



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 0242/11)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Raj Parker**

in the arbitration proceedings between

**Mr. Goran Vrbanc**

**- Claimant -**

vs.

**KK Cibona Zagreb**  
Savska 30, 10000 Zagreb, Croatia

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Goran Vrbanc (hereinafter the "Claimant") is a professional basketball player of Croatian nationality.
2. In these proceedings, the Claimant is represented by Mr. Rikardo Perković of ZOU "Perković & Perković", E. Kotromanić 11, Zadar 23000, Croatia.

### **1.2 The Respondent**

3. KK Cibona Zagreb (hereinafter the "Respondent") is a Croatian professional basketball club.
4. In these proceedings, the Respondent is represented by its Director, Mr. Zdenko Antunovic.

## **2. The Arbitrator**

5. On 19 January 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").
6. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

### 3. Facts and Proceedings

#### 3.1 Background Facts

7. On 16 February 2009, the Claimant and the Respondent entered into a contract of employment (hereinafter the “Contract”). The Contract contains, among others, the following provisions:

*“Article 4*

*4.1. The contracting parties mutually agree that the herein contract is stipulated for a period of two (2) competition seasons, the season 2009/10 and 2010/11.*

*[...]*

*Article 5*

*The Club engages to pay the Player for the competition year 2009/10 the amount of 915,000.00 (nine hundred fifteen thousand) kunas which represents the gross salary of the Player without VAT and the Club will calculate the VAT based on the herein mentioned amount according to the following payment dynamics:*

- The payment is to be performed in 10 equal monthly installments, each for the amount of 91,500.00 due on the fifteenth of every month for the current month and beginning from September 15, 2009 and ending on June 15, 2010.*

*The Club engages to pay the Player for the competition year 2010/11 the amount of 915,000.00 (nine hundred fifteen thousand) kunas which represents the gross salary of the Player without VAT and the Club will calculate the VAT based on the herein mentioned amount according to the following payment dynamics:*

- The payment is to be performed in 10 equal monthly installments, each for the amount of 91,500.00 due on the fifteenth of every month for the current month and beginning from September 15, 2010 and ending on June 15, 2011.*

*Article 6*

*6.1. The Club’s fulfillment of the obligation from Articles 5 and 8 of the herein Contract is negotiated by the Club and the Player as an essential regulation of the herein Contract, and in case of non-fulfillment of the herein mentioned obligations they*

*mutually agree that legal consequences are to be conducted pursuant to Subparagraph 2 and 3 of the herein article.*

*6.2. In case of the Club's late payment of the amounts mentioned in Article 5 of the herein Contract for a period of 30 days, the Player retains the right to stop fulfilling his contracted obligations until the owed amount is settled.*

*6.3. The contracting parties mutually contract the right of the Player to cancel the herein Contract at the cost of the Club in case the Club is 60 days late with the fulfillment of its obligation from Article 5 of the herein Contract, and has the right to join any other club in the country or abroad in the free player status.*

*[...]*

#### *Article 8*

*The Player agrees to the right of award and bonus for competitions throughout the duration of the herein Contract as follows:*

- 1. Award for winning the Croatian Basketball Championship in the amount of 44,500.00 kunas*
- 2. Award for winning the NLB League in the amount of 44,500.00 kunas*
- 3. Award for the Euro League:*

<i>- Ranking in the Top 16</i>	<i>44,500.00 kunas</i>
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*[...]*

*The contracting parties jointly agree that the abovementioned awards are determined cumulatively.*

*The contracting parties jointly agree that the Club will pay such bonuses within 15 days from the last played game in the competition season of their winning in the above specified amounts that represent the gross amount of bonus per player not including VAT, and the Player will charge the club for the VAT added to the abovementioned amounts."*

8. In the course of the 2009-2010 season, the Respondent did not make certain salary and bonus payments on the dates on which they were due under the Contract. The Claimant subsequently sent an undated letter to the Respondent, informing the Respondent that the unpaid salary and bonus payments amounted to 1,140,309.00 Kunas inclusive of VAT.

9. It is not in dispute that these salary and bonus payments have not been paid by the

Respondent to the Claimant, pursuant to the Contract.

