

**ARBITRAL AWARD**

(BAT 0402/13)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Alessandro Finelli**

**- Claimant -**

represented by Mr. Giuseppe Cassi, attorney at law,  
Via Archimede 18, 97100 Ragusa, Italy

vs.

**Virtus Pallacanestro Bologna S.p.A.**  
Via dell'Arcoveggio 49/2, 40129 Bologna, Italy

**- Respondent -**

represented by Mr. Florenzo Storelli, attorney at law,  
Viale Luigi Cadorna Arancio 50, 55100 Lucca, Italy

## **1. The Parties**

### **1.1. The Claimant**

1. Mr. Alessandro Finelli (hereinafter the “Coach”) is a professional basketball coach of Italian nationality. He is represented by Mr. Giuseppe Cassi, attorney at law in Ragusa, Italy.

### **1.2. The Respondent**

2. Virtus Pallacanestro Bologna S.p.A (hereinafter the “Club”) is a professional basketball club located in Bologna, Italy. The Club is represented by Mr. Florenzo Storelli, attorney at law in Lucca, Italy.

## **2. The Arbitrator**

3. On 17 June 2013, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the BAT (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

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

4. On 23 May 2011, the Coach and the Club signed an employment agreement for the position of the head coach of the Club’s basketball team for the 2011-2012 and 2012-2013 seasons (hereinafter the “Coaching Agreement”). The Coach was entitled to a “guaranteed salary net after all taxes” of EUR 80,000.00 for the 2011-2012 season and of EUR 100,000.00 for the 2012-2013 season, payable in ten equal instalments per

season and certain “personal bonuses”. The Club was represented by its then President, Mr. Romano Bertocchi, who resigned from his position after conclusion of the Coaching Agreement.

5. On 5 October 2011, the Coach and the Club signed a further agreement, namely the standard form contract (hereinafter the “League Contract”) provided by the Italian Basketball Federation, the Basket League Serie A and the U.S.A.P., i.e. the union of basketball coaches. The League Contract also concerns the 2011-2012 and 2012-2013 season but states a “fix yearly compensation” of EUR 67,200.00 gross for each of these seasons. The League Contract was signed on behalf of the Club by Mr. Bertocchi’s successor Mr. Claudio Sabatini.
6. The Coach trained the Club’s team from the beginning of the 2011-2012 season until March 2013 and did not resume his function thereafter. The Coach claims that neither in the 2011-2012 nor in the 2012-2013 season did he receive his full salaries.
7. On 5 March 2013, the Club sent a letter to the Coach by which it suspended the Coach from all activities with the team until further notice.
8. By letter of 7 March 2013, the Coach’s counsel requested payment to the Coach of outstanding salaries and bonuses in the total amount of EUR 61,000.00 net of all taxes. In addition, he requested payment of future instalments on the scheduled dates and informed the Club that in case of failure to pay the outstanding amounts within 5 days after receiving the letter, the Coach would file a claim with the “Ordinary or Sport Justice Authority of FIP or FIBA”.
9. According to the Coach, the Club made a further payment of EUR 3,161.35 after the Request for Arbitration with the BAT was filed.
10. On 16 May 2013, the Club’s leadership changed and Mr. Renato Valletta became its new President.

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

11. On 16 May 2013, the BAT Secretariat received the Coach's Request for Arbitration dated 11 April 2013 and a letter of 16 May 2013 titled "Supplementary Statement". The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 15 April 2013.
12. By letter of 18 June 2013, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 9 July 2013. The BAT Secretariat also requested the Parties to pay the following amount as an Advance on Costs by no later than 2 July 2013:

<i>"Claimant (Mr Alessandro Finelli)</i>	<i>EUR 4,500</i>
<i>Respondent (Virtus Bologna)</i>	<i>EUR 4,500"</i>

13. The Club submitted its Answer by the set deadline. Upon request of the Arbitrator the Club provided further information/documents on 29 July 2013.
14. By letter of 8 August 2013, the BAT Secretariat confirmed receipt of the Advance on Costs and the Coach was invited to comment on the Answer by 29 August 2013. The Coach submitted its comments (hereinafter the "Reply") by the set deadline.
15. By letter of 13 September 2013, the Club was invited to comment on the Reply by 4 October 2013. The Club provided its comments on the Reply (hereinafter the "Rejoinder") by the set deadline. By letter of 10 October 2013, the BAT Secretariat informed the Parties that the Arbitrator had decided to declare the exchange of documents complete.

