ARBITRAL AWARD

(BAT 0302/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Damir Markota

- Claimant -

represented by Ms. Koraljka Tomasic, attorney-at-law

vs.

BC Cibona
Savska Cesta 30, 10000 Zagreb, Croatia

- Respondent -

represented by its Director, Mr. Zdenko Antunovic

1. The Parties

1.1. The Claimant

1. Mr. Damir Markota (hereinafter the “Player”) is a professional basketball player of Croatian nationality. He is represented by Ms. Koraljka Tomasic, attorney-at-law in Zagreb, Croatia.

1.2. The Respondent

2. BC Cibona (hereinafter the “Club”) is a professional basketball club located in Zagreb, Croatia. The Club is represented by its Director, Mr. Zdenko Antunovic.

2. The Arbitrator

3. On 24 July 2012, 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 Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator nor to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 11 August 2008, the Player and the Club entered into an agreement for the Player’s basketball services (hereinafter the “Player Contract“) for two competition seasons, namely 2008/2009 and 2009/2010. Both Parties reserved the right to unilaterally terminate the Player Contract after the end of the 2008/2009 season (Article 4.3 of the Player Contract). According to Article 5 of the Player Contract, for the 2008/2009

season, the Club agreed to pay to the Player the amount of 3,620,000.00 HRK (Croatian Kuna) plus VAT at the rate of 22%. This sum should be paid in ten equal monthly instalments, starting on 10 September 2008 and ending on 10 June 2009.

5. If the Club was late with its payments for more than 30 days, the Player would be entitled to "discontinue execution of his contractual obligations" (Article 6.2 of the Player Contract). If the Club was in default for more than 45 days, the Player would be entitled to terminate the Player Contract "at the expense of the Club" and "to join any other club in Croatia or abroad in the free player status" (Article 6.3 of the Player Contract).

6. To date, the Club has not made any payments to the Player under the Player Contract.

7. On 23/24 October 2008, the Player signed a new agreement with the Spanish club "MENORCA BASKET – SAD" for the remaining 2008/2009 season for a total salary of EUR 210.000,00.

8. On 28 October 2008, the Spanish Basketball Federation requested a Letter of Clearance from the Croatian federation for the release of the Player, and the Club agreed to that request on 3 November 2008. The Letter of Clearance was then issued by the Croatian Basketball Federation on 4 November 2008.

9. On 3 November 2008, the Club imposed a "pecuniary penalty" of HRK 1,810,000.00 on the Player for "breach of work duties". This decision was appealed by the Player on 15 November 2008. According to the Player, no appeal decision has been rendered to date.

3.2. The Proceedings before the BAT

10. On 11 June 2012, the BAT Secretariat received the Player's Request for Arbitration dated 30 May 2012. The non-reimbursable handling fee of EUR 4,000.00 arrived in the BAT bank account on 25 June 2012.

11. By letter of 31 July 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. 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 21 August 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 10 August 2012:

"Claimant (Mr. Damir Markota)	*EUR 4,500*
Respondent (BC Cibona)	*EUR 4,500"*

12. On 21 August 2012, the Club submitted its Answer together with exhibits.

13. By letter of 24 August 2012, the BAT Secretariat confirmed receipt of the Player's share of the Advance on Costs and informed the Parties about the Club's failure to pay its share and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. Therefore, the BAT Secretariat invited the Player to pay the Club's share of the Advance of Costs.

14. By letter of 17 September 2012, the BAT Secretariat confirmed receipt of the full Advance on Costs (paid entirely by the Player) and forwarded the Answer to the Player. By the same letter, the Arbitrator invited the Player to comment on the Club's Answer and to clarify some inconsistencies in his request for relief by no later than 28 September 2012.

15. On 4 October 2012, the BAT Secretariat confirmed receipt of the Player's comments dated 28 September 2012. By the same letter, the Club was invited to comment on the Player's submission by 15 October 2012. The Club did not submit any comments.

16. By letter of 23 October 2012, the BAT Secretariat informed the Parties that the Club had failed to provide the BAT with comments on the Player's further submissions. Moreover, the Parties were informed that the Arbitrator had decided to declare the exchange of documents complete, and they were invited to submit a detailed account of their costs until 30 October 2012.

