



# **BAT Jurisprudence On *Verwirkung***

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## *Venire contra factum proprium*

- *Contradiction to one's own previous conduct*



## What is *Verwirkung* in BAT?

BAT arbitrators apply the doctrine of *Verwirkung* in order to impose **time restrictions** to a claimant's attempt to collect his/her debts.

## The *Verwirkung* principle requires two prerequisites:

- that the creditor has failed during a significant period of time to exercise his rights;
- that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his rights or claim in the future.

## BAT 0107/10 (paragraph 57):

- *“Regarding the “significant period of time”, in general a stringent standard has to be applied. In an environment in which contracts are rather short-lived and players move quickly from one club to the other, **the period of one year could - in principle - be seen as a limit.**”*

## BAT 0480/13 (paragraph 91):

- *The Arbitrator notes that in football-related cases the principle of “Verwirkung” only kicks in “**if more than two years have elapsed from the event giving rise to the dispute.**” The Arbitrator finds this an equitable concept and, thus, deems that – in principle – for the condition of “significant period of time” to be **fulfilled a minimum of two years** must have elapsed from the occurrences that gave rise to the present dispute until the filing of the Request for Arbitration.*

**BAT 0480/13** (paragraph 91):

- *“The Arbitrator would, however, be prepared to accept a lesser period of time in truly exceptional circumstances <...>”.*

**BAT 0674/15** (paragraph 45):

- *“In sum, absent any clear evidence that the Player contested the termination or put the Club on notice or reserved its rights during a period spanning **more than two basketball seasons**, the Arbitrator considers that the Club could legitimately and in good faith believe that the Player had accepted the termination or had not suffered any damage he deemed sufficient to claim.”*

**BAT 1601/20** ( paragraph 73):

- “<..> the Arbitrator considers that **two years** is the outer limit of time which might pass leading to the barring of a claim. There may, of course, be specific and exceptional circumstances which might bar a claim in a shorter amount of time, but for present purposes the Arbitrator is content to apply **a two-year time limit for the purposes of Verwirkung.**”

**BAT 1644/20** (paragraph 210):

- “ <...> the general principle set down in BAT 0408/13 is often referred to, that is, that save for “truly exceptional circumstances”, **a minimum of two years must have passed from the events giving rise to the claim and the filing of the claim itself.**”





## *BAT jurisprudence on Verwirkung*

### **BAT 1082/17**

- Claimant Gist                      debt occurred in 2011                      RfA 2017
  - Claimant James                      debt occurred in 2012                      RfA 2017
  - Claimant Gordon                      debt occurred in 2013                      RfA 2017
  - The Agency                      debt occurred in 2012-2013                      RfA 2017
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- The case was not dismissed due to *Verwirkung*

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## BAT 1082/17 (paragraph 62):

- *The Arbitrator is satisfied, that **the Claimants repeatedly and continuously tried to collect the outstanding debts from Respondent.** They submitted numerous e-mails (including internal e-mails with phone call memoranda) sent to Respondent reminding the latter of the outstanding debts, including threats to commence legal action.*

## BAT 1644/20 (paragraph 212):

- “When assessing the second condition, i.e. whether the debtor has reasonable grounds to rely on the assumption that the creditor will not exercise his right in the future, all of the relevant circumstances are taken into account, however arbitrators will invariably consider **whether the creditor put the debtor on notice that it intended to seek unpaid amounts in the future.** Additionally, arbitrators will often take into account **whether a creditor’s relationship with the debtor has come to an end** (for example when a player leaves a club)”.

## BAT 0593/14 (paragraph 47):

- *‘On any analysis, if a professional basketball player **leaves a club and makes no demands**, or no demands even if made have been proven, **for a period of two years**, it is entirely reasonable for such club to presume that it will not be pursued for any remaining matters associated with that player.’*

## **BAT 1082/17** (paragraph 55):

- ‘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. In particular, the arbitrator is not required to apply the limitation periods provided by the law which would otherwise govern the contract.” <...> “BAT arbitrators apply the doctrine of *Verwirkung* in order to impose time restrictions to a claimant’s attempt to collect his or her alleged debts. *Verwirkung* is rooted in the principle of legal certainty, which requires that any payment must be claimed within a reasonable period of time after it has become due. **This also applies to claims by an employee against his or her employer.**’

## BAT 1644/20 (paragraph 196):

- *“As an initial matter, and as set out above, national laws providing for statutory limitation periods are generally accepted not to apply in BAT arbitrations, where the question of whether or not a claim is time barred is assessed in accordance with the principle of Verwirkung.”*

## BAT 0674/15 (paragraph 46):

- *“The same reasons apply mutatis mutandis to the Agent’s claim, bearing in mind that he has neither alleged nor filed any evidence that during the two-year period in question he ever put the Club on notice for late payment further to its termination of the Player’s contract, despite the fact that the contractual due date of his fee was 15 January 2013.”*



## BAT 1342/19 (paragraph 37):

- *“The objection of forfeiture (“Verwirkung”) does not have to be raised by a party but **shall be applied ex officio.**”*

## The Verwirkung principle in BAT

### Prerequisites:

- that the creditor has failed during a significant period of time to exercise his rights;
- that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his rights or claim in the future.
  
- Applicable to players, coaches and agents;
- Applicable to employment relationships;
- Applicable *ex officio*.