16. Upon request of the BAT Secretariat, both Parties then submitted their accounts of costs. Neither party filed any comments to the account of costs of the other party.
17. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions available.

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

##### **4.1. The Claimant's Position**

18. The Coach submits the following in substance:
  - The agreement relevant for his claim is the Coaching Agreement, not the League Contract. The League Contract is just a “preprinted league form” required for registration with the Italian Basketball Federation. Clause 10 of the Coaching Agreement stipulates that the provisions of the League Contract shall not replace the provisions of the Coaching Agreement which is therefore the only applicable agreement regarding the Coach's compensation.
  - The Club did not pay the Coach the full salary due under the Coaching Agreement although it was agreed as “guaranteed” in, inter alia, Clause 2 and 5 of the Coaching Agreement. The outstanding payments amount to EUR 97,838.65 as follows:
    - regarding the 2011-2012 season, the Club failed to pay the amount of EUR 25,000.00, i.e. salary in the amount of EUR 10,000.00 and bonuses for reaching the league play-offs (EUR 10,000.00) and the Italian Cup final eight qualification (EUR 5,000.00);
    - regarding the 2012-2013 season, the Club paid only EUR 27,161.35 instead of the agreed EUR 100,000.00. Thus, the Club failed to pay salary in the total

amount of EUR 72,838.65.

- The Coach never agreed to any reduction of his salary which is demonstrated by witness statements of the Club's former General Manager, Mr. Massimo Faraoni, and the Coach's agent, Mr. Riccardo Sbezzi. A reduction from EUR 180,000.00 net plus bonuses according to the Coaching Agreement by about 60% to EUR 80,000.00 net (EUR 134,400.00 gross) as provided by the League Contract would be totally unreasonable. Moreover, the Coach already started working for the Club in May 2011 (planning of season, training camp, preseason etc) and the League Contract was not signed before October 2011.
- The Coach did not enforce payment of the outstanding amount for the 2011-2012 season because the Club always promised to pay as soon as possible. The Coach did not want to initiate legal actions when he was still employed by the Club. However, after his suspension, he immediately requested all outstanding amounts by letter of 7 March 2013.

#### 4.2. The Claimant's Request for Relief

19. In his Reply, the Coach requested the following relief:

*"The Claimant requests the BAT declares his right to receive from the Respondent the amount of **Euros 97.838,65** (ninety seven thousand eight hundred thirty eight/65) as specified with the Supplementary Statement dated May 16, 2013 **net of all taxes as specified in the General Agreement**, with legal interests and all costs involved."*

#### 4.3. The Respondent's Position

20. The Club submits the following in substance:

- The only relevant agreement for the determination of the Coach's salaries is the League Contract, not the Coaching Agreement. The Coaching Agreement is just a pre-contract which provided that a final and binding agreement would be signed

later.

- The Coaching Agreement must be considered as pre-contract, because it does not indicate any commencement date and it refers expressly to a coming regular contract. A breach of the Coaching Agreement results only in a pre-contractual liability. A pre-contract is supposed to be replaced by a final contract which eventually happened when the League Contract was signed.
- The Coach's Request for Arbitration is contrary to the duty of good faith because his claim is based on a pre-contract. It is rather a reaction to the Club's suspension letter of 5 March 2013.
- The Parties "tacitly renounced" Clause 10 of the Coaching Agreement which gave the Coaching Agreement priority over the League Contract.
- The Coach agreed to the lower salary in order to appease the Club's supporters because the Coach was the former head coach of the Club's rival Fortitudo Bologna, and his hiring caused some uproar within the Club. The Club paid all instalments due until the suspension letter of 5 March 2013 and continued payments for March, April and May 2013. The Coach never disputed any payments until his letter of 7 March 2013.
- The two witnesses who testified in support of the Coach have a significant interest in the outcome of this case and are not reliable.

