



Arbitration CAS 2015/A/4250 Al Ittihad FC v. Ghassan Waked, award of 9 May 2016

Panel: Mr Mark Hovell (United Kingdom), President; Mr Clifford Hendel (USA); Mr Lars Nilsson (Sweden)

Football

Contract of agency between an agent and a club in connection with the transfer of a player

Fulfillment by the agent of his obligations under the contract

Proportionality of the commission due to the agent under the contract

1. **On the basis of a contract concluded between a club and an agent stating the agent's obligations and of the evidence submitted, it may appear that the agent completed his obligations. The intervention of 2 other agents, one representing the player and one representing the club does not necessarily mean that the agent's services were not used especially where the three agents involved appeared to have performed different roles. Therefore, the club is obliged to pay the agent the commission specified in the agreement.**
2. **An agent's commission corresponding to 10% of a transfer fee is not unreasonable or contrary to common practice or indeed to Swiss Law. Furthermore, there is no link between the commission owed to an agent and the length of time a player transferred spent at his new club. Finally, in the absence of any evidence to the contrary, there is no reason to reduce the contractual commission due to an agent because of the unilateral termination of the employment agreement by the player.**

I. PARTIES

1. Al-Ittihad FC ("the Club" or "the Appellant") is a football club with its registered office in Jeddah, Saudi Arabia. The Club is currently competing in the Saudi Professional League. It is a member of the Saudi Arabian Football Federation ("the SAFF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").
2. Mr Ghassan Waked ("the Agent" or "the Respondent") is a licensed intermediary registered with The Football Association with his principal office in London, England.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and

allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 18 July 2012, the Parties made a Commission Agreement (the “Agreement”) in connection with the transfer of the player D. (the “Player”) to the Club. The preamble to the Agreement provided that the Agent was “*acting here for the Club in its recruitment of the Brazilian footballer D. from Club Regatas de Vasco de Gama in Brazil*”. The Agreement contained the following material Articles:

- “1. *The services of the Agent that the Club were seeking for are:*
- a. to negotiate the transfer fee;*
 - b. to close the transaction and contracts tying all three parties.*
2. *The indicated task of the agent shall end with the signature of the contracts with the Club and the Player, and the Agent will have no further right of commission once he is paid in full as stated in points 5 and 6 below.*
3. *In light of the services provided by the Agent in connection with the contract of the Player, the Club undertakes to pay the agent a commission valued at 10% (ten per cent) of the total value of the transfer fee paid for the Player.*
4. *The total transfer fee being €5,000,000.00 (Five Million Euros) NET. Therefore the total commission for the guaranteed part of the contract being €500,000.00 (Five Hundred Thousand US Dollars [sic]).*
5. *The Commission is to be paid in 1 (One) instalment no later than 15 October 2012.*
6. *The payments shall be made to the Agents nominated bank account below...”.*

5. On the same day, the Club concluded a commission agreement with Daniel Gonzales, a licensed player’s agent with principal office in Bolivia (the “Gonzales Agreement”) who was “*acting here for the Club in its recruitment of the Brazilian footballer D. from Club Regatas de Vasco da Gama in Brasil*”. Under the Gonzales Agreement, Mr Gonzales was to be paid USD 400,000 commission. Article 2 of the Gonzales Agreement stated as follows:

- “2. *The services of the Agent that the Club were seeking for are:*
- a. to negotiate the transfer fee;*
 - b. to negotiate the player’s terms;*
 - c. to set a payment schedule convenient to the Club; and*
 - d. to close the transaction and contracts tying all three parties”.*

6. On 21 July 2012, the Player signed an employment agreement with the Club (the “Employment Agreement”) for the three-year period of 23 July 2012 to 30 June 2015, with a one-year extension option in favour of the Club. On the last page of the Employment Agreement, Eduardo Uram (a registered sports agent in Brazil) signed as the agent for the Player and Daniel Gonzales was mentioned as the agent for the Club.

