# ARBITRAL AWARD

**(BAT 0304/12)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Marko Tomas**

**- 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. Marko Tomas (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 26 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 23 July 2009, the Player and the Club entered into an agreement for the Player’s services during the 2009/2010 basketball season (hereinafter the “Player Contract”).

5. According to Article 5.1 of the Player Contract, the Club agreed to pay to the Player an amount of HRK (Croatian Kuna) 2,775,000.00 plus VAT at the rate of 22% for the

2009/2010 season. In case that the VAT rate would change during the term of the Player Contract, the Club agreed to pay the VAT at the new rate. The agreed sum should be paid in ten equal monthly instalments, starting on 10 September 2009 and ending on 10 June 2010.

6. According to Article 8 of the Player Contract, the Player was entitled to bonuses for competitions as follows:

> *"1. bonus for winning the Croatian National Championship in the amount of 10.000,00 EUR*
> *2. bonus for winning the Croatian Cup in the amount of 5.000,00 EUR*
> *3. Bonuses for the NLB league:*
> *- entering the final tournament (Final Four) of the NLB league the amount of 15.000,00 EUR*
> *- entering the finals of the NLB league, an additional amount of 5.000,00 EUR*
> *- winning the NLB league, an additional amount of 20.000,00 EUR*
> *3.(sic) Bonuses for the Euroleague*
> *- entering the top 16 15.000,00 EUR*
> *- entering the top 8, an additional amount of 15.000,00 EUR*
> *- entering the Final Four, an additional amount of 20.000,00 EUR*
> *- winning the Euroleague, an additional amount of 50.000,00 EUR"*

7. The Club agreed to pay the applicable bonuses within 15 days after the last official game played in the 2009/2010 season and to pay it in HRK, calculated at the exchange rate on the due date. Furthermore, the Club also agreed to pay all the taxes on the paid-out bonuses which are mandatory in accordance with the law.

8. The Player played the entire 2009/2010 season for the Club's team. The last game of the Croatian League finals took place on 10 June 2010.

9. The Player submits that until the date of the Request for Arbitration, he received only HRK 903,169.30. He claims that the rest of the income payments (HRK 2,254,780.70, including VAT), and certain bonus payments (EUR 45,000.00 net, corresponding to EUR 70,354.47 gross) are still outstanding and subject of this arbitration.

### 3.2. The Proceedings before the BAT

10. On 10 May 2012, the BAT Secretariat received the Player's Request for Arbitration dated 2 May 2012. The non-reimbursable handling fee of EUR 4,000.00 was received 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. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 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. Marko Tomas)* | *EUR 4,500* |
| *Respondent (BC Cibona)* | *EUR 4,500"* |

12. By email of 10 August 2012, the Player's counsel informed the BAT Secretariat of the possibility that the Parties had reached a settlement and asked the Arbitrator extend the time limit for payment of the Advance on Costs until 1 September 2012. On 14 August 2012, the BAT Secretariat informed the Parties that the Arbitrator's had decided to suspend the proceedings until 1 September 2012 and requested the Parties inform the BAT by that date whether they had reached a settlement agreement.

13. By email of 31 August 2012, Player's counsel instructed the BAT Secretariat that the negotiations were still continuing and asked for another suspension for further 30 days.

14. By email of 5 September, the BAT Secretariat informed the Parties that the Arbitrator had decided to suspend the proceedings until 30 September 2012. Furthermore, the Parties were requested to inform the BAT Secretariat by 1 October 2012 whether they had reached a settlement agreement or whether the arbitration should continue.

15. By email of 28 September 2012, Player's counsel notified the BAT Secretariat that the settlement negotiations had not been successful and asked to resume the arbitration proceeding.

16. By letter of 2 October 2012, the BAT Secretariat confirmed receipt of the Player's share of the Advance on Costs and informed the Parties that the Club had failed to pay its share and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. The Player was invited to pay the Respondent's share of the Advance of Costs on or before 12 October 2012 and the Club was asked to file its Answer by no later than 22 October 2012.

17. By email of 12 October 2012, Player's counsel asked the Arbitrator to grant a time-limit extension for the payment of Respondent's share of the Advance on Costs. On 15 October 2012, the Arbitrator granted the extension and invited the Player to pay the Club's share by no later than 22 October 2012.

