Arbitration CAS 2015/A/3962 Ciro José Sánchez v. Enzo Nicolás Pérez, award of 7 December 2016

Panel: Mr José María Alonso Puig (Spain), President; Mr Michele Bernasconi (Switzerland); Mr Hernán Jorge Ferrari (Argentina)

Football
Breach of contract of representation between a player and an agent
Determination of FIFA standing to be sued according to article 75 CC
CAS power of review
Relevant criterion to determine whether the dispute is national or international under the 2008 PAR
Annulment of the agent's right to compensation due to a conflict of interest

1. **Neither the CAS Code nor FIFA Regulations contain specific rules on the right to be sued. Pursuant to CAS case law, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it. In general, pursuant to art. 75 of the Swiss Civil Code (SCC), as interpreted by case law, a decision made by an association cannot be turned aside without the association being summoned. However, it is also understood that art. 75 SCC does not apply indiscriminately to every decision made by an association, but its applicability has to be determined on a case-by case basis. When the decision taken by the association is not related to a matter of its own but merely relates to a contractual relationship between its members, a so-called "horizontal matter", acting as a first instance decision maker, art. 75 SCC is not necessarily applicable. In this respect, a FIFA Single Judge's decision that declines jurisdiction is not necessarily a decision that requires a party to name FIFA as a respondent in the proceedings before the CAS, in line with Art. 75 SCC since FIFA acts as a neutral entity that is called to settle a strict contractual dispute between its members in a matter that does not concern FIFA's relationship to one of its members. Furthermore, this neutral position is not changed by the fact that appellant has the chance to get the case reviewed by CAS pursuant to FIFA's recognition of the jurisdiction of the CAS in the FIFA Statutes.**

2. **Pursuant to the jurisprudence of the Swiss Federal tribunal, the CAS full power of review referred to in Art. R57 of the CAS Code is not limited by the fact that the first instance adjudicator decided that it did not have jurisdiction. The CAS panel can chose between a new decision that replaces the previous decision or referring the case back to the previous instance. No limits are imposed on this choice.**

3. **The relevant criterion to determine whether a dispute between a players' agent and a player is national or international under the 2008 FIFA Players' Agents Regulations (PAR) is the place of registration of the parties at the time when the dispute arose and not the parties' nationalities.**

4. Art. 19.8 of the 2008 PAR provides a clear prohibition of double brokerage and conflict of interest. Yet, a valid agency contract is not nullified by a situation of conflict of interest. It may be breached or become partially unenforceable. In this regard, even if it is undisputable that an agent brokered for a player and helped the latter sign for a club, triggering the contractual right to compensation, the agent's undisclosed conflict of interest is contrary to applicable clear loyalty obligations and amounts to a substantial breach of contract, which determines the loss of the right of the agent to a compensation. This conclusion is in line with art. 415 of the Swiss Code of Obligations (that would be applicable through the subsidiary application of Swiss Law).

1. PARTIES

1. Mr. Ciro José Sánchez (the "Appellant" or the "Agent") is a football agent licensed by the Argentinian Football Association (the "AFA").

2. Mr. Enzo Nicolás Pérez (the "Respondent" or the "Player") is an Argentinian football player, currently registered with the Spanish football club Valencia Club de Fútbol.

3. The Appellant and the Respondent are referred to collectively as the "Parties".

2. FACTUAL BACKGROUND

4. On 7 March 2011, the Parties signed a representation contract (the "Contract"), according to which the Appellant would have the power to represent and assist the Respondent with exclusive rights in the negotiation of every labor contract as well as in every transfer contract and sponsorship agreement the latter entered into as professional football player. According to the Contract, the duration was set until 6 March 2013.

5. Clause 3 of the Contract established the Agent's remuneration, amounting to 15% of any sums received by the Respondent from any agreements signed with the assistance of the Agent. Payments were due at the end of each sporting season.

6. Pursuant to clause 4, the Parties agreed that their relationship would be carried out on an exclusive basis.

7. Clause 6 of the Contract stated the following: *"The parties involved accept the decisions of the Supervisory and Decision making Body of the AFA and/or the other FIFA competent bodies".*

8. On 22 June 2011, the Player signed a 5-year contract with the Portuguese club Sport Lisboa e Benfica ("Benfica"), with the assistance of the Appellant. The Respondent's employment contract was valid until 30 June 2016 and provided a gross salary per season of EUR 1,123,596.

9. The Player was loaned from Benfica to the Argentinian club Estudiantes de la Plata ("Estudiantes") from February to June 2012. At the beginning of the sporting season 2012/2013 the Player returned to Benfica.

10. The Player played with Benfica during the seasons 2012/13 and 2013/14 and was called to the Argentinean national team for the FIFA World Cup 2014.