7. On the same day, Mr Uram and the Club concluded an agency agreement (the “Uram Agreement”) under which Mr Uram was to be paid USD 400,000 commission for his “*mediation services*” in the signature of the Employment Contract. In the preamble to the Uram Agreement, it stated that Mr Uram “*participated in the negotiations for hiring the Player, and negotiated with the CLUB [the Club] the payment of an agency fee for these services*”.
8. On 26 October 2012, the Player unilaterally terminated the Employment Agreement stating, *inter alia*, that the Club had failed to make numerous salary payments owed to him. The Player subsequently returned to Brazil and signed with Cruzeiro Esporte Clube on a free transfer. In total, the Player played in 8 matches for the Club.

Proceedings before FIFA

9. On 4 March 2014, the Agent filed a claim in front of the FIFA Players’ Status Committee (the “FIFA PSC”), claiming that the Club had breached the Agreement by failing to pay the commission owed to him. In his claim, the Agent requested the amount of EUR 500,000 as well as interest at 5% per year as from 15 October 2012.
10. On 21 May 2015, the Single Judge of the FIFA PSC rendered a decision as follows (“the Appealed Decision”):

- “1. *The claim of the Claimant, Ghassan Waked, is partially accepted.*
2. *The Respondent, Al Ittihad, has to pay to the Claimant, Ghassan Waked, **within 30 days** as from the date of notification of this decision, the amount of EUR 500,000 as well as 5% interest per year on the said amount as from 16 October 2012 until the date of effective payment.*
3. *Any further claims lodged by the Claimant, Ghassan Waked, are rejected.*
4. *If the aforementioned amount, plus interest as established above, is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA’s Disciplinary Committee for consideration and a formal decision.*
5. *The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Al Ittihad, **within 30 days** as from the date of notification of this decision, as follows:*
 - 5.1 *The amount of CHF 15,000 has to be paid to FIFA to the following bank account with reference to case nr. 14-01214/itr:*
 - ...
 - 5.2 *The amount of CHF 5,000 has to be paid directly to the Claimant, Ghassan Waked”.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 21 October 2015, pursuant to Article R47 of the Code of Sports-related Arbitration (“the CAS Code”), the Club filed a Statement of Appeal against the Agent at the Court of Arbitration for Sport (“the CAS”). The Statement of Appeal contained the following requests for relief:
 - “1. *To accept this appeal and annul the Decision rendered by the FIFA PSC Decision.*

2. *Independently of the type of the decision to be issued, the Appellant requests the Panel:*
 - a. *To fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of his legal fees and costs.*
 - b. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees”.*
12. In its Statement of Appeal, the Club nominated Mr Clifford J. Hendel, Attorney-at-Law, Madrid, Spain as an arbitrator and requested that the matter be heard by a panel of 3 arbitrators.
13. On 23 October 2015, the CAS Court Office wrote to the Agent, *inter alia*, granting him a deadline of 10 days to nominate an arbitrator.
14. On 2 November 2015, pursuant to Article R51 of the CAS Code, the Club filed its Appeal Brief with the CAS Court Office with the following requests for relief:
 - “1. *To accept this appeal and annul the Decision rendered by the FIFA PSC Decision.*
 2. *In the alternative to reduce the amount payable to the Respondent to €41,666.66 pursuant to article 417 of the CO as the fee is excessive.*
 3. *Independently of the type of the decision to be issued, the Appellant requests the Panel:*
 - a. *To fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of his legal fees and costs.*
 - b. *To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees”.*
15. On 6 November 2015, the CAS Court Office wrote to the parties stating that as the Agent had failed to nominate an arbitrator within the 10 day deadline provided for in the CAS Court Office’s letter dated 23 October 2015, pursuant to Article R53 of the CAS Code, the President of the CAS Appeals Arbitration Division would be nominating an arbitrator *in lieu* of the Agent.
16. On 24 November 2015, pursuant to Article R55 of the CAS Code, the Agent filed his Answer to the Appeal Brief containing the following requests for relief:
 - “1. *To reject the Appellant’s appeal in its entirety.*
 2. *To confirm the decision passed by the Single Judge of the Player’s Status Committee in the meeting held in Zurich, Switzerland, on 21 May 2015.*
 3. *To condemn to the Appellant to bear all cost incurred with the present procedure and to cover all the Respondent’s legal expenses relating to the present procedure”.*
17. On 25 November 2015, the Club wrote to the CAS Court Office stating that it preferred for a hearing to be held in this matter.
18. On 2 December 2015, the Agent wrote to the CAS Court Office stating that he also wished for a hearing to be held in this matter.