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

10. On 20 December 2011, the Claimant filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 3,000.00 from the Claimant on 22 December 2011.
11. By letter dated 24 January 2012, the BAT Secretariat fixed a time limit until 15 February 2012 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment of 8 February 2012, the following amounts were fixed as the Advance on Costs:

<i>"Claimant (Mr. Goran Vrbanc)</i>	<i>EUR 3,500</i>
<i>Respondent (KK Cibona Zagreb)</i>	<i>EUR 3,500"</i>
12. Due to problems with the transmission of this letter, the BAT Secretariat sent a further letter to the Claimant and the Respondent dated 20 February 2012 which extended: (i) the time limit for the Respondent to file the Answer to the Request for Arbitration until 12 March 2012; and (ii) the time limit for the payment of the Advance of Costs (in the amounts stated in the letter dated 24 January 2012) until 29 February 2012.
13. The Claimant paid his share of the Advance on Costs on 1 February 2012. The Respondent failed to pay its share of the Advance on Costs. The Claimant subsequently paid the Respondent's share of the Advance on Costs (in accordance with Article 9.3 of the BAT Rules) on 19 March 2012.
14. On 14 March 2012, the Respondent filed its Answer to the Request for Arbitration. The arbitrator decided that, in the circumstances of the case and in the interests of fairness, the Respondent's Answer to the Request for Arbitration was admissible, despite being

filed two days after the time limit for the Answer.

15. On 11 April 2012, the Arbitrator issued a Procedural Order to the Respondent requesting additional information and documentation from the Respondent (hereinafter the “First Procedural Order”). On 20 April 2012, the Respondent submitted its reply to the First Procedural Order which attached a copy of the Respondent’s Disciplinary Rules dated March 2011 (hereinafter the “Disciplinary Rules”) and a copy of a ‘Decision on Money Penalty’ dated 22 March 2011, together with a certified translation (hereinafter the “Penalty Decision”).
16. On 16 May 2012, the Arbitrator issued a second Procedural Order to the Claimant requesting additional information and documentation from the Claimant (hereinafter the “Second Procedural Order”). On 25 May 2012, the Claimant submitted his reply to the Second Procedural Order.
17. The Arbitrator issued a third Procedural Order to both Parties on 5 June 2012 (hereinafter the “Third Procedural Order”). The Third Procedural Order informed the Respondent that, in accordance with Article 9.3 of the BAT Rules, the Arbitrator would not consider the Respondent’s counterclaim<sup>1</sup> unless the Respondent paid its share of the Advance on Costs by 15 June 2012.
18. By Procedural Order dated 21 June 2012 (hereinafter the “Fourth Procedural Order”), the Arbitrator confirmed that, as the Respondent had failed to pay its share of the Advance on Costs, the Respondent’s counterclaim had been deemed withdrawn. By the Fourth Procedural Order, the Arbitrator also declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 2 July 2012.

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<sup>1</sup> See paragraphs 50 to 53 below in relation to the Respondent’s counterclaim.

19. On 2 July 2012, the Claimant submitted the following account of costs:

**“Legal fees:**

- Request for arbitration	10.000,00 €
- Reasoned response to the Respondent*s counterclaim (on the basis of 12.000,00 € as the value of dispute in cunterclaim [sic])	5.000,00 €

**Handling fees:**

- Advance cost (2 x 3.500,00 €)	7.000,00 €
- Nonreimbursable cost	3.000,00 €

**Other costs:**

- Documentation translation cost	196,20. €
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**Total costs** 25.196,20 €”

20. The Respondent did not submit an account of costs. By email dated 3 July 2012, the BAT Secretariat invited the Respondent to submit any comments on the Claimant’s account of costs by no later than 9 July 2012. The Respondent did not submit any such comments.

21. Since neither of the Parties filed an application for a hearing, the Arbitrator 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 of the Parties.

#### 4. The Parties' Submissions

##### 4.1 The Claimant's Request for Arbitration

22. The Claimant submits that the Respondent failed to make scheduled salary and bonus payments inclusive of VAT for the 2009-2010 seasons as required under Articles 5 and 8 of the Contract. The Claimant claims that the Respondent's failure to pay was in breach of the Contract.
23. The Claimant submitted that he was entitled to receive 1,140,309.00 Kunas by way of unpaid salary and bonuses inclusive of VAT due under the Contract for the 2009-2010 season.
24. The Claimant's request for relief states:

*"The Respondent has to pay to the Claimant the following amounts in respect of unpaid salaries*

