Arbitration CAS 2012/A/3012 Club Atlético Boca Juniors v. Sport Club Corinthians Paulista, award of 8 May 2014

Panel: Mr Ricardo de Buen Rodríguez (Mexico), President; Mr Hernán Ferrari (Argentina); Mr Rui Botica Santos (Portugal)

Football
Non-fulfilment of a sell-on clause due to early termination of the employment contract by mutual consent
Validity of an early termination of the employment contract by mutual consent
Alleged prevention in bad faith

1. **There is no provision that prohibits the early termination of employment contracts by mutual consent of employees and employers. This is possible not only in regular labour relationships but also in labour relationships between professional football players and clubs.**

2. **In the absence of any evidence of deception, the early termination of an employment agreement between a club and a player by mutual consent, preventing the fulfilment of a sell-on clause cannot be considered a reprehensible behaviour of that club nor a violation of the good faith principle, as such termination is just the exercise of the club and the player's right to freely and early terminate an employment contract by mutual consent.**

I. THE PARTIES

1. Club Atlético Boca Juniors (hereinafter the "Appellant" or "Boca"), is a football club based in Buenos Aires, Argentina, licensed by and registered with the Argentinean Football Association (AFA).

2. Sport Club Corinthians Paulista (hereinafter the "Respondent" or "Corinthians"), is a football club based in São Paulo-SP, Brazil, licensed by and registered with the Brazilian Football Confederation (CBF).

II. THE FACTS

II.1 GENERAL BACKGROUND

3. A summary of the most relevant facts and the background giving rise to the present dispute will be developed on the basis of the parties' submissions and the evidence taken. Additional factual background may be also mentioned in the legal considerations of the present award.

4. On 24 November 2004, the company X. Ltd (hereinafter "X. Ltd" or the "Company") and the Respondent signed a 10-year agreement so called *"Joint Venture Agreement for the exclusive management of the professional and amateur football department, licensing and other covenants"* (hereinafter, the "Joint Venture Agreement") by means of which the licensing of Corinthians' rights as well as the management of all its professional and amateur football departments were assigned to X. Ltd. The content of the Joint Venture Agreement has been analized and is well known by the Panel.

5. On 17 December 2004, the Appellant and the Respondent concluded the so called *"Contrato de Cesión de Derechos Económicos y Federativos"* in English the *"Assignment of Economic and Federative Rights Agreement"* (hereinafter the "Agreement") by virtue of which the Appellant transferred the Respondent the federative and economic rights of the Argentinean player C. (hereinafter, the "Player" or "C."), for the amount of USD 16.000.000.

6. It is important to point out that Clause 7 of the Agreement contained a sell on clause which reads as follows: *"in case of a future transfer of the Player by Corinthians to another club or sporting company, Boca Juniors will have the right to obtain the 20% of the exceeding amount which is over the sum of USD 35.000.000. In case that transfer is closed for an amount below USD 35.000.000, Boca Juniors will have not right to receive any other sum"*.

7. It is also relevant that Clause 8 of the Agreement stated that *"Corinthians shall inform Boca by writing in regard to the terms and conditions of the transfer before its execution (…)"*.

8. On 13 January 2005, the Player and Corinthians entered into an employment agreement valid as of 13 January 2005 until 13 January 2007 (hereinafter the "Employment Agreement").

9. It is important to remark that Clause 2 of the Employment Agreement provided that: *"in order to transfer the player to any other club abroad, the parties agreed that the value of the penalty clause shall be paid in favour of Corinthians, which is established in the amount of USD 100.000.000"*.

10. On 28 August 2006, the Player and the Respondent executed the *"Instrument of Settlement and Termination of Employment Agreement"* (hereinafter the "Termination Agreement").

11. In relation with the Termination Agreement the Appellant expresses that *"…Corinthians agreed with the Player and the Company X. Ltd to terminate the referred Player's Employment Agreement "for free"…"* and the Respondent argues that *"…The termination was decided by a company named X. Ltd*

Licenciamientos e Administracao Ltda ("X. Ltd"…), company that was responsible for managing the Professional Football Department of Corinthians at that time".