19. On 7 January 2016, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to this case was constituted as follows:
 - President: Mr Mark A. Hovell, Solicitor, Manchester, United Kingdom
 - Arbitrators: Mr Clifford J. Hendel, Attorney-at-Law, Madrid, Spain
Mr Lars Nilsson, Attorney-at-Law, Stockholm, Sweden.
20. On 12 January 2016, the CAS Court Office requested that FIFA provide it a full copy of the FIFA file.
21. On 14 January 2016, the CAS Court Office wrote to the Parties confirming that, pursuant to Article R57.2 of the CAS Code, a hearing would be held on 4 March 2016.
22. On 21 January 2016, the counsel for the Agent wrote to the CAS Court Office stating that the Agent had suffered a brain haemorrhage and was unable to attend the hearing or participate in a cross examination as he could hardly communicate.
23. On 25 January 2016, in light of the recent development regarding the Agent's inability to attend the hearing due to health reasons, and the fact that neither party had identified in their submissions any witnesses or experts to be called to testify at a hearing, the CAS Court Office wrote to the Parties requesting them to indicate whether they would be satisfied to have a second round of written submissions in lieu of a hearing.
24. On 26 January 2016, the CAS Court Office sent, by courier, a copy of the complete FIFA file in relation to this matter to both Parties and the Panel.
25. On 27 January 2016, the Club wrote to the CAS Court Office confirming that it was satisfied to have a second round of written submissions in lieu of a hearing.
26. On 28 January 2016, the Agent wrote to the CAS Court Office confirming that he too was satisfied to have a second round of written submissions in lieu of a hearing.
27. On 29 January 2016, in light of the Parties confirming that they would be satisfied with a second round of written submissions in lieu of a hearing, the CAS Court Office informed the Parties that the hearing scheduled for 4 March 2016 was cancelled.
28. On 5 February 2016, the Club filed its second round of written submissions with the CAS Court Office and reiterated its requests for relief contained in its Appeal Brief dated 2 November 2015.
29. On 18 February 2016, the Agent filed his second round of written submissions with the CAS Court Office and reiterated his request for relief contained in his Answer dated 24 November 2015.
30. On 24 February 2016, the Agent filed a signed Order of Procedure with the CAS Court Office.

31. On 26 February 2016, the Club filed a signed Order of Procedure with the CAS Court Office.

IV. THE SUBMISSIONS OF THE PARTIES

32. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Club's Submissions

In summary, the Club submitted the following in support of its claim:

33. The Agent did not render the services agreed to in the Agreement. Mr Uram negotiated the Employment Agreement on behalf of the Player and Mr Gonzales negotiated the Employment Agreement on behalf of the Club. As such, the Agent was not entitled to receive any commission.

34. In the alternative, should the Panel determine that the Agent was entitled to commission, the commission payable to him should be reduced for being excessive and disproportionate.

a) The Agent did not perform the agreed services under the Agreement

35. The Club stated that the signatures to the Employment Agreement demonstrated that the Agent was not involved in the concluding of that contract and instead, it was Mr Uram and Mr Gonzales who were agents for the Player and the Club respectively. This was further evidenced by the Uram Agreement, the Gonzales Agreement and the fact that Mr Uram continues to act for the Player today.

36. The Club admitted that it did, in fact, conclude the Agreement with the Agent on 18 July 2012. However, it claimed that between the 18th and 21st of July 2015, only Mr Uram and Mr Gonzales were involved in negotiations and the Agent did not provide any of the services required under the Agreement.

37. The Club stated that CAS jurisprudence required that an agent must actually be involved in the negotiation of a contract in order to be deserving of a commission fee, and cited *CAS 2006/A/1019* in this regard.