18. By letter of 26 October 2012, the BAT Secretariat confirmed receipt of the full Advance on Costs (paid entirely by the Player) and informed the Parties of the Club's failure to file an Answer. By the same letter, the Arbitrator granted the Club a final opportunity to file its Answer by no later than 2 November 2012 and informed the Parties that if the Club failed to submit its Answer, he would nevertheless proceed with the arbitration and deliver an award as provided by Article 14.2 of the BAT Rules.

19. By letter of 29 November 2012, the Parties were informed about the Club's failure to submit an Answer, and the Arbitrator requested the Player provide additional information and documents in relation to the income payments and the Croatian VAT-law until 10 December 2012.

20. By email of 10 December 2012, Player's counsel asked the BAT Secretariat for a time-limit extension of his reply to the Procedural Order of 29 November 2012. On 11 December 2012, the Arbitrator extended this time limit until 20 December 2012.

21. By email of 20 December 2012, the Player's counsel asked the BAT Secretariat for a further time-limit extension of his reply which was granted until 27 December 2012.

22. By email of 27 December 2012, the Player's counsel requested a further time-limit extension. The reason what that because of the Christmas holidays, some documents were still missing. On 8 January 2013, the Arbitrator granted a final extension until 11 January 2013.

23. By email of 16 January 2013, the BAT Secretariat confirmed receipt of the Player's submission dated 11 January 2013 and forwarded a copy to the Club. The Club was then invited to submit its comments on this submission by no later than 25 January 2013. The Player's submission included the following account of costs:

*"Non-reimbursable handling fee.....4.000,00 EUR*
*Costs of legal representation (request).....5.500,00 EUR*
*Costs of legal representation*
*(comments January 11,2013).....5.500,00 EUR*
*Costs of translation of documents.....600,00 EUR*
*Administrative costs.....100,00 EUR*

*15.700,00 EUR*

*Advance on costs (Claimant's and*
*Respondent's share paid by the Claimant).....9.000,00 EUR*

*Total* *24,700,00 EUR"*

24. By email of 22 January 2013, the Club's Director requested the BAT Secretariat extend the time-limit for commenting on the Player's submission dated 11 January 2013 until 30 January 2013. On 24 January 2013, the Arbitrator granted an extension until 30 January 2013 and informed the Club that its comments should be strictly limited to the Player's submission dated 11 January 2013.

25. On 30 January 2013, the BAT Secretariat received the Club's comments on the Player's submission of 11 January 2013.

26. On 13 February 2013, the BAT Secretariat informed the Parties that the Arbitrator had decided to declare the exchange of documents complete. As the Player had already submitted the account of his costs with his submission dated 11 January 2013, only the Club was invited to submit a detailed account of its costs as well as its comments on the Player's account of costs by 20 February 2013. However, the Club did neither submit any account of costs nor any comments.

27. 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

28. The Player submits the following in substance:

- The Player Contract obliged the Club to pay to the Player the amount of HRK 2,775,000.00 gross plus VAT at the applicable rate at the time of payment, payable in 10 monthly instalments. When the Player Contract was signed, the VAT rate was 22%. It changed to 23% as of 1 August 2009.

- The Player was subject to VAT only from the beginning of 2010 on, when his annual income was expected to exceed a certain threshold. Thus, the Player was entitled to 4 x HRK 277,500.00 (for 2009, no VAT due) and 6 x HRK 341,325.00 (for 2010, incl. 23% VAT). This amounts to HRK 3,157,950.00.

- In the 2009/2010 season, the team won the Croatian National Championship and qualified for the Final Four of the NLB League and the top 16 of the Euroleague. That entitled the Player to bonuses in the total amount of EUR 45,000.00 net which had to be adjusted by taxes and "compulsory contributions" and lead to an amount of EUR 70,354.47 to be converted into HRK at the day of payment.

- The Club paid only HRK 903,169.30 of the agreed income to the Player. The remaining amount of HRK 2,254,780.70 (HRK 3,157,950.00 minus HRK 903,169.30) and the equivalent of EUR 70,354.47 in HRK as bonuses are still open and subject to the Player's claim in this arbitration.

