Arbitration CAS 2015/A/4326 Al-Ittihad FC v. Ghassan Waked, award of 19 October 2016

Panel: Prof. Luigi Fumagalli (Italy), President; Mr András Gurovits (Switzerland); Mr José Juan Pintó (Spain)

Football
Contract of agency between an agent and a club in connection with the transfer of a player
Fulfillment by the agent of his obligations under the contract
Interpretation of commission agreements
Proportionality of the commission due to the agent under the contract

1. **According to CAS jurisprudence, an agent, in order to obtain his remuneration under a contract of agency, needs to establish his "significant involvement" in the transfer of a player. Such involvement may be proven *e.g.* by references in the player's employment contract or in the transfer agreement to the agent as the agent of the club; or by a letter of the President of the club by which the latter confirms that the agent *"acted for the club at the request of the club and the knowledge of the board"* and that *"he brought both deals to a positive conclusion and the player promptly joined and played for the club"*. In these circumstances the club, in order to successfully argue that the agent had not fulfilled his obligations, needs to provide corroborating evidence to that effect. If *e.g.* the club claims that the services of the player were secured by a different individual it needs to provide respective evidence *e.g.* in the form of declarations by the respective individual supporting its version of events.**

2. **In case where a club and an agent conclude two commission agreements the terms of which are largely coincident and which were signed on the same day, in order to determine whether one of the agreements was intended to supersede the other one, the two contracts need to be interpreted. If *e.g.* none of the contracts contains a provision clarifying that the other version was superseded, and if the two agreements are apparently intended to cover and remunerate two different services rendered by the agent – *e.g.* the conclusion of the employment contract and the conclusion of the transfer agreement – unless there are any other indications it cannot be concluded that only one of the contracts remained valid.**

3. **An agent's commission corresponding to 10% of the value of the employment contract and of the transfer fee paid by the club for the player is not unreasonable or contrary to common practice or to Swiss Law. Furthermore, in the absence of any clause in the agreement linking the player's stay with the new club to the amount of commission owed to the agent there is no link between the length of time a player transferred spent at his new club and the commission owed to the agent. Finally, in the absence of any evidence to the contrary, there is no reason to reduce the contractual commission due**

to an agent because of the unilateral termination of the employment agreement by the player.

1. BACKGROUND

1.1 THE PARTIES

1. Al-Ittihad FC (the "Club" or the "Appellant") is a football club with registered office in Jeddah, Saudi Arabia. The Club is affiliated to the Saudi Arabian Football Federation (the "SAFF"), which in turn is a member of the Fédération Internationale de Football Association ("FIFA").

2. Mr Ghassan Waked (the "Agent" or the "Respondent") is a licensed intermediary registered with The Football Association, and has his principal office in London, England.

1.2 THE DISPUTE BETWEEN THE PARTIES

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 18 July 2012, the Parties entered into a Commission Agreement (the "First Commission Agreement") in connection with the transfer of the player A. (the "Player") to the Club. The preamble to the First Commission Agreement provided that the Agent was *"acting here for the Club in its recruitment of the Palestinian footballer [A.] from Hajduk Split in Croatia"*. The First Commission Agreement contained then the following provisions:

> *"1. This Agreement follows the Exclusive Mandate granted to The Agent by the Club on 11 July 2012.*
>
> *2. The services of the Agent that the Club were seeking for are:*
>
> *a. to negotiate the transfer fee;*
>
> *b. to negotiate the player's terms;*
>
> *c. to set a payment schedule convenient to the Club; and*
>
> *d. to close the transaction and contracts tying all three parties.*
>
> *3. The indicated task of the agent shall end with the signature of the contracts with the Club and the Player, and the Agent will have no further right of commission once he is paid in full as stated in points 5 and 6 below.*
>
> *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 10% (ten per cent) of the total value of the player's*

contract.