38. Further, the Club cited Articles 412 and 413 of the Swiss Code of Obligations (the "CO") which state as follows (emphasis added by the Club):

Art. 412

1. *A brokerage contract is a contract whereby the broker is instructed to alert the principal to an opportunity to conclude a contract or to facilitate the conclusion of a contract in exchange for a fee.*

2. *The brokerage contract is generally subject to the provisions governing simple agency contracts.*

Art. 413

1. *The broker's fee becomes payable as soon as the information he has given or the intermediary activities he has carried out result in the conclusion of the contract.*
2. *Where the contract is concluded subject to a condition precedent, the fee becomes due only once such condition has been satisfied.*
3. *Where the principal has contractually undertaken to reimburse the broker's expenses, the broker may request such reimbursement even if the transaction fails to materialise”.*

39. Accordingly, for the reasons stated above, the Club argued that pursuant to Articles 413(1) and 413(2) of the CO, the Club did not have to compensate the Agent for the services that he did not perform.

b) The commission should be reduced for being excessive and disproportionate

40. In the alternative, the Club argued that if a commission fee was due and payable to the Agent, then the Panel should reduce it for being excessive in the circumstances.

41. The Club cited Article 417 of the CO which states as follows (emphasis added by the Club):

“Art. 417

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”.

42. The Club stated that the Panel therefore had the legal authority to reduce the commission fee to an appropriate amount despite what was agreed between the Parties.

43. The Club claimed that the commission due (10% of the value of the transfer fee paid by the Club for the Player) was excessive because it was based on securing the Player's services for a minimum of 3 seasons, whereas ultimately the Player unilaterally terminated the Employment Agreement after only 3 months of signing and returned to Brazil on a free transfer. The Player therefore only performed the agreed services for 3 months out of the 36 months agreed in the Employment Agreement.

44. As such, as the Player only performed 1/12th of the services agreed to with the Club, the Club argued that the commission due to the Agent should be reduced by 11/12ths, *i.e.* to EUR 41,666.66.

c) Summary of the second round of submissions by the Club

In addition to the arguments outlined above, the Club, in summary, also submitted the following in their second round of submissions:

45. In response to the Agent's argument that he did, in fact, participate in negotiating the transfer fee and closing "*the transaction and contracts tying all three parties*", the Club claimed that the Agent did not provide any evidence of him actually participating in the negotiations.
46. In relation to the Agent's claims that he had worked on other transactions for the Club later on in 2012, the Club dismissed them as irrelevant to the matter at hand as it did not prove or disprove whether the Agent fulfilled his duties under the Agreement.
47. In relation to the Agent's submission of an alleged statement from the former President of the Club, Mohammad Hamed Fayed, the Club contested the validity of this document as it was an unsworn statement and not on a Club letterhead. The Club claimed that this was the first time it had seen a signed and dated version of this document. Moreover, the Club claimed that the document was not written contemporaneously at the time the Parties entered into the Agreement, and the Club did not have an opportunity to cross-examine Mr Fayed. As such, the Club stated that this evidence must be disregarded.
48. The Club submitted that it had demonstrated with comfortable satisfaction that persons other than the Agent completed the transaction in which the Player moved to the Club and the Agent did not carry out the services required under the Agreement.
49. The Club reiterated that the commission fee was excessive and should be reduced to EUR 41,666.66 pursuant to Article 417 of the CO.

B. The Agent's Submissions

In summary, the Agent submitted the following in support of his defence:

50. The Agent denied the Club's claim that he was not involved in securing the Employment Agreement. Further, he noted that the Club was introducing a new argument at the CAS as the alleged intervention of the two other agents (Mr Uram and Mr Gonzales) was not brought up in the first instance proceedings in front of the FIFA PSC.
51. In relation to the Club's claims that the amount of commission due should be reduced for being excessive, the Agent stated that once the Employment Contract was concluded, the commission under the Agreement was due and payable. There was no link between the Agreement and the length of time the Player was to ultimately spend at the Club. Accordingly, the principle of *pacta sunt servanda* should apply in relation to the Agreement.
 - a) The Agent did not perform the agreed services under the Agreement
52. The Agent submitted that he did in fact perform the services required under the Agreement which were to (i) negotiate the transfer fee and (ii) close the transaction and contracts binding all the parties. The Agent duly completed his duties as a transfer fee of EUR 5,000,000 was agreed and the Employment Agreement was concluded. This was not disputed by the Club.