17. On 29 October 2012, the Player submitted an account of costs as follows:

"Non-reimbursable handling fee.....	*4.000,00 EUR*
Costs of legal representation (request).....	*5.000,00 EUR*
Costs of legal representation (comments September 28,2012).....	*5.000,00 EUR*
Costs of translation of documents.....	*350,00 EUR*
Administrative costs.....	*100,00 EUR*
	14.450,00 EUR
Advance on costs (Claimant's and Respondent's share paid by the Claimant).....	*9.000,00 EUR*
Total	*23.450,00 EUR"*

18. The Club did not submit any account of costs.

19. By email of 31 October 2012, the BAT Secretariat acknowledged receipt of the Player's account of costs and invited the Club to submit its comments, if any, on the Player's account of costs by no later than 5 November 2012. The Club did not file any comments.

20. 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

21. The Player submits the following in substance:

- The Player Contract obliged the Club to pay to the Player the amount of 3,620,000.00 HRK (plus VAT at the rate of 22%) for the 2008/2009 season, totalling to 4,416,400.00 HRK which corresponds to EUR 610.000,00. The Player issued invoices and reminders, and tried to solve the problem in meetings with the Club representatives. However, no payments have been received to date.

- The Player was contractually entitled to terminate the Player Contract if the Club was late with payments by more than 45 days from the respective due date. The Club failed to pay the first instalment which was due on 10 September 2008. Accordingly, the Player had the right to unilaterally terminate the Player Contract from 25 October 2008 on.

- A new contract with MENORCA BASKET – SAD was concluded on 24 October 2008. Although it is dated 23 October 2008, it was sent to the Player by fax only one day later. It has to be considered as a "preliminary agreement" because its validity was subject to the condition that the Player would actually be released from the Club (para. 6 of the contract between the Player and MENORCA BASKET – SAD). On 3 November 2008, the Club accepted the request from the Spanish Basketball Federation to the Croatian Basketball Federation to release a Letter of Clearance. The condition was therefore met and the contract with MENORCA BASKET – SAD became valid and enforceable.

- The Player claims both instalments for the time when he was still playing for the Club, namely September and October 2008. According to the Player Contract, the

Player was entitled to EUR 61,000.00 for each of these months (i.e. EUR 122,000.00). For the time thereafter, the Player claims the remaining income (8 x EUR 61,000.00 = EUR 488,000.00) from which his earnings from MENORCA BASKET – SAD (i.e. EUR 210,000.00) shall be deducted, leaving a total of 278,000.00. The overall claim amounts to EUR 400,000.00 plus interests and VAT. The Player does not request any payments for the 2009/2010 season because the Player Contract would have continued only if it was not terminated before 20 July 2009.

- The Club's allegations that the Player was in breach of the Player Contract because of insufficient efforts are "utterly false". Although the Club's statement is true that the Player did not participate in the Club's team trip to St. Petersburg on 30 September 2008, he did not participate because he was told so by the Club's coach. In addition, the Club never served the Player with its decision to initiate disciplinary proceedings. These documents must have been fabricated later.

4.2. The Claimant's Request for Relief

22. In his submission of 29 September 2012, the Player amended his request for relief submitted in the Request for Arbitration. Eventually, the Player requests the following relief:

> *"A) That the Respondent BASKETBALL CLUB CIBONA, Savska cesta 30. 10000 Zagreb, Croatia, shall pay to the Claimant DAMIR MARKOTA, Duzice 18, 10000 Zagreb, Croatia, the amount of 400.000,00 plus the interest of 5% p.a.:*
>
> *- on the amount of 61,000.00 EUR since 11th September 2008;*
> *- on the amount of 61,000.00 EUR since 11th October 2008;*
> *- on the amount of 34.750,00 EUR since 11th November 2008;*
> *- on the amount of 34.750,00 EUR since 11th December 2008;*
> *- on the amount of 34.750,00 EUR since 11th January 2009;*
> *- on the amount of 34.750,00 EUR since 11th February 2009;*
> *- on the amount of 34.750,00 EUR since 11th March 2009;*
> *- on the amount of 34.750,00 EUR since 11th April 2009;*
> *- on the amount of 34.750,00 EUR since 11th May 2009;*
> *- on the amount of 34.750,00 EUR since 11th June 2009.*

B) That the Respondent BASKETBALL CLUB CIBONA, Savska cesta 30, 10000 Zagreb, Croatia, shall pay to the Claimant DAMIR MARKOTA, Duzice 18, 10000 Zagreb, Croatia the reimbursement of the arbitration costs, as well as the legal fees and expenses."