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

29. In his second submission of 11 January 2013, the Player amended his initial request for relief as stated in his Request for Arbitration dated 2 May 2012. The Player finally requests the following relief:

> *A) That the Respondent BASKETBALL CLUB CIBONA, Savska cesta 30, 10000 Zagreb, Croatia, shall pay to the Claimant MARKO TOMAS, _____ [Claimant's address] the amount of 2.254.780,70 HRK plus interest of 5% p.a.:*
>
> *- on the amount of 206.830,70 HRK since 11th December 2009;*
> *- on the amount of 341.325,00 HRK since 11th January 2010;*
> *- on the amount of 341.325,00 HRK since 11th February 2010;*
> *- on the amount of 341.325,00 HRK since 11th March 2010;*
> *- on the amount of 341.325,00 HRK since 11th April 2010;*
> *- on the amount of 341.325,00 HRK since 11th May 2010;*
> *- on the amount of 341.325,00 HRK since 11th June 2010.*
>
> *B) That the Respondent BASKETBALL CLUB CIBONA, Savska cesta 30, 10000 Zagreb, Croatia, shall pay to the Claimant MARKO TOMAS, _____ [Claimant's address], the amount of 70.354,47 EUR in the Croatian kuna equivalent, calculated at the sell exchange rate of Zagrebacka banka valid on the day of payment, plus interest of 5% p.a. on that amount since 26th June 2010.*
>
> *C) That the Respondent BASKETBALL CLUB CIBONA, Savska cesta 30, 10000 Zagreb, Croatia, shall pay to the Claimant MARKO TOMAS, _____ [Claimant's address], Croatia the reimbursement of the arbitration costs, as well as the legal fees and expenses."*

30. The Arbitrator will base his award on the second and corrected Request for Relief only.

### 4.3. The Respondent's Position

31. Despite several invitations by the BAT, the Club did not submit an Answer to the Request for Arbitration. However, on 30 January 2013 the Club provided comments on the Player's second submission dated 11 January 2013.

32. These comments contain the following in substance:

- The Player was not an employee. As a consequence, he was obliged to pay the VAT directly and the Club had to withhold and transfer the income taxes to the tax authorities. In addition, the Player had to pay the VAT when he received the payment from Respondent and not when he invoiced the Club.

- The Player's invoices were not correct because they also include the income tax. However, the income tax liability results from a tax return to be filed at the end of the year. The actual tax then depends on the total taxable income amount taking into account also the expenses and other deductions. The taxable income determines the tax rate (progression) which may range between 12% and 40% of the taxable income.

- For the income taxation, the Player has used a standard taxation model with flat-rate deductions leading to a tax rate of 26,024%. The same taxation model should be used also for the bonuses and any other payment made to the Player. The Club was obliged to withhold the income tax (plus surtax) and to transfer it to the tax authorities. It is therefore only obliged to transfer the net income and the VAT as indicated on the invoices.

### 4.4. The Club's Request for Relief

33. The Club did not submit a specific Request for Relief. From its comments of 30 January 2013, the Arbitrator concludes that the Club does not oppose to the Player's claims with the exception of the payment of income taxes upon the monthly income instalments and the bonus payments.

## 5. The Jurisdiction of the BAT

34. 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).

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

36. 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.

37. 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 (sic) 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)."*

38. 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.

39. 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.

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

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

## 6. Other Procedural Issues

42. The Club has not submitted an Answer but filed comments to the Player's reply to the Arbitrator's additional questions. The Arbitrator accepts these comments, especially since the Player also amended his initial Requests for Relief.

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

43. 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".*

44. 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."*

45. 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*.

46. 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":

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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.

> *"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]

47. 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]

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

## 8. Findings

49. It seems to be common ground between the Parties (i) that the Player was entitled to the full income for the entire 2009/2010 season as agreed in the Player Contract, (ii) that the Club paid only a part of the agreed income to the Player and (iii) that the Player qualified for the bonuses relating to the win of the Croatian National Championship and the participation in the Final Four of the NLB League and the top 16 of the Euroleague. It is also undisputed that the Player is entitled to an additional compensation of the VAT calculated on the income and the bonuses.

50. What is disputed, however, is the question of whether or not the Player is also entitled to any compensation for income taxes and surtaxes payable on the income and the bonuses.

51. Thus, the Arbitrator has to determine the gross amount of the Player's outstanding income (para. 8.1), the VAT rate and amount on the Player's income (para. 8.2.), the

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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.

gross amount of the Player's bonuses (para. 8.4), and the VAT rate and amount on the Player's bonuses (para. 8.5).

