**Arbitration CAS 2013/A/3383-3385 Volga Nizhniy Novgorod v. Levan Silagadze, award of 13 November 2014**

Panel: Mr Hendrik Willem Kesler (The Netherlands); Mr José María Cruz (Spain); The Hon. Michael Beloff QC (United Kingdom)

*Football*
*Contract of agency between a players' agent and a club*
*Validity of an agency contract*
*No unjust enrichment of the agent*
*Mitigation of the agent remuneration*

1. **In principle certain contracts (*e.g.* an immoral contract) must be considered void. The FIFA Players' Agents Regulations contain a *lacuna* in this respect that shall be filled by the subsidiary application of Swiss law, in particular by article 20 of the Swiss Code of Obligations (SCO) which deals with the nullity of contracts. This provision leaves in principle no space for the provisions regarding nullity of contracts in the regulations of the national federation. Although the former president of a club has no free discretion to conclude contracts on behalf of that club that are impossible to perform, unlawful or immoral, the statutes of the club or the law of a national federation cannot be directly violated by the signature of agency contracts by a former president. Absent any evidence, the contracts appear to have been validly concluded. Finally, both parties can validly agree that, despite the fact that an agency agreement is concluded on a particular date, this does not exclude the possibility that the agent may have previously carried out the work that finally led to the conclusion of the employment contract, so triggering his right to payment.**

2. **The FIFA Players' Agents Regulations contain a *lacuna* regarding the principle of unjust enrichment that shall be filled by the subsidiary application of Swiss law .The contractual obligations of an agent are fulfilled where players concluded employment contracts with a club due to the work carried out by the agent. In the absence of any contradictory evidence and in case of confirmation by the club through 'Acts of Acceptance', a club has failed to discharge the burden upon it of proving that the agent was paid agency fees for no valid reason whatsoever under article 62 SCO. For the same reasons there is no unjust enrichment of an agent based on the national federation's regulations.**

3. **On the basis of the general legal principle – and one of the pillars of the transfer system enacted by FIFA – *pacta sunt servanda*, contracts, in principle, have to be respected. There is therefore no reason retroactively to reduce the agency fees mutually agreed upon by the parties in the agency contracts.**

## I. PARTIES

1. Volga Nizhniy Novgorod (hereinafter: the "Appellant" or the "Club") is a football club with its registered office in Nizhniy Novgorod, Russian Federation. The Club is registered with the Russian Football Union (hereinafter: the "RFU"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: "FIFA").

2. Mr Levan Silagadze (hereinafter: the "Respondent" or the "Agent") is a Players' Agent of Georgian nationality, licensed by the Georgian Football Federation with license number 31.

## II. FACTUAL BACKGROUND

### A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings and the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.

4. On 1 January 2011, the Club and the Agent concluded three agreements titled "Agency Contract" (hereinafter: the "Agency Contracts"), valid for a period of one month, *i.e.* until 31 January 2011.

5. The three Agency Contracts were in identical form, except for the football players referred to (Mr Gogya Gogita[1], Mr Mate Vatsadze and Mr Grigalava Giya (hereinafter: the "Players") – all professional players of Georgian nationality) and the Agent's remuneration (EUR 600,000, EUR 400,000 and EUR 200,000 respectively). The Agency Contracts were signed by Mr Goykhman Alexey Lipovich[2], then President of the Club acting on its behalf, and the Agent and contain, *inter alia*, the following relevant terms:

> *"1. Objects of the contract*
>
> *1.1. The* [Club] *orders and the Agent undertakes an obligation to mediate the conclusion of the labor contract between the football player* [Gogya Gogita, Mate Vatsadze and Grigalava Giya respectively] *(date of birth* [04.09.1983, 17.12.1988 and 05.08.1989 respectively]*) and* [the Club].

[1] The English translations of the documents on file refer to Mr Gogya Gogita as well as to Mr Gogua Gogita. The Panel has no doubt that this is the same person and will refer to Mr Gogya Gogita in this award.
[2] The English translations of the documents on file refer to Mr Goykhman Alexey Lipovich as well as to Mr Goihman Alexey Lipovich. The Panel has no doubt that this is the same person and will refer to Mr Goykman Alexey Lipovich in this award.

*1.2. The Agent is obliged to carry preliminary negotiations, prepare interim agreements and contracts and provide other actions directed on conclusion of the labor contract between the* [Club] *and the football player* [Gogya G., M. Vatsadze and Grigalava G. respectively].

*2. Validity of the contract.*

*2.1. The present Contract is valid from 01 January 2011 until 31 January 2011. Comes into effect on the 01 January 2011 and expires 31 January 2011.*

*3. Agent's remuneration.*

*3.1. The* [Club] *is obliged to pay the Agent the remuneration in amount of* [600,000, 400,000 and 200,000 respectively] *Euro in the Ruble equivalent at the exchange rate of Central Bank of Russian Federation on day of payment.*
*3.2. The Agent's remuneration should be paid by the* [Club] *in the following term: until 31 October 2011.*

*4. Dispute Resolution*

*4.1. The Parties should take all due measures to solve all disputes regarding this contract by means of negotiations.*
*4.2. In case the dispute can not be solved by means of negotiations the dispute should be submitted for resolution to the corresponding sports authorities, at the same time each Party has the rights to resolve the dispute according to the current legislation of the Russian Federation.*