4.3. The Respondent's Position

23. The Club submits the following in substance:

- Considering Article 6.2 of the Player Contract, the Player was entitled to cease fulfilment of his obligations if the Club was late with payment by more than 30 days, i.e. in any event not before 10 October 2008.

- The Player did not respect his contractual obligations. In spite of "frequent warnings" of the Club's coach "regarding the fact that he did not show his best efforts on the field", the Player "wilfully" left the training session on 26 September 2008 and did not show up at the departure of the team for a tournament in St. Petersburg. Consequently, on 30 September 2008, the Club initiated disciplinary proceedings against the Player whereupon the Club's management imposed a suspension *"until a final decision on the punishment by the disciplinary proceeding has been reached but not for longer than 50 days".*

- The Player's right to terminate the Player Contract "at the expense" of the Club only existed in case the Club was late with payment by more than 45 days, i.e. after 25 October 2008. However, the Player signed a contract with his new club "MENORCA BASKET – SDA" on 23 October 2008 which means that the Player Contract could not be cancelled "at the expense" of the Club because the new contract was signed before the end of the period as determined in Article 6.3 of the Player Contract. Thus, when the Player left the Club before the expiration of the payment period of 45 days, the Club was no longer bound by Article 6.3 of the Player Contract and had no further

obligations to the Player.

4.4. The Respondent's Request for Relief

24. In the last paragraph of its Answer, the Club summarized its submission as follows:

> *"Thus it follows from the above stated facts that the Claimant did not fulfil his contractual obligations, cancelling, wilfully, the contract before the term agreed on. Thus, the obligation of the Respondent towards the Claimant ceased to exist with 23.10.2008, that is, with the Claimant's transfer to another club."*

25. By letter of 17 September 2012, the Arbitrator informed the Parties that he understands the last paragraph of the Club's Answer as its request to fully reject the Player's request for relief. Neither of the Parties has objected to the Arbitrator's interpretation of the Club's request.

5. The Jurisdiction of the BAT

26. 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).

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

28. 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.

29. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 15 of the Player Contract, which reads as follows:

> *"Any dispute of a financial nature arising from or related to the present Contract shall be submitted to the FIBA Arbitral Tribunal (FIBA Arbitral Tribunal -FAT) in Geneva, Switzerland, Arbitration rules of the of FIBA Arbitral Tribunal shall apply to such disputes,*

i.e. that they shall be resolved in accordance with those Rules, by a single arbitrator appointed by the FIBA Arbitral Tribunal President.

The seat of the arbitration shall be Geneva, Switzerland.

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' nationality, domicile or seat.

The language of the arbitration shall be English.

Decisions of the FIBA Arbitral Tribunal can be appealed to the Court of Arbitration for Sport (Court of Arbitration for Sport – CAS) in Lausanne, Switzerland.

The parties explicitly waver the right to appeal decisions of the FIBA Arbitral Tribunal, as well as second instance decisions of Court of Arbitration for Sport, to the Swiss Federal Court, in accordance with the Article 192 of the Swiss Code on Private International Law.

The arbitrator, as well as the Court of Arbitration for Sport when deciding upon appeal, shall decide the dispute according to principles of equity (ex aequo et bono)."

30. In accordance with Article 1.1 of the BAT Rules, these rules "*shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name "FIBA Arbitral Tribunal (FAT)*". Article 18.2 of the BAT Rules says: "*Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT."* The Parties' reference to the "FIBA Arbitral Tribunal" in Article 15 of the Player Contract is therefore understood as a reference to the BAT.

31. The Player Contract 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 other 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 of financial nature arising from or related to the present Contract"* in Article 15 of the Player Contract covers the present dispute.