##### **Season 2009/2010 salary debts**

*(according to art.5 of the Professional player s contract)*

*- for the september 2009 salary total amount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this amount [sic] starting from september 16<sup>th</sup> 2009 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia*

*- for the october 2009 salary total amount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from october 16<sup>th</sup> 2009 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia*

*- for the november 2009 salary total ammount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from november 16<sup>th</sup>*



## BASKETBALL ARBITRAL TRIBUNAL

2009 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the december 2009 salary total ammount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from december 16<sup>th</sup> 2009 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the january 2010 salary total ammount [sic] of **64.466,50 kn** (52.411,80 kn plus 12.054,70 kn VAT) with the interest on this ammount [sic] starting from january 16<sup>th</sup> 2010 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the february 2010 salary total ammount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from february 16<sup>th</sup> 2010 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the march 2010 salary total ammount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from march 16<sup>th</sup> 2010 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the april 2010 salary total ammount [sic] of **93.462,50 kn** (75.985,80 kn plus 17.476,70 kn VAT) with the interest on this ammount [sic] starting from april 16<sup>th</sup> 2010 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the may 2010 salary total ammount [sic] of **85.095,00 kn** (69.183,00 kn plus 15.912,00 kn VAT) with the interest on this ammount [sic] starting from may 16<sup>th</sup> 2010 as the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since July 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia

- for the june 2010 salary total ammount [sic] of **112.545,00 kn** (91.500,00 kn plus 21.045,00 kn VAT) with the interest on this ammount [sic] starting from june 16<sup>th</sup> 2010 as

*the maturity date of collection for the specified amount at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia*

*The Respondent has to pay to the Claimant the following amounts in respect of unpaid awards*

**Season 2009/2010 won awards debts**

*(according to art.8 of the Professional player s contract)*

*- for the Croatian championship winner total ammount [sic] of **54.735,00 kn** (44.500,00 kn plus 10.235,00 kn VAT included) ) with the interest on this ammount [sic] starting from june 14<sup>th</sup> 2010 as the day of maturity date of collection for the specified amount (15 days after the last official game played by the Respondent in the Croatian League for the champion ) at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia*

*- for the placement in the TOP EL 16 total ammount [sic] of **54.735,00 kn** (44.500,00 kn plus 10.235,00 kn VAT included) ) with the interest on this ammount [sic] starting from january 30<sup>th</sup> 2010 as the day of maturity date of collection for the specified amount (15 days after the last official game played by the Respondent in EL) at rate of 14% per annum until the date of june 30<sup>th</sup> 2011, and since july 01<sup>st</sup> 2011 at a rate of 12% per annum until the execution of the payment, all according art.29 paragraph 2 of the Law on Obligations of Republic of Croatia*

**Other requests**

- *Translation cost of the documentation in ammount [sic] of **1.472,20 kn** (by the rate 1€=7,5 kn — equivalent of 196,20 €)*
- *Costs of the arbitration, legal fees and expenses will be specified and requested by the Claimant at a later point in time."*

**4.2 The Respondent's submissions**

25. The Respondent admits liability for the unpaid salary and bonuses inclusive of VAT in Kunas being claimed by the Claimant. The Respondent submits that the only reason it has not paid the Claimant is due to the Respondent's current financial situation. The

Respondent submits that all its accounts have been frozen by its creditors. The Respondent further submits that the City of Zagreb will take responsibility for resolving the Respondent's financial problems and will provide financial support to the Respondent to allow the Respondent to pay its creditors, including the Claimant.

26. The Respondent submits that the BAT should postpone rendering an award for a reasonable period of time so as to allow the Respondent to obtain financial assistance from the City of Zagreb.
27. The Respondent further submits that the Claimant is liable to pay a disciplinary fine of 91,500.00 Kunas as a result of the Penalty Decision. The Respondent submits that this amount should be deducted from the amount being claimed by the Claimant.

#### **4.3 The Respondent's response to the First Procedural Order**

28. In his response to the First Procedural Order, the Respondent provided a translation of the Penalty Decision and a copy of the Disciplinary Rules. The Penalty Decision states:

*"The player Goran Vrbanac has been pronounced guilty for the fact that he, on the occasion of playing a championship match against KK BORIK from Zadar in Zadar, on March 19<sup>th</sup>, 2011, as the participant in this match, participated in the heavy loss the Club Cibona suffered (when defeated by KK BORIK (with a difference of 23 points). By this activity he committed the injury of Art. 10, para 1 Item and 7 of the Disciplinary Rules, punishable pursuant to Art. 44 para 1 Item 1 of the same Rules and thus he is pronounced a disciplinary measure as stated herein.*

[...]

