A comparison of the legal approach of dispute resolution bodies in football and basketball concerning conditions precedent in employment contracts

From the pitch to the court

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Introduction

It is not uncommon for sports employment contracts to contain conditions precedent. The term *"condition precedent"* refers to a condition or event that must occur before the employment contract comes into effect. A condition precedent is a tool used in contract drafting to introduce flexibility and manage risks. In practice, clubs commonly use conditions precedent in athlete employment contracts as a risk management tool to manage risk exposure for the club.

For example, an athlete employment contract may consist of the following common conditions precedent:

- the athlete must pass a medical examination before the employment contract comes into effect; and/or
- the athlete (or coach) must obtain the relevant visas and work permits of the country of the new club.

The validity of conditions precedent in employment contracts is not undebated and sometimes regulated. In the sports industry, conditions precedent are often dealt with differently between sports.

Those who are familiar with both the FIFA regulations and the jurisprudence of the FIFA Dispute Resolution Chamber of the FIFA Football Tribunal ("FIFA DRC") and the jurisprudence of the Basketball Arbitral Tribunal ("BAT") know that such conditions precedent are treated differently in these two great sports.

As described in an earlier article in *SLT*[3], conditions precedent are, generally, deemed valid in the world of professional basketball, whereas in football a stricter legal regime applies.

Through a comparative analysis, in this article we aim to shed light on the contrasting approaches employed by the FIFA DRC and the BAT when addressing the subject of common conditions precedent.

Applicable rules and regulations

The FIFA DRC is the designated forum for, among other types of disputes, the resolution of employment-related disputes with an international dimension between professional football players and their football clubs. FIFA has its own set of rules and regulations which apply in disputes brought before the FIFA judicial bodies, ensuring a uniform and diligent procedure in such cases. The FIFA judicial bodies, and, as such, the FIFA DRC, base their decisions *"primarily on the FIFA Statutes as well as FIFA's regulations, circulars, directives and decisions, and the Laws of the Game, and subsidiarily on Swiss law and any other law that the competent judicial body deems applicable"*.[4] In employment-related matters between a player and its club, the FIFA DRC mainly applies the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). The FIFA RSTP regulates the employment relationship between a professional football player and a football club. As such, the FIFA RSTP also dedicates several articles to the permissibility of conditions precedent in employment contracts of professional football players.

The BAT serves as a specialised forum for the resolution of disputes within the field of professional basketball. Functioning as an independent arbitral body, the BAT operates under its own set of rules and procedures. Pursuant to these BAT rules – and this is crucial – the BAT deals with disputes based on the principle of *ex aequo et bono*, meaning

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3 Nick Poggenklaas, "Basketball: A legal jump ball: Analyzing the role of conditions precedent in employment contracts in professional basketball", in: *SLT 2024/2*, March 2024.

4 Art. 5 of the FIFA Disciplinary Code, 2023 edition.

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that the BAT issues decisions *"according to what is just and good"*. To avoid confusion: the BAT is not bound by any overarching regulations of FIBA, nor by national laws.[5]

Medical examinations in football

Medical examinations play an extremely important role in the world of professional football. It is not uncommon for a transfer of a professional football player, oftentimes involving substantial (transfer) fees, to be called off just prior to the completion of the transfer, due to the player's failure to pass a medical examination to the satisfaction of the new club.

However, FIFA has strict rules and regulations regarding the requirement for an athlete to pass the medical examination before the contractual employment relationship is deemed effective. In this sense, art. 18 para. 4 of the FIFA RSTP states that:

"The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit."

However, the goal of art. 18 para. 4 of the FIFA RSTP is not to render the entire employment contract invalid if it contains such a condition precedent, but rather to solely render the specific condition precedent regarding the medical examination invalid.[6]

As a general rule, FIFA requires and its regulations force clubs to perform a medical examination before signing an employment contract with a player.[7] If the club fails to do so, and signs the employment contract before the successful completion of a medical examination by the player, any termination of the signed employment contract by the club due to a negative medical examination will be considered to have been done without just cause, and thus illegally.[8] These rules aim to provide legal certainty to and provide protection for the players when concluding employment contracts.