**8.1. The Player's income**

52. According to Article 5.1 of the Player Contract, the Player is entitled to a fixed compensation of HRK 2,775,000.00 gross for the entire season, which includes taxes and social security (i.e. pension insurance and health insurance) premiums.

53. In Article 5.2 of the Player Contract, the Parties agreed that the fixed compensation was calculated on the basis of the tax rate applicable to taxpayers, which are subject to "withholding tax", subject to later adjustment if this rate would be changed at a later date.

54. The Club argues that it was its obligation to withhold the income tax and to transfer it to the tax authorities. The Player submits that as a professional athlete, he was obliged to register with the Croatian Sporting Activities Registry, which he did, as confirmed by the registrar. As a consequence, he was deemed as an independent service provider and not as an employee, and he was obliged to pay the taxes and social security contributions directly to the respective authorities. This also corresponds to the Arbitrator's understanding of the Croatian Income Tax Act which has been extensively quoted by both parties.

55. The Club does not provide any evidence that it actually withheld any taxes due by the Player and transferred them to the tax authorities. To the contrary: the Club made four payments to the Player which included the tax amounts as invoiced by the Player, and there is no evidence that the Club ever objected to the Player's invoices and the Player's obligation to declare and pay these taxes directly to the Croatian tax authorities.

56. The Arbitrator therefore finds the Player's explanation and the confirmations of the Croatian financial authorities credible, according to which it was up to the Player to pay the taxes and social security contributions directly to the respective authorities. These confirmations do not contain any reference to an obligation of the Club to make any withholdings and transfer these amounts to the respective authorities in the name of the Player. The only reference to the withholding tax has been made to determine the applicable rate on which the taxes were calculated. This also corresponds to Article 5.2 of the Player Contract.

57. The Arbitrator therefore finds that the Player is indeed entitled to the contractually agreed gross compensation of HRK 2,775,000.00, whereby it is up to him to file the respective income tax returns and to pay the taxes directly to the Croatian tax authorities. Should the Club have made any payments to the tax authorities on behalf of the Player, it would be entitled to re-imbursement.

### 8.2. VAT on the Player's income

58. According to Article 5.1, first paragraph of the Player Contract, the gross income of HRK 2,775,000.00 must be understood net of VAT. This means that if the Player is subject to VAT, he can add the respective amount to the income claim. The applicable VAT rate was 22% at the time of signing of the Player Contract but was increased to 23% on 1 August 2009. Article 5.1, first paragraph of the Player Contract explicitly states *"in case that the rate of VAT changes during the period of this Contract, the Club agrees to pay the VAT at this new rate"*. Thus, the applicable VAT rate was 23%.

59. The Club does not dispute the Player's claim that his income is subject to VAT and that he has to pay VAT directly to the tax authorities. It is therefore correct to add the VAT to the gross income invoiced to the Club. The VAT amount for which compensation is sought must be added to the invoice to the recipient of the services, i.e. the Club. Whether it must be paid to the tax authorities based on the invoiced amounts or the

amounts actually received is a matter which concerns the Player and the tax authorities and does not affect the relationship between the Player and the Club.

60. The Player points to the fact that he became subject to VAT only when his annual income exceeded a certain threshold which was exceeded only in 2010. That is why the Player did not request the payment of VAT by his monthly invoices in 2009. This seems to be plausible and has not been disputed by the Club.

61. Thus, the Arbitrator finds that the Player correctly added VAT of 23% to his monthly invoices on the 2010 instalments, and that the Club is obliged to pay them in addition to the gross compensation. Consequently, the Player is generally entitled to a gross amount of HRK 2,775,000.00 plus VAT of 23% on the 2010 instalments. This results in a total amount of HRK 3,157,950.00.

### 8.3. Conclusion about the Player's income plus VAT

62. The Arbitrator notes that the Player has indeed submitted the monthly invoices as required by Article 5.1, second paragraph of the Player Contract.

63. All payments already made by the Club must be set off against the above amount of HRK 3,157,950.00. The payment vouchers submitted by the Player show that the Club had made five payments in the total amount of HRK 903,169.30 which have to be deducted from the income claim, resulting in an open claim for gross income plus VAT in the total amount of HRK 2,254,780.70.