*In handwriting: b  
23.3.2011  
REFUSED TO ACCEPT  
(Signed – illegible)*

*24.3.2011  
DISPLAYED ON BULLETIN BOARD"*

#### **4.4 The Claimant's response to the Second Procedural Order**

29. In response to the Second Procedural Order, the Claimant submitted that he does not accept that a deduction of 91,500.00 Kunas is applicable to the amounts which he claims from the Respondent as a fine imposed pursuant to the Respondent's Disciplinary Rules for a disciplinary offence committed during a basketball match on 19 March 2011 between the Respondent and KK Borik. The Claimant submits that the Penalty Decision imposed on him was: (i) a "forgery"; (ii) imposed on him in March 2011 and does not relate to the 2009-2011 season (for which the Claimant claims outstanding salary and bonus payments); (iii) not validly delivered to the Claimant; and (iv) unfairly imposed because none of the other players on the team received a penalty for the poor performance of the team in the same game.

#### **5. Jurisdiction**

30. 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).

31. 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

32. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.<sup>2</sup>

## 5.2 Formal and substantive validity of the arbitration agreements

33. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

*"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*

*2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

34. Article 16 of the Contract stipulates:

*"All disputes concerning amounts due that may arise from the herein Contract or may be its consequence, the contracting parties contract the competence of the FIBA Arbitral Tribunal – FAT in Geneva, Switzerland, and further agree that Arbitral Regulations of the FIBA Arbitral Tribunal will be applied for the mentioned disputes, that decisions are to be taken in line with the aforesaid regulations, and by one arbitrator named by the President of the FIBA Arbitral Tribunal.*

*The headquarters of the arbitration is in Geneva, Switzerland.*

*Chapter 12 of the Swiss Act on International Private Rights is to be applied at arbitration, and this independent of citizenship, residence and the parties' headquarters.*

*The arbitration language is the English language.*

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<sup>2</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

*An appeal against the decision of the FIBA Arbitral Tribunal can be lodged to the Court of Arbitration for Sport – CAS in Lausanne, Switzerland.*

*The parties expressly renounce the right to dispute the decision of the FIBA Arbitral Tribunal and decisions of the second instance taken by the Court of Arbitration for Sport before the Swiss Federal Court as foreseen in Article 192 of the Swiss Act on International Private Rights.*

*Upon taking decisions on the appeal, the arbiter, as well as the Court of Arbitration for Sport, acts according to the rules of righteousness (ex aequo et bono)."*

35. The Arbitrator notes that the FIBA Arbitral Tribunal was renamed the Basketball Arbitral Tribunal on 1 April 2011 (see also Article 18.2 of the BAT Rules).
36. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.
37. With respect to substantive validity, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178(2) PILA). In addition, the Parties did not challenge the jurisdiction of BAT in their submissions.
38. In light of the above, the Arbitrator finds that the BAT has jurisdiction to hear this dispute.

## **6. Discussion**

### **6.1 Applicable Law – ex aequo et bono**

39. 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*”, as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

40. As set out in paragraph 34 above, the Contract stipulates that the “*Arbitral Regulations of the FIBA Arbitral Tribunal will be applied for the mentioned disputes*”. 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.”*

41. Article 16 of the Contract stipulates that “*the arbiter, as well as the Court of Arbitration for Sport, acts according to the rules of righteousness (ex aequo et bono)*”. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

42. 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>3</sup> (Concordat),<sup>4</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*

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<sup>3</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>4</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

*not inspired by the rules of law which are in force and which might even be contrary to those rules.”<sup>5</sup>*

43. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.<sup>6</sup>
44. 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”.
45. In light of the foregoing matters, the Arbitrator makes the following findings.

## 6.2 Findings

### 6.2.1 The Claimant’s salary and bonuses for the 2009-2010 season

46. It is not in dispute that the Respondent failed to make certain salary and bonus payments inclusive of VAT pursuant to the Contract for the 2009-2010 season.
47. The Respondent admits that it is liable to the Claimant for the amount of 1,140,309.00 Kunas in this respect.
48. The Respondent submits that it has not paid the outstanding salary and bonus inclusive of VAT to the Claimant due to its egregious financial situation. The Respondent therefore proposes that the BAT should postpone rendering an award for a reasonable

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<sup>5</sup> JdT 1981 III, p. 93 (free translation).