#### **4.4. The Respondent's Request for Relief**

21. In its Rejoinder, the Club requested the following relief:

*"For all the above, the Respondent, Virtus Pallacanestro Bologna S.P.A., insists in claiming that the BASKETBALL ARBITRAL TRIBUNAL rejects in toto the request for relief submitted by Mr. Alessandro Finelli against the Club.*

*The Respondent also claims that the BASKETBALL ARBITRAL TRIBUNAL orders*

*the Claimant to refund to the Respondent all costs and legal fees.”*

#### **4. The Jurisdiction of the BAT**

22. Pursuant to Article 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).
23. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
24. The Arbitrator finds that the dispute is of a financial nature and arbitrable within the meaning of Article 177(1) PILA.
25. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 11 of the Coaching Agreement, which reads in its English translation as follows:

*“Notwithstanding to the federal and League regulation, the resolution of any dispute about the present agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (B.A.T.) with sit(sic) in Geneva, Switzerland, according to the rules and regulations of the B.A.T. arbitration procedure, with unique Arbitrator appointed by the President of BAT. The arbitration shall be ruled by chapter 12 of Swiss Act on private law (PIL), independently of parties domicile.”*

26. The Coaching Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute about the present agreement” in Clause 11 of the Coaching Agreement covers the present dispute.

27. According to Art. 178(3) PILA, the arbitration agreement cannot be contested on the grounds that the main contract is not valid. Hence, Clause 11 of the Coaching Agreement may be valid even if the validity of the rest of the Coaching Agreement is disputed.
28. Actually, the Club did not object to the BAT jurisdiction. In its Rejoinder, the Club expressly submitted that, as long as the Coach was relying on the Coaching Agreement only but not on the League Contract, the Club would not argue lack of jurisdiction. As a matter of fact, the Coach based its claim for outstanding salary and bonuses exclusively on provisions contained in the Coaching Agreement. Thus, the fact that Clause 6 of the League Contract refers to the “Permanent Board of Conciliation and Arbitration [...] located in Bologna at the Italian Basketball League” does not affect the competence of the BAT to decide this dispute.
29. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Coach’s claims.

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

30. 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 is generally translated into English as follows:

*“the Parties may authorize the arbitral tribunal to decide ex aequo et bono”.*

31. 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.”*

32. In the arbitration agreement in Clause 11 of the Coaching Agreement, the Parties agreed that the resolution of the present dispute shall be “according to the rules and regulations of the B.A.T arbitration procedure” which includes Article 15.1 of the BAT Rules. Hence, the Parties have directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. Furthermore, the Parties did not refer to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.
33. 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 of 1969<sup>1</sup> (Concordat),<sup>2</sup> under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage 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>3</sup>*

34. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

*“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand.”<sup>4</sup>*

35. In light of the foregoing considerations, the Arbitrator makes the findings below:

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<sup>1</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>2</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

<sup>3</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

<sup>4</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

## **6. Findings**

36. The Coach claims outstanding salary and bonuses for the 2011-2012 season and outstanding salary for the 2012-2013 season in the total amount of EUR 97,838.65. In addition, he claims interest. All claims are based on the provisions for compensation in the Coaching Agreement.

### **6.1. The validity of the Coaching Agreement**

37. The first issue for the Arbitrator to determine is whether the Coaching Agreement, which provides for annual salaries of EUR 80,000.00 (2011-2012) and EUR 100,000.00 (2012-2013) plus a bonus, rather than the League Contract, which provides for annual salaries of EUR 67,000.00 for both seasons without a bonus, constitutes a valid legal basis for the Coach's claim. The Club argues that the Coaching Agreement was only a pre-contract and later replaced by the League Contract.

38. As is well-known, a number of national basketball leagues require their clubs to submit the player contracts for registration by the league management. Sometimes, the leagues request that a standard contract shall be presented but the clubs and the players nevertheless agree on an individually drafted contract. The individual contracts and the contracts provided to the league management are for whatever reasons not always congruent, especially with respect to the financial terms. Still, the principle *pacta sunt servana* applies to both of them. The mere fact that there are two contracts on the same issue between the same parties does not automatically lead to the invalidity of one of them, except if it was the parties' intention that one contract shall substitute the other. However, neither the Coaching Agreement nor the League Contract contains any explicit reservation which implies that the first would later be replaced by the second.