12. On 30 August 2006, West Ham United entered into a four-year agreement with the Player and the companies X. Ltd and Y. Inc.

II.2 THE PROCEEDINGS BEFORE FIFA

13. On 25 October 2007, Boca decided to file a claim before FIFA in order to request the payment by Corinthians of USD 4.000.000 as compensation for an alleged breach of the Agreement.

14. On 26 March 2012, the Single Judge of the Players' Status Committee rendered a decision (hereinafter the "Appealed Decision") in which he decided the following:

"(i) The claim of CA Boca Juniors is rejected.

(ii) The costs of the proceedings in the amount of CHF 12.000 are to be paid by Boca Juniors…".

II.3 THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 26 November 2012, the Appellant filed a statement of appeal before the Court of Arbitration for Sport – CAS, pursuant to Article R48 of the Code of Sports-related Arbitration (2012 edition) (the "CAS Code") against the Respondent with respect to the Appealed Decision.

16. On 26 December 2012, the Appellant filed its appeal brief, pursuant to Article R51 of the CAS Code.

17. By communication dated 14 January 2013, the CAS Court Office informed the Parties that the Panel had been constituted as follows:

- Mr. Ricardo De Buen Rodríguez, attorney-at-law, Mexico City, Mexico (President)
- Mr. Hernán Jorge Ferrari, attorney-at-law, Buenos Aires, Argentina appointed by the Appellant
- Mr. Rui Botica Santos, attorney-at-law, Lisbon, Portugal appointed by the Respondent.

18. On 8 February 2013, the Respondent filed its answer, pursuant to Article R55 of the CAS Code.

19. On 7 March 2013, the CAS Court Office informed the Parties that pursuant to Article R57 of the CAS Code and after having analysed the Parties' written submissions and studying the case, the Panel had decided to hold a hearing. The language of these proceedings is English.

20. On 23 May 2013, pursuant to Article R44.3 of the CAS Code, the Panel requested the Respondent to produce any agreement(s) signed on or after 17 December 2004 between Corinthians and/or X. Ltd or any other company concerning the Player. However, the

Respondent did not produce such documents by arguing that it had already filed all the contracts in which the Respondent was a party.

21. On 18 June 2013, the Order of Procedure was sent to the parties. Both Parties signed it without making any objection.

22. On 12 July 2013, the hearing in the present case took place in Lausanne.

23. The following persons attended the hearing:

    i. For the Appellant: Mr. Daniel Crespo, Mr. Lucas Ferrer, Mr. Cristian Ferrero and Ms. Ana Maria Ferrero, Attorneys-at-law; and Mrs. Marisol Crespo, translator.

    ii. For the Respondent: Mr. Ivandro Sánchez, Attorney-at-law.

24. The parties were afforded the opportunity to present their cases, submit their arguments and answer the questions raised by the Panel.

25. At the end of the hearing, the Parties explicitly agreed that their right to be heard and their right to be treated equally in these proceedings had been fully observed by the Panel.

III. SUMMARY OF THE PARTIES' POSITIONS

26. The following outline of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. However, the Panel has carefully considered all the submissions made by the Parties, even if no explicit reference has been set forth below.

III.1 THE APPELLANT'S POSITION

27. In summary, the Appellant's arguments are as follows:

a) Prevention by the Respondent of the fulfilment of Clause 7 of the Agreement

28. Despite acknowledging the great value of the Player, the Respondent decided to terminate the employment relationship with him. However, the Appellant considers that there is no reasonable explanation of this situation other than a clear deception orchestrated by Corinthians and X. Ltd in order to avoid their obligations vis-a-vis the Appellant.

29. The consequences of this behaviour should be analysed in the light of Swiss Law and taking into consideration CAS jurisprudence.

30. Clause 7 of the Agreement foreseen a sell on clause which reads as follows: *"in case of a future transfer of the Player by Corinthians to another club or sporting company, Boca Juniors will have the right to*

obtain the 20% of the exceeding amount which is over the sum of USD 35.000.000. In case that transfer is closed for an amount below USD 35.000.000, Boca Juniors will have not right to receive any other sum".