11. On 6 November 2013, the Appellant filed a claim with FIFA against the Player, claiming payment for amounts due for remuneration under the Contract for a total amount of EUR 337,078.80 (plus interests). On 14 October 2014, the Single Judge of the Players' Status Committee of FIFA (the "Single Judge") issued its decision, the grounds being notified to the parties on 11 February 2015 (the "Challenged Decision"). The Single Judge ruled that:

    1. *The claim of the Claimant, players' agent Ciro José Sánchez is not admissible.*
    2. *The final costs of the proceedings in the amount of CHF 23,000 are to be paid by the Claimant to FIFA. given that the Claimant, Ciro José Sánchez, has already paid the amount of CHF 3,000 as advance of costs at the start of the present proceedings, the latter has to pay the amount of CHF 20,000, within 30 days as from the date of notification of the present decision to FIFA to the following bank account (…).*

12. The Single Judge considered that the claim was not admissible since the dispute lacked international dimension, being the Agent licensed by the AFA and the Player of Argentinean nationality.

13. In January 2015, the Player was transferred to the Spanish club Valencia Club de Fútbol SAD.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 4 March 2015, the Appellant filed his Statement of Appeal against the Respondent with respect to the Challenged Decision, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code").

15. On 9 March 2015, the CAS informed FIFA of the filing of the Appeal, inviting FIFA to participate in the proceedings should it decide to do so, pursuant to Articles R54 and R41.3 of the CAS Code.

16. On 18 March 2015, the Appellant filed his Appeal Brief, pursuant to Article R51 of the CAS Code.

17. On 27 March 2015, FIFA informed the CAS that it did not intend to intervene in the proceedings.

18. On 20 April 2015, the CAS informed the Parties that the Panel appointed to decide on this matter was constituted as follows: Mr Lucio Colantuoni (nominated by the Appellant), Mr

Hernán Ferrari (nominated by the Respondent) and Mr José María Alonso (President of the Panel).

19. On 11 May 2015, the Respondent filed his Answer, pursuant to Article R55 of the CAS Code.

20. On 15 May 2015, the CAS acknowledged receipt of the Answer, inviting the Parties to comment on whether they preferred a hearing to be held in this case. On that same day the Respondent informed the CAS that it deemed a hearing to be unnecessary in this case. On 22 May 2015, the Appellant informed the CAS that it deemed a hearing to be necessary. Furthermore, the Appellant requested that it be allowed to file an additional written submission in order to reply to the Respondent's defence. On 26 May 2015, the Respondent objected to the requested additional written submission.

21. On 28 May 2015, the CAS informed the Parties that the Panel had decided to hold a hearing and reject the Appellant's request for an additional written submission noting, however, that during the hearing the Appellant would have full opportunity to provide its arguments and rebut the Respondent's Answer. The Appellant was also invited to provide his position on certain document production requests filed by the Respondent in his Answer. On 1 June 2015, the Appellant filed its comments, objecting to the evidentiary measures requested.

22. On 9 June 2015, upon consultation with the Parties, the CAS informed the Parties that the hearing would be held in Lausanne on 23 July 2015.

23. On 23 June 2015, the Respondent filed a new document, consisting of the new AFA's agents' regulations, requesting that such regulations be admitted pursuant to Article R56 of the CAS Code.

24. On 29 June 2015, the CAS sent to the Parties a copy of the Order of Procedure, which was duly signed by both Parties.

25. On 1 July 2015, the Appellant objected to the filing of the new document by the Respondent stating that it was irrelevant to the case at hand.

26. On 13 July 2015, the CAS informed the Parties that the Panel had decided to grant the Respondent's request for the production of documents, thus raising the request to the Appellant as well as to the relevant entities, i.e. Benfica and FIFA. The CAS also informed the Parties that the AFA's agents' regulations filed by the Respondent had been admitted into the file.

27. On 20 July 2015, the Respondent answered the Panel's order for evidentiary measures. On that same day, FIFA presented the full file of the case before the Single Judge, inviting CAS to present additional issues before FIFA TMS. On 21 July 2015, Benfica answered the request presented by CAS. On 22 July 2015, the CAS requested the FIFA TMS the information envisaged on the evidentiary measures ordered by the Panel.

28. On the same date, the Respondent informed the CAS that it would be unable to attend the hearing in person, but would be represented by Mr. Ariel Reck.

29. On 23 July 2015, a hearing was held in Lausanne. Both Parties attended, represented by their counsel in these proceedings. At the end of the hearing the Parties confirmed that they were satisfied with the way in which the proceedings had been carried out.

30. On 27 July 2015, FIFA TMS informed the CAS that it would be unable to provide the information requested due to data protection and confidentiality obligations unless further information regarding the request was provided. Due to the fact that the commitments requested by FIFA TMS could not be confirmed by the CAS or the Panel, no further requests were raised to FIFA TMS.

31. On 27 July 2015, the Respondent filed a new document (a decision rendered by the Argentinean Court ordering the Club Estudiantes de la Plata to pay to the Appellant an amount of EUR 180'000), requested that it be admitted to the file pursuant to Article R56 of the CAS Code. On 30 July 2015, the Appellant objected to the admissibility of such new document. On 31 July 2015, the CAS informed the Parties that the Panel had declared the document as inadmissible.