39. Clause 10 of the Coaching Agreement addresses a possible conflict between the Coaching Agreement and the League Contract. It reads as follows:

*“10) The invalidity of even one or any articles of the present agreement cannot involve the invalidity of the other articles or of the whole contract itself. In case of any kind of dispute arising between parties, the clauses of this agreement complete the clauses of the regular contract registered in Serie A League, and in case of conflict between the clauses the first shall replace the seconds. The party who does not respect this agreement has the pre-contractual liability of the breach.”*

40. The second sentence of this provision (*“In case of any kind of dispute arising between parties, the clauses of this agreement complete the clauses of the regular contract registered in Serie A League, and in case of conflict between the clauses the first shall replace the seconds.”*) seems to contain a rule on how to resolve conflicts arising from incongruent clauses, namely that a provision of the “first” (i.e. the Coaching Agreement) shall prevail over the corresponding provision in the “seconds” (i.e. the League Contract).
41. The Club now asserts that Clause 10 had been “tacitly renounced” by the Parties. However, such tacit renouncement has not been proven by any means. In particular, there is no evidence in support of the Club’s allegation that its supporters had forced the Coach to accept a lower salary. If so, the Arbitrator assumes that Parties would have addressed this issue explicitly at the time when the protests occurred and not only by “tacitly renouncing” Clause 10 at an unspecified date. It is in any event highly questionable whether “renouncing Clause 10” would lead to the result desired by the Club, namely the exclusive applicability of the League Contract.
42. The Club further argues that in any event Clause 10 of the Coaching Agreement confirmed the Parties’ common understanding that a “regular contract registered in Serie A League” would be signed later which replaced the Coaching Agreement. The provisions of the Coaching Agreement would therefore only “complete” but not override

the “regular” League Contract. That is why a violation of the preliminary Coaching Agreement would only result in a “pre-contractual liability”.

43. The reference to the League Contract as the “regular” contract seems not to be correct when reading the original text in Italian, which speaks only of the “clausole del contratti depositati presso la Lega Serie A” which does not include any qualification of the League Contract as the “regular” contract.
44. While the Arbitrator agrees that the Parties indeed intended to sign a League Contract later, there is no indication for the Club’s allegation that it should then replace the Coaching Agreement. To the contrary: the wording of Clause 10 of the Coaching Agreement, which is the starting point for the interpretation, rather indicates that the Parties were aware of the risk of conflicting clauses, and that they agreed on a rule (i.e. Clause 10) how to address such conflicts. In particular, they agreed that the clauses in the Coaching Agreement should “replace” (“sostituiranno”) the respective clauses in the League Contract. The Arbitrator accepts that this wording is not crystal clear, insofar as one could conclude from Clause 10 that the clauses of the Coaching Agreement would prevail over the respective clauses in the League Contract, or that the League Contract should be amended based on the Coaching Agreement. However, Clause 10 can definitely not be understood in the converse sense, namely that the provisions of the League Contract would prevail over the respective clauses in the Coaching Agreement. This is also the understanding on which, e.g., Clause 8 of the Coaching Agreement is based and according to which a relegation of the team shall not lead to *“a reduction of compensation in case of relegation to a lower league, notwithstanding the individual contract registered in Serie A League (...)”*.
45. There remains the meaning of the “pre-contractual” liability of the breach of the Coaching Agreement as addressed in the last sentence of Clause 10. The Club submits that this wording qualifies the Coaching Agreement as a “pre-contract” for the League Contract. The Parties were indeed aware of the need to sign another contract which would then be provided to the league management. In this respect, the Coaching

Agreement which was signed first may well be seen as the preceding contract. However, this does not disqualify the legal meaning of the Coaching Agreement as a valid and enforceable contract. The Arbitrator rather understands that the party in breach of the Coaching Agreement would be fully liable already before (and irrespective of whether) the League Contract was signed.