*5. Special Provision*

*5.1. The present contract becomes valid on the date of its signature by both Parties and is in force until complete fulfillment of the Parties' obligations.*
*5.2. The present contract can be terminated under the mutual agreement of the Parties.*
*5.3. Subject to the present contract the Parties are obliged to act according to the current legislation of the Russian Federation.*
*(…)*
*5.6. The Agent's obligations are considered as fulfilled in case the* [Club] *concludes the labor contract with the football player* [Gogya G., M. Vatsadze and M. Vatsadze [sic][3] respectively] *with the participation of an Agent.*
*5.7. In case the labor contract specified under p. 5.6. of the present contract is concluded, the* [Club's] *obligations according to the present contract will be recognized as fulfilled when* [Club] *fulfills the terms of the art. 3 (Agent's remuneration) of the present contract in full.*
*(…)".*

[3] In light of the other references to "Grigalava G". in the third Agency Contract, the Panel has no doubt that this reference to "M. Vatsadze" is a typographical mistake – at least in the translation into English – and that the parties intended to refer to "Grigalava G"..

6. On 1 January 2011, the Club also signed employment contracts with Mr Gogya Gogita and Mr Mate Vatsadze.

7. Finally, on 1 January 2011, Mr Goykhman, acting in the same capacity as above, and the Agent signed three documents titled "Act of Acceptance to Agency Contract d/d 01.01.2011" (hereinafter: the "Acts of Acceptance"). These Acts of Acceptance contained, *inter alia*, the following relevant terms:

> *"1. The Agent rendered the services to the* [Club] *as to conduction of preliminary negotiations and preparation of preliminary agreements and contracts which support the conclusion of an employment contract between the* [Club] *and football player* [Gogya Gogita, Mate Vatsadze and Grigalava Giya respectively] *(date of birth* [04.09.1983, 17.12.1988 and 05.08.1989 respectively]*).*
>
> *2. The services supporting the conclusion of the employment contract are rendered in full and in a proper manner in accordance with the Agency Agreement dated January 1st, 2011, the parties have no claims against each other. The fee for the services rendered is* [600,000, 400,000 and 200,000 respectively] *euro.*
>
> *3. The Report is made in 2 copies, one for each party, both copies having equal legal effect"*[4].

8. On 4 January 2011, the Club signed an employment contract with Mr Grigalava Giya.[5]

9. On 29 August 2011, Mr Goykhman, at his own request, was dismissed as President of the Club during an extraordinary general meeting of the Club and Mr Anisimov was appointed as the new President of the Club.

## B. Proceedings before the Single Judge of the Players' Status Committee of FIFA

10. On 27 March 2012, the Agent lodged three claims with FIFA against the Club, arguing that the latter had failed to discharge its contractual obligations towards him in that the total sum of EUR 1,200,000 for the services he had rendered in connection with the transfer of the Players to the Club was still outstanding.

11. On 5 June 2013, the Single Judge of the Players' Status Committee of FIFA (hereinafter: the "Single Judge") handed down three decisions (hereinafter: the "Appealed Decisions") with, *inter alia*, the following operative part:

> *"1. The claim of the* [Agent] *is accepted.*

[4] Although the translation into English of the Act of Acceptance to Agency Contract d/d 01.01.2011 of Mr Gogya Gogita slightly differs from the other Acts of Acceptance, the Panel observes that the original documents in the Russian language appear to be identical and that the differences in translation do not appear to be material, nor is this argued by any of the parties.

[5] Although this employment contract was signed a few days after the conclusion of the act of acceptance in respect of this player, the Panel observes that the conclusion of the employment contract with Mr Grigalava Giya was apparently only a mere formality and did not prevent the Club from signing the act of acceptance, nor did the Club deduce any argument from this discrepancy between the dates.

2. *The* [Club] *has to pay to the* [Agent] *the amount of* [EUR 600,000, EUR 400,000 and EUR 200,000 respectively]*, within 30 days as from the date of notification of this decision.*
3. *If the aforementioned amount is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

*(…)".*

12. On 21 October 2013, the grounds of the Appealed Decisions were communicated to the parties providing, *inter alia*, as follows:

- *"(…) The competence of the Single Judge of the Players' Status Committee and the applicable regulations having been established and entering into the substance of the matter, the Single Judge went on to consider the documentary evidence that the parties had submitted in support of their allegations. Before doing so, the Single Judge was keen to recall the content of article 12 par. 3 of the Procedural Rules according to which "any party claiming a right on the basis of an alleged fact shall carry the burden of proof". In other words, only allegations supported by clear evidence can be taken into consideration by the Single Judge of the Players' Status Committee.*

- *In continuation, the Single Judge recalled that, in its submissions to FIFA, the* [Club] *had firstly stressed that the* [Agent] *had infringed the Players' Agents Regulations by not registering the agreement and the act at the relevant "national associations" and by not having mentioned in the employment contract signed between the player and the* [Club] *that the* [Agent's] *services had been used. The Single Judge also took note that the* [Club] *had contested the validity of the agreement alleging that the dates stipulated in the agreement as well as in the act were wrong and that such documents "were signed by the parties in order to receive unjustified benefit not connected with the employment agreement concluded with the player". Hence, the Single Judge stressed that the question of whether the agreement had been validly concluded between the* [Agent] *and the* [Club] *and was therefore binding upon them had first to be addressed.*

