



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 0386/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Ms. Annett Rombach**

in the arbitration proceedings between

**Mr. Petteri Koponen**

represented by Mr. Giovanni Facci, attorney at law,  
Studio Legale Facci, Via Marconi n. 51, 40122 Bologna, Italy

**- Claimant -**

vs.

**BC Virtus Pallacanestro Bologna**  
Via dell'Arcoveggio n. 49/2, 40129 Bologna, Italy

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Petteri Koponen (the "Player" or "Claimant"), is a professional basketball player of Finnish nationality.

### **1.2 The Respondent**

2. BC Virtus Pallacanestro Bologna (the "Club" or "Respondent" and together with Claimant the "Parties") is a professional basketball club located in Bologna, Italy.

## **2. The Arbitrator**

3. On 6 May 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

4. On 20 August 2008, the Player and the Club entered into a contract (the "Player Contract"), pursuant to which the Club engaged the Player as a professional basketball player for the seasons of 2008-2009, 2009-2010, 2010-2011 and 2011-2012. On 19 August 2009, the Parties signed an amendment to the Player Contract (the "Amendment"), which, *inter alia*, modified the annual base salaries the Player was entitled to receive under the Player Contract. Pursuant to the Amendment, the Club

agreed to pay the Player a total base salary of EUR 375,000 net of all Italian taxes and charges for the 2011-2012 season as follows:

- *EURO 125,000 net through the Lega contract in 11 installments of Euro 11,364 each one, starting from September 10, 2011 until July 10, 2012;*
- *EURO 250,000 net through an image contract (Magellanica Consulting Srl.) payable as follows:*
  - *EURO 50,000 net on 15 November, 2011*
  - *EURO 50,000 net on 15 December, 2011*
  - *EURO 50,000 net on 15 February, 2012*
  - *EURO 50,000 net on 15 April, 2012*
  - *EURO 50,000 net on 15 May, 2012”*

5. The Club made certain (partial) payments under the Player Contract as modified by the Amendment. The dispute revolves around a remainder of EUR 63,900 pertaining to the 2011-2012 season, which the Club has allegedly failed to pay to date.

### **3.2 The Proceedings before the BAT**

6. On 22 February 2013, the Claimant filed a Request for Arbitration (with several exhibits) in accordance with the BAT Rules, which was received by the BAT Secretariat on 4 March 2013. The non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on 26 February 2013.
7. On 13 May 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 29 May 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 24 May 2013 as follows:

<i>“Claimant (Mr. Petteri Koponen)</i>	<i>EUR 4,000</i>
<i>Respondent (Virtus Pallacanestro Bologna Spa)</i>	<i>EUR 4,000”</i>

8. By letter to the Parties dated 30 May 2013, the BAT Secretariat acknowledged receipt of Claimant's share of the Advance on Costs and informed the Parties that Respondent had failed to submit its Answer and to pay its share of the Advance on Costs. Respondent was granted a final opportunity to file its Answer and Claimant was invited to substitute for Respondent's share of the Advance on Costs. Claimant paid Respondent's share of the Advance on Costs on 13 June 2013.
9. On 18 June 2013, the Parties were informed that Respondent, despite several invitations by the Arbitrator, had failed to submit its Answer. The Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs by no later than 24 June 2013.
10. By letter of 20 June 2013 (received by the Arbitrator via e-mail on 24 June 2013), Claimant submitted the following account of costs:

*“Legal fees for the FIBA Arbitration Application of 22.2.2013: **€ 4.000,00**;*

*Legal fees for Several Requests for Payments (doc. 4, 5, 6, 7, attached to the Request for Arbitration): **€ 1.500,00**.*

*Not [sic] reimbursable handling fee: **€ 2.000,00**.*

*As a result, the amount due for legal fees amounts to **€ 7.500,00** (seven thousand and five hundred).*

*To this amount must be added the additional costs incurred by Mr. Koponen related to the Fiba Arbitration.”*

11. On 25 June 2013, the BAT Secretariat forwarded Claimant's account of costs to the Respondent and invited it to comment on it by no later than 28 June 2013. No comments were filed by the Respondent.
12. As none of the Parties requested to hold a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

#### **4. The Positions of the Parties**

##### **4.1 Claimant's Position and Request for Relief**

13. Claimant submits that the Club did not make certain salary payments for the 2011-2012 season due under the Amendment to the Player Contract despite his continuous efforts to receive the outstanding payments from it.