31. In accordance with article 151.1 of the Swiss Code of Obligations (hereinafter the CO), *"a contract which is dependent upon the occurrence of an uncertain fact in order to be binding is deemed to be conditional".*

32. Therefore, Clause 7 of the Agreement must be considered a conditional clause in the sense of Article 151.1 of the CO, which is also corroborated by the CAS jurisprudence, i.e. CAS 2009/A/1756.

33. Moreover, article 156 of the CO states that *"a condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith".*

34. The Appellant considers that this article is based on the general principle *"nemo auditor propiam turpitudinem allegans"*, which according to the jurisprudence of the Swiss Federal Tribunal (the "SFT"), only applies if the following conditions are met:

    (i) *The existence of a condition:* Clause 7 of the Agreement constitutes the condition in the present case.

    (ii) *The occurrence of this condition being prevented:* when the Respondent decided to terminate the employment contract with the Player, it prevented any potential fulfilment of the condition foreseen in Clause 7 of the Agreement.

    (iii) *A reprehensible behaviour of one of the parties to the contract:* allowing the Player to become a free agent without any reason and prejudicing the Appellant's interest shall be deemed reprehensible.

    (iv) *The violation of good faith principle:* according to the jurisprudence of the SFT, any infringement of the principle of mutual trust is sufficient for proving a violation of the good faith principle.

    (v) *A reasonable link between the behaviour of the preventing party and the non-occurrence of the condition:* as the performance of the Player was really good during 2005, his value had significantly increased as of 2004 (i.e. when he was transferred from Boca to the Appellant). It seems rather clear that should the Respondent have not agreed the early termination of the Employment Agreement with the Player; the latter would have been transferred to one of the several top-European clubs which were interested in his services.

35. Therefore, article 156 of the CO fully applies to the case at hand and the consequences foreseen therein shall be entirely assumed by the Respondent. In accordance with Swiss law doctrine, if the requirements for the applicability of such provision are met, the condition foreseen in the contract shall be deemed fulfil and the obligations deriving from it bind the parties.

36. In view of the foregoing, it shall be considered that the Player was transferred for a price that exceeds the amount of USD 35.000.000. Consequently, the Appellant should receive 20% of the price exceeding this amount.

b) Compensation in favour of Boca

37. In 2006, the Player was considered one of the most valuable players in the world. During such year his name was in the agendas of all European top clubs.

38. In accordance with the witness statements of T., N., R. and C., the value of the Player was between USD 40.000.000 and USD 45.000.000.

39. In addition, the Player's value could even be compared to other players with similar skills:

    (i) Transfer of Andriy Shevchenko from AC Milan to Chelsea for aprox. USD 60.000.000.

    (ii) Transfer of Didier Drogba from Marseille to Chelsea for USD 50.000.000.

    (iii) Transfer of Wayne Rooney from Everton to Manchester Utd. for USD 50.000.000.

40. The Appellant requested to the "Comité de Valoración de la LFP" to issue a report with respect to the market value of C. in 2006. The report concluded that the value of the Player at the moment of his transfer to West Ham United, in 2006, was GBP 36.000.000 (i.e. aprox. USD 58.000.000).

41. Furthermore, a report issued by KPMG.Sibille considers that the value of the Player was between USD 44.000.000 and USD. 52.000.000 at that time.

42. Finally, the Player was transferred to Manchester City in 2009 for an amount of GBP 47.000.000 (aprox. USD 76.500.000)

43. The Appellant criticized the opacity of the contractual relationship between C., Corinthians and X. Ltd. Only after the procedure was initiated before FIFA, the Respondent disclosed its private agreements with the Company.

44. The Appellant argues that there are some facts from which it could be inferred the existence of another private contract between the parties for a longer period that it could not be registered due to restrictions foreseen in Brazilian regulations. These facts are as follows:

    (i) *Statements to the press by K., X. Ltd President:* in May 2006, the X. Ltd president was not worried about the proximity of the end of the contract stating that *"C. will be sold in four or five years"*.

    (ii) *News and other publications:* there were several publications that assured a 5-year deal between C. and Corinthians.

