



**Arbitration CAS 2016/A/4485 Al Ittihad FC v. Daniel Gonzales Landler, award of 20 September 2016**

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

*Football*

*Contract between a players's agent and a club*

*Condition of agent's commission falling due*

*Doctrine of judicial estoppel*

*Determination of the remuneration of the agent*

*Proportionality of the commission due to the agent under the contract*

1. If a commission agreement foresees that the agent's ultimate task is to ensure that a player signs an employment contract and if the agreement does not contain an express provision subjecting the agent's right to the commission on him cumulatively performing other contractually agreed tasks, the agent's commission falls due following the signing by the player of the employment contract, and irrespective of whether or not the agent has performed the other tasks. This is even more so if the commission agreement contains a clause implying that the agent would only be entitled to the commission if his duties culminated in the player signing the employment contract, if the club had additionally assigned some of the ancillary duties of the agent to two other agents and if the agent's commission is fixed on the basis of the player's net income under the employment contract.
2. According to the doctrine of *judicial estoppel*, a party to pending proceedings is prevented from adopting a position contrary to what it had adopted in earlier proceedings in which a final and binding decision has been rendered.
3. There is no cap in the applicable Players' Agents Regulations on the amount of the remuneration of an agent who has been contracted by a club. The FIFA Regulations on Working with Intermediaries which came in force as of 1 April 2015 only recommend that the remuneration due to the intermediary be of 3% of the player's basic gross income. Furthermore, also Swiss law does not foresee a mandatory cap on the amount of the remuneration of an agent contracted by a club. Therefore, when asked to reduce an allegedly excessive agent's fee in application of Article 417 of the Swiss Code of Obligations (CO), the adjudicating body must observe a degree of deference as the parties are, to a certain extent, free to determine the amount of the commission and as the principle of freedom of contract commands that the judge abides by the parties' agreement. To determine if the remuneration is excessive, the adjudicating body must assess all the objectively relevant elements and take into account the concrete circumstances of the matter before it. It can only consider applying Article 417 of the CO if there manifestly exist exceptional circumstances pointing towards the excessive

**nature of the commission due.**

- 4. An agent's commission corresponding to 5% 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 the player transferred with the agent's intervention spent at his new club. Finally, in the absence of any evidence to the contrary or any stipulation in the agent's contract 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. THE PARTIES**

1. Al Ittihad FC ("Appellant" or "Ittihad") is a Saudi Arabian professional football club and a member of the Saudi Arabian Football Federation ("SAFF"). The latter is a member of the Fédération Internationale de Football Association ("FIFA").
2. Daniel Gonzales Landler ("Respondent" or "Agent") is a football intermediary of Bolivian nationality.

## **II. INTRODUCTION**

3. This matter is related to an appeal filed by Ittihad against the decision rendered by the Single Judge of the FIFA Players' Status Committee ("FIFA PSC") on 22 April 2015 ("Appealed Decision"). The grounds of the Appealed Decision were notified to the Parties on 22 February 2016.
4. The subject matter of this appeal basically touches on whether or not the Appellant is obliged to pay the Respondent the commission following an agreement entered into between the Parties for the transfer of the Brazilian player D. ("the Player") from the Brazilian Club Regatas de Vasco da Gama ("Vasco da Gama") to Ittihad.

## **III. THE FACTUAL BACKGROUND**

5. The facts leading to the present arbitration as presented by the Parties are closely and inseparably linked to the roles played by two other licensed football agents, Mr. Eduardo Uram ("Eduardo") and Mr. Ghassan Waked ("Ghassan") in the Player's transfer from Vasco da Gama to Ittihad pursuant to the conclusive findings made by the FIFA PSC and the Court of Arbitration for Sport ("CAS") in proceedings involving the two aforementioned agents (CAS 2015/A/4112 and CAS 2015/A/4250). As such, the Sole Arbitrator finds it pertinent to address himself to the proceedings involving Eduardo and Ghassan in aiding his appreciation of these arbitration proceedings.

6. The facts leading to the present arbitration can be summarized as follows.

**a) Ittihad's contractual relationship with the Agent**

7. On 15 July 2012, Eduardo, a licensed football agent acting on behalf of the Player wrote to the Appellant in relation to the Player's projected transfer from Vasco da Gama to Ittihad, informing the latter as follows:

*"(...).*

*(...) we would like to confirm that we've received (...) your proposal towards [D.] for a working contract (...) of 3 (three) years, plus an optional year with ITTIHAD CLUB.*

*Before that, we've acknowledged that there is an offer from ITTIHAD CLUB to CR Vasco da Gama, and, there is already a principle of agreement between two clubs, and the only point pending is the agreement with the player.*