32. On 12 January 2016, the CAS Court Office informed the Parties that Mr Lucio Colantuoni, arbitrator nominated by the Appellant, had passed away and invited the Appellant to replace him, pursuant to Article R36 of the Code.

33. On 19 January 2016, the Appellant nominated Mr Michele A.R. Bernasconi, attorney-at-law in Zurich, Switzerland, as arbitrator.

34. On 25 January 2016, the President of the CAS Appeals Arbitration Division confirmed the nomination of Mr Bernasconi by the Appellant.

35. On 4 February 2016, the CAS Court Office invited the Parties to inform whether they were in agreement that no second hearing was needed, notwithstanding the change of one arbitrator. Both Parties agreed that no second hearing was needed.

4. THE PARTIES' SUBMISSIONS AND PRAYERS FOR RELIEF

4.1. Appellant: Ciro José Sánchez

A. Jurisdiction of the CAS

36. The Appellant invokes Article R57 of the CAS Code to motivate the jurisdiction of the CAS over this dispute.

B. Merits of the dispute

a) FIFA Jurisdiction

37. The Single Judge decided that the claim raised by the Agent was not admissible as it lacked an international dimension. In particular, it stated that *"the crucial elements to take into account in order to decide it a dispute between a players' agent and a player is national or not, are, on one hand, the country of*

the association which granted the relevant license to the players' agent and, on the other hand, the nationality of the player". The Appellant submits that this finding is incorrect, as it overlooks that the relevant information is the player's place of registration at the time of the dispute (in this case Portugal) and not his nationality.

38. The FIFA Players' Agents Regulations of 2001 (the "2001 PAR") provided that national disputes were those between players and agents registered with the same association. On 2008, the FIFA Players' Agents Regulations were amended (the "2008 PAR"). In the 2008 PAR, Art. 32 provides for jurisdiction of national bodies arising from domestic transaction. The Appellant submits that these "domestic transactions" refer evidently only to situations between parties registered with a particular association as only then the association has power over them. A decision by a national body against a party that is not registered in that association would be unenforceable: this is the reason why the international FIFA proceedings were established. This is confirmed by CAS case law (*cf.* CAS 2012/A/2778).

39. Additionally, the Agent holds that national bodies of the AFA have no jurisdiction to hear this case, so it should be handled by FIFA. Pursuant to Art. 30.1 of the 2008 PAR:

To deal with domestic disputes in connection with players' agents' activity, the associations shall as a last resort refer any dispute arising from or relating to national players' agents regulations to an independent, duly constituted and impartial court of arbitration, while taking into account the FIFA Statutes and the laws applicable in the territory of the association.

40. In this case, no *"independent, duly constituted and impartial court of arbitration"* exists within AFA. In any case, the "Órgano de Resolución de Litigios" (the other available body being a purely administrative body) provides in its rules that it deals with disputes between agents, players and clubs that are registered with AFA. The Parties, in their agreement, chose a body of AFA that has no powers to issue a decision in this regard. Alternatively, they chose the organs of FIFA which should therefore be competent.

b) Amounts due by the Player from the Agent's activity

41. The Agent holds that his actions were essential to ensure the Player's contract with Benfica. In fact, the Agent's participation is recognized in clause 16 of the contract concluded by the Player with Benfica and in numerous press articles appeared at the time of the transfer. When the Player intended to remain in Argentina in 2011, it was the Agent who arranged his loan with Estudiantes. The Player, however, never paid any amount to the Agent.

42. The Agent negotiated the salary in Estudiantes, ensuring for the Player the same salary as he had in Benfica.

43. The Player in negotiations with Estudiantes pledged to be represented only by Mr. Sánchez, excluding any other agents. Regarding the remuneration due to the Agent for the six months passed by the Player at Estudiantes, the Agent holds that it must be due:

- Either as compensation for the activity done by Mr. Sánchez if it considers that the Agent's activity is proven;
- Or as reimbursement for breach of contract by the Player, for infringement of the exclusivity clause.

44. The Player never paid the Appellant's fees, reason why the Agent is claiming in this proceeding for 15% of the Player's earnings on the corresponding seasons.