    (iii) *Logical line of reasoning:* it is senseless to invest USD 16.000.000 in order to sign a young and promising player for only two years.

45. Based on the foregoing and taking into consideration that the market value of the Player was USD 55.000.000 in 2006; pursuant to Clause 7 of the Agreement the Respondent shall pay USD 4.000.000 (i.e. 20% of USD 20.000.000) to the Appellant following the application of article156 of the CO.

46. Moreover, the Appellant considers that it can also justify the same amount of damages (USD 4.000.000) from another perspective.

47. Under Swiss law, the principle *"restitution in integrum"* establishes that the party who suffers the damage shall be put in the same position as if the tortuous action would have never occurred.

48. The price considered by Boca for releasing the Player was not less than USD 20.000.000 net, as it was confirmed by the witness statements.

49. Despite Respondent's offer for the Player's transfer was not the highest, The Appellant decided to sell the Player to Corinthians because the Respondent offered the Appellant the possibility to participate in the profits of an eventual future transfer of the Player to a third club.

50. Therefore, the transfer price agreed between the Appellant and the Respondent was directly and stringently linked to the sell-on clause set forth in Clause 7 of the Agreement.

51. Contracts do not only oblige the parties to fulfil what is therein agreed, but also to assume the consequences that, depending on their nature, are in accordance with good faith, customs and law. Based on the commercial loyalty, parties are also obliged to communicate everything that could be relevant for the performance of the contract. The Respondent did not comply with this expectation.

52. The Appellant concluded that the Agreement signed by Corinthians and Boca for the transfer of the Player was made for a total amount of USD 16.000.000. Consequently, the difference up to USD 20.000.000 consists in USD 4.000.000, which is the amount claimed by the Appellant in these proceedings.

53. Within its statement of appeal, the Appellant requested as follows:

"a) Corinthians shall pay €4.000.000 to CA Boca Juniors by virtue of the agreement signed on 17 December 2004, plus the accrued legal interest.

b) Corinthians shall reimburse the CHF 12.000 paid by CA Boca Juniors as administrative costs within FIFA.

c) The costs related to the present arbitration shall be borne by Corinthians.

d) Corinthians shall pay the legal fees and other expenses incurred by CA Boca Juniors in connection with the present arbitration procedure".

54. Within its appeal brief, the Appellant requested the following prayers for relief:

"a) Accept the appeal against the decision adopted by FIFA on 26 March 2012.

b) To annul the decision issued by FIFA on 26 March 2012 and issue a new decision establishing that:

i. SC Corinthians Paulista is ordered to pay USD 4.000.000 to CA Boca Juniors.

ii. SC Corinthians Paulista shall reimburse the CHF 12.000 paid by Boca Juniors as administrative costs within FIFA.

iii. The costs related to the present arbitration shall be borne entirely by SC Corinthians Paulista.

iv. SC Corinthians Paulista shall pay the legal fees and other expenses, to be determined, incurred by CA Boca Juniors in connection with the present arbitration procedure.

Subsidiary, only in the event that the above is rejected, the Appellant requests the CAS:

a) To accept the appeal against the decision adopted by FIFA on 26 March 2012.

b) To annul the decision issued by FIFA on 26 March 2012 and issue a new decision establishing that:

i. SC Corinthians shall compensate Boca Juniors in the amount to be established by the Panel in application of article 42.2 of the Swiss Code of Obligations.

ii. SC Corinthians shall reimburse the CHF 12.000 paid by CA Boca Juniors as administrative costs within FIFA.

iii. The cost derived from the present arbitration shall be borne by SC Corinthians Paulista.

iv. Condemn SC Corinthians Paulista to pay the legal fees and other expenses incurred by Boca Juniors, still to be determined, in connection with the present arbitration procedure".

III.2 THE RESPONDENT'S POSITION

55. The Respondent's position can be summarised as follows:

56. On 28 August 2006, C. and the Respondent executed the *"Instrument of Settlement and Termination of Employment Agreement"*. The consequence of such agreement was that the Player became a "free agent".

