BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0193/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Rok Stipcevic,

- Claimant -

Represented by Mr. José Lasa Azpeitia, Laffer Abogados,
c/ Almagro 13, 2 D, 28010 Madrid, Spain

vs.

Club KK Cibona Basketball,
Savska 30, H-10000 Zagreb, Croatia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Rok Stipcevic (the “Player” or “Claimant”) is a professional basketball player. He is represented by Mr. José Lasa Azpeitia, attorney-at-law in Madrid, Spain.

1.2 The Respondent

2. Club KK Cibona Basketball (the “Club” or “Respondent”) is a professional basketball club located in Zagreb, Croatia.

2. The Arbitrator

3. On 4 July 2011, the President of the Basketball Arbitral Tribunal (the "BAT") Richard H. McLaren appointed Prof. Dr. Ulrich Haas as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (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 12 August 2010, the Parties signed an employment contract according to which Respondent engaged Claimant as a professional basketball player for two seasons, namely 2010/2011 and 2011/2012 (the “Employment Contract”). The Employment Contract provided in Art. 4.3 for a total remuneration in the amount of EUR 400,000.00 (EUR 150,000.00 for the 20010/2011 season and EUR 250,000.00 for the 2011/2012 season). Art. 5.1 provided that the remuneration for the 2010/2011 season would be

paid in 10 equal monthly instalments (calculated in kunas). The first instalment for the 2010/2011 season was due on 15 September 2010 and the last one on 15 June 2011.

5. None of the agreed payments for the 2010/2011 season were made by the Club.

6. In view of the Club's failure to honour its obligation agreed upon in the Employment Contract, the parties on 15 February 2011 entered into a second agreement (the "Termination Agreement"). This agreement reads in its relevant parts as follows:

> *"RECITALS*
>
> *I. Whereas the CLUB concluded with the PLAYER a* [sic] *the professional contract dated 12-08-2010 (hereinafter "The Contract") which would expire at the end of the season 2011-12.*
>
> *II. Whereas the CLUB has not fulfilled up to the present date his financial obligations to the PLAYER agreed between the Parties by means of the aforementioned Contract dated 12-08-2010.*
>
> *III. Whereas the CLUB and the PLAYER have reached an agreement (hereinafter "the Agreement") whereby the Parties would terminate their current rapport in accordance with the terms and conditions set forth below.*
>
> *CLAUSES*
>
> *1. TERMINATION OF THE CONTRACT*
>
> *The Parties have decided to put an end to their current contractual relationship. In accordance to this decision, the CLUB would disburse an economic settled sum to the PLAYER and the CLUB would release the PLAYER from any of his obligations under the Contract and would give permission to Croatian Basketball Federation to issue the pertinent Letter of Clearance (hereinafter "LOC") under the terms herein determined.*
>
> *2. COMPENSATION*
>
> *The CLUB declares to have not fulfilled properly up to date his financial obligations towards the PLAYER under the Contract.*
>
> *The Parties agree hereby for the sum of NINETY SEVEN THOUSAND AND FIVE HUNDRED EUROS (97,500.00 €) to be the only amount to be disbursed to the PLAYER by the CLUB in virtue of the present Agreement and the termination of the Contract.*

This economic settlement shall be contingent notwithstanding to the consequent release of the Player from the Contract and the pertinent issuing of the LOC within the period determined to such effect.

The CLUB undertakes the obligation to disburse the settled amount to the Player within the next SIXTY (60) days upon the signature of this Agreement.

3. LETTER OF CLEARANCE

The CLUB will provide the PLAYER immediately with the pertinent LOC, being determined as a deadline to such effect Tuesday 15th, February 2011.

Should the CLUB not provide the PLAYER with the aforementioned LOC within the period established between the date of the signature of the Agreement and the foregoing deadline Tuesday 15th February 2011, every term and condition herein shall not be considered, by any means, in force.

Therefore, the Parties agree that in the event the CLUB shall not deliver and issue the PLAYER the LOC with the aforementioned period, (i) this Agreement should be considered null and void, (ii) the Contract terminated and (iii) the PLAYER shall be entitled to the entire compensation settled under the Contract as well as any other additional benefits therewith established without prejudice to any further PLAYER'S legal rights and actions under the applicable legislation and dispute venue.

[…]

5. FINAL CONSIDERATION

The Parties have determined by this Agreement the terms and conditions to govern the termination of their contractual relationship on the terms herein determined. The Parties aim hereby to regulate the current situation generated before FIBA, due to the CLUB'S failure regarding his financial obligations towards the PLAYER and the renounce of the PLAYER to any other amounts than those hereby settled".