5. *The total guaranteed value of the Player's Contract being 1,600,000.00 (One Million and Six Hundred Thousand Euros) NET. Therefore the total commission for the guaranteed part of the contract being €160,000.00 (One Hundred and Sixty Thousand Euros).*
6. *The Commission is to be paid in 1 (One) instalment no later than 15 September 2012.*
7. *The payments shall be made to the Agents nominated bank account below: ….*
8. *There shall be no deductions, set-off or any reduction in the amounts payable to the Agent under any circumstances.*
9. *In the event The Player is transferred by the Club for a monetary consideration, or a player exchange the Agent shall be entitled to an amount equivalent to the outstanding commission as detailed in point 5 above.*
10. *In the event any upgrade in the Player's contract, the Agent shall be entitled an equivalent of 10% of the increase in the contract. This contract shall be automatically amended to reflect the increase in commission.*
11. *In the event the Club takes up the option on the Player for the season 2014/15, the Agent shall be entitled to a commission valued at 10% of the value of the Player's salary.*
12. *The contents of this agreement are to remain secret unless determined by law or competent tribunal or for taxes purposes.*
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. As for such appeal, the parties agree that it will be dealt in an expedite manner according to art. 44.4 of the CAS Code, with the application of FIFA laws and regulations. The Panel will consist of one arbitrator and the language of the arbitration will be English. The Parties irrevocably agree that the arbitral award is final, binding and shall be executed and enforced before FIFA committees.*
14. *This agreement and its counterparts may be executed either in original or faxed form for all legal and binding purposes and effects, provided that any party providing its signature in faxed form shall promptly forward to the other Party an original signed copy of this guarantee which was so faxed.*
15. *This agreement is written in two (two) original versions to be retained by each party to act accordingly".*

5. On 18 July 2012, the Parties entered also into another Commission Agreement (the "Second Commission Agreement"; together with the First Commission Agreement the "Commission Agreements") in connection with the transfer of the Player to the Club. Also the preamble to the Second Commission Agreement provided that the Agent was *"acting here for the Club in its recruitment of the Palestinian footballer [A.] from Hajduk Split in Croatia"*. The Second Commission Agreement contained the following provisions:

"1. This Agreement follows the Exclusive Mandate granted to The Agent by the Club on 11 July 2012.

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

a. to negotiate the transfer fee;

b. to negotiate the player's terms;

c. to set a payment schedule convenient to the Club; and

d. to close the transaction and contracts tying all three parties.

3. The indicated task of the agent shall end with the signature of the contracts with the Club and the Player, and the Agent will have no further right of commission once he is paid in full as stated in points 5 and 6 below.

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 10% (ten per cent) of the total value of the transaction.

5. The total value of the transfer fee being 1,800,000.00 (One Million and Eight Hundred Thousand Euros) NET. Therefore the total guaranteed commission being €180,000.00 (One Hundred and Eighty Thousand Euros).

6. The Commission is to be paid in 1 (One) instalment no later than 15 September 2012.

7. The payments shall be made to the Agents nominated bank account below: ….

8. There shall be no deductions, set-off or any reduction in the amounts payable to the Agent under any circumstances.

9. In the event The Player is transferred by the Club for a monetary consideration, or a player exchange the Agent shall be entitled to an amount equivalent to the outstanding commission as detailed in point 5 above.

10. In the event the player is transferred for a consideration over €1,800,000.00 (One Million and Eight Hundred Thousand Euros), the Agent is entitled to 10% of the surplus amount.

11. The contents of this agreement are to remain secret unless determined by law or competent tribunal or for taxes purposes.

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

13. This agreement and its counterparts may be executed either in original or faxed form for all legal and binding purposes and effects, provided that any party providing its signature in faxed form shall promptly forward to the other Party an original signed copy of this guarantee which was so faxed.

14. This agreement is written in two (two) original versions to be retained by each party to act accordingly".

6. On 23 July 2012, the Player signed an employment contract with the Club (the "Employment Contract"). The Employment Contract indicated in the signature block the Agent as *"agent for Al Ittihad"*.

7. On 24 July 2012, a transfer agreement regarding the Player was signed by Hajduk Split, the Club and the Player (the "Transfer Agreement"). Article 5 of the Transfer Agreement reads as follows:

"Al Ittihad and Hajduk state and accept that the present Transfer has occurred with the participation of Gassan Waked, an agent licensed by the FA, working for Al Ittihad Club".

8. On 26 February 2014, Eng. Mohammed Hamed Fayez signed a declaration, addressed *"To Whom it May Concern"*, as follows (emphasis in the original):

"This to clarify that Mr. Gassan Waked, Players' Agent licensed by the FA, conducted the negotiations on behalf of Al Ittihad with the Brasilian Player ***[D.]*** *and his club* ***Vasco Da Gama*** *and with the Croatian/Palestinian Player* ***[A.]*** *and his club* ***Hajduk Split.***

Mr. Waked acted for the club at the request of the club and the knowledge of the board.