- *In this respect, the Single Judge of the Players' Status Committee pointed out that art. 19 par. 6 of the Regulations provided that players' agents were "advised" to send copies of their representation contracts to the associations concerned for registration purposes only. Consequently, the Single Judge underlined that the Regulations do not establish the aforementioned registration as a requirement for the validity of a particular representation agreement and also, do not provide any legal consequences suspending or jeopardising its validity in the event of non-registration. In other words, failure to register a representation contract with a particular association will not lead to its nullity or invalidity. In this context, the Single Judge was keen to stress that this well-established approach is in line with the jurisprudence of the Players' Status Committee and is confirmed by the Court of Arbitration for Sport (cf. CAS 2009/A/1906 […]).*

- *Furthermore, the Single Judge went on to address the allegation of the* [Club] *according to which the* [Agent] *had also infringed the Regulations and the relevant national "procedures" as the employment contract between the player and the* [Club] *did not mention that his services were used. In this respect, the Single Judge held that such omission could not per se invalidate the contractual relationship between the* [Agent] *and the* [Club] *which had been laid out in their agreement, which clearly stipulated the obligations of each party and the conditions under which the* [Agent] *would be entitled to his*

*commission. In this respect, the Single Judge pointed out that the* [Agent] *was not a party to the employment contract the* [Club] *had signed with the player and could therefore not have influenced its wording.*

- *Regarding the contested validity of the agreement and the act based on the claim by the* [Club] *that the dates contained in the documents faxed to FIFA by the* [Agent] *in his first position were "wrong", the Single Judge underlined that the* [Agent] *had provided at a later stage in the investigation the original of the agreement and the act which demonstrated that the dates in question appeared to be the dates agreed upon between the parties.*

- *On account of all the above, the Single Judge concluded that the agreement and the act had been validly concluded between the* [Agent] *and the* [Club] *and were therefore valid and binding upon them.*

- *Having established the aforementioned, the Single Judge reverted to the basic legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith. In this respect, the Single Judge established that the* [Club] *has to fulfil its contractual obligations towards the* [Agent] *according to the agreement and the act and consequently, pay him the outstanding amount of* [EUR 600,000, EUR 400,000 and EUR 200,000 respectively]*".*

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 11 November 2013, the Club filed three Statements of Appeal with the Court of Arbitration for Sport (hereinafter: the "CAS"). In these submissions, the Appellant requested the CAS Court Office to have the three appeals heard in one single appeals arbitration proceeding. In addition, the Appellant nominated Mr José María Cruz, attorney-at-law in Seville, Spain, as arbitrator.

14. On 15 November 2013, the parties were invited to inform the CAS Court Office whether they would agree to refer the three appeals to the same Panel and that in the absence of an agreement between the parties, the President of the CAS Appeals Arbitration Division, or his Deputy, would decide.

15. On 21 November 2013, the Club filed its Appeal Briefs, in accordance with Article R51 of the CAS Code. These documents contained a statement of the facts and legal arguments. The Appellant challenged the Appealed Decisions, submitting the following requests for relief:

*"1. To accept these appeal against the decision of the Single Judge of the FIFA Players' Status Committee dated 5 June 2013, with its grounds notified on 21 October 2013, in the case ref.* [12-00960/lde, 12-01077/lde and 12-01078/lde respectively].

*2. To adopt an award annulling the said decision and adopt a new one declaring that all the claims of the Players' Agent Levan Silagadze against Volga Nizhniy Novgorod must be dismissed.*

*3. Alternatively, to adopt an award annulling the said decision and adopting a new one declaring that Volga Nizhniy Novgorod should only pay to the Players' Agent Levan Silagadze an amount equivalent to three per cent (3%) calculated on the basis of each player's annual basic gross income.*

4. *Alternatively, to adopt an award annulling the said decision and adopting a new one declaring that Volga Nizhniy Novgorod should only pay to the Players' Agent Levan Silagadze an amount equivalent to five per cent (5%) calculated on the basis of each player's annual basic gross income.*

5. *To fix a sum of 15,000 CHF to be paid by the Respondents to the Appellant to aid the Appellant in the payment of its defence fees and costs.*

6. *To condemn the Respondents to the payment of the whole CAS administration costs and the Arbitrators fees".*

16. On 28 November 2013, the Appellant confirmed its preference to have all three cases referred to the same Panel.

17. On 29 November 2013, the Respondent objected to the reference of all three cases to the same Panel.

18. On 4 December 2013, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided, pursuant to Article R50 of the CAS Code of Sports-related Arbitration (2013 edition) (hereinafter: the "CAS Code"), to refer the cases *CAS 2013/A/3383 Volga Nizhniy Novgorod v. Levan Silagadze, CAS 2013/A/3384 Volga Nizhniy Novgorod v. Levan Silagadze and CAS 2013/A/3385 Volga Nizhniy Novgorod v. Levan Silagadze* to the same Panel. The Parties were also informed that the application of Article R50 of the CAS Code did not entail a consolidation in the sense that the cases are merged into one and be attributed a combined case reference. Finally, the Parties were advised that it remained within the Panel's discretion as whether or not the three matters should be heard in one hearing and be decided in one award.

19. On 12 December 2013, the Respondent nominated The Hon. Michael J. Beloff QC, Barrister in London, United Kingdom, as arbitrator.