7. The Club up until today has not paid the monies agreed upon by the parties in clause 2 of the Termination Agreement.

3.2 The Proceedings before the BAT

8. On 15 June 2011, the Claimant's counsel, on behalf of Claimant, filed a Request for Arbitration in accordance with the BAT Rules, which was received by the BAT with

several exhibits on 20 June 2011. The non-reimbursable fee of EUR 2,000 was received in the BAT bank account on 27 June 2011.

9. On 7 July 2011, the BAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as Arbitrator in this matter; invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules by no later than 29 July 2011 (the "Answer"); and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 11 March 2011 as follows:

"Claimant (Mr. Stipcevic)	*EUR 4,500*
Respondent (Club KK Cibona Basketball)	*EUR 4,500"*

10. On 7 July 2011, the BAT Secretariat informed the parties that they had failed to pay their shares of the Advance of Costs within the prescribed deadline. Furthermore, in the same letter the parties were advised that the proceedings would not continue unless the Advance on Costs was received by the BAT Secretariat by no later than 12 August 2011.

11. On 5 August 2011, the BAT Secretariat confirmed receipt of Claimant's share of the Advance on Costs and informed the Parties that Respondent had failed to both pay its share, and to submit the Answer. Furthermore, the BAT Secretariat noted that, in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, Claimant was invited to effect payment of Respondent's share of the Advance on Costs by no later than 17 August 2011.

12. Upon request by the Claimant the deadline to substitute for the Respondent's share of the Advance on Costs was extended until 5 September 2011.

13. On 30 August 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. Furthermore, the Arbitrator granted a final time limit (délai de grâce)

for the Respondent to submit its Answer, until 2 September 2011. Furthermore, in said letter, the Arbitrator requested the Respondent to comment on the Claimant's legal fees and expenses as mentioned in the Request for Arbitration and to submit its own account on costs. Finally the Arbitrator advised the Parties that with the expiry of the deadline the exchange of documents would be completed.

14. Respondent submitted an Answer within the prescribed deadline and requested the BAT to "*postpone passing the decision regarding the Claimant's claim for fairly period*."

15. By way of a letter dated 6 September 2011, the BAT Secretariat acknowledged receipt of the Respondent's Answer and requested the Claimant provide its comments on Respondent's request for postponement of the decision.

16. By letter dated 7 September 2011, the Claimant agreed that the proceedings would be stayed until the end of September 2011.

17. By letter dated 7 September 2011, the BAT Secretariat informed the parties on behalf of the Arbitrator that "*the proceedings shall be suspended until 30 September 2001. Upon expiry of said time limit, the proceedings will continue and an arbitral award will be rendered unless the parties agree otherwise*."

18. By email dated 5 October 2011, counsel for Claimant informed the BAT as follows: *"My client has not received to date any payment from Respondent. Therefore, I request to the Panel to reactivate the proceedings without further delay.*"

19. Since the Parties have not agreed otherwise, and since the Parties did not request the BAT to hold an oral hearing, the Arbitrator decided in accordance with Article 13.1 of the BAT Rules, to render the award on the basis of the Parties' written submissions.

4. The Positions of the Parties

4.1 Claimant's Position

20. Claimant submits the following in substance:

- The Club has violated its obligation towards the Player repeatedly and without just cause. First, the Club did not honour its obligation under the Employment Contract. This non-payment of the remuneration due to the Player put the latter in a difficult financial position. It was solely because of the Club's breach of its contractual obligation that the Parties entered into a second agreement, i.e. the Termination Agreement. This can be clearly inferred from the wording of the Termination Agreement (cf. Recitals II, clause 5).

- The Termination Agreement has put an end to the Employment Agreement, and the contractual relationship between the parties is solely governed by the Termination Agreement.

- Clause 2 of the Termination Agreement provides that the Club is under the obligation to pay EUR 97,500.00 to the Player within 60 days upon signature of said agreement.

- The Termination Agreement was signed on 15 February 2001, and up until today no payments were effectuated by the Club towards the Player.

- The Respondent has no valid cause for not paying the amounts due and has so far never given any justification for its behaviour.

- According to the Player, the non-payment constitutes a serious breach of the Club's obligations.