He brought both deals to a positive conclusion and the players promptly joined and played for the club.

As elected President of Al Ittihad Club, I signed his agreed commission contracts on 30 July 2012 in Jeddah".

9. On 4 March 2014, the Agent filed a claim in front of the FIFA Players' Status Committee (the "PSC"), claiming that the Club had breached the Commission Agreements by failing to pay the commission owed to him. In his claim, the Agent requested that the Club be ordered to pay the amount of EUR 340,000 (representing the aggregate of EUR 160,000 under the First Commission Agreement and of EUR 180,000 under the Second Commission Agreement), as well as interest at 5% per year as from 15 September 2012.

10. On 21 May 2015, the Single Judge of the PSC (the "Single Judge") rendered a decision as follows (the "Decision"):

"1. The claim of the Claimant, Ghassan Waked, is partially accepted.

2. The Respondent, Al Ittihad, has to pay to the Claimant, Ghassan Waked, within 30 days as from the date of notification of this decision, the amount of EUR 340,000 as well as 5% interest per year on the said amount as from 16 September 2012 until the date of effective payment.

3. Any further claims lodged by the Claimant, Ghassan Waked, are rejected.

4. If the aforementioned amount, plus interest as established above, is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Al Ittihad, within 30 days as from the date of notification of this decision, as follows:

5.1 The amount of CHF 15,000 has to be paid to FIFA to the following bank account (…).

5.2 The amount of CHF 5,000 has to be paid directly to the Claimant, Ghassan Waked.

6. The Claimant, Ghassan Waked, is directed to inform the Respondent, Al Ittihad, immediately and directly of the account number to which the remittance … above are to be made and notify the Players' Status Committee of every payment received".

11. On 18 November 2015, the Decision, together with the grounds supporting it, was notified to the Appellant.

12. In his Decision, the Single Judge first found that the 2008 edition of the FIFA Players' Agent Regulations (the "Regulations") was applicable to the merits of the dispute. The Single Judge, next, stated the following:

> *"7. … to begin with, the Single Judge noted that, on 18 July 2012, the parties concluded two agreements for the participation of the Claimant in the negotiations for the transfer of the player to the Respondent. In this respect, the Single Judge acknowledged that the Claimant was entitled to receive from the Respondent the amount of EUR 160,000 as per in the first agreement as well as EUR 180,000 pursuant to the second agreement.*
>
> *8. In continuation, the Single Judge took note that, in his claim to FIFA, the Claimant had requested from the Respondent the payment of the total amount of EUR 340,000 as commissions as well as 5% interests as from 15 September 2012.*
>
> *9. Likewise, the Single Judge remarked that, for its part, the Respondent had rejected the Claimant's complaint arguing that the Claimant had not even signed the employment contract of the player with the Respondent, that the commissions contractually agreed were contrary to art. 20 of the Regulations and, alternatively, that said commissions had to be considered "excessive and disproportionate" since the player had allegedly terminated his employment contract with the Respondent before its expiry.*
>
> *10. Moreover, the Single Judge took note of the fact that the Respondent pointed out that the Claimant had never participated to any activities leading to the conclusion of the transfer of the player to the Respondent and maintained that the negotiations had been carried out by the "Sport Director" of the Respondent.*
>
> *11. In view of the above, the Single Judge reasoned that the first question to be addressed in the present dispute was whether the two agreements concluded between the parties were in violation of the Regulations as alleged by the Respondent.*
>
> *12. In this respect, the Single Judge went on to analyse the content of both agreements concluded between the parties on 18 July 2012 and, in particular, its respective articles 4. In doing so, the Single Judge reasoned that the terms of such articles clearly established the payment of lumps sums agreed upon in advance to be paid to the Claimant for his services. Therefore, the Single Judge held that the agreements were clearly not in contradiction with the Regulations, contrary to the allegations of the Respondent.*
>
> *13. Having established the aforementioned, the Single Judge recalled that the Respondent contested the Claimant's intervention in the negotiations of the transfer of the player. In this regard, the Single Judge was keen to stress that, according to art. 12 par. 3 of the Procedural Rules which states that* "any party claiming a right on the basis of an alleged fact shall carry the burden of proof"*, the Claimant had provided convincing evidence such as the statement of the president of the Respondent dated 24 February 2014, confirming the involvement of the Claimant in the negotiations for the transfer of the player. Therefore, the Single Judge held that,* in casu*, it is clearly established that the transfer of the player from Hajduk Split to the Respondent occurred as a result of the professional work of the Claimant. Additionally, despite the lack of the Claimant's name in the employment contract concluded with the player, the Single Judge recalled that, regardless of whether the document in question also bore the signature of the Claimant or not, the Respondent had clearly undertaken to pay the commission to the Claimant by concluding the agreement with the Claimant. Furthermore and for the sake of*