46. Finally, the Club argues that the lack of any commencement date of the Coaching Agreement would be an indication for its invalidity or ineffectiveness. The Arbitrator disagrees. First, a contract becomes effective upon signature of the contracting parties unless otherwise stated in the contract, and second, Clause 2 of the Coaching Agreement says that it shall be valid for the 2011/2012 and the 2012/2013 season which is a sufficient determination of the term of the contract.
47. It is therefore clear for the Arbitrator that the Coaching Agreement was intended by the Parties to be the relevant agreement governing the legal relationship between them and that it was not replaced by the League Contract. It can therefore be left open whether the League Contract was actually a simulated contract for the only purpose of registration with the league management. In any event, the Arbitrator considers the salary provisions in the Coaching Agreement to be the legal basis for the Coach's claim.

**6.2. Is the Coach entitled to outstanding salary in the amount of EUR 10,000.00 for the 2011-2012 season?**

48. The Coach claims outstanding salary in the amount of EUR 10,000.00 as part of the compensation agreed for the 2011-2012 season. However, the Coach does not substantiate his claim any further. He also confirms that he did not request payment of the outstanding amount until 7 March 2013 (i.e. after he was suspended by the Club) because he did not want to spoil his relationship with the Club while he was still employed.

49. The Club submits that all payments due to the Coach under the League Contract had been made. The Club's salary statements indicate that the Coach was entitled to EUR 72,663.76 gross whereas the money transfer statements (bank transfers and checks) demonstrate payments to the Coach of only EUR 38,375.15 net.
50. As held before, the salary must be calculated on the basis of the Coaching Agreement. The Coach was entitled to receive the agreed salary on the agreed dates and he had no duty to invoice the Club. There is indeed a major gap between the agreed salary for the 2011-2012 season (EUR 80,000.00 "net after all taxes") and the payments made as declared in this arbitration by the Club, namely EUR 38,375.15.
51. The Coach explicitly confirms in the Reply that he "*never disputed (he did not have any reason) the partial payments received by the (Club).*" The Arbitrator understands that this confirmation concerns the amounts received and not the outstanding payments. However, this confirmation is also to be read at least as the Coach's acceptance of the respective salary statements which show that a substantial amount was deducted for tax and other reasons. The monthly salary statements have not been addressed or disputed by the Coach in his written submissions. The Arbitrator therefore concludes that the Coach received the monthly salary statements without objection which must be deemed as acceptance of their content, which also means that he accepted that his salaries were to be understood as gross amounts. The Arbitrator does, however, not concur with the Club's submission that the Coach completely waived all his salary claims in excess of what he obtained from the Club since there is no evidence whatsoever which would support that allegation.
52. The outstanding salary for the 2011-2012 season must therefore be calculated on the basis of the salaries agreed in the Coaching Agreement minus tax and other allowances. When reviewing the salary statements, the Arbitrator, deciding *ex aequo et bono*, finds a deduction of 30% appropriate. Thus, from the agreed salary of EUR 80,000.00, EUR 24,000.00 must be deducted. Of the resulting amount of EUR 56,000.00, only EUR 38,375.15 have actually been paid out according to the

Club's payment statements. The Arbitrator can however not grant a higher amount than requested by the Coach which is EUR 10,000.00.

**6.3. Is the Coach entitled to outstanding salary in the amount of EUR 72,838.65 for the 2012-2013 season?**

53. The Coach claims outstanding salary for the 2012-2013 season in the total amount of EUR 72,838.65.
54. According to Clause 2 of the Coaching Agreement the salary for the 2012-2013 season amounts to EUR 100,000.00 net, payable in 10 instalments of EUR 10,000.00 each. The Coach claims that he received only EUR 27,161.35 (i.e. EUR 4,000.00 each month from September 2012 until February 2013, and EUR 3,161.35 at a later date).
55. The Club submits that all due salaries had been paid until the Coach was suspended on 5 March 2013 and then continued to be paid, as provided by the League Contract. It presents the respective salary statements and money transfer statements. The salary statements indicate a gross amount of EUR 61,407.33 (i.e. EUR 43,453.14 from September 2012 until February 2013 and EUR 17,954.19 from March until May 2013). The money transfer statements show payments made by the Club to the Coach in the total amount of EUR 31,620.06 (from September 2012 until May 2013).
56. Undisputedly, the employment of the Coach was terminated only when the agreed term of the Coaching Agreement expired, i.e. by the end of the 2012-2013 season. By letter of 7 March 2013, the Club only suspended the Coach from his contractual obligations. It continued, however, the salary payments throughout May 2013, i.e. the end of the respective season.
57. As in the 2011-2012 season, the Arbitrator relies on the salary and transfer statements submitted by the Club which have not been addressed or disputed by the Coach. The Arbitrator also applies the same principle as developed in para. 51 above according to which the Coach did not dispute the Club's salary statements which indicated certain