14. In his Request for Arbitration, Claimant requests the following relief:

*“Mr. Koponen is requesting to Virtus Pallacanestro Bologna the payment of € 63.900,00 (sixty three thousand nine hundred) net of any Italian income tax.*

*To that amount we need to have the interests on the missing payments to be calculated starting from the following dates with a 5% yearly percentage:*

*on € 13.900,00 from 15.4.2012: € 550,29*

*on € 50.000,00 from 15.5.2012: € 1.773,97.*

*The total amount of the accumulated interests is of € 2.324,26.*

*It is also right of Mr. Koponen to receive [sic] the reimbursement of the legal expenses for the present arbitration which is not going to be less than € 10.000,00.*

*The total credit of Mr. Koponen towards Virtus Pallacanestro Bologna s.p.a. is for the above reasons of € 76.224,26 (seventy six thousand two hundred twenty-four<sup>26</sup>) net of any Italian income tax.”*

##### **4.2 Respondent's Position and Request for Relief**

15. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

## 5. The Jurisdiction of the BAT

16. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, she will examine her jurisdiction *ex officio* on the basis of the record as it stands.
17. Pursuant to Art. 2.1 of the BAT Rules, “[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
19. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
20. The jurisdiction of the BAT over Claimant’s claims results from the arbitration agreement contained in Clause 12 of the Player Contract, which sets forth as follows:

*“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules.*

*The arbitrator shall decide the dispute ex aequo et bono.*

*Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.”*

21. The agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.

22. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Clause 12 of the Player Contract clearly covers the present dispute.
23. Furthermore, at the time of signing of the Player Contract, the BAT was still called the “FIBA Arbitral Tribunal (FAT)” while it has now changed its name to “BAT”. In this respect, Article 18.2 of the BAT Rules specifically provides that “[a]ny reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT”.
24. The arbitration agreement contained in the Player Contract remained effective also after the Parties signed the Amendment. The Amendment, in its preamble, clarifies that “[a]ll terms of the original Agreement shall remain in effect unless otherwise noted”. As the Parties did not “otherwise note” anything with respect to their original arbitration agreement contained in the Player Contract, it is clear that the Amendment does not touch upon the Parties’ agreement to refer their disputes to the jurisdiction of the BAT.
25. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by either Claimant or Respondent. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the present dispute.

## 6. Other Procedural Issues

26. Article 14.2 of the BAT Rules specifies that “the Arbitrator may [...] proceed with the arbitration and deliver an award” if “the Respondent fails to submit an Answer.” The Arbitrator’s authority to proceed with the arbitration in case of default by one of the

parties is in accordance with Swiss arbitration law and the practice of the BAT.<sup>1</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

27. This requirement is met in the present case. The Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimant's Request for Arbitration and to its Account on Costs. Respondent, however, chose not to participate in this Arbitration.

## 7. **Applicable Law – *ex aequo et bono***

28. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA reads as follows:

*"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

29. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

*"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."*

30. In Clause 12 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to

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<sup>1</sup> See *ex multis* BAT cases 0001/07, Ostojic and Raznatovic vs. PAOK KAE; 0018/08, Nicevic vs. Beşiktaş; 0093/09, A.S.D. Pallacanestro Femminile Schio vs. Braxton; 0170/11, Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis.

any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

31. 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<sup>2</sup> (Concordat)<sup>3</sup>, 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.”<sup>4</sup>*

32. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.
33. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 8. Findings

34. Claimant requests the payment of outstanding salaries (8.1), and interest on all outstanding amounts (8.2).

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<sup>2</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

### **8.1 Outstanding Salary in the Amount of EUR 63,900**

35. According to the Amendment to the Player Contract, the Player was entitled to a base salary for the 2011-2012 season in the total amount of EUR 375,000 net of all Italian taxes and charges. A partial amount of EUR 63,900, referring to the instalments of 15 April 2012 (EUR 13,900) and 15 May 2012 (EUR 50,000), remains allegedly outstanding.
36. Respondent neither disputed the existence, nor the quantum of the claimed amounts before or during this arbitration. Based on the record before her, the Arbitrator finds that there is no indication that would cast doubt on the existence of the Club's obligation to pay the Player the (outstanding) salaries as stipulated under the Amendment to the Player Contract. The Arbitrator therefore finds that Claimant is entitled to the claimed salary payments for the season 2011-2012 in the amount of EUR 63,900.