57. The Respondent did not receive any financial compensation from West Ham United when the latter signed the Player.

a) Non-Applicability of article 156 of the CO

58. All the negotiations related to the Player's transfer from the Appellant to the Respondent were held by the company X. Ltd and not by the Respondent because, in virtue of the Joint Venture Agreement, the Company was the sole responsible of the management of the Professional Football Department of Corinthians.

59. Pursuant to clause 4.3 of the Joint Venture Agreement, *"X. Ltd shall be authorized to administer and manage with exclusivity the Football Department (…) including the assignment of the Federative rights of any player (…)".*

60. Therefore, the Respondent had not had a reprehensible behaviour since it limited itself to comply with the Joint Venture Agreement signed with X. Ltd and, more specifically, with the Clause 4.3 of such agreement.

61. Finally, the Respondent argued that article 156 of the CO was not applicable to the case at hand since the Respondent has only complied with a contractual obligation assumed towards X. Ltd and, therefore, it did not acted with bad faith in order to prevent the occurrence of any condition which could hypothetically benefit the Appellant.

b) Non-Prevention of the Respondent to terminate the Employment Agreement with the Player

62. The Appellant had not included in the Agreement any rights and/or contractual guarantees to protect its interest in front of X. Ltd.

63. The Agreement did not impose the Respondent any obligation towards the Appellant other than the ones described in its clauses seven and eight.

64. Therefore, the Respondent was not prevented to:

(i) Execute a two-year employment agreement with the Player, as it was duly evidenced with the filing of such contract;

(ii) Agree with C. the early the termination of the Employment Agreement without receiving any financial compensation, as it was also duly evidenced with the filing of the Termination Agreement.

c) Non-Applicability of the precedent brought by the Appellant

65. The Appellant made reference to the CAS award rendered in the case CAS 2009/A/1756. However, the Appellant omitted to mention that in such case the player requested the early termination of the employment agreement because the club did not pay his salary during six months. Therefore, in such case the bad faith was recognized due to the fact that the club did not pay the player's salary.

66. In the present case, the termination of the Employment Agreement with the Player was made in good faith and in compliance with the Joint Venture Agreement.

d) The Appellant's hypothetical lack of knowledge about the relationship between Corinthians and X. Ltd.

67. The Respondent avers that the Appellant had full knowledge with respect to the contractual relationship maintained between the Corinthians and X. Ltd.

68. The player's transfer negotiations were personally conducted by K. and the Appellant was aware that such person was the chairman of X. Ltd and not of the Respondent.

69. Furthermore, even in FIFA's official website was published the contractual relationship between Corinthians and X. Ltd by referring to investments made by the Company in players such as C.

70. Moreover, Clause 4 of the Agreement established that *"the total amount of the transaction (…) will be paid by Corinthians or by whom this determinates (…)"*. Therefore, the parties expressly recognized the possibility that a third-party assumes the obligations foreseen in the Agreement.

71. In view of the above, the Appellant was completely aware that X. Ltd would be responsible for the payment of the transfer of C. to Corinthians, as it actually was. Furthermore, all the amounts received by the Appellant in connection with the player's transfer were paid by companies pertaining to the X. Ltd Group, and not by the Respondent.

72. Consequently, the Respondent considers that the Appellant's arguments by means of which the latter sustains that (i) it was not aware of the participation of X. Ltd in the player's transfer and (ii) Corinthians acted in bad faith are completely false. Therefore, such arguments shall be disregarded by the Panel.

e) The "Market value" of the Player.

73. The market value is undisputed due to the fact that the Respondent:

    (i) did not receive any compensation for the termination of the Employment Agreement nor for the Player's signing with West Ham United.

    (ii) did not acted in bad faith for preventing the fulfilment of any condition which could hypothetically benefit the Appellant.

74. Despite that, the market value attributed by the Appellant was not reasonable, especially in view of Article 28 of Brazilian Law 9615/1998 ("Lei Pelé"- the Federal law that regulates sports in Brazil), which establishes that the penalty clause might be freely agreed between the parties. However, the penalty clause does not mean that the market value of C. was at that moment USD 100.000.000. In this respect, it shall be noted that the penalty clause is a contractual mechanism used by clubs in order to protect themselves from losing players without receiving any compensation.