completeness, the Single Judge pointed out that, as a general rule, such omission is only a formal prerequisite which do not affect the validity of the agreement the parties concluded as it is confirmed by the well-established jurisprudence of the Players' Status Committee.

14. In addition and with regard to the request for mitigations of the commissions as the player had allegedly terminated his employment contract with the Respondent prematurely, the Single Judge recalled that both agreements concluded between the Claimant and the Respondent did not contain any conditions for the payment of the commission to the Claimant. In other words, the Single Judge held that, according to both agreements, the payment of the commissions to the Claimant by the Respondent were not subject to the permanence of the player at the Respondent or to any other conditions whatsoever.

15. In continuation, the Single Judge held that, in accordance with the basic legal principle of pacta sunt servanda *which in essence means that agreements must be respected by the parties in good faith, the Respondent has to fulfil its contractual obligations towards the Claimant and therefore has to pay to the latter the commissions amounting to EUR 340,000 for the transfer of the player based on the two agreements.*

16. Finally, the Single Judge decided that the Respondent has to pay the Claimant the total amount of EUR 340,000 as well as 5% interest as from 16 September 2012, i.e. one day after the due date, until the date of effective payment, as established in the agreements".

2. THE ARBITRAL PROCEEDINGS

2.1 THE CAS PROCEEDINGS

13. On 2 December 2015, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Club filed a statement of appeal against the Agent with the Court of Arbitration for Sport (the "CAS") with respect to challenge the Decision.

14. In its statement of appeal, the Appellant appointed Dr András Gurovits as an arbitrator and requested that the matter be heard by a panel of three (3) arbitrators.

15. In a letter of 10 December 2015, the Respondent indicated its preference for the appointment of a panel of three (3) arbitrators and designated Mr José Juan Pintó Sala as an arbitrator.

16. On 18 December 2015, FIFA informed the CAS Court Office of its decision to renounce to its right to intervene in the arbitration between the Club and the Agent.

17. On 18 December 2015, pursuant to Article R51 of the Code, the Appellant filed its appeal brief with the CAS Court Office, together with five (5) exhibits.

18. On 21 December 2015, the Respondent requested that the time limit for the filing of his answer to the appeal be set after the payment by the Appellant of its share of the advance of costs.

19. On 18 March 2016, the CAS Court Office informed the Parties that the Appellant had paid the advance of costs, and therefore invited the Respondent to file his answer.

20. On 21 March 2016, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to hear this case was constituted as follows: Prof. Luigi Fumagalli, President; Dr András Gurovits and Mr José Juan Pintó Sala, Arbitrators.

21. On 5 April 2016, pursuant to Article R55 of the Code, the Agent filed his answer, with 16 exhibits.

22. On 6 April 2016, the CAS Court Office wrote to the Parties requesting whether they wished a hearing to be held in this case.

23. On 7 April 2016, the counsel for the Agent informed the CAS Court Office that the Agent had suffered from a brain haemorrhage and was unable to attend any hearing or participate in a cross examination, as he could hardly communicate.

24. On 11 April 2016, the Appellant requested that a hearing be held.

25. On 13 April 2016, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing.

26. On 13 May 2016, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the "Order of Procedure"), which was accepted and signed by the Parties.

27. On 10 June 2016, pursuant to notice given to the Parties in a letter of the CAS Court Office dated 29 April 2016, a hearing was held in Lausanne. The Panel was assisted by Mr Daniele Boccucci, Counsel to CAS. The following persons attended the hearing for the Parties:

    i. for the Appellant: Mr Juan de Dios Crespo Pérez, counsel;

    ii. for the Respondent: Mr Alberto Ruiz de Aguiar Díaz-Obregón, counsel.