*(...) we would like to invite Mr. Daniel Gonzalez, officially representing ITTIHAD CLUB, for a meeting (...) to discuss details of the possible future settlement between ITTIHAD CLUB and the player himself.*

*Such details to be discussed are: a) schedules of payments of the amounts inserted on the proposal to the Player; b) the terms that rule the one year more option; c) personal achievement bonuses; d) plus all the matters concerning his personal living while in Saudi Arabia (...).*

*The fixed amount inserted on the proposal is considered satisfactory and shall not be discussed in this meeting. The last point to be discussed would be a settlement between ourselves (agents) concerning the intermediation fees.*

*(...)"*

8. Thereafter, on 22 July 2012, the Parties entered into an agreement ("Commission Agreement") through which Ittihad undertook to pay the Agent a commission of USD 400,000 ("Commission") in consideration for the Agent's services in facilitating the Player's transfer to Ittihad.

9. The relevant parts of the Commission Agreement provided as follows:

*"(...)*

*2. The services of the Agent that the Club were asking for are:*

- a. to negotiate the transfer fee;*
- b. to negotiate player terms;*
- c. to set a payment schedule convenient to the Club; and*
- d. to close the transaction contracts tying all three parties.*

*3. The indicated task of the agent shall end with the signature of the contracts with the Club and the Player (...).*

4. *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 5% (five percent) of the total value of the Player's contract with the Club.*
5. *The total value of the Player's contract is \$8,000,000.00 (...) NET. Therefore, the total commission for the guaranteed part of the contract being \$400,000.00 (...).*
6. *The Commission is to be paid in 1 (one) instalment no later than 15 August 2012.*
7. *(...).*
8. *There shall be no deductions, set-off or any reduction in the amount payable to the Agent under any circumstances.*  
*(...).*
13. *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. (...)*

**b) Ittihad's contractual relationship with the agents Ghassan Waked and Eduardo Uram**

10. On 21 July 2012, Ittihad entered into another agency agreement with Ghassan Waked, ("Ghassan Agreement"), in which this agent was specifically "*acting here for the Club in its recruitment of the Brazilian footballer [D.] from Club Regatas de Vasco de Gama in Brazil*". The relevant parts of the Ghassan Agreement provided as follows:

*"1. The services of the Agent that the Club were seeking for are:*

*To negotiate the transfer fee;*

*To close the transaction and contracts tying all three parties.*

*(...)"*

11. On the same date, i.e. on 21 July 2012, Ittihad signed a third agency agreement with the agent Eduardo Uram ("Eduardo Agreement") whose relevant parts provided as follows:

*"(...)*

*(i) the CLUB acquired the federative rights of football player [D.] (...) from Brazilian club C.R. Vasco da Gama and signed a labor contract with the Player for a period of 03 (three) years, with possibility of extension for another 01 (one) year (...);*

*(ii) the AGENT participated in the negotiations for hiring the Player, and negotiated with the CLUB the payment of an agency fee for these services.*

*Thus, the [Parties] hereby agree to enter into this AGENCY AGREEMENT, subject to the following terms and conditions:*

1. *The CLUB shall pay to the AGENT as remuneration for mediation services on the signature of the contract with the Player, the initial amount equivalent to US\$ 400,000,00.*

(...)"

12. On 21 July 2012, Ittihad signed an employment contract ("Employment Contract") with the Player valid for three seasons, this being the period 23 July 2012 to 30 June 2015. The Employment Contract also contained an extension clause allowing Ittihad to exercise an option of extending the contract to a fourth year, i.e. the 2015-2016 season.
  13. At different points in time, Ghassan and Eduardo filed claims against Ittihad before the FIFA PSC. They sought to enforce the payment of their respective commissions, which led to the following FIFA PSC decisions:
    - a) A decision ordering Ittihad to pay Ghassan EUR 500,000 plus interest at 5% p.a. from 16 November 2012 until the date of effective payment; and
    - b) A decision ordering Ittihad to pay Eduardo USD 420,000 plus interest at 5% p.a. from 15 October 2012 until the date of effective payment.
  14. Ittihad appealed both FIFA PSC decisions to the CAS, respectively arguing as follows:
    - a) Ghassan was not entitled to any commission because he did not perform any services. Instead, it was Eduardo and Mr. Daniel Gonzales (the Agent) who represented the Player and Ittihad respectively in the negotiations to the Player's employment contract with Ittihad. Ghassan's commission was also excessive and ought to be reduced pursuant to Article 417 of the Swiss Code of Obligations ("CO") given that the Player had merely served 1/12<sup>th</sup> of the Employment Contract.
    - b) Eduardo was not entitled to any commission because (i) the parties had already terminated the Eduardo Agreement through an oral mutual termination agreement ("Termination Agreement"); and (ii) Eduardo had induced the Player to terminate the Employment Contract. Eduardo's commission was also excessive and ought to be reduced to an amount not exceeding the 3 months the Player spent at Ittihad in application of Article 417 of the CO. They also sought to reduce the commission on grounds that it exceeded the amount established in the FIFA Regulations on Working with Intermediaries, which stood at 3% of the player's basic income.
  15. Both appeals were dismissed on the grounds highlighted in section III. d) below.
- c) The FIFA Players' Status Committee Proceedings between the Appellant and the Respondent**
16. On 8 September 2014, the Agent filed a claim against Ittihad before the FIFA PSC seeking payment of the Commission. He also sought an annual interest of 5% from the said amount calculated with effect from the date it fell due.
  17. Ittihad neither replied to the FIFA PSC's summons in these proceedings nor did it file any defence.