deductions (especially for tax). Again, the Arbitrator concludes from the Coach's acceptance of the salary statements and his comment in the Reply (*"The Claimant never disputed (he did not have any reason) the partial payments received by the (Club)."*) that he also understood the salary to be paid out after deduction of taxes and other justified allowances, i.e. net.

58. The Coach is entitled to the difference between the amount of EUR 70,000.00 (i.e. the contractually agreed salary of EUR 100,000.00 gross from which the accepted deduction of 30% must be made) and the amount actually paid to the Coach, which was EUR 34,781.41 (i.e. EUR 31,620.06 received according to the money transfer statements plus EUR 3,161.35 received after the Request for Arbitration with the BAT was filed). The difference amounts to EUR 35,218.59 which is the amount to which the Coach is entitled as remaining salary for the 2012-2013 season.

**6.4. Is the Coach entitled to bonuses of EUR 15,000.00 for the 2011-2012 season?**

59. The Coach claims outstanding bonuses in the total amount of EUR 15,000.00 for the 2011-2012 season because the Club's team reached the league play-offs (EUR 10,000.00) and the Italian Cup final eight qualification (EUR 5,000.00). No bonuses are claimed for the 2012-2013 season.
60. The claimed bonuses correspond to the respective agreement in Clause 3 of the Coaching Agreement. The bonuses shall be paid within 10 days after the respective results have been reached. The Club's team has indeed achieved the results which entitled the Coach to the claimed bonuses. This has not been disputed by the Club but confirmed by publicly available sources and the statements of the witnesses named by the Coach.
61. The League Contract on which the Club relies does not provide for any bonus payments. However, the Arbitrator has already held above that it is the Coaching Agreement and not the League Contract which is relevant for the Coach's claims.

62. The Coach has not claimed the bonus payments before 7 March 2013. However, this cannot be construed as a waiver. Other than in the case of the salaries, there is no indication from which the Arbitrator must conclude that the Coach accepted any reduction of his bonus claims. The Arbitrator therefore relies on Clause 3 of the Coaching Agreement and upholds the Coach's bonus claim of EUR 15,000.00 net of all taxes.

**6.5. Did the Coach act in bad faith when he claimed the open amounts?**

63. The Club submits that the Coach acted in bad faith when he sued the Club for outstanding payments. He never requested these amounts before he was temporarily suspended on 5 March 2013 and the Club trusted that the Coach had accepted the amount of salaries paid to him. The Coach replies that he had repeatedly asked for the outstanding payments but he hesitated to initiate legal steps in order not to spoil the ongoing relationship with his employer.

64. The Arbitrator disagrees with the Club's submission. The Coach claimed the outstanding salaries for the 2011-2012 and 2012-2013 seasons and the bonuses for the results in the 2011-2012 season by letter of 7 March 2013. The Club did not react. The Coach augmented his claim when he filed the Request for Arbitration on 11 April and 16 May 2013. A monetary claim may indeed expire due to lapse of time or because of a waiver of the creditor. However, the Arbitrator finds that the Coach's claim which was raised immediately after his suspension cannot be regarded time-barred. In addition, although there is no evidence that the Coach requested payment of the amounts claimed for the 2011-2012 season at an earlier date, there are also no facts from which the conclusion can be drawn that the Coach waived his rights to salary and bonuses under the applicable Coaching Agreement – with the sole exception of the Coach's acceptance of the tax allowances and other deductions from his salary (see para. 51 above). The Arbitrator therefore finds that the Coach did not act in bad faith when he initiated legal steps in order to enforce the outstanding salary and bonus payments.

