

**Arbitration CAS 2017/A/5219 Gaetano Marotta v. Al Ain FC, award of 20 April 2018**

Panel: Prof. Petros Mavroidis (Switzerland), President; Mr Olivier Carrard (Switzerland); Mr João Nogueira da Rocha (Portugal)

*Football**Claim for player's agent commission following transfer of player**Applicable version of FIFA rules and regulations**Advance of costs**Waiver of right to lodge a claim with FIFA judicial bodies**Principle of "Durchgriff"*

1. In order to determine which version of the FIFA regulations applies to a dispute, the date of the submission of the claim before FIFA is the most relevant criterion. Specifically, the general principle, expressly transcribed *e.g.* in Article 26 para. 1 of the Regulations on the Status and Transfer of Players (RSTP), is that any case that has been brought to FIFA before the entering into force of the most recent version of the regulations, will be assessed according to the previous regulations, *i.e.* the regulations in force at the moment of the filing of the claim before FIFA.
2. The advance of costs is an administrative issue which is dealt with by the CAS Court Office. The deadline fixed by the CAS Court Office is only an indicative delay, not a mandatory time limit. The non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with Article R64.2 of the Code of Sports-related Arbitration.
3. According to Article 25 para. 5 of the RSTP, a party waives its right to lodge a claim with the FIFA deciding bodies if more than two years have elapsed from the event giving rise to the dispute. In this context the date on which the Respondent has been notified of the claim, even if much later, is irrelevant.
4. The "*Durchgriff*" principle, liberally translated, allows to pierce the corporate veil and acknowledge rights, otherwise belonging to a legal entity, to a natural person who has created a legal entity for the exercise of his or her commercial activity. For the *Durchgriff* principle to apply, *i.e.* for a natural person, in a legal action to act in the place of his or her company (holder of the disputed right), on the ground that, economically speaking, he/she and the company are the same person, the individual relying on the principle must establish that he/she is the sole shareholder of the legal entity or that there is an economical identity between him/her and the company, and that there is a misuse of the legal independence of the "one man company limited by share" to

fraudulently obtain an unjustified advantage. In order to establish sole shareholder capacity it is not sufficient for the individual in question to provide a (signed) statement confirming that he/she holds – and always held – the totality of the shares of the company, accompanied by a testimony of one of the company’s employees. Rather more convincing evidence has to be adduced such as *e.g.* the shares themselves or at least the register of bearer shareholders and of the beneficial owners notified to the company as required under the Swiss Code of Obligations.

I. THE PARTIES

1. Mr. Gaetano Marotta is a players’ agent, licensed by the Swiss Football Association (“Mr. Marotta” or “the Appellant”). He alleges that he is also the sole shareholder as well as the sole director of Gama Sport & Events SA, a company limited by shares with its registered seat in Montreux, Switzerland. The goal of this company is (as translated into English by Mr. Marotta) *“management of sportsmen and sportswomen; placement of football players; organisation and development of sporting events; acquisition and sale of sports rights; economic, financial, tax, legal, asset management and insurance services and advice, mainly for persons or institutions operating in the field of sport”*. In 2017, Gama Sport & Events SA was put into bankruptcy.
2. Al Ain Football Club (“Al Ain” or the “Respondent”) is a football club with its registered office in Al Ain, United Arab Emirates. It is a member of the United Arab Emirates Football Association (“UAEFA”), which is, in turn, affiliated with the Fédération Internationale de Football Association (“FIFA”).

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings, and evidence adduced. References to additional facts and allegations found in the Parties’ written submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence that it deems is necessary to explain its reasoning.

B. The transfer of Mr. A. to Al Ain

4. In 2011, the head coach of Al Ain was Mr. Olaroiu Cosmin, an individual of Romanian nationality. He was acquainted with Mr. Mihaita-Ionut Curea, a compatriot of his, who introduced him to Mr. Marotta.

5. In 2011, Mr. Olaroiu Cosmin was looking for a player with specific skills and, in this context, entered into contact with Mr. Marotta, who suggested the acquisition of the services of Mr. A. (the “Player”). At that time, the latter was registered as a professional player with the English club Sunderland Association Football Club (“Sunderland”).

6. On 4 September 2011, Al Ain sent the following facsimile:

*“To: Gama Sport Management & Events SA,
Avenue des Alpes 29,
1820 Montreux,
Switzerland,*

Represented by Marotta Gaetano

Subject: player transfer commission

The Higher management of Al Ain Sports & Cultural Club greets you and wish you continuous success.

We would like to inform you that Al Ain FC will give you 10% from the contract between Al Ain FC and Sunderland Association Football club as commission after finishing the transfer of the player/[A.] to Al Ain FC. (...).”

7. The same day, Al Ain sent another facsimile, which reads as follows:

“TO WHOM IT MAY CONCERN

Subject: Mandate for [A.]/Al Ain FC

Al Ain Football Club (...).