Although the foregoing is clear and prohibits the clubs from including a medical examination as a condition precedent in any employment contract, oftentimes a club will send a player a so-called "pre-contract", "proposal", "offer" or "letter of invitation" (furtheron jointly referred to as "pre-contract"). According to CAS and FIFA jurisprudence such a pre-contract is different from a final employment contract, since it does not yet contain all essential elements of the contract, the so-called *essentialia negotii*.[9]

Regarding an employment contract, these *essentialia negotii* are:

- the date;
- the parties' names;
- the subject of the contract;
- the duration of the contractual relationship;
- the player's remuneration;
- both parties' signatures; and
- the obligations of the parties to each other.[10]

Since such a pre-contract differs from an actual employment contract, it is not forbidden per se to include a conditional medical examination in the pre-contract as long as the pre-contract does not contain all these *essentialia negotii*.

In this regard, to avoid circumvention of the FIFA regulations, and more specifically art. 18 para. 4 of the FIFA RSTP, the inclusion of a conditional medical examination in a pre-contract will generally only be deemed valid if the parties can clearly demonstrate that they intend to further negotiate the conditions of the employment contract of the player, if and insofar as the player successfully passed the medical examination. In any case, it must be clear that the pre-contract does not contain the final negotiations between the parties.[11]

Medical examinations in basketball

As previously mentioned, the BAT issues decisions based on the principle of ex aequo et bono. In one of its earliest awards, the BAT already justified a medical examination clause by stating that the good health and playing condition of a player are the essential basis of every player's employment contract. Pursuant to this reasoning, the BAT deemed a "medical examination clause" a valid means in order to protect the club's interests.[12]

This conclusion was repeated in the BAT jurisprudence that subsequently followed.[13] Considering the above, one must conclude that there is a fundamental different approach on the issue of medical examinations in football as compared to basketball. Where FIFA regulations explicitly forbid a medical examination to be a condition precedent, in basketball it is the most common condition precedent in player contracts.

5 Art. 15 of the BAT Arbitration Rules, 2024 edition.

6 CAS 2016/A/4495 *Hakan Calhanoglu v. Trabzonspor FC and FIFA* and CAS 2016/A/4535 T*rabzonspor FC v. Hakan Calhanoglu*.

7 FIFA Commentary on the FIFA Regulations on the Status and Transfer of Players, 2023 edition, p. 235.

8 For example, DRC decision of 9 June 2022 (Barbosa) and DRC decision of 17 August 2023 (*Kadiri*).

9 For example, CAS 2016/A/4489 *Beijing Renhe FC v. Marcin Robak*, DRC decision of 29 January 2020 (*Mendonca*), DRC decision of 7 December 2023 (*Binene Sabwa Bwalya*) and DRC decision of 7 July 2023 (082341).

10 E.g. CAS 2015/A/3953 and 3954, preamble, para. 4, CAS 2018/A/5628, para. 81, CAS 2021/A/8008, para. 73, DRC decision of 31 August 2023 (*Aguilar Vargas*) and DRC decision of 22 June 2023 (*Bakic*).

11 *FIFA Commentary on the FIFA Regulations on the Status and Transfer of Players*, 2023 edition, p. 238.

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

13 E.g. BAT Award 107/10 (*Kelati v. Olympiacos Piraeus*), BAT Award 783/15 (*Kitchen v. Haopel*) and BAT Award 1363 (*Holman v. Tianjin*).

However, that does not imply that clubs can easily invoke a clause that stipulates that the employment contract only comes into effect after the player has passed a medical examination. There is a vast amount of BAT jurisprudence on whether a club legally failed a player for its medical examination. Pursuant to the BAT jurisprudence, a club has a margin of appreciation when assessing a player's medical examination, but in the end, a club must establish that it failed a player for objective and comprehensive medical reasons. Considering the BAT jurisprudence on the matter, it can be established that the BAT jurisprudence aims to achieve "fairness" whilst maintaining a high level of contractual stability.[14]

Visas and work permits

Another condition precedent that is common in sports contracts, is a clause that stipulates that an athlete (or coach) must obtain the relevant visas or work permits before an employment contract comes into effect.

In football, such clauses are, however, prohibited by art. 18 of the FIFA RSTP.[15] In fact, art. 18 para. 4 of the FIFA RSTP explicitly states that:

"The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit."