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

> *"CLAIMANT*
>
> *a) Claimant seeks relief whereby FAT would rule ex aequo et bono (as concretely settled between the Parties in the Agreement) as follows:*
>
> *b) Respondent is held liable for breach of the Termination signed in February 15th, 2011 without just cause.*
>
> *c) Respondent is ordered to pay the net amount of NINETY SEVEN THOUSAND FIVE HUNDRED EURO (97,500€) as being THE AMOUNT, THE ONE SETTLED BY THE PARTIES FOR THE Termination of the Employment Agreement.*
>
> *d) Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum to every aforesaid amount, in accordance to the terms and conditions expressed ut supra.*
>
> *e) Respondent is ordered to pay expenses and reasonable legal fees on a net amount of SIX THOUSAND EUROS (6.000€) concretely related to the execution of the present request for arbitration and Respondent's refusal to submit the proper payment.*
>
> *f) Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee of TWO THOUSAND EUROS (2,000€) and it should be considered when assessing the Claimants' legal fees and expenses.*
>
> *g) Respondent is, as well, ordered to disburse the advanced (sic) of costs eventually determined by BAT."*

4.2 Respondent's Position

22. Respondent initially failed to submit an Answer. However, within the "délai de grâce" granted by the Arbitrator Respondent submitted a letter that reads – *inter alia* – as follows:

> *"The Respondent does not deny the claim of the Claimant in the amount notified in EUR. The Respondent emphasized that it has duly fulfilled other obligations arising from the Agreement dated February 15th, 2011, what proves that the Respondent was and still is interested in solving this dispute amicably. The only reason why the*

Respondent has not paid the claimed amount on behalf of the Claimant is its current financial situation. All accounts of the Respondent are still under block by creditors. In the meantime City of Zagreb, Croatia take responsabilities for solving of financial problems of the Respondent. During the September, 2011 Council of the City of Zagreb will take session to provide financial support on the behalf of the Respondent in order to help the Respondent to fulfil it obligation toward Claimant – Mr Rok Stipcevic and all other creditors of the respondent especially ex. and present basketball players."

5. Jurisdiction

23. 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).

24. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

5.1 Arbitrability

25. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[1].

5.2 Formal and substantive validity of the arbitration agreement

26. The Claimant bases his claim upon the Termination Agreement. The latter contains an arbitration clause in clause 4 that reads as follows:

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[1] Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001, reported in ASA Bulletin 2001, p. 523.

> *"4. IN EVENT OF A DISPUTE*
>
> *Any disputes arising with respect to or in connection with this Agreement should be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration – for – Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

27. The Termination Agreement containing the arbitration clause was concluded between the parties in written form and signed by the Club's representative and the Player; thus, the arbitration clause fulfils the formal requirements of Article 178(1) PILA.

28. 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 with respect to or in connection with this Agreement .." in clause 4 of the Termination Agreement clearly covers the present dispute.[2]

6. Other Procedural Issues

29. In the case at hand, Respondent has initially not participated in these proceedings.

30. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable both in the Contract and also in the Appendix to the Contract, specifies that: "the Arbitrator may nevertheless proceed with the arbitration and deliver an award" if "the Respondent fails to submit an Answer".

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[2] *See for instance* BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

31. The arbitrator's authority to proceed with the arbitration proceedings in the case of default of one of the parties is in accordance with Swiss laws on arbitration proceedings.[3] However, the Arbitrator must undertake everything possible to allow the defaulting party to assert its rights.[4] This has happened in the current case. In compliance with the relevant rules, the Respondent has been informed of the initiation of the proceedings and of the Arbitrator's appointment. Furthermore, in the letter of the BAT Secretariat dated 7 July 2011, the Respondent was not only given a time limit within which to respond to the Request for Arbitration, but was also informed as follows:

> *"6. The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the BAT Rules […]*
>
> *Any defence as to the lack of jurisdiction of the BAT must be submitted in the Answer, failing which the defence is deemed to be waived.*
>
> *Please note that according to Art. 14.2 of the BAT Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules."*

32. Hence, the Respondent was well advised as to the consequences of not submitting an Answer, i.e. of the possibility of a judgment by default. Finally, by letter dated 30 August 2011, the Arbitrator granted the Respondent a further grace period (délai de grâce) in order to comment on the case, and explicitly advised that submissions would be closed once this final time limit would expire. The Respondent this time did respond to the Procedural Order and submitted an Answer, the filing of which was not contested by the Claimant.

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3 Swiss Federal Tribunal SJ 1982, 613, *621*; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, no. 483.

4 KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, no. 484.

7. Applicable Law

33. 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".*

34. 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."*

35. Clause 4 of the Termination Agreement provides in relation to the applicable law as follows:

> *" […] The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

36. To sum up, the Arbitrator holds that the Parties not only agreed on BAT arbitration and the respective set of rules applicable to BAT proceedings, but – in addition – expressly conferred upon the arbitrator the power to decide the present dispute ex aequo et bono.