53. The Agent noted that Article 2 of the Agreement clearly stated as follows:
- “2. The indicated task of the agent shall end with the signature of the contracts with the Club and the Player, and the Agent will have no further right of commission once he is paid in full as stated in points 5 and 6 below”.*
54. Accordingly, there were no other conditions which the Agent needed to satisfy in order to be entitled to his commission under the Agreement.
55. The Agent also noted that the Club entrusted him to complete further transactions on behalf of the Club on June, July and November 2012, *i.e.* both before and after the date when the Agreement was concluded. The Agent claimed that if the Club were not satisfied with his performance of the Agreement, it was unlikely that they would use his services again merely a few months later.
56. The Agent also submitted as evidence a letter addressed *“To Whom it May Concern”* from the former President of the Club, Mohammed Hamed Fayed dated 24 February 2014, which stated as follows:
- “This is to clarify that Mr. Gassan Waked, Players’ Agent licensed by FA, conducted the negotiations on behalf of Al Ittihad with the Brazilian Player **D.** and his club **Vasco Da Gama** and with the Croatian/Palestinian Player **A.** and his Club **Hajduk Split**.*
- Mr. Waked acted for the club at the request of the club and the knowledge of the board.*
- He brought both deals to a positive conclusion and the players promptly joined and played for the club.*
- As elected President of Al Ittihad Club, I signed his commission contracts on 30 July 2012 in Jeddah”.*
57. The Agent claimed that the Club have never denied the authenticity of the above letter, which clearly supports his claims that he did in fact complete his obligations under the Agreement. However, the Panel notes that the Club did later contest the authenticity of this document in their second round of written submissions (see above).
58. In relation to the Club’s arguments that it was Mr Uram and Mr Gonzales who were entitled to commission and not him, the Agent noted that even if the other two agents were involved in negotiating the Employment Agreement, that does not preclude him from being entitled to commission under the Agreement. The Agent claimed that the intervention of multiple agents in one transaction is usual and common in complex relations involving several parties. The Agreement merely required the Agent to negotiate a transfer fee and to close the transaction, *i.e.* ensure that the Employment Agreement was signed. Conversely, the Gonzales Agreement involved the actual negotiation of the terms of the Employment Agreement. This explained why the commission under the Agreement was calculated on the transfer fee paid while the commission under the Gonzales Agreement was calculated on the value of the Employment Contract.

59. The Agent also submitted as evidence a letter dated 15 July 2012 from Mr Uram (the agent for the Player) and the Player to the Club and Mr Gonzales (agent for the Club) which stated, *inter alia*, that an agreement had been reached in principle between Club Regatas de Vasco de Gama (“Vasco de Gama”) and the Club and a contract offer had been received by Mr Uram for the Player. Mr Uram then invited Mr Gonzales for a meeting to finalise the payment schedules and other details of the Employment Agreement. The Agent submitted that this clearly stipulated the roles of Mr Uram and Mr Gonzales and also confirmed that a transfer had been agreed in principle – which he had negotiated. Lastly, the Agent also noted that the Single Judge of the FIFA PSC in the Appealed Decision held that the Agent clearly established that he was involved in the transfer of the Player from Vasco de Gama to the Club. In summary, the Agent claimed that the involvement of Mr Uram and Mr Gonzales did not affect the validity of the Agreement.

b) The commission should be reduced for being excessive and disproportionate

60. The Agent denied that the commission owed under the Agreement should be reduced to take into account how long the Player was at the Club. The Agent noted that there was nothing in the Agreement or the Employment Agreement that stated that the commission owed was dependent on the Player staying at the Club for a specified amount of time. The Club was free to include such a clause but chose not to do so.

61. Accordingly, once the Employment Agreement was concluded, the commission owed was due and payable. The commission was agreed between the two parties with free will and pursuant to the principle of *pacta sunt servanda*, the Club had to complete the required payment. The Agent also noted that the Single Judge of the FIFA PSC in the Appealed Decision held that the commission due was not subject to the Player staying at the Club or any other condition whatsoever.

c) Summary of the second round of submissions by the Agent

In addition to the arguments outlined above, the Agent, in summary, also submitted the following in his second round of submissions:

62. The Agent reiterated that it did not matter that Mr Uram and Mr Gonzales were also involved in the transaction bringing the Player to the Club because they performed different roles to the one he did. The Agent fulfilled the duties required of him under the Agreement and the role of the other agents was irrelevant.