As a general rule, it is a club's responsibility to obtain the work permit or visa on behalf of the player prior to the signing of an employment contract or during its period of validity, to enable the player to render his or her services to the club.[16] Therefore, the club must perform all administrative steps, including the issuance of a visa or work permit, to allow the player to perform the services provided in his employment contract.[17]

FIFA maintains a strict approach when it comes to visas and work permits. If a player and a club sign an employment contract before the club confirms the player's visa or work permit approval, the employment contract remains valid and binding, regardless of the outcome of the application. Therefore, if the competent authorities deny the visa or work permit after the parties have signed the employment contract, the club will not be able to terminate the employment contract with just cause because of the refusal of the competent authorities.[18]

Again, in basketball, the approach is very different. It follows from the BAT jurisprudence that conditions precedent, requiring that an employee obtains all relevant documents such as visas and work permits, are valid. However, the BAT does underscore in its decisions that an employee's influence on obtaining these documents is rather limited. Therefore, the BAT has a stringent approach when it assesses these kinds of conditions precedent. Considering the far-reaching consequences that non-fulfilment of a condition precedent has for the employee and considering the limited influence of the employee on whether the condition precedent is fulfilled, the BAT strongly rejects an extensive interpretation of a condition precedent beyond the clear language of the contractual clause.

Analysis

The above clearly indicates that there is a great difference between the way the BAT deals with disputes, namely based on the principle of ex aequo et bono, and the way the FIFA judicial bodies deal with disputes, based on applicable rules, regulations and laws. The approach taken to handle the conditions precedent differs significantly, as does the substantive assessment of typical conditions precedent in employment contracts.

This raises questions. First, what warrants this difference in approach? We believe that, from a legal point of view, there are no substantial differences between basketball and football that can justify the fact that in basketball conditions precedent are valid and binding whereas in football, in principle, they are not. After all, the good health and playing condition of a player forms the basis of a player contract in football as well. Why would this justify the validity of a medical examination in basketball, but not in football?

And a similar analysis can be made when one looks at the condition precedent that involves that a player (or coach) obtains the right visas and work permits. In the event of non-fulfilment of such a clause, the employee shall not be allowed to perform its contractual duties for the club. In our view, from a legal point of view, it should not matter whether that employee is active in basketball or football.

Thus, a second question is raised. Is the approach taken by FIFA better than the approach taken by the BAT? Or vice versa? After all, if the BAT decides, based on what is just and good, that conditions precedent in employment contracts are valid, is any different approach unfair by default? We believe that this question cannot easily be answered, and we believe many different views on this matter are possible and equally defendable. Personally, we believe that legal certainty is an important commodity. We feel that both the football community (by means of the FIFA clear regulations as well as its jurisprudence) and the basketball community (by means of consistent jurisprudence of the BAT) do not face serious legal uncertainty when it

14 Nick Poggenklaas, "Basketball: A legal jump ball: Analyzing the role of conditions precedent in employment contracts in professional basketball", in: *SLT 2024/2*, March 2024.

15 Although visas are not expressly mentioned in art. 18 para. 4 of the FIFA RSTP, it is well-established CAS and FIFA jurisprudence that the successful obtaining of a visa is considered to be prohibited as a condition precedent as well.

16 For example, the DRC decision of 18 October 2023 (*Wanyoike*), the DRC decision of 18 October 2023 (*Mwavali*) and the DRC decision of 20 July 2023 *(Adeede*).

17 DRC decision of 16 August 2023 (*Diallo*).

18 *FIFA Commentary on the FIFA Regulations on the Status and Transfer of Players,* 2023 edition, p. 239.

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comes to the enforceability of conditions precedent in employment contracts. In general, the approach of the dispute resolution bodies in both sports is sufficiently clear.

However, if we must make a critical note, it is our personal opinion that the current practice in football, where parties work with pre-contracts, is not completely transparent. We believe that pre-contracts can, in certain circumstances, be used to circumvent the FIFA Regulations. Therefore, in our opinion a higher level of legal certainty and clarity can be provided when a medical examination clause is deemed valid and binding, but such clauses cannot be abused by clubs due to a limited margin of appreciation when assessing the player's medical examination.

In addition to legal certainty, we believe that the law should also ensure a righteous outcome of legal procedures. But what is fair? Even when putting personal interests aside, this question is almost impossible to answer. After all, the European employment laws are oftentimes quite stringent and favourable to employees, whereas, for example, in the United States of America or the Middle East, employment laws are less stringent, and employers generally have a lot more flexibility. However, it would be very condescending to simply state that one system is better than the other, as all legal systems constantly evolve at their own pace, thereby considering their own problems and issues.

In all respects, we believe that it is essential to monitor the distinctions between "football law" and "basketball law". Whilst there may not be ample justification for unifying the regulations governing athlete employment contracts across all sports, we must remain receptive to diverse perspectives. By maintaining an open-minded approach, various sports and arbitral tribunals can gather insights from one another. This collaborative exchange has the potential to result in fairer outcomes in legal proceedings.