18. On 22 April 2015, the FIFA PSC rendered the Appealed Decision and held as follows:

- “1. *The claim of the Claimant, Daniel Gonzales Lander, is accepted.*
  2. *The Respondent, Al Ittihad, has to pay to the Claimant, Daniel Gonzales Lander, within 30 days as from the date of notification of this decision, the amount of USD 400,000 plus an interest rate of 5% interest per annum on the said amount from 16 August 2012 until the date of effective payment.*
- (...)”.

19. The Appealed Decision was based on the following grounds:

- a) By ignoring the FIFA PSC’s summons, Ittihad was assumed to have waived its right to self-defence and had consequently admitted the Agent’s claims. The matter was therefore determined on the basis of the documents on file in accordance with Article 9.3 of the FIFA Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (“the FIFA Procedural rules”); and
- b) Ittihad had breached the doctrine of *pacta sunt servanda* and was therefore liable to pay the Agent the agreed Commission of USD 400,000, which fell due on 15 August 2012, together with interest at 5% per annum with effect from 16 August 2012 until the date of effective payment.

**d) The CAS decisions in relation to the Eduardo and Ghassan’s claims against Ittihad**

20. Because of its connection and relevance to the decision of the current appeal, the Sole Arbitrator would like to refer to the CAS decisions in relation to the related disputes involving the other two agents (Eduardo and Ghassan):

- CAS 2015/A/4112 - in relation to the dispute between Ittihad and Eduardo - in which it dismissed the appeal and made the following findings:
  - a) Ittihad had failed to discharge its burden of proving that Eduardo had accepted the terms of the termination agreement;
  - b) Ittihad had failed to prove that the Player committed “*a contractual breach (...) without just cause*”. In any case, if indeed Eduardo had induced the Player to breach the Employment Contract, then he ought to have been subjected to disciplinary sanctions pursuant to the FIFA Disciplinary Code;
  - c) The FIFA Regulations on working with intermediaries’ recommendation that an intermediary’s commission be fixed at 3% of the player’s basic gross income are by nature not mandatory (i.e. as they are (i) mere “recommendations” and ii) were not in force at the moment of the signature of the Eduardo Agreement); and
  - d) Eduardo’s commission (5% of the Player’s basic income) was compatible with Swiss law and the applicable FIFA Players’ Agents Regulations.
- CAS 2015/A/4250 - in relation to the dispute between Ittihad and Ghassan - in which it dismissed the appeal and made the following findings:

- a) Ittihad had failed to discharge its burden of proving that Ghassan did not render any services;
- b) The three agents, i.e. Ghassan, Eduardo and the Agent performed different roles;
- c) Ghassan's services and obligations – which he fulfilled - were strictly limited to the club to club transfer, i.e. negotiating the transfer fee between Ittihad and Vasco da Gama;
- d) The Agent's (i.e. Mr. Daniel Gonzales) obligations were limited to representing Ittihad in negotiating the terms and conditions of the employment contract to be entered into with the Player. This is corroborated by the fact that his commission was based on the value of the Employment Contract;
- e) Eduardo's role was limited to representing the Player in negotiating the terms and conditions of the employment contract to be entered into with Ittihad;
- f) If Ittihad had inadvertently entered into two separate contracts to obtain the same service, then this could not be to the detriment of Ghassan or the Agent (i.e. Mr. Daniel Gonzales); and
- g) Ghassan's commission was not excessive. There was no clause in the Ghassan Agreement subjecting the amount of his commission to the Player completing the full term of the Employment Contract. In any case, a 10% commission was generally deemed to be fair and proportionate.