75. Another argument sustained by the Appellant was related to the sporting results of the Player. However, if the Player's market value was directly linked to the sporting results, such value would have been even higher in 2003, when he won the Copa Libertadores with Boca.

76. Moreover, the Appellant refers to the report issued by KPMG-Sibille which intends to assess C. market value when he signed with West Ham United. However, it shall be noted that Sibille is an Argentinian company and, therefore, it is clear that such report was biased in order to support the Appellant's allegations.

77. The Appellant also refers to the Player's transfer from Manchester United to Manchester City in 2009 for GBP 47.000.000. However, this situation cannot be compared with this specific case because such teams have a huge rivality. Furthermore, Manchester City is one of the richest teams in the world.

78. Regarding the report issued by the Comité de Valoración of the LFP, it is necessary to take into account that transfer fees depend on different circumstances such as the financial situation of the players' current club, the players' intention to be transferred, the term remaining of employment agreements…etc. However, all these circumstances were unknown by the companies which prepare the reports filed by the Appellant.

79. Finally the Respondent argued that the contract between the Respondent and the Player would have been expired in less than six months and, thus, when the Respondent and the Player terminated their contractual relationship, the latter was already allowed by FIFA Regulations to negotiate a new contract with another club without being obliged to pay any compensation to the Respondent.

80. Therefore, the market value assigned by the Appellant to the Player was unreasonable since it did not take into account the specific contractual status of the Player at the time he terminated his Employment Agreement with the Respondent.

81. Within its answer, the Respondent requested the following prayers for relief:

a) Fully maintaining the decision passed by the Single Judge of the Players' Status Committee of the FIFA on 26 March 2012.

b) Condemning the Appellant to the payment, in favour of the Respondent, of all the legal expenses incurred.

c) Condemning the Appellant to the payment of all the costs derived from the proceeding before this honourable CAS.

IV. LEGAL CONSIDERATIONS

IV.1 CAS JURISDICTION

82. Article 67.1 of the FIFA Statutes states 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"*.

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

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

84. Therefore, the Panel considers that CAS is competent to decide on this case.

IV.2 ADMISSIBILITY

85. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

86. The same time limit is contained in article 63.1 of the FIFA Statutes which is applicable to the present dispute and no further internal recourse against the Decision is available to the Appellant within the structure of FIFA.

87. The Appealed Decision was notified to the Appellant on 5 November 2012, and the Statement of Appeal was presented on 27 November 2012. Taking into account that 26 November 2012 was holiday in Argentina, the Panel considers that the appeal was filed on time pursuant to Article R32 of the Code.

88. Consequently, the appeal shall be deemed admissible.

IV.3 APPLICABLE LAW

89. Article R58 of the CAS Code reads as follows:

"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 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".

90. Clause 10 of the Agreement stipulates the following:

"For any effect arising out of the contract, the parties set the domiciles mentioned above, where all notifications/communications shall be considered as valid, and they accept to be submitted to the competent bodies of FIFA".

91. In accordance with article 66.2 of the FIFA Statutes, the provisions of the CAS Code shall apply to these proceedings. Therefore, CAS shall primarily apply FIFA Regulations and, subsidiarily, Swiss law.

IV.4 MERITS

92. According to the parties' written submissions and the arguments raised by them in the hearing, the main issues raised in this dispute are as follows:

    1.- Was the termination of the Employment Agreement by the Respondent a prevention of the fulfilment of the Agreement, and in particular, of its clause 7 or not?

    2.- In case the Respondent is liable, should it pay compensation to the Appellant and in what amount?

93. For logical reasons, the Panel will first analyse the first question.

1. Was the termination of the Employment Agreement by the Respondent a prevention of the fulfilment of the Agreement and in particular clause 7 or not?

94. The Appellant basically argues that the behaviour of the Respondent allowing C. to become a free player prevented it to receive the amount agreed in Clause 7 of the Agreement.

95. The Appellant has filed different arguments to support its position. All these arguments as well as the allegations contained in the Respondent's answer have been carefully studied by the Panel.