c) Prayers for relief

45. The Appellant thus requests that the CAS:

- preliminary, to acknowledge its competence to deal with the matter, ruling on the merit of the dispute at hand
- on the merit, to upheld the present appeal, setting aside the decision of the Single Judge of the FIFA Players' Status Committee, condemning Mr. Pérez to pay:
  - € 168.539,40, as remuneration for the sporting season 2011/2012, or alternatively € 98.314,65 as remuneration from July 2011 to January 2012 and € 70.224,75 as compensation for breach of contract by the Player, plus 5% interest per annum, for the delay in the payment, pursuant to art. 104 CO, from 1 July 2012 until the date of effective payment;
  - € 168.539,40, as remuneration for the sporting season 2012/2013, plus 5% interest per annum on said amount, for the delay in the payment, pursuant to art. 104 CO, from 1 July 2013 until the date of effective payment;
  - € 168.539,40, as remuneration for the sporting season 2013/2014, plus 5% interest per annum on said amount, for the delay in the payment, pursuant to art. 104 CO, from 1 July 2014 until the date of effective payment;
  - € 84.269,70, as remuneration for the sporting season 2015/2016, plus 5% interest per annum on said amount, for the delay in the payment, pursuant to art. 104 CO, from 3 January 2015 until the date of effective payment or from 1 July 2015 until the date of effective payment.
- in subsidiary way, if the Panel does not deem opportune to rule on the merit of the dispute, to affirm that present dispute has an international dimension and, as consequence, refer back the case to FIFA Player's Status Committee for a decision on the merits;
- in any case, to condemn Mr. Pérez to pay all the expenses and costs of the present proceeding as well as legal costs and fees.

4.2. Respondent: Enzo Nicolás Pérez

A. Preliminary procedural issues

46. The Respondent does not object to the jurisdiction of CAS. However, he raises two preliminary procedural issues that, he submits, should determine the rejection of the appeal.

47. The Player submits that the appeal should have been directed against FIFA, since FIFA made no decision as to the substance of the claim and only decided that it was not competent to decide the merits of the matter. By naming the wrong Respondent, the decision of FIFA became final and binding.

48. On a subsidiary basis, the Respondent invokes Art. R57 of the CAS Code. Pursuant to the same, the Panel is only allowed to issue a new decision which replaces the decision challenged. Since in the present case FIFA never issued a decision in the merits, there is no ruling that can be replaces. Based on this, Respondent submits that CAS should at most refer the case back to FIFA.

B. Merits of the dispute

a) FIFA Jurisdiction

49. The Player holds that the Parties agreed in the Contract a specific body for dispute resolution: the competent AFA body. Contrary to the Agent's claims, the Parties decided to submit all disputes to the relevant AFA body. As the reference to the AFA body is explicit, there is no need to go to any other FIFA body.

50. The Respondent claims that, against other documentation presented by the Appellant, the AFA body is fully operational and does entertain claims. The Agent, however, never tried to pursue his claim before the AFA body. The burden of proving the lack of jurisdiction of the AFA body lies on the Appellant and Respondents argues that Appellant didn't even try to file a claim with AFA. Any alternative jurisdiction FIFA would only open once a claim was rejected by the relevant AFA body.

51. Furthermore, Respondent underlines that the Contract was specifically registered with AFA.

b) Preliminary issues out of scope of Appeal

52. The Respondent claims that in the FIFA proceedings the Agent only claimed for amounts due for seasons 2011/2012 and 2012/2013. No request was made for the additional seasons 2013/2014 and 2014/2015 that he is requesting in the present CAS procedure. These claims should be disregarded from the offset.

53. Furthermore, any claim related to the Player's time at Estudiantes is, even under the Appellant's assertions, a purely national dispute. Besides, the Contract explicitly excludes commission in

Argentinean contracts that are under 1 million pesos, net, which the contract with Estudiantes clearly was.

c) Amounts owed due to the Agent's activity

54. The Respondent holds that the Agent omits a "key issue" in this case, which is the violation by Appellant of the prohibition of double brokerage. The contract with Benfica was negotiated by the Appellant and with another agent that owned 50% of the Player's economic rights, Mr. Miguel Pires.

55. The deal with Benfica was structured in the following way:

- Estudiantes only had 50% of the economic rights of the player.
- Taxes were only paid over that 50% of the rights in Argentina, the other 50% was paid to a company outside the federative system, therefore no taxes were paid.

56. The Player did pay the Agent the sum of USD 150.000 from an amount of money paid "under the desk". Usually the Agent receives money from more than one part in sport's transfers, therefore it is not possible that if involved in a 5 Million Euro transfer, an agent does not get any commission.

57. In any event, the Player then found out that the Agent had a side agreement with Benfica, covering any future transfer of the Player that gave him right to 5% of any future transfer of the Player that exceeded EUR 5.700.000. This side agreement was a just cause for termination and a reason to declare the Contract null and void.

58. Furthermore, the commission fee established in the Contract was abusive. The Player's fees were paid in gross and the Agent's fees are calculated over that gross amount. However, if one considers the net amount obtained by the Player, the Agent's requests amount to approximately 35% of the Player's salary. This is unacceptable and must be reduced pursuant to Art. 417 of the Swiss Code of Obligations (the "SCO").

d) Prayers for relief

59. The Respondent thus requests the following:

1. To reject the appeal against FIFA's decision declining its jurisdiction to enter the matter, for being wrongly directed against Mr. Pérez instead of FIFA.

2. On a subsidiary basis to refer the case back to FIFA for a decision on the merits

3. On a subsidiary basis to reject the claim on the merits developed in this answer (lack of competence, abusive nature of the commission, nullity of the contract due to double brokerage).