#### **IV. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

21. On 10 March 2016, the Appellant filed its Statement of Appeal before the CAS, pursuant to Article R48 of the Code of Sports-related Arbitration (CAS Code") and proposed that the matter be resolved by a sole arbitrator. In its Statement of Appeal, the Appellant asked for the panel, once composed, to request for a copy of the FIFA File and that the deadline for filing the appeal brief start running 10 days upon receipt of the FIFA File.
22. On 11 March 2016, the CAS Court Office granted the Respondent 5 days within which to state whether he consented to the Appellant's request for the matter to be settled by a sole arbitrator and to the Appellant's application for the panel, once constituted, to request a copy of the FIFA File and to fix the deadline for filing the Appeal Brief at 10 days following its receipt of the FIFA File.
23. On 14 March 2016, the Respondent consented to having the matter resolved by a sole arbitrator and to the Appellant's application for the panel, once constituted, to request a copy of the FIFA File. In this regard, and if the Appellant's application were granted by the Panel, the Respondent consented to have the deadline for filing the Appeal Brief run with effect from 10 days following its receipt of the FIFA File.

24. On 4 May 2016, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:
  - Sole Arbitrator: Mr. Rui Botica Santos, attorney-at-law, Lisbon, Portugal
25. On 6 May 2016, the CAS Court Office informed the Parties that the Sole Arbitrator had ordered for a copy of the FIFA File and that the Appellant's deadline for filing the Appeal Brief would run 10 days following its receipt of the FIFA File.
26. On 12 May 2016, the CAS Court Office received a copy of the FIFA File, which was forwarded to the Parties on the same day.
27. On 20 May 2016, the Appellant filed its Appeal Brief together with documents and exhibits which it intended to rely on.
28. On 10 June 2016, the Respondent filed his Answer together with documents and exhibits which he intended to rely on. On the same date, the Parties were invited to state whether they wanted a hearing or preferred to have the matter decided on the basis of their written submissions.
29. On 13 and 15 June 2016, the Parties respectively informed the CAS Court Office of their wish for a hearing.
30. On 21 June 2016, the Respondent requested that the hearing be conducted in Spanish given that he and the Parties' lawyers were Spanish speakers. The Appellant consented to this request.
31. On 21 June 2016, the CAS Court Office informed the Parties that the Sole Arbitrator had agreed to conduct the hearing in Spanish. The Parties were nevertheless informed that English remained the language of the proceedings and that the final award would be rendered in English.
32. On 4 July 2016, the CAS Court Office issued an Order of Procedure, which was duly signed by the Parties.
33. On 1 September 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both Parties confirmed that they had no objection to the composition of the Panel.
34. At the hearing, the Panel was assisted by Mr. Antonio de Quesada, Counsel to the CAS. The following persons attended the hearing:

*For the Appellant*

- Mr. Juan de Dios Crespo Pérez, attorney-at-law, Ruiz-Huerta & Crespo Abogados, Valencia, Spain

*For the Respondent*

- Mr. Alberto Ruiz de Aguiar, attorney-at-law, Sportia Law, Madrid, Spain



- Daniel Gonzales Landler – the Respondent herein was heard as a witness by conference call.
35. At the end of the hearing, the Parties stated that they were satisfied with the manner in which the hearing had been conducted and that their right to be heard had been respected.

## V. THE PARTIES' RESPECTIVE POSITIONS

36. Below is a summary of the facts and allegations raised by the Parties. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

### V.1 The Appellant's submissions

37. The Appellant essentially avers as follows:
- a) The Agent played no role in Ittihad's acquisition of the Player's services. In particular, the Agent failed to perform any of the acts specified on clause 2 of the Commission Agreement.
  - b) The persons who rendered services in negotiating the Player's transfer fee and "*closing the transaction and contracts tying all three parties*" were Ghassan and Eduardo. This is corroborated by the findings respectively made in CAS 2015/A/4250 and CAS 2015/A/4112.
  - c) The Agent is therefore not entitled to any commission. CAS jurisprudence (CAS 2009/A/1019), requires a causal link between the player's transfer and the agent in order for the latter to be entitled to a commission.
  - d) Corroborating the above are Articles 412 and 413 of the CO, which respectively provide as follows:
    - Article 412:
      - "1. *A brokerage contract is a contract whereby the broker is instructed to alert the principal to an opportunity to conclude a contract (...).*
      - 2. *(...)*".
    - Article 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*".
  - e) The Commission agreed is in any case excessive and must be reduced pursuant to Article 417 of the CO, which states that "*[w]here an excessive fee has been agreed for identifying an*

*opportunity to enter into or facilitating the conclusion of an individual employment contract (...), on application of the debtor the court may reduce the fee to an appropriate amount”.*