### 8.4. The Player's bonuses

64. Undisputedly, the Club's team won the Croatian Championship and qualified for the final tournament (Final Four) of the NLB League and the top 16 of the Euroleague when the Player was playing with the team. This has not been disputed by the Club

and has also been confirmed by publicly available sources. Thus, according to Article 8 of the Player Contract, the Player is entitled to bonuses amounting to EUR 45,000.00.

65. The Club submits that it was not the Player's but the Club's obligation to withhold and pay the tax amounts relating to the bonuses. In addition, it claims that the same calculation for taxes should be applied to the bonuses as was used on the income tax on the income payments.

66. It is clear for the Arbitrator that with regard to taxes and social security contributions, the bonuses must be treated like any other income. Article 8, last paragraph of the Player Contract explains in detail how the bonus must be calculated. The bonuses must be understood as net amounts which is different from the definition of the income according to Article 5 of the Player Contract. According to Article 8, last paragraph of the Player Contract, the Club must *"pay up all the taxes (...) which are mandatory in accordance with the law"*. The Club will *"pay up"* means that the respective amounts must be paid by the Club in addition to the bonus amounts. The bonus amounts, which are specified in EUR, shall be paid out in HRK calculated on the basis of the exchange rate applicable on the *"day of payment".*

67. In contrast to Article 5 of the Player Contract, Article 8 does not state how and to whom the Club must pay the taxes. The Club argues that *"the same taxation model used for monthly income should be applied on bonuses and any other payment made to Claimant"*. The Club does not however substantiate to which extent the result would be different if another "model" was applied. The Arbitrator also finds that because the income is determined as a gross amount (including income taxes and social security contributions) while the bonus is defined as a net amount (to which the taxes and social security contributions must be added), a different calculation method is appropriate. From the confirmations of the Croatian tax authorities, it is obvious that the Player is directly responsible for the payment of the taxes (which include the income taxes, the

VAT and the social security contributions). The Club is not obliged to withhold any such payments or to pay taxes on behalf of the Player.

68. Article 8, last paragraph of the Player Contract could be understood in a way that the taxes would be payable by the Club only after the Player was invoiced by the tax authorities ("... *all the taxes on the paid amount of bonuses* ..."). However, the Arbitrator decides that it is fair to apply the same payment method to the bonuses as to the other payments, namely that the Club was obliged to pay a flat fee for the income taxes and social security contributions plus the VAT on the gross amount of the bonus payment at the moment when the bonus became due. This corresponds to the Player's bonus invoices and does not contradict the wording and meaning of Article 8, last paragraph of the Player Contract.

69. The Arbitrator also finds that the EUR/HRK exchange rate which applies to the bonuses shall be determined on their due dates, namely *"15 days after the last official game played in the competition season 2009/10"* (Article 8, last paragraph of the Player Contract). That is also the Player's understanding of the term "*day of payment"* in Article 8, last paragraph of the Player Contract as confirmed by para. 2.9 of the Request for Arbitration ("*In regard to the bonuses earned, ... payment ... in the Croatian kuna equivalent calculated at the sell exchange rate of Zagrebačka banka valid on the day of payment became due on 25th June 2010.*"). The last game of the Croatian League finals took place on 10 June 2010, thus the bonuses became due on 25 June 2010. The Arbitrator, deciding *ex aequo et bono,* agrees with the exchange rate of EUR 1.00 = HRK 7.26, which was applied in the bonus invoice of 23 June 2010.

70. However, the Arbitrator does not agree with the Player's calculation of the taxes to be added to the bonus amount. In paras. 13 to 19 of his submission of 11 January 2013, the Player submitted a calculation for his bonuses in the gross amount of EUR 70,354.47 as equivalent to HRK 415,262.99 (EUR 57,198.76 applying the above exchange rate of EUR 1.00 = HRK 7.26) plus 23% VAT (EUR 13,155.71). The Player

based his calculation, inter alia, on 4% extraordinary tax although the corresponding tax act was no longer applicable when he filed his Request for Arbitration with the BAT. Nevertheless, in his calculation, the Player added 4% to the net amount of HRK 326,700.20 (EUR 45,000.00[5]) and calculated the income tax and the surtax based on this higher amount. This consequently results in higher income tax (HRK 75,053.21) and surtax (HRK 13,509.58).