28. At the opening of the hearing, both Parties confirmed that they had no objections to the appointment of the Panel. The Parties next, by their counsel, made submissions in support of their respective cases. At the conclusion of the hearing, finally, the Parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

2.2 THE POSITION OF THE PARTIES

29. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

a. The Position of the Appellant

30. The statement of appeal contained the following requests for relief:

"1. To accept this appeal and annul the Decision rendered by the FIFA PSC Decision.

2. Independently of the type of the decision to be issued, the Appellant requests the Panel:

a. To fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of his legal fees and costs.

b. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

31. In its appeal brief, then, the Appellant requested 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 €90,000.00 pursuant to article 417 of the CO as the fee is excessive.

3. Independently of the type of the decision to be issued, the Appellant requests the Panel:

a. To fix a sum of 25,000 CHF to be paid by the Respondent to the Appellant, to help the payment of his legal fees and costs.

b. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees".

32. In support of its claim, the Club submits that:

i. the Agent did not render the services agreed to in the Commission Agreements. As such, he is not entitled to receive any compensation;

ii. in the alternative, should the Panel determine that the Agent did render services with respect to the transfer of the Player and is therefore entitled to a compensation,

- the Agent is not entitled to receive a payment under both Commission Agreements, but only under the Second Commission Agreement, which had replaced the First Commission Agreement; or
- the compensation payable to the Agent should be reduced to EUR 90,000, *i.e.* to one half of the Second Commission Agreement, because it would otherwise be excessive and disproportionate.

33. The Club admits that it concluded the Commission Agreements with the Agent. However, it claims that *"the Agent played no role in securing the services of the Player for the Appellant, in negotiating the transfer fee or closing the transaction and contracts binding all three parties"*, and that *"members of the Appellant's front office secured the services of the Player"*.

34. In the Club's opinion, its position is supported by the CAS jurisprudence and Swiss law.

35. To that effect, the Appellant refers to CAS 2006/A/1019, which indicated that an agent must actually be involved in the negotiation of a contract in order to be deserving a commission fee.

36. In addition, the Club cites Articles 412 and 413 of the Swiss Code of Obligations (the "CO")

which state the following:

Art. 412

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

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

Art. 413

1. The broker's fee becomes payable as soon as the information he has given or the intermediary activities he has carried out result in the conclusion of the contract.

2. Where the contract is concluded subject to a condition precedent, the fee becomes due only once such condition has been satisfied.

3. Where the principal has contractually undertaken to reimburse the broker's expenses, the broker may request such reimbursement even if the transaction fails to materialise.

37. Accordingly, since (i) the Player offered no evidence establishing a causal link between the activities he performed and the conclusion of the contracts regarding the transfer and the employment of the Player, and (ii) the Club cannot prove a "negative" fact (the absence of activity of the Agent), the Appellant concludes that, pursuant to Articles 413(1) and 413(2) of the CO, it does not have to compensate the Agent for services that he did not perform.

38. In the alternative, the Appellant notes that both Commission Agreements were for the Respondent to provide the same services, which were described in identical terms. Indeed, the Second Commission Agreement was intended to replace the First Commission Agreement in order to reflect the reality of the transaction regarding the transfer of the Player and the evolution of its negotiation: the transfer fee for the Player was originally determined in EUR 1,600,000, and such amount was reflected into the First Commission Agreement; however, it was later increased to EUR 1,800,000, leading to the adjustment of the commission to EUR 180,000 and the signature of the Second Commission Agreement to replace the First Commission Agreement.

39. In the opinion of the Appellant, the intention of the Parties was clear: *"the total commission was to be 10% of the transfer fee of the Player, not 20%"*. Therefore, the commission is to be limited to 10% of such amount, as provided by the Second Commission Agreement.

40. At the same time, the Club argues that, if a compensation is due and payable to the Agent, then the Panel should reduce it for being *"excessive in the circumstances"*.

41. The Club invokes in that respect Article 417 of the CO, which reads as follows:

Art. 417

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

42. On such basis, the Club submits that the Panel has the power to reduce the commission to an appropriate amount, despite what was agreed between the Parties.

43. The Club contends that the commission claimed by the Agent and, if the case, due under the Second Commission Agreement (10% of the value of the transfer fee paid by the Club for the Player) is excessive, also because it was based on the assumption that the Player's services would be secured for a minimum of 2 seasons, whereas ultimately the Player unilaterally terminated the Employment Contract after only 1 year and returned to Croatia on a free transfer. The Player therefore only *"satisfied ½ of the temporal aspect of the Employment Contract"*.