1.1 The role of X. Ltd.

96. First of all, it is undisputed that the Joint Venture Agreement was executed and from that moment onwards, X. Ltd was in charge of the management of the Respondent's professional and amateur football departments.

97. The Appellant sustains that the Respondent did not disclose within the Agreement that the Player's economic rights were controlled by X. Ltd. On the other hand, the Respondent argued that Boca was aware of such circumstance due to the fact that the Player's transfer negotiations were carried out by the chairman of X. Ltd and the payments received by Boca in relation to such transfer were made by companies pertaining to the X. Ltd group and not by the Respondent.

98. Regardless whether the Appellant knew that X. Ltd owned the economic rights of the Player, the Panel finds there is no conflict between the confidentiality of the private agreement signed by the Respondent and X. Ltd and the Agreement signed by the Appellant and the Respondent.

99. Despite the evidences filed by both parties, for this Panel it is not clear if Boca was aware of the contractual relationship between the Respondent and X. Ltd at the moment in which the Agreement was signed. However, the Panel considers that this circumstance is not relevant to settle this issue.

100. The Respondent argued that if the Appellant had any right to be claimed, it must be addressed to X. Ltd. However, the Panel considers important to point out, after analysing the Joint Venture Agreement and the factual relationship between the parties, that in case X. Ltd was liable for preventing the fulfilment of the Agreement, such liability would not exclude per se the Respondent's liability in this respect. On this basis the Panel will reach the other conclusions in this award.

1.2 The Agreement

101. There is no dispute regarding the existence and content of the Agreement.

102. At this stage, the Panel considers pertinent to refer to Clause 7 of the Agreement, which reads as follows:

"In case of a future transfer of the PLAYER by CORINTHIANS to another club or sporting company, BOCA will have the right to obtain the 20% of the exceeding amount which is over the sum of US$35.000.000 (Thirty five millions US Dollars). In case that that the transfer is closed for an amount below US$35.000.000 (Thirty five million US Dollars), Boca will have no right to receive any other sum".

103. The Appellant alleges that the Respondent prevented the fulfilment of clause 7 of the Agreement. For that reason, it is important to remark the conditions contained therein which grant Boca the right to obtain a further compensation:

a) A Player's future transfer from the Respondent to another club.

b) The payment received by the Respondent for the Player's transfer to a third club exceeds the amount of US $35.000.000

1.3 The Respondent's eventual prevention of the fulfilment of the conditions foreseen in clause 7 of the Agreement

104. This is the most important issue to be solved by the Panel.

105. There is no dispute in relation with the termination of the Employment Agreement and that following such termination the Player signed a new employment contract with West Ham United.

106. Corinthians argues that no transfer fee was paid by West Ham United either to the Respondent or X. Ltd in order to sign the Player. In this regard, the Appellant only states that *"…the Player supposedly signed as a "free agent" a new employment agreement with the English club West Ham United"*.

107. However, the Appellant considers the Respondent liable for the way it dealt with the termination of the Employment Agreement, and more specifically, for allowing the Player to become a free agent before his signing with West Ham United.

108. The Appellant sustains that even though the Respondent acknowledged the great value of the Player, it surprisingly decided to terminate the employment relationship with him without receiving any financial compensation. The Appellant considers that there is no reasonable explanation other than a clear deception orchestrated by Corinthians and X. Ltd in order to avoid their obligations vis-a-vis the Appellant. The Appellant alleges that the Respondent's breach of the Agreement and its bad faith caused the Appellant a significant economical damage.

109. The Appellant requests the Panel to analyse this case in the light of Swiss Law.

110. The Panel deems important to highlight that is not very common that a world class player with a valid employment contract is released by his Club and immediately after, such player is hired by a new Club without paying any transfer fee. However, this Panel considers that this case shall be exclusively solved taking into account the facts that were already proven as well as the applicable law but disregarding allegations which are only mere assumptions.

111. The Appellant argues that it is entitled to receive compensation in accordance with article 156 of the CO, which states that *"a condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith"*.