32. The Club did not object to the BAT jurisdiction.

33. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player's claims.

6. Other Procedural Issues

34. The Club did not submit any comments to the Player's written submissions of 28 September 2012 as invited by the Procedural Order of 4 October 2012. However, in accordance with Article 14.2 of the BAT Rules, if any party fails to abide by an order of procedure or by directions given by the Arbitrator, the latter may nevertheless proceed with the arbitration and deliver an award.

7. Applicable Law – *ex aequo et bono*

35. 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".*

36. 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."*

37. In the arbitration agreement in Article 15 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *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[1] (Concordat),[2] 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."*[3]

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".*[4]

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

8. Findings

41. The Player claims compensation in the total amount of EUR 400,000.00 plus interest of 5% p.a. from the day after the monthly instalments agreed by the Respondent in the Player Contract became due. The Player also claims payment of VAT of 22% of the claimed amount.

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1 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).

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

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

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

42. It is common ground that the Player did not receive any compensation from the Club under the Player Contract; that the Club accepted the release of the Player on 3 November 2008 by consenting to the issuance of the Letter of Clearance by the Croatian Basketball Federation; and that no compensation for the 2009/2010 season has been claimed. It is also undisputed that the earnings of the Player from another source, i.e. his agreement with MENORCA BASKET – SAD, during the 2008/2009 season must be deducted from any amounts payable by the Club for the same period of time.

43. It is however disputed whether the Club is obliged to make any payments to the Player. The Arbitrator understands that the Club refuses any payments because of two reasons:

    a) The Player did not exercise his best efforts and refused to attend training sessions and games and he did not participate in the team's trip to a tournament in St. Petersburg on 30 September 2008. He was therefore in breach of the Player Contract.

    b) The Player signed the agreement with MENORCA BASKET – SAD on 23 October 2008, i.e. before the expiration of the 45-day payment period as set out in Article 6.3 of the Player Contract.

44. With regard to the first argument, the Club submits certain documents which indicate that a disciplinary proceeding was initiated against the Player because his endeavors were not satisfactory. The only specific reproach of the Club concerns the Player's failure to join a team trip to a tournament in St. Petersburg on 30 September 2008. This has been acknowledged by the Player, and the latter did not provide any evidence for his excuse that he skipped the trip because he was told to by the coach.

45. The Arbitrator finds that the Club's allegation of the Player's insufficient performance is rather vague and unsubstantiated. However, the Arbitrator cannot avoid the impression that there is some truth in the Club's arguments and that the relationship between the Club and the Player worsened in September 2008, even if the Player's version is followed: why would the coach abandon one of the newly acquired players in a tournament abroad if there had not been troubles before? However, even if there had been some difficulties between the Club and the Player which caused the Club to initiate a disciplinary proceeding, the Club does not explain how these circumstances would have allowed the Club to interrupt the monthly payments or prohibit the Player from invoking Article 6.3 of the Player Contract.

46. The Arbitrator therefore concludes that there are indeed some indications for certain tensions between the Club and the Player, but there are no sufficient indications that these tensions amounted to a situation which could have entitled the Club to interrupt its payments. In this context, the Arbitrator also considers that the Club agreed on the Player Contract as a "guaranteed contract" (Article 9 of the Player Contract). The Arbitrator therefore dismisses the Club's first objection.

47. With regard to the second argument, the Arbitrator holds that the signing of a second contract before the expiration of the 45-days payment period did not *per se* constitute a breach of the Player Contract. The agreement with MENORCA BASKET – SAD entered into force only upon the Player's release by the Club, irrespectively of the signing date. The Club explicitly released the Player on 3 November 2008.

48. Article 6.3 of the Player Contract entitles the Player to terminate "this Contract" and to join any other club in Croatia or abroad as a free agent after a payment installment remained unpaid for 45 days or more. The termination does not have to be in writing (Article 13 applies only to amendments of the Player Contract) but it is sufficient if the will of the parties to terminate the Player Contract can be deduced from the circumstances. When the Club was asked by the Croatian Basketball Federation

before 3 November 2008 whether it agreed to the issuance of the Letter of Clearance, it was obvious that the Player intended to leave the Club.