<sup>6</sup> POUURET/BESSION, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

period of time so as to allow the Respondent to obtain this financial assistance. The Arbitrator finds that financial difficulties faced by a club is no defence to a claim by a player for unpaid and overdue salary payments. This approach is consistent with previous BAT jurisprudence (see, for example, BAT (then FAT) case 0099/10 (*Perry v Besiktas Jimnastik Kulubu*) at paragraph 44, and BAT case 0166/11 (*Fox v Basket Club Kalev/Cramo*) at paragraph 46.

49. Accordingly, the Arbitrator finds that the Respondent shall pay 1,140,309.00 Kunas to the Claimant.

#### **6.2.2 The counterclaim**

50. The Respondent claims that the Claimant has an obligation to pay the disciplinary fine of 91.500,00 Kunas as a result of the Penalty Decision. The Respondent submits that this amount should be deducted from the amount being claimed by the Claimant.
51. The Arbitrator considers that the Respondent's claim is properly characterised as a counterclaim and not merely a defence to the Claimant's claim by way of set-off. The Arbitrator makes this finding for the following reasons. The Claimant's claim for unpaid salary accrued during the 2009-2010 season. During that season, the Claimant fulfilled his obligations to the Respondent and the Respondent was accordingly obliged to make salary payments to the Claimant for the 2009-2010 season. However, the Penalty Decision was later imposed on the Claimant for an alleged breach of the Disciplinary Rules which occurred in March 2011, i.e. several months after the end of the 2009-2010 season (by which time the Claimant's claim had fully accrued and crystallized). In this sense, any debt owing to the Respondent from the Claimant in the form of a fine payable pursuant the Penalty Decision cannot be viewed as a sum which the Respondent withheld from the Claimant (by means of set-off) when failing to pay the Claimant his full salary during the 2009-2010 season. The Claimant's claim for unpaid salary during the 2009-2010 season and the Respondent's claim for an unpaid fine

should therefore be seen as two distinct claims.

52. In the Third Procedural Order, the Arbitrator informed the Parties that the Respondent's claim for 91.500,00 Kunas payable under the Penalty Decision was a counterclaim. The Arbitrator also informed the Parties that, unless the Respondent paid its share of the Advance on Costs, the Respondent's counterclaim would be deemed withdrawn in accordance with Article 9.3 of the BAT Rules. Consistent with BAT jurisprudence, Article 9.3 of the BAT Rules applies *mutatis mutandis* to counterclaims; see, for example, BAT 0197/11 (*Price and Hollis v ALBA Berlin Basketball GmbH*) at paragraph 75.
53. The Respondent subsequently failed to pay its share of the Advance on Costs, and so its counterclaim has been withdrawn. The Arbitrator is not, therefore, required to determine the merits of the Respondent's counterclaim.

### **6.2.3 Interest**

54. The Claimant claims interest on the unpaid salary and bonus inclusive of VAT amounts at an interest rate of 14% per annum up to 30 June 2011 and 12% per annum thereafter in accordance with the Law on Obligations of the Republic of Croatia. Payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimant should not be awarded interest.
55. However, the Contract makes no provision for interest on late payments of sums due under the Contract. In light of this, and in light of the fact that the governing law applicable to the merits of this dispute is *ex aequo et bono*, the Arbitrator finds that Croatian law is not applicable to the calculation of interest.

56. 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>7</sup>. The Arbitrator considers, *ex aequo et bono*, that a rate of 5% per annum is a reasonable rate of interest. Furthermore, it is in line with the BAT jurisprudence and interest at a rate of 5% per annum should apply to the outstanding payments as follows:

(i) on 112,545.00 Kunas from 16 September 2009;<sup>8</sup>

(ii) on 112,545.00 Kunas from 16 October 2009;<sup>9</sup>

(iii) on 112,545.00 Kunas from 16 November 2009;<sup>10</sup>

(iv) on 112,545.00 Kunas from 16 December 2009;<sup>11</sup>

(v) on 64,466.50 Kunas from 16 January 2010;<sup>12</sup>

(vi) on 54,735.00 Kunas from 30 January 2010;<sup>13</sup>

(vii) on 112,545.00 Kunas from 16 February 2010;<sup>14</sup>

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<sup>7</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*

<sup>8</sup> In relation to the September salary payment.