4. in any case, to order Mr. Sánchez to pay all the costs and expenses relating to the FIFA PSC and the CA arbitration proceedings

5. To order the Appellant to pay a contribution towards the legal fees and other expenses incurring by this party in CHF 15.000.

5. CAS JURISDICTION

60. The jurisdiction of CAS, which is not disputed, derives from Articles 66 and 67 of the FIFA Statutes and Article R47 of the CAS Code. It is further confirmed by the Order of Procedure duly signed by the Parties. It follows that the CAS has jurisdiction to decide on the present dispute.

61. Under Article R57 of the CAS Code, the Panel has the full power to review the facts and the law.

6. APPLICABLE LAW

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

The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

63. Article 66 par. 2 of the FIFA Statutes provides *"[t]he 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".*

64. In this case, as the Contract was entered into on March 2011, it is undisputed that the 2008 PAR are applicable to the merits of this dispute.

65. The Panel notes that the Parties have not chosen a specific applicable law. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily.

7. ADMISSIBILITY

66. Art. 67.1 of the FIFA Statutes provides that:

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.

67. The grounds of the Challenged Decision were notified to the Parties on 11 February 2015. The Appellant filed his Appeal on 4 March 2015, within the provided time limit.

68. It follows that the appeal is admissible.

8. PRELIMINARY PROCEDURAL ISSUES

69. Before addressing the issue on the merits and the Agent's claim for compensation, the Respondent has raised various procedural issues that have to be addressed:

- Standing to be sued: whether the appeal should have been directed against FIFA as the Single Judge's decision merely rejected jurisdiction;
- Whether the Panel may enter into the merits or it must, should it find that FIFA was competent, send the case back to FIFA.

70. The Panel rules that the appeal did not have to be directed against FIFA and that the fact that FIFA has not been named as respondent does not trigger the inadmissibility of the appeal. Furthermore, the Panel rules that it may enter into the merits of the dispute without having to send the case back to FIFA.

71. Regarding the first issue, whether FIFA had to be named as a Respondent, it must first be noted that neither the CAS Code nor FIFA Regulations contain specific rules on the right to be sued. Pursuant to CAS case law, *"under Swiss law, applicable pursuant to Articles 60.2 of the FIFA Statutes and R58 of the CAS Code, the defending party has standing to be sued (légitimation passive) if it is personally obliged by the "disputed right" at stake (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189; CAS2006/A/1192)"* (CAS 2007/A/1329-1330).

72. In general, pursuant to art. 75 of the Swiss Civil Code ("SCC"), as interpreted by case law, it is the association (in this case FIFA) who has the standing to be sued and a decision by its bodies cannot be turned aside without the association being summoned[1]. However, it is also understood that art. 75 SCC does not apply indiscriminately to every decision made by an association, but its applicability has to be determined on a case-by case basis. When the decision taken by the association is not related to a matter of its own but merely relates to a contractual relationship between its members, a so-called "horizontal matter", acting as a first instance decision maker, art. 75 SCC is not necessarily applicable (*cf.* CAS 2008/A/1517, CAS 2008/A/1518 and CAS 2006/A/1192).

73. In this case, the issue at stake is whether the Single Judge's decision that declined jurisdiction is a decision that requires a party to name FIFA as a respondent, in line with Art. 75 SCC. The Panel is of the view that in the present case there was no necessity to direct the appeal against FIFA itself. As stated in CAS 2008/A/1517:

"As a result, the Panel notes that FIFA in the present case offered a system of resolution of disputes, where FIFA was not a party but a neutral entity that was called to settle a strict contractual dispute between its members in a matter that did not concern FIFA's relationship to one of its members. Furthermore, this neutral position was not changed by the fact that Appellant had the chance to get the case reviewed by CAS pursuant to FIFA's recognition of the jurisdiction of the CAS in the FIFA Statutes. Nevertheless, the Panel recognizes

[1] Art. 75 SCC: *"Every member of an association shall be entitled by force of law to challenge in court, within one month of his having gained knowledge thereof, resolution that he has not consented to and that violate the law or the articles of association".*

that the appeal filed before CAS challenging the decision of the DRC could concern FIFA. Therefore, FIFA could have intervened in the CAS arbitration proceedings by making use of article 41.3 of the CAS Code. However, when FIFA was given the opportunity to participate in these proceedings under article 41.3 of the CAS Code, it declined to do so".

74. As a consequence of the above, the Panel holds that naming FIFA as respondent in the present proceedings was not an essential prerequisite in order to challenge the Single Judge's decision. Therefore, there is no reason to reject the appeal because of the alleged lack to be sued of Respondent.