**6.6. Is the Coach entitled to interest?**

65. In addition, the Coach requests interest, however, without stating in which rate and from which date.
66. The total amount awarded to the Coach is EUR 60,218.59 which is the maximum amount on which any default interest can be calculated.
67. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.<sup>5</sup> Although the Coaching Agreement does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator finds that an interest rate of 5% p.a. is acceptable and in line with BAT jurisprudence as being the interest rate usually awarded by default if no other interest rate has been agreed by the parties.
68. However, it is also generally accepted that the obligee has to expressly request payment of interest from the obligor. When determining the commencement date of the interest, the Arbitrator considers that there is no evidence of the fact that interest has ever been claimed by the Coach from the Club prior to the Request of Arbitration, not even in the Coach's letter of 7 March 2013 to the Club when requesting the amount of EUR 61,000.00. The Arbitrator also considers that the Coach has not claimed any part of the principal amount prior to his letter of 7 March 2013 for the only reason to avoid legal actions while being employed by the Club.
69. Deciding *ex aequo et bono*, the Arbitrator finds therefore that that the Coach is entitled to interest of 5% p.a. on the amount EUR 60,218.59 since 16 May 2013 (i.e. the date when the Request of Arbitration was received by the BAT Secretariat).

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<sup>5</sup> See, *ex multis*, the following BAT awards: BAT 0092/10; BAT 0069/09; BAT 0056/09.

## **6.7. Summary**

70. To sum up, the Arbitrator finds that the Coaching Agreement must be considered as the only relevant agreement for the calculation of the Coach's salary and bonus, that the Coach agreed that the salary would be calculated on a gross basis, and that he therefore is entitled to salary payments of EUR 10,000.00 (2011-2012 season) and EUR 35,218.59 (2012-2013 season) plus a bonus payment of EUR 15,000.00, resulting in a total amount of EUR 60,218.59 plus interest of 5% p.a. since 16 May 2013.

## **7. Costs**

71. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

72. On 4 February 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”, and 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”, 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 9,000.00.

73. Considering the circumstances of the present case (Article 17.3. of the BAT Rules), in particular the reliefs granted compared to the reliefs sought, the Arbitrator deems it

appropriate that 30 % of the costs of the arbitration shall be borne by the Coach (EUR 2,700.00) and 70 % by the Club (EUR 6,300.00).

74. Given that the Advance on Costs of EUR 9,000.00 were paid by the Coach and the Club in equal shares, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall pay EUR 1,800.00 to the Coach, being the difference between the amount advanced by the Coach (EUR 4,500.00) and the amount the Coach is ordered to pay (EUR 2,700.00).
  
75. Furthermore, the Arbitrator takes note that the Coach requests reimbursement of legal fees and expenses in the amount of EUR 9,278.40 (including the non-reimbursable handling fee of EUR 2,000.00) while the Club requests reimbursement in the amount of EUR 2,500.00. While the legal fees and expenses requested by the Club are acceptable, the Coach's claim exceeds the maximum contribution as provided by Article 17.4 of the BAT Rules for the claimed amount (i.e. EUR 7,500.00, including the Handling Fee). Accordingly, and taking the other factors addressed by Art. 17.3 of the BAT Rules into account, the Arbitrator finds that the Coach shall be entitled to a contribution towards its legal fees and expenses of EUR 5,250.00 from the Club and the Club to EUR 750.00 from the Coach. Consequently, the Club shall pay the amount of EUR 4,500.00 to the Coach.

## **8. AWARD**

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

- 1. Virtus Pallacanestro Bologna S.p.A. is ordered to pay to Mr. Alessandro Finelli the amount of EUR 60,218.59 plus interest of 5% p.a. on this amount since 16 May 2013.**
- 2. Virtus Pallacanestro Bologna S.p.A. is ordered to pay to Mr. Alessandro Finelli the amount of EUR 1,800.00 as a reimbursement of his advance on arbitration costs.**
- 3. Virtus Pallacanestro Bologna S.p.A. is ordered to pay to Mr. Alessandro Finelli the amount of EUR 4,500.00 as a contribution towards his legal fees and expenses. Virtus Pallacanestro Bologna S.p.A. shall bear its own legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 17 March 2014

Stephan Netzle  
(Arbitrator)