Hereby gives its exclusive authorization to Gama Sport Management & Events SA, Avenue des Alpes 29, 1820 Montreux, Switzerland, Represented by Marotta Gaetano, to make enquiries on its behalf in regard to a potential playing contract for the player [A.] (born [...] 1985).”

8. Mr. Marotta entered into negotiations with the representatives of Sunderland for the definitive transfer of the Player to Al Ain. It is not disputed that he travelled all the way to England to meet the Player’s employer.

9. On 5 September 2011, Mr. Miguel Lopes, from Gama Sport & Events SA, sent in the name of Mr. Maximilien Solazzi, an employee of Gama Sport & Events SA, an email to Mr. Niall Quinn, the chairman of Sunderland, which stated the following:

“Dear Mr. Niall Quinn,

Please find our proposal in according with your discussion with Mr. Marotta.

In case of question you can contact me to (...) (Solazzi Maximilien) or (...) (Marotta Gaetano).”

10. Attached to this e-mail was a one-page document, printed on paper with Gama Sport & Events SA letterhead. It read as follows:

“Following your conversation with Mr. Marotta (Gama Sport Management & Events SA), please find our proposal after the transfer of the player’s [A.] of Sunderland FC to Al Ain FC in according to the mandate received from the Al Ain FC.

Our proposal is as follows:

- *8 million euro price for the transfer*
- *1 million euro bonus*
- *10% commission or 800’000.00 euros (payable on the international transfer of the player)*

Deadline for payment:

- *5 million euros to the contract is signed the international transfer*
- *3 million euros payable in July 2012.*

We stay at your disposal for any questions.

Best Regards

Montreux, the 5th September 2011

Gama Sport & Events SA

Gaetano Marotta”.

11. On 6 September 2011, at 00.42 a.m., Mrs. Margaret Byrne, the CEO of Sunderland, answered to Mr. Maximilien Solazzi and made the following counter-offer:

“Our Chairman, Mr. Nail Quinn expressed to Mr. Liam Weeks what would be required for this transfer to occur. To reconfirm, the following is what we will accept:

Guaranteed sums

(...)

10% commission for Gama Sport (900’000.00 Euros) upon signing the contract or when is the international transfer of player”.

12. On 6 September 2011, at 2.15 a.m., Mr. Miguel Lopes sent in the name of Mr. Maximilien Solazzi another email to Mr. Niall Quinn, who was invited to contact either Mr. Solazzi or Mr. Marotta, should he have further questions. This message referred to a discussion that Mr. Niall Quinn had with Mr. Marotta and attached to it was a new offer, printed on a document with Gama Sport & Events SA letterhead. It read as follows:

“Following your conversation with Mr. Marotta (Gama Sport Management & Events SA), we send to you our definitive proposal for the transfer of the player’s [A.] of Sunderland FC to Al Ain FC in according to the mandate received from the Al Ain FC.

Our definitive proposal is:

Total amount: 9.00 millions euros

Duration of the contract: 4 years

- 7.00 millions euros to pay at same time the sign up of the contract
- 2.00 millions euros to pay the 1st June 2012
- and if Al Ain FC is the winner of the national championship: 500'000.00 euros / each year Al Ain FC is winner.
- 10% commission for Gama Sport (900'000.00 Euros) upon signing the contract or when is the international transfer of player.

In case of acceptance of this offer, we will send the official contract by fax for approval.

We stay at your disposal for any questions.

Best Regards

Montreux, the 5th September 2011

Gama Sport & Events SA

Gaetano Marotta”.

13. On 6 September 2011, at 10.13 a.m., Mr. Maximilien Solazzi sent another mail to Mrs. Margaret Byrne containing a new offer, which confirmed a “10% commission for Gama Sport (900'000.00 Euros) upon signing the contract or when is the international transfer of player”.
14. On 6 September 2011 at 11.53 a.m., Mrs. Margaret Byrne sent a message asking Mr. Marotta to confirm that he agreed with the conditions of the transfer of the Player set in her mail of the same day, sent at 9.46 a.m., in which case, Sunderland “will then speak with the player/ his agent about paying commission of € 500,000 to your company as we are not responsible for this”. As a matter of fact, in her mail sent the same day at 9:46 a.m., Mrs. Margaret Byrne stated that “I must also stress that your mandate is not with Sunderland AFC hence we are not paying commission to Gama Sport. Any commission you are seeking must be paid by Al Ain FC. Our Chairman, Mr. Niall Quin, MBE, will speak with H.H. First General Sheikh Mohamed Bin Zayed Al Nahyan or H.H Sheik Hazza Bin Zayed Al Nahyan if necessary regarding this matter should this be an issue”.
15. On 6 September 2011, at 13.44, Mr. Maximilien Solazzi informed Al Ain of the deal agreed between Mr. Marotta and Sunderland for the transfer of the Player. In this message, there was no mention of any agent’s fee whatsoever.
16. On 6 September 2011, at 14.22, Al Ain answered to Mr. Maximilien Solazzi that it could not accept all the terms and conditions that had been negotiated with Sunderland. In its mail, Al Ain listed the amendments to be made in the offer for the Player’s transfer.
17. On 6 September 2011, at 14.41, Al Ain sent directly to Mrs. Margaret Byrne its counter-offer for the acquisition of the Player’s services. This offer was still different from the one mentioned 20 minutes earlier to Mr. Maximilien Solazzi, and did not make any reference to agent’s fees. It did not identify a specific agent either.
18. In the evening of 6 September 2011, several emails were exchanged between Al Ain and Mrs. Margaret Byrne, each party making new changes to the draft of the transfer agreement.