20. On 18 February 2014, the Respondent filed its Answers, in accordance with Article R55 of the CAS Code, whereby he requested the CAS to decide the following:

*"1. To remain the decision of the Single Judge of the FIFA Players' Status Committee dated 5 June 2013, with its grounds notified on 21 October 2013 (case ref.* [12-00960/Ide, 12-001077/Ide and 12-01078/Ide respectively]*) unchangeable, in full force and effect.*

2. *To condemn the Appellant to the payment of interest for the substantial delay in payment, as from the due date of payment (31 October 2011) till effective payment.*

3. *To condemn the Appellant to the payment of the final amount of the cost of arbitration as per Article R64.4 of the CAS Code in full, including the costs and fees of the arbitrators, and reasonable legal fees incurred by the Respondent".*

21. On 21 February 2014, the Appellant informed the CAS Court Office of its preference for a hearing to be held.

22. On 25 February 2014, the Respondent informed the CAS Court Office of his preference for the Panel to issue an award solely based on the Parties' written submissions.

23. On 13 March 2014, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

- Mr Hendrik Willem Kesler, attorney-at-law in Enschede, the Netherlands, as President;
- Mr José María Cruz, attorney-at-law in Seville, Spain, and;
- The Hon. Michael J. Beloff QC, Barrister in London, United Kingdom, as arbitrators

24. On 23 and 30 April 2014 respectively, the Appellant and the Respondent signed and returned copies of the Order of Procedure. The Appellant indicated on the Order of Procedure that due to Mr Piskarev, Deputy General Director of the Appellant, having difficulties with obtaining a passport he would be replaced at the hearing by Mr Anisimov, General Director of the Appellant.

25. On 24 April 2014, upon the request of the President of the Panel and pursuant to Article R57 of the CAS Code, FIFA produced a copy of its file related to the matter.

26. On 16 May 2014, a hearing was held in Lausanne, Switzerland. At the outset of the hearing both parties confirmed that they had no objection to the constitution and composition of the Panel.

27. In addition to the Panel, Mr Dennis Koolaard, *ad hoc* Clerk, and Mr Christopher Singer, Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Juan de Dios Crespo Pérez, Counsel;
- Mr Agustín Amoros Martinez, Counsel;
- Mr Sergey Anisimov, General Director;
- Mr Dimitry Repnikov, Head of Legal Department;
- Mr Igor Taruş, Interpreter

For the Respondent:

- Mr Alexander Kalyagin, Counsel

28. The Panel heard evidence from Mr Sergey Anisimov, General Director of the Appellant. Mr Anisimov was invited by the President of the Panel to tell the truth subject to the sanctions of perjury. Each party and the Panel had the opportunity to examine and cross-examine Mr Anisimov. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

29. Before the hearing was concluded, both parties expressly stated that they did not raise any objection to the procedure adopted by the Panel and that their right to be heard had been respected.

30. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

## IV. SUBMISSIONS OF THE PARTIES

31. The submissions of the Club, in essence, may be summarized as follows:

- The Club submits that the Agent did not in reality render any services for the Club. The Club had already identified the three players before the Agency Contracts were concluded. As there was no scouting work to be carried out by the Agent, there was no reason for the Club to seek assistance from the Agent at all. And as the players had been introduced to the Club and the employment contracts had already been negotiated, there was no introduction of *"players to clubs with a view to negotiating or renegotiating an employment contract"* within the meaning of article 1.1 of the FIFA Regulations Players' Agents.

- The Club maintains that it is therefore clear that the three Agency Contracts and the correlative Acts of Acceptance *"are feigned deals, simulated tools designed by the former President of* [the Club] *and the Agent exclusively in order to benefit the later* [sic] *with disproportionate amounts in exchange of the supposed services, really never rendered to the Club, taking advantage of the last moments in the office of Mr Goykhman, and granting the Agent an undue and unjust enrichment equivalent to 46'24 % of the players' total basic gross income agreed in their labor contracts with the Club"*.

- In order to conclude that the Agency Contracts shall be regarded as insignificant, the Club relies on article 167, 169 and 170 of the Civil Code of the Russian Federation (hereinafter: the "CCR").

- The Club also maintains that the Agency Contracts signed by the former President of the Club and the Agent meet the criteria for the application of the unjust enrichment theory pursuant to article 1.102 and 1.103 of the CCR.

- Finally, and alternatively, the Club requests the agency fees to be reduced to *"the limits corresponding to the usual threshold in this kind of agreements"*.

32. The submissions of the Agent, in essence, may be summarized as follows:

- The Agent maintains that he carried out his duties under the Agency Contracts in negotiating employment contracts to be signed between the Players and the Club fully,

timeously and in good faith. It was as a result of his actions that the Club signed employment contracts with the Players on 1 January 2011.

- The Agent further argues that, in conformity with article 1 of the Acts of Acceptance, the Club acknowledged the fact that he rendered his services to the Club, carried out preliminary negotiations and prepared interim agreements and contracts designed to facilitate conclusion of the employment contracts between the Club and the Players. As a consequence of that, the Agent claims to be entitled to the amount determined in article 2 of the Acts of Acceptance, *i.e.* EUR 600,000, EUR 400,000 and EUR 200,000 respectively.