- f) In order to benefit from a reduction of the Commission as provided for under Article 417 of the CO, a party must prove that:
- i. The Commission was arrived at following an agreement between the Parties;
  - ii. The Commission relates to the conclusion of an individual employment contract; and
  - iii. The Commission is excessive.
- g) Ittihad has met all the requisites for a reduction of the Commission as provided for under Article 417 of the CO because:
- i. The Parties agreed on the Commission;
  - ii. The Commission was brought about by the Employment Contract entered into between Ittihad and the Player;
  - iii. The Player, who had only played 8 matches for Ittihad, terminated the Employment Contract barely 3 months into the 36 month duration of the Employment Contract, meaning he only honored one twelfth (1/12) of the Employment Contract. Under the circumstances, the Commission sought by the Agent is excessive.
- h) The Commission should thus be proportionately reduced to reflect the one twelfth (1/12) period of service rendered by the Player under the Employment Contract. This means the Agent is entitled to a maximum commission of USD 33,333.33 (i.e. 1/12 x USD 400,000).
38. The Appellant concludes its submissions by requesting the CAS:
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 \$33,333.33 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 Arbitrators fees”.*

## **V.2 The Respondent’s submissions**

39. The Respondent essentially avers as follows:
- a) Neither Ghassan nor Eduardo were tasked with representing Ittihad in negotiating the terms of the Player’s employment contract.

- b) As evidenced in Eduardo's letter dated 15 July 2012, Ittihad exclusively mandated Ghassan to negotiate and reach an agreement with Vasco da Gama on the transfer fee to be paid for the Player's services while Eduardo was tasked with representing the Respondent in arriving on the terms and conditions of the Player's employment contract with Ittihad. Corroborating this is Ghassan's representation contract with Ittihad, pursuant to which Ghassan's commission has been fixed on the basis of the transfer fee, unlike the Agent's commission under the Commission Agreement, which has been fixed on the basis of the Player's remuneration.
- c) Therefore, Ittihad cannot claim that the Agent did not render any services in its acquisition of the Player. *A contrario*, this mandate was exclusively given to the Agent.
- d) In addition, the doctrine of estoppel prevents Ittihad from arguing that the Agent did not render any services. Indeed, it was Ittihad's position in CAS 2015/A/4250 that it was the Agent (and not Ghassan) who represented Ittihad in its acquisition of the Player.
- e) In any case, Ittihad has not adduced any evidence substantiating its allegations that the Agent did not render any services.
- f) Ittihad's request for the Commission to be reduced on grounds that the Player only served 1/12<sup>th</sup> of the Employment Contract should be dismissed because there is no link between the Employment Contract and the Commission Agreement, which are independent of each other, and neither does the Commission Agreement subject the Commission to the Player serving the entire duration of the Employment Contract (CAS 2015/A/4250).
- g) The doctrine of *pacta sunt servanda*, means that the Agent is entitled to the Commission, which in any case is not excessive because in CAS 2015/A/4112, an agreement entitling an agent to a 5% commission of the player's basis income was held to be proportionate and compatible with the FIFA Players' Agents Regulations and Swiss law.

40. The Respondent concludes his submissions by requesting the CAS:

- “1. To reject the Appellant's appeal in its entirety.
- 2. To confirm the decision passed by the Single Judge of the Players' Status Committee in the meeting held in Zurich, Switzerland, on 22 April 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”.

## VI. JURISDICTION OF THE CAS

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

*“An appeal against the 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”.*

42. The jurisdiction of the CAS, which is not disputed, derives from clause 13 of the Commission Agreement and also Article 67(1) of the FIFA Statutes (2015 edition) which states as follows:

*“Appeals 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”.*

43. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

## **VII. ADMISSIBILITY**

45. The grounds of the Appealed Decision were communicated to the Appellant on 22 February 2016. The Statement of Appeal was filed on 14 March 2016. This was in accordance with the 21-day deadline fixed under Article 67.1 of the FIFA Statutes.

46. The admissibility of the appeal is further confirmed by the Order of Procedure duly signed by the Parties and by the lack of any objection by Respondent.

47. It follows that the appeal is admissible.

## **VIII. APPLICABLE LAW**

48. 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”.*

49. Article 66.2 of the FIFA Statutes states that:

*“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”.*

50. Therefore, the Panel finds that the dispute must be decided in accordance with the FIFA Regulations and, subsidiarily by Swiss law.

## **IX. MERITS OF THE APPEAL**

51. The Parties have extensively addressed the Sole Arbitrator on the issues they consider to be key to these proceedings. Ittihad in particular contends that the Agent did not render the services

specified in clause 2 of the Commission Agreement and that the Commission is in any case excessive and ought to be reduced. The Agent insists that he rendered the agreed services and refutes Ittihad's assertions regarding the alleged excessive nature of the Commission.

52. The issues for determination therefore are:
- a) What was the Agent's main task under the Commission Agreement and did he perform it?
  - b) In case of an affirmative to the above, is the Commission he is entitled to excessive?