49. The consent of the Club to the termination of the Player Contract of 3 November 2008 was not even necessary since, at the time when the Club received the request of the Croatian Basketball Federation to release the Player, the payment period of 45 days which allowed the Player to unilaterally terminate the Player Contract under Article 6.3 had expired. The agreement of the Club to the request for the issuance of the Letter of Clearance rather demonstrates that the Club received the federation's enquiry and had no objection or reservation against the termination of the Player Contract. Finally, the Club does not assert that the termination of the Player Contract was the result of a settlement which excluded the claimed payments or that Article 6.3 of the Player Contract was not applicable.

50. The Arbitrator finds therefore *ex aequo et bono* a) that the Player was entitled to terminate the Player Contract according to Article 6.3 from 25 October 2008 onwards; b) that the Request of the Croatian Basketball Federation to the Club which was received by the Club between 28 October and 3 November 2008, i.e. after the Player was entitled to terminate, implied the will of the Player to terminate the Player Contract; and c) that the acceptance by the Club dated 3 November 2008 demonstrated that there was no objection or reservation against the termination of the Player Contract. Accordingly, Article 6.3 of the Player Contract must apply which means that the termination is "at the expense of the Club" which can only be understood to mean than that the Club remains obliged to the payments as stipulated by the Player Contract.

51. The compensation due by the Club to the Player consists of the monthly payments due at the time of the termination of the Player Contract (i.e. 2 installments due on 10 September and 10 October 2008), plus the compensation for the remaining term of the Player Contract (8 installments), from which the earnings otherwise obtained and any

other applicable deductions must be subtracted. Only on the final amount, the agreed VAT of 22% must be added. The concrete calculation is as follows:

52. The contractual income amounts to HRK 3,620,000.00 corresponding to EUR 481,460.00 (currency rate at the time of the Request for Arbitration: 1 HRK = 0,133 EUR). In particular, EUR 96,292.00 (2 x EUR 48,146.00) have been due at the time of the termination of the Player Contract and EUR 385,168.00 (8 x EUR 48,146.00) is the remaining income for the 2008/2009 season. From the second amount, the amount of EUR 210,000.00 which is the compensation the Player agreed with MENORCA BASKET – SDA for the remaining 2008/2009 season must be deducted which results in EUR 175,168.00.

53. The Arbitrator then reviews whether from this amount, the pecuniary penalty which was imposed upon the Player by the Club's decision of 3 November 2008 because of the allegations addressed in paras. 44-46 above must also be deducted. There is no indication that this penalty ever became enforceable: the Player appealed against the Club's decision but there is no appeal decision on record. The penalty was not commented by the Club in this arbitration. In particular, the Club did not request the Arbitrator to deduct the penalty if any amounts would be granted to the Player. The Arbitrator finds it therefore impossible to take the pecuniary penalty into account when calculating the compensation due.

54. However, as held above (para. 46), there are indeed some indications that the relationship between the Club and the Player worsened in September 2008. These tensions culminated in the fact that the Player did not participate in the team's tournament in St. Petersburg although he agreed in Article 11 of the Player Contract "playing in all the official competitions, as well as in all the friendly games". The Arbitrator finds that the Player must have contributed to these tensions. These circumstances do not justify denying the Player's contractual claims but they must be taken into consideration when the damage resulting from the justified termination of the

Player Contract has to be calculated. Balancing the facts that, since the beginning of the Player Contract, the Club did not make any payments to the Player, and that the Player was not completely innocent of the worsening of the relationship with the Club, the Arbitrator finds a reduction of 20% from the compensation for the period after the termination of the Player Contract (8 instalments which became due upon termination of the Player Contract minus the amount earned otherwise, i.e. EUR 175,168.00) adequate. This deduction amounts to EUR 35,033.60 and results in EUR 140,134.40 for the period after the termination of the Player Contract.

55. The Arbitrator notes that quite some time elapsed between the termination of the Player Contract and the filing of the Request of Arbitration. He finds that this must be taken into consideration for the applicable exchange rate from HRK to EUR (i.e. at the time of the Request for Arbitration rather than at the conclusion of the Player Contract) and when the time period for the default interest has to be calculated.