112. The Appellant contends that article 156 of the CO is based on the general principle *"nemo auditor propiam turpitudinem allegans"*, and the requirements to apply such provision are met in this particular case because:

    1. The existence of a condition.
    2. The fulfilment of this condition was prevented by the Respondent.
    3. A reprehensible behaviour of the Respondent took place.
    4. The violation of good faith principle by the Respondent, either intentionally or not.
    5. A reasonable link between the behaviour of the Respondent and the non-fulfilment of the condition.

113. The Respondent states that none of these conditions are met or applicable to this specific case. The Respondent contends that it only complied with its contractual obligations towards the Company derived from the Joint Venture Agreement.

114. After analysing all the facts and evidences filed by the parties, the Panel considers the following facts as proven:

    a) The Respondent and the Player agreed to early terminate the Employment Agreement. In this regard, the Panel considers that there is no provision that prohibits the early termination of employment contracts by mutual consent of employees and employers. This is possible not only in regular labour relationships but also in labour relationships between professional football players and clubs.

b) There is no doubt that the Player signed a new contract with West Ham United and he was formally entitled to do so as a free agent.

c) There is no evidence that the Respondent or X. Ltd received directly or indirectly any payment related the Player's signing with West Ham United. Furthermore, there is no evidence of any payment at all.

d) There is no evidence of the supposed clear deception orchestrated by Corinthians and X. Ltd to avoid their obligations in front of the Appellant. As it was previously stated, this Panel considers the termination of the Employment Agreement as a really extraordinary situation, but such situation is not enough to conclude that the Respondent and X. Ltd tried to circumvent its contractual obligations vis-à-vis the Appellant. The Panel has no evidence of any agreement signed by the Respondent and X. Ltd in this regard.

e) Even though the performance of the Player was outstanding during 2005 and the normal situation would have been to transfer him in exchange of a significant amount of money, this Panel considers that the termination of the Employment Agreement with the Player could be a Respondent's business decision. To assess the reasons for taking such decision are beyond the scope of analysis and review of this Panel.

115. In view of the above and in the light of article 156 of the CO, the Panel agrees that Clause 7 of the Agreement is a conditional clause. However, the Panel considers that the occurrence of the condition foreseen in such clause was not prevented by the Respondent's early termination of the Agreement because such termination was, at least from the evidence filed by the parties in this case, just the exercise of the parties' right (the Respondent and the Player) to freely and early terminate a labour contract by mutual consent.

116. In this sense, the Panel is of the opinion that the termination of the Employment Agreement cannot be considered a reprehensible behaviour of the Respondent nor as a violation of the good faith principle. In this respect, the Panel does not find proof linking the behaviour of the Respondent and the non-occurrence of the condition foreseen in Clause 7 of the Agreement.

117. As mentioned above, a termination of a labour agreement like the one that occurred in this case is not very common but it is still lawful. The bad faith of the Respondent must be proven and it cannot be based on mere presumptions.

118. For this Panel, in this case, there is no enough proof to conclude that the Respondent's behaviour (i.e. to allow the Player became a free agent) was aimed to prevent the fulfilment of the Agreement or was an act of bad faith.

119. Therefore, after a thorough analysis of the requirements to be fulfilled for the applicability of article 156 CO, this Panel concludes that such provision is not applicable to this case because:

- There is no enough evidence to prove that the Respondent prevented the fulfilment of the condition foreseen in clause 7 of the Agreement.
- There is no evidence of bath faith from the Respondent.

120. This Panel concludes that the Respondent is not liable because it did not breach the Agreement nor prevented the fulfilment of the condition contained therein. Therefore, the Panel considers that there is no compensation to be paid by the Respondent to the Appellant.

2. In case the Respondent is liable, should it pay compensation to the Appellant and in what amount?

121. As mentioned above the Panel concludes that there is not a breach of contract by the Respondent and, therefore, it had no obligation to pay any compensation to the Appellant. For this reason, the panel considers moot to analyse the amount of any compensation.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Club Atlético Boca Juniors against the decision issued on 26 March 2012 by the Single Judge of FIFA is dismissed.

2. The decision issued on 26 March 2012 by the Single Judge of FIFA is confirmed.

(…)

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