminating the contract in case of non-compliance ... but leaves room for other sanctions*",

ii. that[52] a term of a contract[53] providing for the termination of the contract in case of the detection during its employment of a chronic disease not initially revealed by the player, "*does not entitle* (the club) *to immediately dismiss the player ... The principle of proportionality requires that only a serious disease preventing the player from exercising basketball on a competitive level over a substantial part of the term of the Contract may lead to the termination of the Contract".*

In fact, in all cases[54] FAT found that the decision of the team to terminate the contract of its player was not in proportion with the alleged (by the team) behavior of the player, such termination was considered as wrongful and therefore FAT ruled in favor of the player.

Furthermore, FAT uses this principle to calculate the amount of the contractual penalty due in case of breach of the contract. Although the purpose of the contractual penalty, namely to discourage the party from breaching the contract is understood by it, FAT, generally accepts that "*a contractual penalty should not be disproportionate to the compensation for late payment whose payment is secured by the contractual penalty*"[55]. Such a penalty is "*considered to be excessive if it is disproportionate to the basic obligation of the debtor*"[56].

h. Good Faith - Fairness

The general principle of "good faith" is also taken into account by FAT. "Good faith" is used as a means of interpretation of both of the term of the contract between the parties[57] and of their

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[45] See FAT Decision 0036/09 (TP Sports vs WBC Spartac St. Petersburg), par. 55d, with further reference to 0008/08 (Djoric vs PBC Lukoil Academic Sofia BC)
[46] See FAT Decision 0037/09 (Vasiljevic vs Memorca BC), par. 59.
[47] See inter alia FAT Decision 0066/09 (Albert vs AEP Olimpias Patras), par. 84.
[48] See inter alia FAT Decision 0043/09 (Gomis vs Fenerbahce BC), par. 61, 0041/09 (Panellinios BC vs Kelley), par. 82.
[49] See FAT Decision 0038/09 (Liadelis vs Azovmash BC), par. 67.
[50] Ibid.
[51] The said clause reads as follows: *"In case of violation of sports regime, the loss of sports form, evasion from the struggle, weak will and indifference during the matches and breach of discipline, the Club has a right to impose monthly fines or terminate the contract. The decision according to the termination of contract is made by the Club Vice - President and Coach with the consecutive approval by the President of the Club"*, Id., par. 66.
[52] See FAT Decision 0039/09 (Capin vs Azovmash BC), par. 54.
[53] The said clause reads as follows: "*During medical examination the Player is obliged to inform the club about presence of chronic disease including one in the form of remission. In case of revelation of chronic disease worsening his physical abilities during the course or the agreement, this fact will be the reason for one-side annulment of the present agreement from the side of the Club*", Ibid., par. 31.
[54] See inter alia FAT Decision 0050/09 (Dabovic vs Besiktas JK), par. 53
[55] See FAT Decision 0037/09 (Vasiljevic vs Memorca BC), par. 59.
[56] See FAT Decision 0036/09 (TP Sports vs WBC Spartak St. Petersburg), par. 53.
[57] See FAT Decision 0017/08 (Lugtenburg, Kukic vs Sekularac), par. 49.

behavior and their actions[58]. The fact e.g. that the player decided at a certain period of time to be "*indulgent*" with the club he worked for in relation to already due wages, cannot be interpreted by the club as a renouncement of its rights to ask for his payment[59]. On the contrary, FAT accepted[60] that because of the behavior of the club[61] "*it was normal for the Player to consider in good faith by mid-December that de facto his contract had been unilaterally terminated; and therefore it was fair for him to consider that in such circumstances leaving for home at the Christmas break made more sense than remaining in Cyprus and continuing to negotiate or remaining at the Club's disposal for no purpose*".