63. In relation to the Club’s claims that he had not provided evidence of his intervention in the transfer, the Agent noted that he had submitted proof of payment of one instalment of the transfer fee from the Club to Vasco de Gama. The Agent stated that the only reason he was in possession of this payment confirmation was because he was entrusted to negotiate the transfer between the two clubs. The Agent added that the transfer of the Player to the Club could clearly not be contested by the Club.

64. In relation to the Club's claims that they had never previously seen the statement by Mr Fayed dated 24 February 2014, the Agent noted that this letter was included as an exhibit in his claim at the FIFA PSC. In fact, the Single Judge of the FIFA PSC specifically mentioned the letter in the Appealed Decision. Moreover, the Agent stated that the Club did not provide any convincing reasons for why the authenticity of the letter could be doubted.

V. JURISDICTION OF THE CAS

65. Article R47 of the CAS Code provides as follows:

“An appeal against a decision of a federation, association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.

66. Further, Article 10 of the Agreement states as follows:

“In case of conflict or dispute arising out of this agreement, the FIFA laws and regulations will apply according to art. 22 c) of the FIFA Regulations on the Status and Transfer of Players with an appeal to the CAS in Lausanne. As for such an appeal, the parties agree that it will be dealt in an expedited manner according to art. 44.4 of the CAS Code, with the application of FIFA laws and regulations. The Panel will consist of one arbitrator and the language of the arbitration will be English. The Parties irrevocably agree that the arbitral award is final, binding and shall be executed and enforced before FIFA committees”.

67. The jurisdiction of the CAS, which is not disputed, is further confirmed by the Order of Procedure duly signed by the parties. The Panel further notes that during the course of this arbitration, the Club requested a panel of 3 arbitrators, despite the wording of clause 10 of the Agreement and the Agent agreed to the same when he signed the said Order of Procedure.
68. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

69. The Statement of Appeal, which was filed on 21 October 2015, complied with the requirements of Articles R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

70. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

71. 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

72. Further, Article 10 of the Agreement states as follows:

“In case of conflict or dispute arising out of this agreement, the FIFA laws and regulations will apply ...”.

73. Accordingly the Panel rules that various FIFA Regulations would apply with Swiss law applying to fill in any gaps or *lacuna*, when appropriate.

VIII. LEGAL DISCUSSION

A. The Main Issues

74. The Panel observes that the main issues to be resolved are:

- a) Did the Agent fulfil his duties and obligations under the Agreement?
- b) If so, should the commission due under the Agreement be reduced for being excessive and/or disproportionate?

a) Did the Agent fulfil his duties and obligations under the Agreement?

75. The Panel notes that the crux of the Club’s argument is that despite entering into the Agreement with the Agent, the Agent did not actually perform any services because it was the two other agents (Mr Uram and Mr Gonzales) that represented the Player and the Club when negotiations were being undertaken regarding the Employment Agreement.

76. The Panel will first deal with the question of whether there was any ‘overlap’ between the roles of the three agents involved – the Agent, Mr Uram and Mr Gonzales – and the services they provided. The Panel will then turn to the question of whether there is sufficient evidence of the Agent actually performing the obligations required of him under the Agreement.

77. In relation to the roles of the agents, the Panel notes that Article 1 of the Agreement clearly stated that the Agent was tasked with negotiating a transfer fee between the Club and Vasco de Gama and then ensuring all necessary contracts were signed binding the Club, Vasco da Gama and the Player. Article 2 of the Gonzales Agreement specified that Mr Gonzales was also tasked with these same two obligations as the Agent, *i.e.* to negotiate a transfer fee and *“to close the transaction and contracts tying all three parties”*. However, he was also required to negotiate the Player’s terms and agree a payment schedule convenient to the Club – two tasks that the Agent was not required to undertake. In the Uram Agreement, it stated that Mr Uram *“participated in the negotiations for hiring the Player”*.