<sup>9</sup> In relation to the October salary payment.

<sup>10</sup> In relation to the November salary payment.

<sup>11</sup> In relation to the December salary payment.

<sup>12</sup> In relation to the January salary payment.

<sup>13</sup> In relation to the bonus for ranking in the top 16 of the Euro League. Article 8 of the Contract provides that “the Club will pay such bonuses within 15 days from the last played game in the competition season of their winning”.

(viii) on 112,545.00 Kunas from 16 March 2010;<sup>15</sup>

(viii) on 93,462.50 Kunas from 16 April 2010;<sup>16</sup>

(x) on 85,095.00 Kunas from 16 May 2010;<sup>17</sup>

(xi) on 54,735.00 Kunas from 14 June 2010;<sup>18</sup> and

(xii) on 112,545.00 Kunas from 16 June 2010.<sup>19</sup>

## 7. Costs

57. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

58. On 27 August 2012, 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*

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<sup>14</sup> In relation to the February salary payment.

<sup>15</sup> In relation to the March salary payment.

<sup>16</sup> In relation to the April salary payment.

<sup>17</sup> In relation to the May salary payment.

<sup>18</sup> In relation to the bonus for winning the Croatian Basketball Championship. Article 8 of the Contract provides that *“the Club will pay such bonuses within 15 days from the last played game in the competition season of their winning”*.

<sup>19</sup> In relation to the June salary payment.

*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 at EUR 7,000.00.*

59. The Arbitrator notes that the Claimant was successful in establishing his claim in its entirety. The Arbitrator notes that the Respondent failed to pay its share of the Advance on Costs and that Claimant paid both his share of the Advance on Costs and the Respondent’s share. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules, the Respondent shall bear 100% of the costs of the arbitration. Further, the Arbitrator considers it appropriate to take into account the non-reimbursable fee (EUR 3,000.00) when assessing the expenses incurred by the Claimant in connection with these proceedings. The Claimant has claimed EUR 15,196.20 for legal fees and translation costs (not including the non-reimbursable fee of EUR 3,000.00). The Arbitrator considers that such fees and costs are excessive for this case, particularly given the level of complexity of the case and the volume of submissions required in the proceedings. In the circumstances, the Arbitrator finds that it would be reasonable for the Respondent to pay to the Claimant EUR 5,000.00 (representing legal fees and translation costs) and EUR 3,000.00 (representing the non-reimbursable fee). Therefore, the Arbitrator decides:

- (i) the Respondent shall pay to the Claimant EUR 7,000.00, being the amount of arbitration costs advanced by the Claimant; and
- (ii) the Respondent shall pay EUR 8,000.00 to the Claimant, as a contribution towards the Claimant’s legal fees and expenses.

## **8. AWARD**

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

- 1. KK Cibona Zagreb is ordered to pay to Mr. Goran Vrbanc 1,140,309.00 Kunas as compensation for unpaid salary and bonuses for the 2009-2010 season, together with interest payable at a rate of 5% per annum as follows:**
  - (i) 112,545.00 Kunas from 16 September 2009;**
  - (ii) 112,545.00 Kunas from 16 October 2009;**
  - (iii) 112,545.00 Kunas from 16 November 2009;**
  - (iv) 112,545.00 Kunas from 16 December 2009;**
  - (v) 64,466.50 Kunas from 16 January 2010;**
  - (vi) 54,735.00 Kunas from 30 January 2010;**
  - (vii) 112,545.00 Kunas from 16 February 2010;**
  - (viii) 112,545.00 Kunas from 16 March 2010;**
  - (ix) 93,462.50 Kunas from 16 April 2010;**
  - (x) 85,095.00 Kunas from 16 May 2010;**
  - (xi) 54,735.00 Kunas from 14 June 2010; and**
  - (xii) 112,545.00 Kunas from 16 June 2010.**
  
- 3. KK Cibona Zagreb is ordered to pay Mr. Goran Vrbanc EUR 8,000.00 as reimbursement for his legal fees and expenses.**



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- 4. KK Cibona Zagreb is ordered to pay Mr. Goran Vrbanc EUR 7,000.00 as reimbursement of the advance on BAT costs.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 31 August 2012

Raj Parker  
(Arbitrator)