Furthermore, FAT takes into account the general principle of "fairness", which is used in a similar to the principle of proportionality, way. In line to that principle, FAT has ruled that[62] in case the club believes that a player underperforms, "*fairness require that the player be given a reasonable opportunity to adapt her training before other measures were taken*".

i. Interest

FAT constantly accepts that "*payment of interests is a customary and necessary compensation for late payment*"[63] due even if the contract, the agreement between the parties does not specify interest rate[64]. Furthermore, in line with its constant jurisprudence FAT rates the interests at 5% per annum which it characterize as "*reasonable and equitable*"[65], without, however, explaining (in the most of them) the reason why it choose that rate (and not for instance 6 or 4%). The reasoning is revealed in some of its awards explaining that the interest rate of 5% "*is consistent with the Swiss statutory rate which is also set in 5% per annum*"[66].

V. Final thoughts

A first point that should be mentioned is the fact that the parties choose to resolve their differences *ex aequo et bono*. In fact, among the fifty two (52) awards uploaded (by August 15th, 2010) on the official site of FIBA[67], the parties did not choose as applicable law the *ex aequo et bono* in only two cases[68].

A second point is that, the repeated use of *ex aequo et bono* leads to a certain practice followed by FAT in a number of matters, a fact that, as it is said[69], helps to save time and speed up the render of the awards.

A third point, is that FAT, have set those general principles of law in order of preference, seating in the foremost place the principle of *pacta sunt servanda* prevailing of all the other general principles. A principle characterized, as already mentioned[70], as "*of paramount significance for the Arbitrator when assessing the behavior of the parties*" and the one first examined by the arbitrator, provided of course the existence of a valid contract (*pacta*) between the parties[71].

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[58] See inter alia FAT Decision 0021/08 (Varda, Fimic vs Zalgirio Remejas), par. 70.
[59] See FAT Decision 0054/09 (Salyers vs Azovmash BC), par. 64.
[60] See FAT Decision 0075/10 (Tamir, Krayn vs Apoel Nicosia BC), par. 47.
[61] Consisted, as accepted by the FAT, in making the player to "*understand that he was no longer wanted on the team"* and that he would not be offered more than partial compensation.
[62] See FAT Decision 0040/09 (Hornbuckle, Dyke, Baptiste vs Besiktas JK), par. 54.
[63] See inter alia FAT Decision 0020/08 (Dimitropoulos vs AEK BC), par. 8, 0009/08 (Smith vs Lukoil Academic Sofia BC), par. 92.
[64] See inter alia FAT Decision 0041/09 (Panellinios BC vs Kelley), par. 83, 0039/09 (Capin vs Azovmash BC), par. 57.
[65] This same wording is found in all cases interests are awarded.
[66] See inter alia FAT Decision 0020/08 (Dimitropoulos vs AEK BC), par 8.
[67] Supra note 10.
[68] See FAT Decision 0057/09 (Podkovyrov vs Slupskie TKSSA), par. 46, in which as applicable law was chosen the Polish law, and 0034/09 (Tucker, Pro One Sports vs BC Kyiv), par. 60, in which as applicable law was chosen the Swiss law.
[69] See also on that matter Ian Blacksaw *The FIBA Arbitral Tribunal (FAT)* The International Sports Law Journal 2009, N0 1-2, also available at http://www.asser.nl/default.aspx?site_id=11&level1=13914&level2=13931&level3=&textid=35936
[70] Supra note 23.
[71] See FAT Decision 0019/08 (Clancy, Raseni, Pinnacle M.C. vs Ural Great BC), par. 6.2.1, in which the case was dismissed because of the lack of a binding agreement between the parties, since the claimants (the player and the agents) never sent back to the respondent (the club) a signed copy of their agreement. As stated in this award "*the Respondent's act of sending the signed supplementary Agreement to the Claimants constituted an offer. Deciding ex aequo et bono, the Arbitrator finds that to become a binding agreement, such an offer must be accepted by the Claimants by signing the Supplementary Agreement and that this acceptance must be communicated to the Respondent, in accordance with the terms of the offer*".