75. On the second issue, Art. R57 of the CAS Code provides that: *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

76. This full power of review is not limited by the fact that the first instance adjudicator decided that it did not have jurisdiction. The Panel, *ex* Art. R57 of the CAS Code can chose between a new decision that replaces the previous decision (a decision stating that the Single Judge did have jurisdiction and solving on the merits does precisely that) or referring the case back to the previous instance. No limits are imposed on this choice. Furthermore, both the Parties and FIFA (by reference to the FIFA statutes) have accepted the application of Art. R57 of the CAS Code, providing the Panel with a full power of review over the case.

77. In this regard, the Swiss Federal Tribunal has recently ruled, in a judgment of 9 July 2014 (judgment 4A_90/2014) that *"the only issue is whether he could do so despite the fact that the C._____ Committee had declined jurisdiction and therefore did not decide the merits of the claims submitted by the Respondent. The answer must be affirmative"*[2]. Furthermore, quoting its decision on judgment 4A_386/2010, the Swiss Federal Tribunal stated:

> *"Jurisdiction was based on Art. R57(1) of the Code [of Sport Arbitration] (on that issue see Rigozzi, op. cit. [L'arbitrage international en matière de sport, 2005], n. 1079 ff.). That provision states that "the panel shall have full power to review the facts and the law" and that "it may issue a new decision which replaces the decision challenged or annul the decision and refer to the case to the pervious instance". The CAS chose the former solution. One does not see why this could be wrong. Contrary to what the Appellant argues, such a solution is not at all inconsistent with the nature of appeal proceedings. It is rather a characteristic of an appeal that the higher body may decide the merits itself. Neither does the solution chosen by the CAS go against the mission of that arbitral jurisdiction, no matter what the Appellant claims: It is apt to facilitate quick disposition of disputes and may be an adequate way to remedy the categorical refusal of a National Sports Federation to open disciplinary proceedings against an athlete who is a citizen of a country in which it is based".*

78. Based on the above, the Panel decides to review the case on its merits, taking also into due consideration the fact that the value and complexity of this dispute would not justify a referral of the case back to the Single Judge, should the Panel find that the Single Judge was competent to hear the dispute (*cf.* CAS 2008/A/1741, CAS 2009/A/1974).

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[2] Club A._____ v. B._____, 4A_90/2014. Translation by http://www.swissarbitrationdecisions.com/. Available at: http://www.swissarbitrationdecisions.com/court-arbitration-sport-may-decide-merits-even-if-jurisdiction-only-issue.

9. MERITS

9.1. Jurisdiction of the FIFA Single Judge

79. Clause six of the Contract establishes the Parties' choice of forum, providing for an alternative choice:

> ***SIXTH: NATURE OF THE CONTRACT AND COMPETENCE****: For the resolution of any conflict that might arise in connection with the celebration, interpretation, execution and termination of this contract, the parties shall refer the case to the decision of the Organo de Vigilancia y Toma de Decisiones de la Asociacion de Futbol Argentino and/or any other competent body of FIFA. (…).*

80. When filing its claim, the Appellant decided to file it before the FIFA Single Judge, claiming that it was a *"competent body of FIFA"* to rule on the matter. The Single Judge declined its competence, stating that the dispute was purely national as both Player and Agent are Argentinian nationals. The Appellant challenges this decision, stating that the relevant criteria is not nationality but place of registration at the time of the dispute. Additionally, the Appellant holds that the *"Órgano de Vigilancia y Toma de Decisiones de la Asociación de Fútbol Argentino"* was not competent to hear the dispute.

81. The Panel is of the opinion that the alternatives provided between AFA's and FIFA's competent bodies consist on alternative dispute resolution procedures based on each body's competence to hear the dispute, attending on whether it was national or international in nature.

82. In this regard, it is of use to analyse the relevant bodies' competence to hear this dispute.

83. Regarding AFA, the relevant body appears to be the *Órgano de Resolución de Litigios*, established by special bulletin nº 3659 (Exhibit 13 of the Appeal Brief). Art. 2 of this bulletin provides that:

> *1) The jurisdiction of the ORL is fixed in art. 22 of the "New FIFA Players' Regulations".*
>
> *2) In particular, the ORL must resolve the following disputes:*
>
> *a. dispute between a player and a players' agent.*
>
> *b. dispute between a club and a players' agent.*
>
> *c. dispute between two players' agents.*
>
> *In any case, the dispute shall be between players, clubs and players' agents registered and affiliated with the Argentinian Football Association.*

84. Regarding the FIFA's bodies, Art. 30.1 and 30.2 of the 2008 PAR provide that:

> *1. To deal with domestic disputes in connection with players' agents' activity, the associations shall as a last resort refer any dispute arising from or relating to national players' agents regulations to an independent, duly constituted and impartial court of arbitration, while taking into account the FIFA Statutes and the laws applicable in the territory of the association.*
>
> *2. In the case of international disputes in connection with the activity of players' agents, a request for arbitration proceedings may be lodged with the FIFA Players' Status Committee.*

85. No specific definition exists of the concepts of domestic or international disputes. The 2001 PAR did, however, state, in Art. 22.1, that national disputes were *"disputes between a players' agent and a player, a club and/or another players' agent all of whom are registered with the same national association"*.