- The Agent submits that there was no correlation between the conclusion of the Agency Contracts and the early dismissal of Mr Goykhman as President of the Club as the dismissal was pronounced at the request of Mr Goykhman himself and occurred almost eight months after the conclusion of the Agency Contracts.

- The Agent argues that the Club has provided no evidence and put forward no reasonable argument whatsoever that established sufficiently, or at all, that Mr Goykhman had entered into such type of transaction on behalf of the Club in a capacity as the President of the Club as *"feigned deal"* or *"deal which has been created for the purpose of hiding another deal"* or that he had ever received an *"undue and unjust enrichment"*.

- The Agent contends that *"the Agency Contracts may in no event be interpreted as a transaction completed with a goal knowingly contrary to the fundamental elements of the law order and of the morality"*. Therefore, the Club's reasoning, aimed at invalidating the Agency Contracts, is deemed to be entirely theoretical and to have no connection with the practical merits of the case.

- With reference to article 309 of the CCR and the basic legal principle of *pacta sunt servanda*, the Agent concludes that *"the obligations shall be completely duly and properly in accordance with the terms of obligation and the requirements of the law, other regulations and in absence of such terms and requirements – pursuant to the business customs or other common requirements"*.

- The Agent also maintains that more than five Georgian football players of the Club were compelled to terminate their employment contracts with the Club. Mr Gogya Gogita was obliged to play with the second team of the Club and did not receive his salaries for almost half a year, compelling him to terminate his employment contract, which was qualified by the Russian football authorities as a substantial breach of employment contract by the Club.

- Finally, the Agent expresses his belief that the only reason for the Club filing an appeal was to procrastinate time and, in doing so, to delay the enforcement of the Appealed Decisions.

## V. ADMISSIBILITY

33. The appeal was filed within the deadline of 21 days set by article 67(1) FIFA Statutes (2013 edition). The appeal complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court Office fees.

34. It follows that the appeal is admissible.

## VI. JURISDICTION

35. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes, as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and article R47 of the CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

36. It follows that CAS has jurisdiction to decide on the present dispute.

## VII. APPLICABLE LAW

37. In keeping with article 176 of the Switzerland's Private International Law Act (hereinafter: the "PILA"), Chapter 12 of the PILA governs this arbitration as the *lex arbitri*, *i.e.* the law governing the arbitral proceedings. With respect to the *lex causae*, *i.e.* the substantive rules and/or laws to be applied to the merits of the dispute, article 187(1) of the PILA provides:

> *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".*

38. Article R58 of the CAS Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

39. The Panel notes that article 66(2) of the FIFA Statutes stipulates the following:

> *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

40. Finally, the Panel observes that article 4.2 and 5.3 of the Agency Contracts determine as follows:

*"In case the dispute can not be solved by means of negotiations the dispute should be submitted for resolution to the corresponding sports authorities, at the same time each Party has the rights to resolve the dispute according to the current legislation of the Russian Federation".*

*"Subject to the present contract the Parties are obliged to act according to the current legislation of the Russian Federation".*

41. With reference to the contractual provisions cited above, both parties maintain that Russian law is applicable to the merits of the case.

42. The question as to which system of law governs the substantive issues in the appeal raises issues of interest and complexity. Because the Panel would have determined the appeal in the same way whichever answer it gave to that question, its observations are obiter and not conclusive. It will, however, indicate its preferred view in the subsequent paragraphs.

43. The Panel finds that Article R58 of the CAS Code and the specific rules of conflict it sets out constitute an expression of the fundamental principle of party autonomy in arbitration; by submitting their disputes to CAS (appeals) arbitration, the parties have agreed that the *lex causae* should be determined as provided in the CAS Code (RIGOZZI/HASLER, Article R58 CAS Code, in: ARROYO, Arbitration in Switzerland, 2013, p. 1047). Accordingly, the applicable regulations prevail over the law chosen by the parties.

44. The Panel finds that the same applies to the various regulations of FIFA; by submitting their dispute to FIFA – in accordance with article 4.2 of the Agency Contracts – the parties impliedly agreed that the *lex causae* is to be determined as provided in the various regulations of FIFA.

45. In this respect, the Panel finds that the present dispute falls under the scope of the FIFA Regulations Players' Agents (2008 version). As such, the FIFA Regulations Players' Agents as well as the FIFA Statutes (2013 edition) are the applicable regulations. According to article 66 of the FIFA Statutes, the various regulations of FIFA primarily and, additionally, Swiss law shall be applied. It follows that Swiss law applies if there is a *lacuna* in the applicable regulations of FIFA.

46. The Panel observes that whereas Article R58 of the CAS Code provides for the possibility to apply the law chosen by the parties subsidarily, the FIFA Statutes do not provide for such option.

47. However, the Panel observes that the parties specifically elected to be bound by the *"current legislation of the Russian Federation"* and that the application of such Russian law is not in dispute between the parties in the present appeal arbitration proceedings.

48. Regarding this conflict between *lex causae*, the Panel, without finally deciding, will proceed on the basis that it finds that CAS, as an international arbitration tribunal specifically specialising in sport related matters, has as one of its duties to seek to establish a coherent and consistent line of jurisprudence. This duty would be compromised by the application of the same sports

regulations, but subsidiarily complemented by different national laws following a specific choice of law of the parties in the dispute in question. This Panel finds, on a preliminary basis, that the regulations of international sports-governing bodies have to be interpreted coherently for all constituents, regardless of their nationality or laws applicable to these constituents (except provisions binding upon them), which, in principle, excludes the subsidiary application of national laws other than Swiss law to the various regulations of FIFA.