Analyzing FAT' awards[72] and based on their reasoning and the data provided by them[73] in most of the cases the award and its reasoning is, to the writer' opinion, convincing. In some, however, of those cases it seems that although, as expressly stating in them[74] the arbitrator when deciding *ex aequo et bono*:

- *ignores the law and focus exclusively on the specific circumstances of the case at hand;*
- *pursues 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;*
- *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;*

FAT seems to focus / sticks too much on the general principle of *pacta sunt servanda* without always focusing / sticking on the circumstances of the particular case and without (in some cases) taking into account other general principles of law such as the obligation of the parties to act in good faith.

In the *Mikhalevskiy vs Bikov case*[75], for instance, in which the respondent (the player) decided unilaterally and without just cause[76], to terminate the contract with the claimant (the agent) before its conclusion, the award dismissed all the latter' (the agent's) reliefs based on the principle of *pacta sunt servanda*.

As ruled by FAT[77] the claimant *"arranged his affairs with Respondent in a particular way and cannot now put those arrangements to one side merely because either, on the one hand,* ***he failed to protect himself*** *by having the appropriate clause inserted into the player/club contract, or, on the other hand, is put off by a mere declining by Dynamo Moscow of its liability"* (emphasis added).

For the same reason (the lack of an express provision in the contract) the FAT dismissed the agent' claim for a percentage of 10% of the salary of the player, although, as acknowledged in the award[78], *"it is well known that such a percentage represents custom and practice in the basketball agency business"*.

In this particular case, however, based on the information derived from the award, it is the writer opinion, that the actual "*issue*" of the case was a badly drafted contract not reflecting the real deal between the parties.

It seems that the player, in this particular case, took advantage of that badly drafted contract, and FAT, deciding *ex aequo et bono,* allowed it to happen.

Such an approach is definitely in accordance with the stringency of *pacta sunt servanda*, it is not, however to the writer' opinion, in accordance with the *ex aequo et bono* doctrine.

In the *Branzova vs BC Nadezhda case*[79] the matter at stake was whether the breaching (by the club) of an agreement[80] terminating the original agreement between the player and the club (not containing, however, an express clause giving the right to unilateral termination of that contract), resulted in the retroactively cancelation of the last agreement and the restoration of the original one.

FAT dismissed the claimant request for restoration of the original contract[81] stating that it found "*it difficult to acknowledge that Claimant's notice and requests amounted to a prompt and unconditional cancellation of the Termination Agreement. Claimant did not notify Respondent of her intention to terminate the Termination Agreement, nor did she proceed to terminate it, but, rather, she announced that she would undertake certain legal steps if Respondent did not pay the compensation due under the Termination Agreement. When the time limit she had set to Respondent for payment of the said compensation expired, Claimant did not promptly declare that the*

[72] The fifty (50) of the fifty two (52) awards uploaded (by August 15th, 2010) on the official site of FIBA, in which the arbitrator decided *ex aequo et bono*.
[73] Since the writer have no personal knowledge of the facts of the cases.
[74] Supra note 10.
[75] See FAT Decision 0065/09.
[76] Ibid., par. 50.
[77] Id., par. 48.
[78] Id., par. 65.
[79] See FAT Decision 0056/09.
[80] Article 3 of that agreement provided that: "*The Athlete on his [sic] part confirms that after the transfer of the sum specified in item 1 of the present Agreement, he [sic] will not make any claims to "Nadezhda" Basketball club", including financial, as well as claims regarding the pre-term termination of the labour contract".* Ibid., par. 60.
[81] Awarding her only the amount provided for in the agreement terminating the original contract.

Termination Agreement would be cancelled but waited more than 3 weeks before filing the Request for Arbitration".

However, as acknowledged by the award[82] in a case like that "*such a unilateral termination right might still be found to exist depending on the circumstances and based on considerations of fairness".* In particular as accepted by the award[83] "*it is generally accepted that a creditor may choose to continue enforcing his claim against the debtor in default or to withdraw from the contract and refuse also his own performance. If the creditor intends to withdraw from the contract, he must notify the debtor accordingly, set a reasonable deadline and, upon expiration this deadline, promptly and unconditionally declare his withdrawal from the contract. The contract is then deemed to be cancelled retroactively and the status quo ante (i.e. the situation before the contract was concluded) is deemed to be restored, which means that any benefits under the cancelled contract must be restituted to the other party*".