86. From the above, a first conclusion seems clear for the Panel: the AFA's *Órgano de Resolución de Litigios* was not competent to hear the dispute as its rules clearly state that it shall only deal with disputes between parties registered with the AFA. At the time of the dispute (i.e. when the claim was filed before the FIFA Single Judge[3]), the Player was no longer registered before the AFA.

87. This, however, does not necessarily mean that the definition of international and national disputes in the 2008 PAR must be understood to refer to place of registration instead of nationality. The AFA's regulations are based on the 2001 PAR, that clearly made this distinction, and not on the 2008 PAR. The Panel must therefore analyse what must be understood for "international" disputes under the 2008 PAR.

88. The Panel has reached the conclusion that the relevant criteria to determine whether a dispute between a players' agent and a player is national or international under the 2008 PAR must be the place of registration and not the parties' nationalities. Indeed, FIFA's power to solve international disputes is provided as a means to solve those disputes that would not, in general, have effective resolution by purely national means: FIFA provides an international forum for the solution of disputes that exceed the scope of a single national association's adjudicative powers and, as a general, quite obvious rule, national associations would only exercise their powers over their (direct and indirect) members. Furthermore, even though no clear definition exists in the 2008 PAR, the 2001 PAR can be used as guidance, and no evidence has been provided to show that the intention of the legislator was precisely to invert the rule.

89. As a consequence of the above, the Panel finds that the Single Judge was competent to hear the dispute between the Parties. The AFA's body was not competent and, the dispute being of an international, not domestic nature, the Parties choice led to the jurisdiction of the relevant FIFA body: the Single Judge.

90. As stated above, based on CAS jurisprudence, the Panel holds that considering the complexity and value of the dispute and the need for procedural economy, the Panel shall decide on the merits of the dispute without referring the case back to the Single Judge.

9.2. Conflict of interest?

91. It appears undisputed between the Parties that the Agent acted as intermediary for the hiring of the Player by Benfica. As a consequence, in principle, the Agent's right to compensation would have accrued, pursuant to clause 3 of the Contract.

92. The Player, however, claims that the Agent may not obtain payment as it had side deals with both Benfica and Estudiantes regarding commissions for a future transfer of the Player. As a

[3] *Cf.* CAS 2010/A/2091: *"the pertinent point in time to establish whether a dispute is national or international is necessarily the moment when the dispute arises, that is, more precisely, the moment when a claim by either party is first filed"*.

consequence, in view of the Respondent, the Agent, when helping the Player sign for Benfica, was in a conflict of interest and such conflict annuls the Agent's right to compensation. From the available evidence, the Panel is satisfied that the existence of double brokerage by the Agent cannot be disputed both from a formal standpoint (the Agent had deals with the Player, Benfica and Estudiantes) and from a substantial point of view (the Agent has received or has a right to effective payment from Benfica deriving from the Player's transfer)[4].

93. Art. 19.8 of the 2008 PAR, contained under section IV, *Rights and Obligations of Players' Agents*, provides that:

"Players' agents shall avoid all conflicts of interest in the course of their activity. A players' agent may only represent the interests of one party per transaction. In particular, a players' agent is forbidden from having a representation contract, a cooperation agreement or shared interests with one of the other parties or with one of the other parties' players' agents involved in the player's transfer or in the completion of the employment contract".

94. Art. 19.8 of the 2008 PAR thus provides a clear prohibition of double brokerage, explicitly stating that *"a players' agent is forbidden from having a representation contract, a cooperation agreement or shared interests with one of the other parties or with one of the other parties' players' agents involved in the player's transfer or in the completion of the employment contract"*. The Agent's actions evidently determine that when acting for the Player he had shared interests with Benfica as we would benefit from any future transfer of the Player from Benfica to another club.

95. The next question to be answered is, however, what legal effect should have such kind of double representation and conflict of interests, respectively?

96. The Player first holds that the Agent's conflict of interest automatically makes the Contract void. In the Panel's opinion the Agent's conflict of interest does not nullify the Contract. Indeed, it appears uncontested between the Parties that the Contract fulfilled all formal and substantive requirements for its validity at the time of its conclusion (i.e. expression of consent, valid form, consideration, etc.). A valid agency contract is not nullified by a situation of conflict of interest. It may be breached or become partially unenforceable, as it will be considered below, but is not outright voided.