49. Against this background, and again, without finally deciding on this issue, the Panel finds that in case parties have elected to submit their dispute to FIFA, FIFA – and CAS in a possible appeal proceeding – are to apply Swiss law subsidiarily to the primary application of the various regulations of FIFA, and not the law specifically agreed upon by the parties.

50. Nevertheless, the Panel finds that the law specifically chosen by the parties is not to be wholly ignored, but that it is only applicable insofar it does not contravene the various regulations of FIFA and/or Swiss law. The Panel finds that the application of the law chosen by the parties is thus to be interpreted as a distinct set of rules, applied in addition to, and therefore separate from, the various regulations of FIFA and/or Swiss law.

51. As such, because the parties in the present matter specifically elected to *"act according to the current legislation of the Russian Federation"*, the Panel finds that, in principle, besides the applicability of the various regulations of FIFA, and the possible subsidiary application of Swiss law thereto, Russian law is also applicable to the merits of the case to the extent such law has been relied upon by the parties, but only insofar it does not conflict with the various regulations of FIFA and/or Swiss law, in which case the latter shall prevail.

## VIII. PRELIMINARY ISSUE

52. Further to the correspondence of the CAS Court Office dated 4 December 2013, at the start of the hearing the Panel asked both parties whether they would have any objection to hearing the three matters (*i.e. CAS 2013/A/3383 Volga Nizhniy Novgorod v. Levan Silagadze*, *CAS 2013/A/3384 Volga Nizhniy Novgorod v. Levan Silagadze* and *CAS 2013/A/3385 Volga Nizhniy Novgorod v. Levan Silagadze*) in one hearing and to issue one combined award.

53. As both parties expressly agreed to the issuance of a combined award, the Panel decided and confirmed to the parties that one combined award would be rendered as indeed principles of good case management dictated.

## IX. MERITS

### A. The Main Issues

54. In view of the above, the main issues to be resolved by the Panel are:

i. Were the Agency Contracts validly concluded?
ii. Was there an unjust enrichment of the Agent?

iii. Should the Agent's remuneration, as determined under article 3.1 of the Agency Contracts, be mitigated?

### *i. Were the Agency Contracts validly concluded?*

55. The Club maintains that the Agency Contracts are feigned deals, see para. 31 above, and should therefore be disregarded. The Club relies on article 167, 169 and 170 of the CCR and article 20 of the Swiss Code of Obligations (hereinafter: the "SCO").

56. The Agent, to the contrary, maintains that there are genuine contracts duly performed by him, see para. 32 above.

57. The Panel notes that in unofficial translation, article 20 of the SCO provides as follows:

> *"1. A contract is void if its terms are impossible, unlawful or immoral.*
> *2. However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them".*

58. The Panel observes that in unofficial translation the provisions of the CCR, further relied upon by the Club, provide as follows:

> *"Article 167. The General Provisions of the Consequences of the Invalidity of the Deal:*
>
> *1. The invalid deal shall not entail legal consequences, with the exception of those involved in its invalidity, and shall be invalid from the moment of its effecting.*
> *2. If the deal has been recognized as invalid, each of the parties shall be obliged to return to the other party all it has received from it by the deal, and in the case of such return to be impossible in kind (including when the deal has been involved in the use of the property, the work performed or the service rendered), its cost shall be recompensed in money – unless the other consequences of the invalidity of the deal have been stipulated by the law.*
> *3. If it follows from the content of the disputed deal that it may only be terminated for the future, the court, while recognizing the deal to be invalid, shall terminate its operation for the future.*
>
> *Article 169. Invalidity of the Deal, Made for the Purpose, Contradicting the Foundations of the Law and Order, and of Morality*
>
> *The deal which has been aimed at the goal, flagrantly contrary to the foundations of the law and order, or of morality, shall be regarded as insignificant.*
>
> *If the malicious intent has been found on the part of both parties to such deal, in the case of execution of the deal by both parties, all they have gained by the deal shall be exacted from them into the revenue of the Russian Federation, and in the case of the deal being executed by one party, into the revenue of the Russian Federation shall be exacted all the gain by the deal, derived by the other party, and also all that was due from it to the first party in compensation of the gain.*

*If the malicious intent has been found in only one party to such a deal, all it has gained by the deal shall be returned to the other party, while what the latter has received, or what is due to in compensation of the executed, shall be exacted into the revenue of the Russian Federation.*

*Article 170. Invalidity of the Sham and of the Feigned Deal*

1. *The sham deal, i.e., the deal, effected only for the form's sake, without an intention to create the legal consequences, corresponding to it, shall be regarded as insignificant.*
2. *The feigned deal, i.e., the deal, which has been effected for the purpose of screening another deal, shall be regarded as insignificant. Toward the deal, which has actually been intended, shall be applied the relevant rules, with account for its substance".*

59. The Panel observes that the FIFA Regulations Players' Agents do not contain a provision contemplating circumstances in which certain contracts, or certain contractual terms may be considered null, nor does either party contend otherwise. The question is therefore posed whether this absence is to be considered as a *lacuna* that shall be filled by the subsidiary application of Swiss law.