### **8.2 Interest on Outstanding Salary**

37. Claimant requests the payment of interest on the outstanding salary at an annual rate of 5% from 15 April 2012 on the amount of EUR 13,900 and from 15 May 2012 on the amount of EUR 50,000. Claimant calculates a total interest amount of EUR 2,324.26 until a non-specified date in January 2013 and asks for payment of such specific amount in his request for relief.
38. As a preliminary matter, the Arbitrator finds that the issue of (default) interest is one that is governed by the same substantive law applicable to Claimant's claims, i.e. must be decided in accordance with the principles of *ex aequo et bono*.

39. Neither the Player Contract nor the Amendment provide for any obligation by the Club to pay interest in case of a non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence,<sup>5</sup> that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.
40. With respect to the starting date, the Arbitrator finds that default interest should accrue immediately from the day after the requested payments became due under the relevant agreement. The payment due dates are explicitly set out in Clause 2 of the Amendment to the Player Contract so that Respondent knew at what time it was obligated to effectuate the payments. The Arbitrator, deciding *ex aequo et bono*, finds that it is just and equitable to award interest from the earliest possible day.
41. Accordingly, interest on the Player's outstanding salary accrues from 16 April 2012 on the amount of EUR 13,900 and from 16 May 2012 on the amount of EUR 50,000.
42. The Arbitrator notes she is bound by Claimant's request for relief, seeking payment of a specific interest amount based on a calculation that ends shortly before the filing of the Request for Arbitration. Hence, she awards interest only in the amount expressly requested, and not for any time period after the date on which Claimant's calculation ends.

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<sup>5</sup> See, *ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09, Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda; 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

## **9. Costs**

43. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.
44. On 20 September 2013 – considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration, which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”; that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, and taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 5,555.00.
45. Considering that Claimant prevailed with all of his claims, it is appropriate that all of the costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs (if any).
46. Additionally, pursuant to Articles 17.1 and 17.3 of the BAT Rules, Claimant is entitled to the handling fee, which qualifies as “other expenses” incurred in connection with the present arbitration.
47. With respect to Claimant’s legal costs in the amount of EUR 5,500 (excluding the handling fee), the Arbitrator, however, finds that these costs are excessive and that Respondent must bear only a portion of them. The Request for Arbitration was rather short and simple and included a small number of exhibits. Besides the Request for

Arbitration, no further submissions discussing the merits of the case were filed. Because the Respondent chose not to participate in these proceedings at all and because the facts of the case are undisputed and the legal issues are simple and straightforward, the Arbitrator finds, in accordance with Article 17.3 of the BAT Rules, that Claimant should be granted a reduced contribution towards his legal costs in the amount of EUR 3,000.

48. Given that Claimant paid both shares of the Advance on Costs in the amount of EUR 8,000 (2x EUR 4,000), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,445 to Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
  - (ii) Respondent shall pay EUR 5,555 to Claimant, being the difference between the costs advanced by Claimant and the amount to be reimbursed by the BAT;
  - (iii) Furthermore, as stated above, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 2,000 when assessing the expenses incurred by Claimant in connection with these proceedings. Hence, because the Arbitrator considers a reduced amount of EUR 3,000 for Claimant's legal fees and expenses to be reasonable, the Arbitrator fixes the contribution towards Claimant's legal fees and expenses at EUR 5,000. The total amount awarded is not exceeding the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

## **10. AWARD**

For the reasons set forth above, the Arbitrator decides as follows:

- 1. BC Virtus Pallacanestro Bologna is ordered to pay to Mr. Petteri Koponen EUR 63,900.00 net together with interest in the amount of EUR 2,324.26.**
- 2. BC Virtus Pallacanestro Bologna is ordered to pay to Mr. Petteri Koponen EUR 5,555.00 as a reimbursement of the Advance on Costs.**
- 3. BC Virtus Pallacanestro Bologna is ordered to pay to Mr. Petteri Koponen EUR 5,000.00 as a contribution towards his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 24 September 2013

Annett Rombach  
(Arbitrator)