78. The Panel notes that both Parties were in agreement that Mr Uram alone represented the Player during the entire period in question and continues to do so, so that is not in dispute. Accordingly, there does not appear to be a conflict or overlap between services provided by Mr Uram and the Agent in this regard. However, the Club argued that it was Mr Gonzales who acted for the Club in the transfer of the Player and cited the fact that Mr Gonzales was a Party in the Employment Agreement as the Club's agent as evidence of this. Conversely, the Agent claimed that this was irrelevant as negotiating the Employment Agreement on behalf of either the Club or the Player was not what he (the Agent) was required to do under the Agreement, his services related to the club to club transfer.
79. In summary, the Panel agrees with the Agent's arguments in this regard. The Agreement stated what the Agent's obligations were and it appears that he completed these obligations (discussed further below). The intervention of Mr Uram and Mr Gonzales does not necessarily mean that the Agent's services were not used. Based on the evidence presented to the Panel, the three agents involved appeared to have performed different roles. Mr Uram represented the Player in his contract negotiations (which were part of the Employment Agreement) while Mr Gonzales represented the Club in the same contract negotiations. Both the agents were Parties to the Employment Agreement reflecting these roles. Further, the amount of commission paid to Mr Gonzales was based on the value of the Employment Agreement, which appears to reflect the nature of his role in the negotiations.
80. Conversely, although the Agent may not have been involved in negotiating the Employment Agreement, it does appear that he was involved in negotiating the transfer fee between the Club and Vasco da Gama. Once this transfer fee was agreed, then Mr Uram and Mr Gonzales were required to negotiate the terms of the Employment Agreement on behalf of the Club and the Player. The Club relied on the fact that the Agent did not sign the Employment Agreement as evidence that he did not participate in the transaction at all. However, for the reasons stated above, the Panel does not agree with this argument. Under the Agreement, the Agent was primarily required to negotiate the transfer fee, which it appears he did. The Panel notes in this respect that the conclusion of both the Agreement and the Gonzales Agreement took place on the same day (*i.e.* 18 July 2012). If the Club inadvertently entered into two separate contracts to obtain the same service, then this should not be to the detriment of the Agent or Mr Gonzales.
81. The Panel notes the Club's reference to previous CAS jurisprudence and the case *CAS 2006/A/1019*. In that decision, the arbitrator sought evidence of a "*significant involvement*" by the agent in question to the relevant transfer, something more than a mere introduction. The Club also cited Articles 412 and 413 of the CO. In the matter at hand, the Agent has submitted as evidence the Agreement which required him to undertake two tasks. A transfer fee was clearly agreed between the Club and Vasco de Gama for the Player and this was undisputed. An employment contract was also subsequently concluded binding the Player to the Club. The Agent also submitted a letter from the former President of the Club dated 24 February 2014 confirming that he had, in fact, completed the obligations required of him under the Agreement. The Club denied knowing of the existence of this letter, yet the Agent pointed out that this letter was clearly submitted as evidence in the proceedings in front of FIFA, so the Club could not have been unaware of its existence. Accordingly, the Panel is *prima facie* satisfied that the Agent completed his obligations under the Agreement. The Agent was also able to submit a

proof a payment of the transfer fee, which further indicates his involvement in the club to club part of this transaction.

82. If the Club wished to dispute this, the Panel notes that it bore the burden of proof. In this regard, the Panel notes that the Club failed to provide any convincing evidence that the Agent failed to complete his duties or that the Agreement was invalid for any other reason. It merely claimed that the Agent did not perform any services for them and challenged the authenticity of evidence put forth by the Agent. The only evidence they put forward to support their claims was the Employment Agreement which did not contain the Agent's signature. However, as noted above, the Panel is of the opinion that this did not, in and of itself, prove that the Agent did not perform any services at all. The fact that the letter of the former President of the Club is "unsworn" is not, in the opinion of the Panel, reason to disregard it entirely. The Club has not raised any arguments that it is not a genuine letter from the former President, that it was forged or provided under duress or the like.
83. The Panel is also a little surprised that the Club did not provide a witness statement from either Mr Gonzales or Mr Uram supporting its version of events. Further, the Panel notes that the Club did not provide any copies of contemporaneous correspondence between it and the Agent stating that the Agent's services were no longer required as Mr Gonzales was going to act for them instead. Similarly, no copies of contemporaneous correspondence was provided of the Club informing the Agent that the Agreement was to be deemed null and void as he had not performed the services they expected from him. Based on the evidence provided to the Panel, the first time the Club complained about this was at the FIFA proceedings. Conversely, the Agent provided evidence that he continued to act for the Club in other transactions shortly after the transfer of the Player to the Club. Overall, the Panel was left with the impression that the Club could have presented more evidence to support its claims than it did in support of its submissions.
84. Accordingly, on the basis that there was insufficient evidence to conclude otherwise, the Panel is satisfied that the Agent did, in fact, complete the obligations required of him under the Agreement. Therefore, the Panel concludes that the Club is obliged to pay the Agent the commission specified in the Agreement, subject to the discussion below.
- b) Should the commission due under the Agreement be reduced for being excessive and/or disproportionate?
85. The Club argued that if the Panel ruled that commission was due to the Agent under the Agreement, then it should be reduced to EUR 41,666.66 pursuant to Article 417 of the CO, as this was reflective of the period of time which the Player spent with the Club.
86. Firstly, the Panel notes that the amount of commission due under the Agreement is EUR 500,000, which corresponds to 10% of the transfer fee paid by the Club to Vasco de Gama for the Player. The commission, which the Parties freely agreed to in the Agreement, can be reduced by the Panel pursuant to Article 417 of the CO if deemed to be "*excessive*". However, in the case at hand, the Panel does not consider this commission to be unreasonable or contrary to common practice or indeed to Swiss law. Even if the Panel were to apply a wide interpretation