44. As a result, in the Appellant's opinion, the commission to be paid should in any case be reduced to one half of the amount provided by the Second Commission Agreement, *i.e.* to EUR 90,000.

b. The position of the Respondent

45. In his answer to the appeal, the Agent requested 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 21 May 2015.*
>
> *3. To condemn to the Appellant to bear all cost incurred with the present procedure and to cover all the Respondent's legal expenses relating to the present procedure"*.

46. In support of his request that the appeal be dismissed, the Agent rebuts the various grounds invoked by the Appellant to challenge the Decision.

47. First, the Respondent denies the Club's claim that he did not render the services contemplated by the Commission Agreements and submits that he did in fact perform the services required thereunder, as a result of which the Player was transferred to, and was employed by, the Club.

48. In this respect, the Respondent refers to the following documentary evidence, confirming that he fulfilled his contractual duties under the Commission Agreements:

i. a written offer of a contract sent by the Club to the Player on 19 July 2012, which contained the mention *"Cc Ghassan Waked"*;

ii. the reference in the Employment Contract to the Agent as the agent of the Club;

iii. the mention *"Cc Ghassan Waked"* also contained in the offer sent to the Player's former club;

iv. the indications in Article 5 of the Transfer Agreement and in the signature page of the same;

v. the unequivocal terms of the letter signed by the former President of the Club, Mr Mohammed Hamed Fayed, on 26 February 2014.

49. The performance by the Agent of his contractual duties is confirmed, in the Respondent's opinion, also by the fact that the signature of the Employment Contract and of the Transfer Agreement has never been contested by the Club, and is evidenced by the *"intense relationship … prior and after the transfer of the Player"*, which went beyond the case of the Player.

50. Second, with regard to the *"alleged (and improper) replacement of the first contract by the second contract"*, the Respondent maintains that:

    i. there is no reference in the Second Commission Agreement of any function to substitute the First Commission Agreement;

    ii. the two Commission Agreements were signed on the same day, a fact which excludes that one was intended to replace the other;

    iii. the two Commission Agreements contain significant differences in wording, referring to the different functions performed by the Agent, one relating to the conclusion of the Employment Contract, the other regarding the Transfer Agreement. In fact, the basis for the calculation of the amounts due is different: in the case of the First Commission Agreement the basis is offered by the value of the Employment Contract; in the case of the Second Commission Agreement, the basis consists in the amount of the transfer fee: *"taking into account such different roles, it is logical that the Agent and the Club signed on the same date two commission contracts. … there is no "first" and "second" contract but two contracts under which the Agent performed different services related to the amount of the transfer and the labour conditions for the expected employment contract"*.

51. Third, the Agent contends that the amount due under the Commission Agreements, freely negotiated by the Parties, cannot be reduced, and that there is no link between the Commission Agreements and the duration of the employment relation between the Player and the Club: once the Employment Contract was concluded, the compensation for the Agent became due and payable, and there is nothing in the Commission Agreements or in the Employment Contract that stated that the remuneration owed was dependent on the Player staying at the Club for a specified amount of time.

3. LEGAL ANALYSIS

3.1 JURISDICTION

52. CAS has jurisdiction to decide the present dispute between the Parties.

53. In fact, the jurisdiction of CAS is not disputed by the Parties, has been confirmed by the signature of the Order of Procedure, and is contemplated by the Statutes of FIFA, which provide materially as follows:

Article 66

"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs,

Players, Officials and licensed match agents and players' agents.

2. *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".*

Article 67

"1. 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.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […]".

3.2 APPEAL PROCEEDINGS

54. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a contractual dispute, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, within the meaning, and for the purposes, of the Code.

3.3 ADMISSIBILITY

55. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes and complied with the requirements of Articles R48 and R64.1 of the Code, including the payment of the CAS Court Office fee. The admissibility of the appeal is not challenged by the Respondent. Accordingly, the appeal is admissible.

3.4 SCOPE OF THE PANEL'S REVIEW

56. According to Article R57 of the Code,

"the Panel shall have 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. …".

3.5 APPLICABLE LAW

57. Article R58 of the Code provides the following:

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

58. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA's rules and regulations, because (i) the Parties so agreed in Article 13 of the First Commission Agreement and in Article 12 of the Second Commission Agreement, and (ii) the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations.