**a) What was the Agent's main task under the Commission Agreement and did he perform it?**

53. This is indeed the starting point to this case as ostensibly brought to the Sole Arbitrator's attention by the Parties themselves through their reference to the facts arising from CAS 2015/A/4250 and CAS 2015/A/4112.

54. Ittihad avers that the Agent was tasked with negotiating the Player's transfer fee, the terms of his Employment Contract, negotiating a payment schedule convenient to the club and "*closing the transaction contracts tying all three parties*" (clause 2 of the Commission Agreement).

55. The Agent by implication asserts that his duty was exclusively limited to representing Ittihad in negotiating the terms of the Employment Contract. Both Parties refer the Sole Arbitrator to the facts arising in CAS 2015/A/4250 and CAS 2015/A/4112.

56. The first point of reference to this issue has to be the Commission Agreement from which the Sole Arbitrator takes specific note of clause 2, which states as follows:

*"The services of the Agent that the Club were asking 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 contracts tying all three parties".*

57. In addition to clause 2, the Parties further agreed under clause 3 of the Commission Agreement that "[i]he indicated task of the agent shall end with the signature of the contracts with the Club and the Player (...)"

58. It is therefore apparent from clause 2 of the Commission Agreement as read together with clause 3 thereof that the Agent's ultimate task was to ensure that the Player signed the Employment Contract. Even if the Agent was tasked with discharging all the tasks mentioned in clause 2, there is no express provision in the Commission Agreement subjecting his right to the Commission on him cumulatively performing all the aforementioned tasks. To the contrary,

clause 3 implies that the Agent would only be entitled to the Commission if his duties culminated in the Player signing the Employment Contract.

59. The Sole Arbitrator is of the view that the tasks performed by the Agent must be interpreted whilst bearing in mind those vested on and performed by the 2 other agents (Eduardo and Ghassan) pursuant to the agency agreements Ittihad voluntary entered into with the latter agents on the same date, and the tasks ostensibly vested on the Appellant as highlighted in Eduardo's letter dated 15 July 2012 (cf. para. 7 *supra*).
60. The tasks detailed in clause 2 of the Commission Agreement were purely aimed at reinforcing Ittihad's primary goal, which was to see the Player sign the Employment Contract while it is clear to the Sole Arbitrator that the Agent's main tasks were basically those identified in the abovementioned letter.
61. The following additional facts further corroborate the spirit and the Parties' intention to have clause 2 rank as ancillary to the Player signing the Employment Contract:
  - a. The Agent's Commission was fixed on the basis of the Player's net income under the Employment Contract (cf. clause 5 of the Commission Agreement);
  - b. Ittihad had simultaneously assigned two of the ancillary duties mentioned in clause 2 of the Commission Agreement to Ghassan as evidenced in clause 1 (a) of the Ghassan Agreement having all three agents collaborate together to ensure that the Player joined Ittihad;
  - c. The Commission Agreement was signed one day after the execution of the Ghassan and Eduardo agency agreements and the Employment Agreement. This fact also corroborates Ittihad's acknowledgement of its satisfaction with the services performed by the Agent and its intention to pay in full the Commission; and
  - d. The findings made in CAS 2015/A/4250 that the agent's obligations were limited to representing Ittihad in negotiating the terms and conditions of the Employment Contract.
62. With specific regard to fact (d) above, the Sole Arbitrator must necessarily take judicial notice that the findings made in CAS 2015/A/4250 (which are now final and binding) are true given that they have already been heard and determined by another previous panel in which Ittihad was a party.
63. It therefore follows that the Agent's key task under the Commission Agreement was to represent Ittihad in negotiating the terms of the Employment Contract.
64. Having established the Agent's role under the Commission Agreement as that of negotiating the terms and conditions of the Employment Contract, the Sole Arbitrator must now determine whether or not he indeed performed this duty.
65. Pursuant to Article 8 of the Swiss Civil Code as mirrored in Article 12.3 of the FIFA Procedural Rules, "[t]he burden of proving an alleged fact rests on the party who bases his claim on that fact". In this

regard, the burden of proving that the Agent negotiated the terms and conditions of the Employment Contract lies with the Agent.