to Article 417 of the CO (which appears more applicable to land or employment related transactions, as opposed to club to club transfers), the Panel does not believe 10% commission to be excessive.

87. Secondly, the Club argues that the commission due should be reduced from EUR 500,000 to EUR 41,666.66 on the basis that the Employment Agreement was for a period of 36 months and the Player only stayed for 3 months, *i.e.* for 1/12th of the time. Conversely, the Agent argued that there was no link between the commission owed to him and the length of time the Player spent at the Club.
88. In summary, the Panel agrees with the Agent's arguments. There is nothing in the Agreement which explicitly stated that the commission owed was subject to the Player completing the full term of the Employment Agreement. As stated above, the Agent completed all the obligations required of him under the Agreement and whether the Player left the Club after three (3) months, or completed the entire three (3) years was irrelevant. The full amount of commission was owed to the Agent once the transfer and the Employment Agreement were concluded. The Club was free to include a clause in the Agreement linking the Player's stay with the Club with the amount of commission owed to the Agent, but it chose not to do so.
89. Further, as an aside, the Panel notes that the evidence submitted by the Club to demonstrate that the Player unilaterally terminated the Employment Agreement after three (3) months was a default notice and subsequent termination letter from the Player. These letters, *inter alia*, stated that the reason the Player terminated the Employment Agreement was that the Club owed him unpaid salary payments amounting to over USD 1,300,000 over a period of 3 months. The Panel was not presented with any further information regarding any potential dispute between the Player and the Club in relation to these allegedly unpaid salary amounts.
90. However, in the absence of any evidence to the contrary, the Panel is surprised that the Club would seek to argue that the commission due to the Agent under the Agreement should be reduced as the Player unilaterally terminated the Employment Agreement – when the reason for this unilateral termination appears to be that the Club breached the Employment Agreement by failing to pay the Player.
91. For completeness, the Panel notes that there appeared to be an error in Article 4 of the Agreement which stated that 10% of the value of the transfer fee of EUR 5,000,000 was USD 500,000, as stated below (emphasis added by the Panel):

“4. The total transfer fee being €5,000,000.00 (Five Million Euros) NET. Therefore the total commission for the guaranteed part of the contract being €500,000.00 (Five Hundred Thousand US Dollars)”.
92. However, based on the submissions of the Agent both in the Appealed Decision and here at the CAS, it is evident that the amount being claimed by the Agent is EUR 500,000.
93. In summary, the Panel concludes that the amount of commission does not need to be reduced as it is not excessive or disproportionate and pursuant to the principle of *pacta sunt servanda*, the full amount of commission of EUR 500,000 should be paid to the Agent.

94. Finally, the Panel notes that in the *Appealed Decision*, the FIFA DRC awarded interest on such sum at the rate of 5% per annum from the day after the due date for payment *i.e.* from 16 October 2012. The Panel concurs with this award of interest too.

B. Conclusion

95. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel finds that the Appeal is to be dismissed in its entirety.
96. All further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Al-Ittihad FC dated 21 October 2015 with respect to the decision issued by the FIFA Players' Status Committee on 21 May 2015 is dismissed.
2. The Decision of the FIFA Players' Status Committee of 21 May 2015 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.