37. Consequently, the Arbitrator will decide the present matter ex aequo et bono.

38. 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[5] (Concordat),[6] 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."*[7]

39. 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".*[8]

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

8. Findings

41. Claimant requests remuneration (8.1) and interest (8.2).

8.1 Is Claimant entitled to remuneration in the amount of EUR 97,500.00?

42. The Parties have signed the Termination Agreement on 15 February 2011. The purpose of the Termination Agreement is described in clause 1 of said agreement. According thereto, the parties wanted to put an end to the Employment Contract, settle

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5 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).

6 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

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

8 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

the outstanding amounts due to the Player and release the Player from all his duties under the Employment Contract. Consequently, as from the signing of the Termination Agreement, the contractual relationship between the Parties is solely governed by the Termination Agreement.

43. In clause 2 of the Termination Agreement, the Respondent agreed to pay "compensation" for not having properly fulfilled its financial obligations under the Employment Contract. The agreed-upon compensation amounts to EUR 97,500.00. Furthermore, the Termination Agreement provides that the Club must pay the aforementioned amount within sixty (60) days upon the signature of said contract.

44. There are no circumstances which would suggest to the Arbitrator that the Termination Agreement might be void, or was altered or terminated by the Parties. Furthermore, there are no indications in the evidence submitted and arguments made by the Parties that cast any doubt upon the Claimant's allegation that no payments were made to him by the Club under the Termination Agreement. In addition, there are no indications in the file that the Club was entitled to withhold payment of the agreed amounts for any valid reason. Finally, it must be noted that the Respondent in its Answer acknowledged Claimant's claim ("*The Respondent does not deny the claim of the Claimant in the amount notified in EUR*"). The financial difficulties are not a valid reason for the non-payment, or late payment of the Respondent's debts towards Claimant.

45. Thus, the Arbitrator concludes that the Club is under an obligation to pay to the Player the damages agreed upon in the amount of EUR 97,500.00. In making this decision, the Arbitrator relies on BAT jurisprudence. Specifically, the Arbitrator refers to the case FAT 0074/10 (Boisa v/ Menorca Basquet) that reads – inter alia – as follows:

> *"… It is just and fair that when the parties enter into the sort of contracts which they did in this matter, the provisions of such contracts should be observed. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay him a total amount of … This is the effect of the Termination Agreement. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant.*

Respondent signed the Termination Agreement with Claimant. Claimant clearly has the legitimate entitlement to be paid the sums of money agreed between the Parties." (emphasis added)

8.2 Is Claimant entitled to interest?

46. Claimant requests interest at the rate of 5% p.a. Such obligation is not provided for in the Termination Agreement.

47. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for such an obligation.[9] The obligation to pay interest on the amounts due is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, considers an interest rate of 5% p.a. to be fair and equitable in the present case.

48. In the present case, the Club has been in default of payment since the expiry of the sixty (60) day-time limit, calculated as of 15 February 2011 (cf. clause 2 of the Termination Agreement). Therefore, the Arbitrator finds that default interests of 5% p.a. accrue as of 17 April 2011.

49. Consequently, the Arbitrator decides that Respondent has to pay interest of 5% p.a. on the amount of EUR 97,500.00 since 17 April 2011.

9. Costs

50. 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,

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9 *See* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

51. On 12 October 2011 – 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 7,250.00.

52. Considering that Claimant prevailed with his claims and that the financial situation of the Parties does not compel otherwise, the Arbitrator holds it fair that the costs of this arbitration be borne solely by Respondent. Furthermore, the Arbitrator holds that Claimant is entitled to recover from Respondent its legal fees and expenses, the latter being reasonable in amount.

53. Given that Claimant paid the totality of the Advance on Costs of EUR 9,000.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 1,750.00 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 7,250.00 to Claimant, being the arbitration costs fixed by the BAT President.

    (iii) Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 2,000.00 when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence,

considering also that the further amount of EUR 6,000.00 for Claimant's legal fees and expenses is reasonable, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 8,000.00.

10. AWARD

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

1. **Club KK Cibona Basketball shall pay Mr. Rok Stipcevic an amount of EUR 97,500.00 plus interest of 5% p.a. since 17 April 2011.**

2. **Club KK Cibona Basketball shall pay Mr. Rok Stipcevic an amount of EUR 7,250.00 as a contribution towards the arbitration costs paid by him.**

3. **Club KK Cibona Basketball shall pay Mr. Rok Stipcevic an amount of EUR 8,000.00 as a contribution towards his legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 28 October 2011

Ulrich Haas
(Arbitrator)