59. In this respect it is to be noted that the FIFA Statutes provide for a choice-of-law rule, if an appeal against a final decision passed by FIFA's legal bodies is filed with the CAS. As already mentioned, in fact, pursuant to Article 66.2 of the FIFA Statutes:

"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".

60. As a result, the FIFA rules and regulations fall to be applied primarily. Swiss law, then, applies subsidiarily to the merits of the dispute.

3.6 THE DISPUTE

61. The object of the dispute is the Decision rendered by the Single Judge, which upheld a claim brought by the Agent and ordered the Club to pay an amount found to be due under the Commission Agreements. The Club disputes this conclusion, and requests that the Decision be set aside, or at least that the amount payable be reduced.

62. As a result of the Appellant's contentions in support of the claims it brings, the Panel observes that the main issues to be resolved are the following:

i. did the Agent fulfil his duties and obligations under the Commission Agreements?

ii. did one of the Commission Agreements supersede the other?

iii. should the remuneration due under any of the Commission Agreements be reduced for being excessive and/or disproportionate?

63. The Panel shall consider those issues separately.

i. Did the Agent fulfil his duties and obligations under the Commission Agreements?

64. The first of the Club's arguments is that despite the signature of the Commission Agreements, the Agent did not actually perform any services thereunder, because it was the *"front office"* of the Club that secured the services of the Player.

65. The Panel therefore has to examine whether there is sufficient evidence that the Agent actually

performed the obligations required of him under the Commission Agreements.

66. In that regard, the Panel notes the Club's reference to the award rendered in CAS 2006/A/1019, in which the arbitrator sought evidence of a *"significant involvement"* (and therefore of something more than a mere introduction of one party to the other) in the relevant transfer of the player in question, and to Articles 412 and 413 of the CO.

67. At the same time, the Panel remarks (i) that the Commission Agreements required from the Agent, following an *"Exclusive Mandate"* (see §§ 4 and 5 above), the performance of two main tasks: *"to negotiate a transfer fee"* and *"to negotiate the player's terms"*; and (ii) that an Employment Contract and a Transfer Agreement were actually executed. And the Panel is satisfied that convincing evidence has been provided by the Agent establishing his *"significant involvement"* in the transfer of the Player to, and his employment by, the Club.

68. Such conclusion is based on overwhelming documentary evidence, offered by the Agent. His involvement in the transactions regarding the Player is textually confirmed by the references in the Employment Contract and in the Transfer Agreement to the Agent as the agent of the Club (§§ 6 and 12 above), as well as by the letter dated 26 February 2014 of the President of the Club at the time the Commission Agreements were executed (§ 8 above), expressly indicating that *"Mr. Waked acted for the club at the request of the club and the knowledge of the board"* and that *"he brought both deals to a positive conclusion and the players promptly joined and played for the club"*.

69. The Panel notes that the Appellant offered no indication contrary to such evidence. The Appellant, indeed, maintains that it could not prove a "negative" fact, *i.e.* that the Agent was not "significantly" involved in the transfer of the Player. However, the Club, that submits that the services of the Player were secured by his *"front office"*, was at least in a position to offer evidence in support of this assertion, which would have contradicted the Respondent's indications. The Appellant failed to do so: it did not provide any declaration from any of the members of its *"front office"* supporting its version of events. It has to bear the consequences of this failure.

70. As a result, the Panel holds that Agent fulfilled his duties and obligations under the Commission Agreements. As a matter of principle, therefore, he should be entitled to receive the remuneration due under both of them, subject to the discussion below.

ii. Did one of the Commission Agreements supersede the other?

71. In order to avoid such conclusion, the Club maintains that only the remuneration mentioned by the Second Commission Agreement should be paid (even though subject to a further reduction), because the Second Commission Agreement replaced the First Commission Agreement.

72. The Parties remark that indeed the terms of the two Commission Agreements are largely coincident, and that their drafting probably followed a "copy and paste" approach: the text of one was probably used for the preparation of the other. Such element, however, is not, in the Panel's view, decisive: in fact, it does not necessarily imply that one version superseded the

other, since, however prepared, any text may have its specific and concurrent scope of application.