66. The Agent insists that neither Ghassan nor Eduardo were tasked with representing Ittihad in negotiating the terms of the Employment Contract. He cites Eduardo's letter dated 15 July 2012 which he says is clear that Ghassan was tasked with negotiating the Player's transfer fee while Eduardo was tasked with acting for the Player in negotiating the terms and conditions of the Employment Contract. The Agent further refers to Ittihad's submissions in CAS 2015/A/4250 that it was the Agent (and not Ghassan) who represented Ittihad in its acquisition of the Player.
67. After hearing the Agent's testimony at the hearing and based on the findings in CAS 2015/A/4112 and CAS 2015/A/4250, the Sole Arbitrator acknowledges that the Agent indeed intervened and rendered his services in negotiating the terms and conditions of the Employment Agreement (clause 2. b., c. and d. of the Commission Agreement). This is further corroborated by the fact that the Agent's name is present in the signature page of the Employment Agreement.
68. The Sole Arbitrator also notes that the Appellant has not adduced any evidence that could directly or indirectly cast doubt on the Agent's involvement in the negotiation of the Employment Agreement with the Player on behalf of Ittihad.
69. The Appellant is on record in CAS 2015/A/4250 as saying that the persons who respectively represented the Player and Ittihad in the negotiations leading to the Employment Contract are Eduardo and the Agent. Under these circumstances, the doctrine of judicial estoppel prevents Ittihad from adopting a position contrary to what it had particularly adopted in CAS 2015/A/4250, otherwise such behavior would allow a party to abuse of the court process. The Sole Arbitrator therefore rejects Ittihad's assertion that the Agent did not perform the agreed services.
70. In addition, a final and binding judicial finding has also been made in CAS 2015/A/4250 that:
  - a) Ghassan's role, which he performed, was strictly limited to the club to club transfer, i.e. negotiating the transfer fee between Ittihad and Vasco da Gama; and
  - b) Eduardo's role was limited to representing the Player in negotiating the terms and conditions of the Employment Contract.
71. Therefore, Ittihad cannot by implication argue that the terms and conditions of the Employment Contract were negotiated by Ghassan and Eduardo.
72. In view of the foregoing, the Sole Arbitrator finds the Agent to have satisfactorily discharged his burden of proof and therefore, he is entitled to receive a commission as consideration for the services which he had already rendered in favor of the Appellant.

**b) Is the Commission excessive?**

73. Ittihad invokes Article 417 of the CO and wants the Commission reduced, claiming it is excessive and should be proportionately reduced to not less than USD 33,333.33 (i.e.  $1/12 \times$  USD 400,000) in order to correspond to the one twelfth (1/12) period of service rendered by the Player under the Employment Contract. During the hearing and following the Agent's confirmation that he only performed task b of clause 2 of the Commission Agreement (which absorbs items c. and d. of the same clause), Ittihad made a subsidiary submission that in the worst case scenario, only 50% of the services specified in the Commission Agreement had been performed and that the Agent was therefore only entitled to 50% of the Commission.
74. Invoking the doctrine of *pacta sunt servanda*, the Agent rejects Ittihad's assertions, saying there is no link between the Employment Contract and the Commission Agreement, and that the same are independent of each other. He also cites the reasoning in CAS 2015/A/4250 and submits that the Commission Agreement does not subject the Commission to the duration of the Employment Contract. He says the Commission is compatible with the FIFA Players' Agents Regulations and Swiss law. In relation to the argument that only 50% of the services have been performed and Ittihad's subsequent argument that he was only entitled to 50% of the Commission, the Agent submits that the three agency agreements should be analyzed together and that the Agent's main task, which he performed, was to negotiate the terms and conditions of the Employment Agreement on behalf of Ittihad.
75. In relation to Ittihad's assertion that the Commission be proportionately reduced to the length of services rendered by the Player, the Sole Arbitrator concurs with the finding in CAS 2015/A/4112 that the Commission Agreement contains no clauses conditioning the Commission to any acts or events, i.e. it is not subject and/or conditional to the length of service rendered by the Player to Ittihad, or to any other condition whatsoever.
76. As regards Ittihad's contention that the services related to the "negotiation of the transfer fee" have not been performed, the Sole Arbitrator finds this to have no impact on the established fee as per the findings made in the previous section of this award. Additionally, the Sole Arbitrator underlines that (i) the Commission Agreement contains no direct or indirect link between the Commission and each of the services performed / not performed; and (ii) what is essential is that the acts of all 3 agents culminated in the successful conclusion of each of the roles placed upon them, with the Agent concentrating on negotiating the terms and conditions of the Employment Agreement. It was Ittihad who chose to task Ghassan and the Agent with overlapping roles. The three agency agreements must therefore be interpreted in accordance with Ittihad's will and intention, which was to have them perform a number of acts which would ultimately see the Player sign the Employment Agreement.
77. Pursuant to CAS jurisprudence, an arbitral tribunal is as a general rule required to uphold the doctrine of freedom of contract in determining whether or not a particular commission is excessive. A tribunal can only consider applying Article 417 of the CO<sup>1</sup>, and hence depart from

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<sup>1</sup> "Where a disproportionate brokerage fee been agreed upon for giving an opportunity to conclude an individual employment or real property purchase contract, the judge may, upon request of the obligor, reduce such fee to a reasonable amount".