97. The Agent's actions are, to the opinion of the Panel, in clear breach of clear rules to which he was bound as a registered players' agent. Art. 1 of the 2008 PAR provides that *"these regulations govern the occupation of players' agents"*. Art. 23.1 requires that *"Players' agents [shall] respect and adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA"* and art. 23.2 provides that *"Players' agents shall ensure that every transaction concluded as a result of their involvement complies with*

[4] In this regard, Benfica's answer to the evidentiary measures ordered by the Panel are self-explanatory: *"(b) On the said transfer* [the Player's] *SL Benfica have been assisted by Mr. Miguel Pires and Mr. Ciro Sanchez, at that time as player's agents. By these reason SL Benfica have granted to both, as a remuneration for the services rendered, 5% of the transfer fee to be receivable by SL Benfica in case the player would be transfer* [sic] *to another club, after deducting the amount of € 5.700.000; (c) On January 2015 SL Benfica have agreed with Valencia CF a transfer agreement under which the player Enzo Perez has been transferred under a transfer fee amounting to € 25.000.000".*

the provisions of the aforementioned statutes, regulations, directives and decisions of the competent bodies of FIFA".

98. The Panel considers that this clear breach of a legal duty (avoiding all conflict of interest and representing only one party in a deal) must have an effect on the Parties' rights and obligations under the Contract.

99. The Panel wishes to note that the player-agent relationship is one that is based greatly on trust (in particular, where the agreement is exclusive and the player is, as in this case, prevented from having alternative representation). A player must have the confidence that in every deal his agent's actions are in line with his best interests, being this the main reason for the existence of the parties' relationship. When a player trusts an agent with the handling of his professional career, it is that career that he expects the agent to uphold. Conflicts of interest are in direct contradiction to this basis of trust as they may give rise to situations where the agent's actions are not aligned with the player's best interests but with personal interests or those of a third party, prejudicing the player's own. Unless properly notified and authorised, a player has the right to expect that the agent is free from conflicts of interest. It is for this reason that double representation is prohibited, to ensure that in negotiating a transaction an agent is considering, exclusively, the interest of one of the parties.

100. The Panel therefore considers that by acting on behalf of the Player, but with a clear conflict of interest towards Benfica (the Agent had an interest in ensuring that the Player signed with Benfica as he would profit, as he has, from any future transfer), in breach of the FIFA Regulations, the Agent has forfeited his right to compensation under the Contract. As already noted, the Panel considers that this does not arise from the nullification of the Contract but from a substantial breach of the Agent's duty of loyalty, enshrined in the prohibition of double brokerage of art. 19.8 of the 2008 PAR.

101. This conclusion is in line with art. 415 SCO (that would be applicable through the subsidiary application of Swiss Law), pursuant to which *"Where the broker acts in the interests of a third party in breach of the contract or procures a promise of remuneration from such party in circumstances tantamount to bad faith, he forfeits his right to a fee and to any reimbursement of expenses"*. The Agent has, whilst representing the Player, also represented Benfica's interest (to that the Player be hired) in clear breach of the Contract and the 2008 PAR. As a consequence, he has forfeited his right to remuneration thereunder[5].

[5] This conclusion is, besides, in line with agent's regulations in national jurisdictions that have regulated player-agents regulations.
Art. C.7 of the English Football Associations' 2014-2015 Football Agents Regulations, provides that: *"The Authorised Agent accepts that if he undertakes Agency Activity for a Club and a Player in relation to a Transaction without fulfilling in all material aspects the requirements set out at (a) to (g) above, the Player may terminate the relevant representation agreement with the Authorised Agent on written notice with immediate effect. The Authorised Agent may also be liable to account to the Player for all monies earned in relation to the Transaction in accordance with the terms of the Representation Contract between them".*
Art. L 222-17 of the French *Code du Sport* establishes that *"Un agent sportif ne peut agir que pour le compte d'une des parties aux contrats mentionnés à l'article L. 222-7. (…)Toute convention contraire au présent article est réputée nulle et non écrite".* [A sporting agent may only act on behalf of one of the parties to the contracts mentioned in article L.222-7 (…) any agreement contrary to the present article is null and void" -free translation].

10. CONCLUSION

102. On the basis of the above, the Panel considers that:

- The Panel may evaluate whether the Single Judge was competent to hear the dispute or not, even though FIFA was not called as a respondent to these proceedings;
- The Panel may evaluate the case on the merits without the need of referring the case back to the Single Judge;
- The relevant criteria to determine whether a dispute between a players' agent and a player is international or not is the place of registration of the parties at the time when the dispute arose. In this case, the parties were registered with different national associations when the claim was filed before the Single Judge and, as a consequence, the Single Judge was competent to hear the dispute;
- It is undisputable that the Agent brokered for the Player and helped him sign for Benfica, triggering the effects of clause 3 of the Contract;
- However, the Panel considers that the agent's undisclosed conflict of interest is contrary to applicable clear loyalty obligations and amounts to a substantial breach of contract, which determines the loss of the right of the Agent to a compensation.

103. The Panel therefore concludes that the appeal shall be dismissed, even though some legal arguments of Appellant have been retained, and some legal arguments of Respondent had been rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 4 March 2015 by Mr. Ciro José Sánchez is dismissed and Mr. Ciro José Sánchez has no right to claim compensation from Mr. Enzo Nicolás Pérez in connection with the Contract of Representation concluded between the Parties and with the transfer of Mr. Pérez to Benfica.

2. (…).

3. (…).

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