60. The Panel has no doubt that in principle certain contracts (*e.g.* an immoral contract) must be considered void. The Panel therefore finds that the FIFA Regulations Players' Agents contain a *lacuna* that shall be filled by the subsidiary application of Swiss law.

61. As article 20 of the SCO deals with the nullity of contracts, the Panel finds that this provision shall supplement the FIFA regulations in this respect, leaving in principle no space for the provisions regarding nullity of contracts in the CCR.

62. Without prejudice to that contention, the Panel finds that the content of article 20 of the SCO does not fundamentally differ from the content of the first paragraph of article 169 of the CCR.

63. The Panel observes that there is no dispute between the parties that the former President of the Club did not directly violate the statutes of the Club or the law of the Russian Federation by signing the Agency Contracts and the Acts of Acceptance. Indeed this was even confirmed by the General Director of the Club during the hearing

64. The former President of the Club did not nonetheless have free discretion to conclude contracts on behalf of the Club that are impossible to perform, unlawful or immoral.

65. However, the Panel finds that, on its face, the Agency Contracts appear to be valid. Further, there is no evidence before it which would justify the Panel in concluding that the Agency Contracts were not valid.

66. Finally, the Panel observes that both parties agreed that, despite the fact that an agency agreement is concluded on a particular date, this does not exclude the possibility that the agent may have previously carried out the work that finally led to the conclusion of the employment contract, so triggering his right to payment.

67. For all these reasons, the Panel finds that the Agency Contracts were validly concluded and that the Club, upon whom the burden lies, has not established the criteria for application of article 20(1) of the SCO or articles 167, 169 and 170 of the CCR.

### ii. *Was there an unjust enrichment of the Agent?*

68. The Club also argues that the Agency Contracts signed between the former President of the Club and the Agent meet the requirements for the application of the unjust enrichment theory and refers to articles 1102 and 1103 of the CCR and article 62 of the SCO in support.

69. The Club maintains that *"unjust enrichment, understood as a defective transfer of value, gives rise to liability that instantiates corrective justice. As a characteristic of things of value (whether of objects or of labour), the value of the thing is an entitlement of the owner of the thing. But (as Hegel explains) value also has a set of characteristics (it is quantitative, intrinsically relational, and independent of the particularity of the owner) that allow the law to treat it in abstraction from the thing of value. Thus, the law can recognize a claim involving an unjust transfer of value even though the defendant's right to the thing of value is not in question. A transfer of value ('enrichment at another's expense) occurs when one transfers a thing of value without the reciprocal receipt of a thing of equivalent value. The question then arises whether such a transfer is 'unjust', that is, whether circumstances are present that create an obligation to retransfer the value. This obligation arises if the transferor has given the value without donative intent and if the value has been accepted by the transferee as non-donatively given; the transferee cannot keep for free what was given and received non-gratuitously. Incontrovertible benefit and change of position affect acceptance as an obligation-creating condition, not enrichment as an aspect of transfer. Accordingly, an unjust enrichment situates the parties correlatively as transferor and transferee of what was not transferred gratuitously, thereby conforming to corrective justice".*

70. The Club concludes that in the circumstances of the present case the transfer is unjust since the claim of the Agent involves receipt of a substantial sum of money in circumstances where no real value was given in return, under the Agency Contract, or at all.

71. The Agent submits that once again the Club provides no clear evidence and puts forward no reasonable argument that could establish that the Agency Contracts meet the criteria for application of the unjust enrichment principle.

72. The Panel observes that in unofficial translation, article 1102 and 1103 of the CCR provide as follows:

> *"Article 1102. The Obligation to Return Unjust Enrichment*
>
> 1. *A person who has acquired or saved property (purchaser) without the grounds, established by the law, other legal acts or the transaction, at the expense of another person (victim) shall be obliged to return to the latter the property acquired or saved unjustly (unjust enrichment), except for the cases, provided for by Article 1109 of this Code.*
> 2. *The rules, provided for by the Chapter, shall be applicable regardless of the fact whether unjust enrichment resulted from the behavior of the purchaser of property, the victim himself, third persons or took place regardless of their will.*

*Article 1103 The Correlation of Claims for the Return of Unjust Enrichment With Other Claims for the Protection of Civil Rights*

*Inasmuch as the contrary is not established by the Code, other laws or other legal acts and does not follow from the essence of corresponding relations, the rules, envisaged by the Chapter, shall be applied to the following claims:*

1. *For the return of the executed in an invalid transaction;*
2. *For the reclamation of property by its owner from the illegal possession of other people;*
3. *Of one party in the obligation to the other party for the return of the executed in connection with this circumstance;*
4. *For the redress of injury, including that inflicted by the dishonest behavior of the enriched person".*

73. In addition, in unofficial translation, article 62 of the SCO provides as follows:

*"1. A person who has enriched himself without just cause at the expense of another is obliged to make restitution.*
2. *In particular, restitution is owed for money benefits obtained for no valid reason whatsoever, for a reason that did not transpire or for a reason that subsequently ceased to exist".*

74. The Panel observes that the FIFA Regulations Players' Agents do not contain any provisions regarding the principle of unjust enrichment. As the Panel has no doubt that under certain circumstances (*i.e.* a situation where a contract which leads to the unjust enrichment of one of the parties) such contract should be considered invalid, the Panel finds that the FIFA Regulations Players' Agents contains a *lacuna* that shall be filled by the subsidiary application of Swiss law.