this rule if there manifestly exist exceptional circumstances pointing towards the excessive nature of the commission due (ATF 106 II 56, JdT 1980 I 279). This was indeed emphasized by the panel in CAS 2015/A/4112 at paragraph 77, which stated as follows:

*“Article 417 only applies to agency agreements concerning employment contracts or real estate purchase contracts (François Rayroux, in Thévenoz / Werro, Commentaire Romand, Helbling & Lichtenbahn, Bâle, 2012, ad. Article 417, n 2, p. 2499). When he applies this provision, the Judge must observe a degree of deference as the parties are, to a certain extent, free to determine the amount of the commission and as the principle of freedom of contract commands that the judge abides by the parties’ agreement. The application of Article 417 CO is exceptional by nature (ATF 106 II 56, JdT 1980 I 279)”.*

78. First of all, it is the Sole Arbitrator’s view that pursuant to Article 417 of the CO his powers are limited to reviewing a “disproportionate” commission to an amount that is deemed “reasonable”, i.e. “proportional” and not to a level that he thinks fair.
79. Relating the above to the case at hand, the Sole Arbitrator notes that no evidence has been adduced to the effect that Ittihad was either coerced or unduly influenced into agreeing on the Commission that was fixed. The presumption therefore is that the Parties freely and voluntarily agreed on the Commission. In addition, if the Parties’ indeed intended to fluctuate or vary the Commission depending on the Player’s stay at Ittihad, then the same should have been reflected in the Commission Agreement. There is nothing to this effect, and the Sole Arbitrator is in this regard guided by the findings in CAS 2015/A/4250 which stated as follows at paragraph 88:

*“(…). 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. (...) 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”.*

80. Under the circumstances and in strict compliance with the doctrine of freedom of contract, the Sole Arbitrator finds no room for the application of Article 417 of the CO.
81. Even assuming Article 417 of the CO were in any way applicable, the Sole Arbitrator is not comfortably satisfied that the Commission, which represents 5% of the Player’s basic income under the Employment Contract is manifestly and grossly excessive or “disproportional” for the following reasons:
- a) It is perfectly in line with the FIFA Players’ Agents Regulations, which do not contain any cap on the maximum amount of commission an agent can charge for his services. This is indeed corroborated by CAS 2015/A/4112 at paragraph 69, which stated that *“(…) there is no cap on the amount of the agent’s remuneration. Article 20 para. 5 of the applicable FIFA Players’ Agents Regulations only states that “A players’ agent who has been contracted by a club shall be remunerated for his services by payment of a lump sum that has been agreed upon in advance”;*
  - b) A 10% commission was deemed to be fair and proportionate in CAS 2015/A/4250; and

- c) It is in line with Swiss law, which does not cap the maximum amount of commission an agent can charge for his services. This was also emphasized in CAS 2015/A/4112 (see letter of 14 March 2014 of the Secrétariat d'Etat à l'économie SECO, du Département fédéral de l'économie DFE, entitled "*L'activité d'agent de joueurs de football; Conditions légales prévues par la loi fédérale sur le service de l'emploi et la location de services - LSE; RS 823.11*").
82. In the present case, the Parties agreed on a commission of 5% of the Player's basic income for the entire duration of the Employment Agreement (8 Mio. USD). This Commission (USD 400,000) is compatible with the applicable FIFA Players' Agents Regulation and Swiss Law. For the abovementioned reasons, the Sole Arbitrator does not find the Commission to be excessive or disproportionate. Even if it surpasses the recommendations contained in the New Regulations, these regulations are not mandatory and were not in force when the Commission Agreement was signed.
83. In view of the foregoing, and pursuant to the principle of *pacta sunt servanda*, the Sole Arbitrator finds that the full amount of the Commission is not excessive. It must therefore be paid to the Agent.
- c) Conclusion**
84. The Panel finds that the Agent fulfilled his ultimate duty as mandated in the Commission Agreement by ensuring that the Player signed the Employment Contract. He is therefore entitled to the Commission, which, the Sole Arbitrator finds not to be excessive or disproportionate.
85. Consequently, the appeal is dismissed in its entirety and the FIFA Players' Status Committee decision dated 22 April 2015 is confirmed. The Sole Arbitrator notes that the Appealed Decision awarded interest at 5% per annum from the date ensuing due date for payment. The Respondent wants the Appealed Decision upheld and for this reason the Appellant must pay the interest ordered therein until effective payment of the USD 400,000.

## **ON THESE GROUNDS**

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

1. The appeal filed by Al Ittihad FC against the decision issued on 22 April 2015 by the Single Judge of the FIFA Players' Status Committee is dismissed.
2. The decision issued on 22 April 2015 by the Single Judge of the FIFA Players' Status Committee is confirmed.

(...)

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