73. Actually, the Panel notes that two significant points distinguish the First Commission Agreement from the Second Commission Agreement:

    i. the First Commission Agreement defined the remuneration for the Agent to be *"10% … of the total value of the player's contract"* (Article 4), while the Second Commission Agreement valued such remuneration at *"10% … of the total value of the transaction"* (Article 4) and calculated it with reference to the *"total value of the transfer fee"* (Article 5);

    ii. the First Commission Agreement provided for an additional payment to the Agent in the event of *"any upgrade in the Player's contract"* (Article 10) or of the exercise by the Club of the option to extend the Player's services for a season (Article 11), while the Second Commission Agreement linked such additional payment to a subsequent transfer of the Player for a fee exceeding the fee paid by the Club under the Transfer Agreement (Article 10).

74. In the Panel's opinion, such distinctions make it clear that by the two Commission Agreements the Parties intended to cover and remunerate the two different services (§ 67 above) rendered by the Agent: the conclusion of the Employment Contract, object of the First Commission Agreement; and the conclusion of the Transfer Agreement, object of the Second Commission Agreement.

75. Such conclusion is confirmed not only by the mentioned distinct content of the Commission Agreements, but also by their context: the Commission Agreements were in fact signed on the same day; and it appears telling to the Panel that no provision is contained in the surviving version (be that the First Commission Agreement or the Second Commission Agreement) clarifying that the other version, equally signed, was superseded.

76. The same conclusion, it is to be noted, is not contradicted by any kind of evidence, which the Appellant failed to submit and which might have proved the reasons that are indicated by the Appellant to justify the "evolution" in the amount of the remuneration due to the Agent (but not the other textual differences).

77. In the same way, the identical general description of the services required of the Agent (Article 2) and the provision, contained in both Commission Agreements (Article 4), that the payments therein provided were satisfactory of any claim of the Agent in their respect, do not appear decisive to exclude the co-existence of the Commission Agreements. In fact, such provision appears to be linked to the very services remunerated under each of the Commission Agreements, so that no other compensation additional to the one contemplated by the First Commission Agreement would be paid to the Agent for the conclusion of the Employment Contract, and no other compensation additional to the one contemplated by the Second Commission Agreement would be paid to the Agent for the conclusion of the Transfer Agreement.

78. As a result, the Panel holds that the Second Commission Agreement did not supersede the First

Commission Agreement.

iii. Should the remuneration due under any of the Commission Agreements be reduced for being excessive and/or disproportionate?

79. The Club argues that, if the Panel ruled that compensation is due to the Agent under the Second Commission Agreement, then it should be reduced to EUR 90,000 pursuant to Article 417 of the CO, in order to reflect the period of time which the Player spent with the Club.

80. Firstly, the Panel notes that the amount of the remuneration due under the Commission Agreements corresponded to 10% of the value of the Employment Contract and of the transfer fee paid by the Club for the Player.

81. Such remuneration, which the Parties freely agreed to in the Commission Agreements, can be reduced by the Panel pursuant to Article 417 of the CO, if deemed to be *"excessive"*. However, in the case at hand, the Panel does not consider this commission to be unreasonable, excessive or contrary to common practice or to Swiss law. Indeed, the Appellant did not even submit any specific indication on the point, on top of a generic criticism.

82. Secondly, the Club argues that the commission due should be reduced to EUR 90,000 on the basis of the fact that the Player only remained with the Club for half of the time originally envisaged. Conversely, the Agent contends that there was no link between the commission owed to him and the length of time the Player spent at the Club.

83. The Panel agrees with the Agent's arguments. There is nothing in the Commission Agreements which explicitly states that the payments owed by the Club were subject to the Player completing the full term of the Employment Contract. As stated above, the Agent completed all the obligations required of him under the Commission Agreements and whether the Player left the Club in advance, or completed the entire term of employment, was irrelevant. The full amount of remuneration was owed to the Agent once the Transfer Agreement and the Employment Contract 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. As a result, the amount due cannot be reduced.

84. In summary, the Panel finds that the amount of remuneration contemplated by the Commission Agreements must not be reduced, as it is not excessive or disproportionate. Pursuant to the principle of *pacta sunt servanda*, therefore, its full amount (corresponding to an aggregate of EUR 340,000) should be paid to the Agent. The Decision, which reached the same conclusion, has to be approved.

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

3.7 CONCLUSION

86. In light of the foregoing, the Panel finds that the Appeal is to be dismissed in its entirety.

87. All further claims or requests for relief are dismissed as well.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 2 December 2015 by Al-Ittihad FC against the decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 21 May 2015 is dismissed.

2. The decision taken by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on 21 May 2015 is confirmed.

(…)

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