75. As to article 62 of the SCO, the Panel is unpersuaded that the Agent unjustly enriched himself at the expense of the Club. As indicated *supra*, the Panel finds that, on its face, the Agency Contracts appear to be validly concluded. Article 1.1 of the Agency Contracts clarify that the Agent was hired *"to mediate the conclusion of the labor contract between the* [Players] *and* [the Club]*".* As the Players indeed concluded employment contracts with the Club, it appears that the Agent fulfilled his obligations, which was also confirmed by the Acts of Acceptance issued by the Club. In the absence of any contradictory evidence, the Panel finds that the Club has failed to discharge the burden upon it of proving that the Agent was paid agency fees for *"no valid reason whatsoever, for a reason that did not transpire or for a reason that subsequently ceased to exist".*

76. For the same reasons the Panel finds that there is no unjust enrichment of the Agent based on articles 1102 and 1103 of the CCR. There is no evidence that the transaction was invalid, that the Agent possesses property of the Club without colour of law or that there was a dishonest behaviour of the Agent.

77. As such, the Panel is not satisfied that there was an unjust enrichment of the Agent based on either Swiss or Russian law.

### *iii. Should the Agent's remuneration, as determined under article 3.1 of the Agency Contracts, be mitigated?*

78. The Club submits that the amounts determined in the Agency Contracts shall be reduced to the limits corresponding to the usual threshold in this kind of agreements, which the Club considers to be 3% of the Players' annual salaries (in accordance with article 20.4 of the FIFA Regulations Players' Agents), or the *"well-known fact that Clubs usually pay a maximum fee of 5% of the amounts fixed in contracts to the agents involved in its negotiation"*.

79. At the hearing, the Club also made reference to article 417 of the SCO to corroborate its contention that the Panel has discretion to reduce disproportionate brokerage fees.

80. The Agent maintains that the Club did not provide any clear evidence or put forward any reasonable argument whatsoever that could sufficiently evidence the so called well-known fact that the maximum threshold indicated by the Club (5%) is applicable and binding upon all players' agents throughout the world.

81. The Panel observes that the FIFA Regulations Players' Agents do not determine a maximum amount or a maximum percentage of a football player's annual salary that a players' agent would be entitled to receive from a club upon a successful negotiation of an employment contract. Article 20.4 of the FIFA Regulations Players' Agents applies to the remuneration to be paid by a player to an agent for negotiation or renegotiation in the absence of an agreement on the fees to be paid by the parties. In the present case, the Agent rendered services to the Club and successfully negotiated employment contracts with the Players.

82. At the hearing, Mr Anisimov stated that the Club had paid agents' fees up to a percentage of 25% of the respective player's annual salary. Only recently, the RFU enacted regulations limiting the agency fee to a maximum of 10%.

83. The Panel observes that in unofficial translation, article 417 of the SCO provides as follows:

> *"Where an excessive fee has been agreed for identifying an opportunity to enter into or facilitating the conclusion of an individual employment contract or a purchase of land or buildings, on application by the debtor the court may reduce the fee to an appropriate amount"*.

84. On this basis, the Panel finds that it is empowered to reduce the fees of the Agent in a case where it deems such fees to be disproportionate.

85. The Panel finds that the total agency fees of EUR 1,200,000 (a percentage of 46,24% of the Players' combined annual salary) obtained by the Agent are high, but notes that this practice was not unusual in the world of football at the time and particularly not in the football market of the Russian Federation where, as argued by Mr Anisimov during the hearing, allegedly agency fees were paid to players' agents up to 30-40% of players' annual salaries. The Panel accordingly finds that an agency fee of 46,24% is not inappropriate taking into account the fact that agency fees of 30% to 40% were considered normal at the time.

86. In addition, the Panel finds that it must take into account the further fact that the Players were free agents at the time of conclusion of the employment contracts. The Panel takes judicial notice of the fact that it is not unknown in the world of football that players' agents sometimes obtain higher agency fees if a club does not have to pay any transfer fee in order to register a player.

87. At the moment of acquiring the services of the Players, the Club had itself the possibility to transfer the Players to another club and to obtain a transfer fee, which could be higher than the fee the Club paid to the Agent, *i.e.* a commercial opportunity enjoyed by the Club with the acquisition of the Players.

88. On the basis of the general legal principle – and one of the pillars of the transfer system enacted by FIFA – *pacta sunt servanda*, the Panel finds that contracts, in principle, have to be respected. In the present case, the Panel sees no reason retroactively to reduce the agency fees mutually agreed upon by the parties in the Agency Contracts.

89. As such, the Panel declines to reduce the Agent's remuneration, as determined under article 3.1 of the Agency Contracts.

**B. Conclusion**

90. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments made, the Panel finds that:

i. The Agency Contracts were validly concluded.
ii. There is no evidence of unjust enrichment of the Agent under either Swiss or Russian law.
iii. There is no reason to reduce the Agent's remuneration, as determined under article 3.1 of the Agency Contracts.

91. Any further claims or requests for relief are dismissed.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed on 11 November 2013 by Volga Nizhniy Novgorod against the Decision issued on 5 June 2013 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 5 June 2013 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.