The claimant, in this case, sent a letter to the club stating among others that:

"If this payment is not effective in this time, I will go to FIBA FAT and CAS according our arbitration clause ***to ask the nullity of our transaction*** *because the club didn't execute its obligation of payment.* ***I will ask for the payment of the full salary (120.000 euros)"*** (emphasis added).

And then, she addressed to the FAT asking for the "*full salary*" in line to her warning.

It is a fact that she didn't expressly nullify the agreement; it is however obvious, to the writer' opinion that, that was her intention and that she had communicated it.

Dismissing, therefore, her claim on a "technicality" (if we could use such an expression), on a "formality" is not in accordance with the *ex aequo et bono* doctrine.

In the *van de Hare, Glushkon, Hammink vs Azovmash BC case*[84] the matter at stake was the right (of the club) to terminate or not the agreement (with the player) because of his pre-existing medical condition.

As ruled by FAT[85] "*considering the fundamental principle of pacta sunt servanda"*, in such a case the club should not only demonstrate the existence of a pre-existing medical condition of a certain severity that was likely to affect the player' performance in the period covered by the agreement[86], but also proof the player' "*knowledge of such a pre-existing medical condition*".

Although the first obligation of the club is absolutely logical and fair, it is the writer opinion, that the latter, is not in accordance with the *ex aequo et bono* doctrine. And thus, because in such a case the club would end up paying the salaries (and bonuses etc) of a player who cannot perform his duties without any fault of the club; just because of a mere coincidence. The equitable solution would be to consider that such a matter constitutes a right for the termination of the contract for just cause without further consequences for both parties[87].

VI. Conclusion

The overall, however, appraisal of FIBA' Arbitral Tribunal can only be positive. It is specialized, it is fast, the number of cases addressed to it increase year by year. It is evident that it is rendering an important service for the resolution of disputes between players, agents and clubs. A service, which, thanks to the sanctions provided by FIBA' Internal Regulations[88] in the event that a party fails to honor the final award, is also (and this is of extreme importance) efficient.

Thus the above criticism does not of course mean that FAT arbitrators do not (generally) comply with their duty to decide *ex aequo et bono*. A duty that does not prevent the arbitrator *"from*

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[82] Supra not 80, par. 66.

[83] Ibid.

[84] See FAT Decision 0014/08.

[85] Ibid., par. 56.

[86] In this particular case, however, the club did not even prove the existence of such a pre-existing medical condition.

[87] With the obligation, of course, of the club to pay the salaries, bonuses etc of the player until the date of the termination.

[88] See art. L.2.7 titles "*Honouring of FAT Awards*" according which: "*L.2.7.1 In the event that a party to a FAT Arbitration fails to honour a final award or any provisional or conservatory measures (the "first party") of FAT, the party seeking enforcement of such award (the "second party") shall have the right to request that FIBA sanction the first party. The sanctions can be imposed by FIBA: a. A monetary fine of up to EUR 100.000; this fine can be applied more than once; and/or b. Withdrawal of FIBA-license if the first party is a player's agent; and/or c. A ban on international transfers if the first party is a player; and/or d. A ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club. The above sanctions can be applied more than once. L.2.7.2 The second party shall send to FIBA with his request a complete file of the FAT proceedings. The decision on the sanction is taken by the Secretary General or his delegate. Before taking his decision he shall give the first party an opportunity to state his position. L.2.7.3 The decision to sanction the first party shall be subject to appeal to the FIBA Appeals Tribunal according to the Internal Regulations governing Appeals*".

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".

It's only a reminder of the basic concept of the *ex aequo et bono* provision that[89]:

"*When the parties authorize the arbitrator to decide ex aequo et bono,*
the arbitrator is required to decide ex aequo et bono"[90]**.**

[89] As also acknowledged by the FAT, supra note 10.
[90] (emphasis added)