71. The correct calculation of the taxes to be added to the bonus amounts is as follows:

| | |
|---|---|
| **Gross bonus without VAT:** | **HRK 411,720.23** |
| 30% expenses (deduction): | HRK 123,516.07 |
| Tax base: | HRK 288,204.16 |
| Income tax (25% of tax base): | HRK 72,051.04 |
| Surtax (18% of income tax): | HRK 12,969.19 |
| **Net bonus without VAT:** | **HRK 326,700.00** |

72. The Arbitrator therefore finds that the Club is obliged to pay to the Player, bonuses in the gross amount of HRK 411,720.23 (without VAT). No further conversion into EUR is required since the Player claims the bonuses in the "Croatian kuna equivalent".

[5] Applying the exchange rate of EUR 1.00 = HRK 7.26, the correct HRK amount is minimally less (HRK 0.20) than the amount stated by the Player: HRK 326,700.00 instead of HRK 326,700.20.

### 8.5. VAT on the Player's bonuses

73. The Club does not dispute the Player's claim that his bonuses are subject to VAT and that he has to pay VAT directly to the tax authorities. It is therefore correct to add the VAT to the gross bonuses. The applicable VAT rate on the due date of the bonuses, i.e. 25 June 2010, was 23% (see para. 58 above).

### 8.6. Conclusion about the Player's bonuses plus VAT

74. The Arbitrator finds that the Player is entitled to the gross bonuses of HRK 411,720.23 plus VAT of 23%. This results in the total amount of HRK 506,415.88.

### 8.7. Summary

75. To sum up, the Arbitrator decides that the Club shall pay the following amounts to the Player:

| | |
|---|---|
| Income payments plus VAT: | HRK 2,254,780.70 |
| Bonus payments plus VAT: | HRK 506,415.88 |
| **Total:** | **HRK 2,761,196.58** |

### 8.8. Interest

76. In addition, the Player requests interest at the rate of 5% p.a.

77. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.[6] Although the Player Contract does not provide for the payment of default interest, 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.

78. In the present case, it is striking that it took the Player more than two years since his last invoice to take legal action. The BAT has consistently held that a claimant shall not be rewarded with default interest for delaying its claim. In addition, the Arbitrator notes that the Club had never been informed about any claim of interest before receiving the Player's Request for Arbitration, in particular not about the claimed interest rate.

79. The Arbitrator, deciding *ex aequo et bono* and taking into consideration the delay in filing the Request for Arbitration including the fact that the Player had 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. 10 May 2012.

80. 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 without reference to any national law.

81. Consequently, the Arbitrator finds that the Player is entitled to interest of 5% p.a. on the amount of HRK 2,761,196.58 from 10 May 2012.

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6 *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)*

## 9. Costs

82. 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.

83. On 2 May 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.

84. Considering the outcome and the circumstances of the present case, inter alia the need of clarification from the Player after filing the Request for Arbitration and the Player's correction of his request for relief, the Arbitrator finds it fair that the Player shall bear 20% and the Club 80% of the fees and costs of the arbitration.

85. 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 7,200.00 to the Player, i.e. the difference between the advance on costs paid by the Player and the share of the arbitration costs that the Player must actually bear (20% = EUR 1,800.00).

86. 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 notes that the Player stated in his account of costs legal costs and expenses in the amount of EUR 15,700.00 (non-reimbursable handling fee of EUR 4,000.00 and further legal costs of EUR 11,700.00). However, according to Article 17.4 of the BAT Rules, the maximum contribution to the Player's reasonable legal fees is EUR 15,000.00. When assessing the expenses incurred by the Player and considering his holding and the circumstances of the case, the Arbitrator fixes the contribution to be paid by the Club to the Player at EUR 12,000.00.

## 10. AWARD

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

1. **BC Cibona Basketball is ordered to pay to Mr. Marko Tomas the amount of HRK 2,761,196.58 plus interest of 5% p.a. on this amount since 10 May 2012.**

2. **BC Cibona Basketball is ordered to pay to Mr. Marko Tomas the amount of EUR 7,200.00 as a reimbursement of his advance on arbitration costs.**

3. **BC Cibona Basketball is ordered to pay to Mr. Marko Tomas the amount of EUR 12,000.00 as a contribution towards his legal fees and expenses**

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

Geneva, seat of the arbitration, 06 May 2013

Stephan Netzle
(Arbitrator)