56. As a result, the Player is entitled to a compensation consisting of the two installments due at the time of the termination of the Player Contract of EUR 96,292.00 in total plus the compensation for the remaining term of the Player Contract from which the alternative earnings and the adjustment because of his contribution to the failure of the relationship must be deducted, namely EUR 140,134.40 (para. 54 above). This results in a total compensation (before VAT) of EUR 236,426.40.

57. The Player then requests VAT of 22% on the claimed amount. He has not further explained the details of the VAT. In particular, he has not addressed the questions whether the VAT is also imposed on income payments and due when a player is not living in Croatia any longer. However, the duty to add 22% VAT to the payments has been stipulated explicitly and without any reservation in the Player Contract and the Club has not raised any specific arguments against the obligation to add the VAT. A cursory review on relevant websites indicates that the applicable rate was then 22%. The Arbitrator therefore finds that the Player's claim of 22% VAT in addition to the

income and compensation claim is justified. The VAT on the amount due to the Player (EUR 236,426.40) amounts to EUR 52,013.80.

58. Finally, this results in a total amount due by the Club to the Player of EUR 288,440.20.

9. Interest

59. The Player also requests interest at the rate of 5% p.a., although the Player Contract does not provide for the payment of default interest.

60. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest[5]. This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to expressly request payment of interest from the obligor.

61. The Arbitrator, deciding *ex aequo et bono* and taking into consideration that the Player has not claimed interest before filing the Request for Arbitration with the BAT, finds that the starting date for the calculation of the default interest shall be the day when the Request of Arbitration was received by the BAT, i.e. 11 June 2012.

62. Regarding the interest rate, the Arbitrator, still deciding *ex aequo et bono* and in line with BAT jurisprudence, considers interest in the rate of 5% p.a. to be fair and equitable in the present case.

63. Consequently, the Arbitrator finds that the Player is entitled to interest of 5% p.a. on the amount of EUR 288,440.20 from 11 June 2012.

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5 *See, ex multis,* the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010;* 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft;* 0056/09, *Branzova vs. Basketball Club Nadezhda).*

10. Costs

64. 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.

65. On 15 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.

66. Considering the requests for relief, the outcome and the circumstances of the present case, especially in light of the fact that the Player succeeded by approx. 3/4 of his claim, the Arbitrator finds it fair that 3/4 of the fees and costs of the arbitration shall be borne by the Club (i.e. EUR 6,750.00) and 1/4 by the Player (i.e. EUR 2,250.00).

67. Given that the Player paid the full Advance on Costs in the amount of EUR 9,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club must reimburse EUR 6,750.00 to the Player, i.e. the difference between the advance on costs paid by the Player and the arbitration costs that the Player must actually bear.

68. Furthermore, the Arbitrator considers it adequate that the Player is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of

the BAT Rules). The Arbitrator takes note that the Player's account of costs states a total amount of EUR 14,450.00 (non-reimbursable handling fee of EUR 4,000.00 and further legal costs of EUR 10,450.00) for the expenses incurred by the Player. According to Article 17.3 of the BAT Rules, the prevailing party shall be granted a contribution towards their reasonable fees and costs and therefore the Arbitrator takes into account also the circumstances of the case, in particular its complexity and the Parties' conduct, when assessing the Player's reasonable fees. Considering his holding and the maximum contribution to a party's reasonable legal fees and other expenses established in Article 17.4 of the BAT Rules, the Arbitrator fixes the contribution to be paid by the Club to the Player at EUR 8,000.00.

11. AWARD

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

1. **BC Cibona is ordered to pay to Mr. Damir Markota the amount of EUR 288,440.20 net plus interest of 5% p.a. on this amount since 11 June 2012.**

2. **BC Cibona is ordered to pay to Mr. Damir Markota the amount of EUR 6,750.00 as reimbursement of his advance on arbitration costs.**

3. **BC Cibona is ordered to pay to Mr. Damir Markota the amount of EUR 8,000.00 as contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 26 February 2013

Stephan Netzle
(Arbitrator)