19. Finally, on 7 September 2011, Al Ain sent a final e-mail to Mrs. Margaret Byrne, where it stated the following:

“First of all we want to thank you for your kind cooperation, and we are very sorry to cancel our offer due to the high value of it and its over our budget, we hope that you will understand our decision, wish to deal with your highly reputed club in the future”.

20. The same day, Al Ain sent an email to Mr. Maximilien Solazzi and to Mr. Marotta with the following content:

“First of all we want to thank you all for your kind cooperation during the negotiation with Sunderland AFC, and we want to inform you that we send apology to the club because we can't accept the offer, thanks again for your cooperation, and we will continue dealing with your kind company in future”.

21. On 9 September 2011, Al Ain and Sunderland entered into an agreement consisting of two elements: the temporary loan of the Player and an option granted to Al Ain to acquire the definitive transfer of the Player. The main characteristics of this document can be summarised as follows:

- Sunderland accepted to transfer the Player to Al Ain on a temporary loan basis from the date of the signature of the contract until 30 June 2012.
- In exchange of the loan, Al Ain agreed to pay to Sunderland EUR 6'000'000 in the following two instalments:
 - o EUR 3'000'000 within three days of the registration of the Player with Al Ain;
 - o EUR 3'000'000 on 1 January 2012.
- Al Ain had the option to make the transfer of the Player definitive provided that it exercised the option clause by 30 April 2012 and paid an additional EUR 2'000'000.

22. By means of an 8-page long contract signed on 10 October 2011 with Mr. Rawad Georges Kassis, a licensed players' agent, Al Ain accepted to pay to the latter a fee of EUR 600'000 for the services he provided in relation with the Player's transfer from Sunderland to Al Ain.

23. On 31 October 2011, Al Ain paid to Mr. Rawad Georges Kassis the contractually agreed commission.

24. On 14 January 2012, Al Ain exercised its option to make the Player's transfer definitive.

25. By means of a contract signed on 20 June 2012, Sunderland agreed to transfer the Player to Al Ain on a permanent basis.

C. Proceedings initiated by Mr. Marotta before FIFA

26. On 1 July 2013, Mr. Marotta filed a claim before the Single Judge of the FIFA Players' Status Committee (the “Single Judge”) in order to obtain from Al Ain the payment of the fee that he

claimed to have been entitled to. According to him, the amount to be paid in his favour was EUR 900,000.

27. In its Response, Al Ain argued that Mr. Marotta's claim was not only time-barred but also unfounded as the negotiations led by Mr. Marotta proved to be ineffective. Al Ain argued that it used the services of another players' agent, Mr. Rawad George Kassis, to enter into a loan agreement with Sunderland with an option to make the Player's transfer definitive.
28. In a decision dated 28 February 2017, the Single Judge found that Mr. Marotta's claim had been filed in a timely manner and, consequently, decided to enter into the merits of the dispute. In this regard and on the basis of the evidence on record, the Single Judge held that Al Ain appointed Gama Sport & Events SA (and not Mr. Marotta) to negotiate the Player's transfer with Sunderland. He observed that on every document available, Mr. Marotta appeared to be acting merely as the company's representative and not on his own behalf. *"Hence, from the Single Judge's point of view, in accordance with his well-established jurisprudence, it could not be ascertained that an agreement had been personally concluded between [Mr. Marotta] and [Al Ain] with regard to the loan of the player to Sunderland"*.
29. As a result, on 28 February 2017, the FIFA Single Judge decided the following:
 1. *The claim of [Mr. Marotta] is admissible.*
 2. *The claim of [Mr. Marotta] is rejected.*
 3. *The final costs of the proceedings in the amount of CHF 10,000 are to be paid by [Mr. Marotta]. (...)"*.
30. On 7 June 2017, the Parties were notified of the above decision (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 28 June 2017, Mr. Marotta lodged a statement of appeal with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). Mr. Marotta's brief was in French. Al Ain and FIFA were named as Respondents. Mr. Marotta eventually withdrew his appeal as far as it was directed against FIFA.
32. On 4 July 2017, the CAS Court Office acknowledged receipt of Mr. Marotta's statement of appeal and of his payment of the CAS Court Office fee. It noted that Mr. Marotta chose French as the language of the arbitration. In this respect, it informed Al Ain that, unless it objected within five days, the procedure would be conducted in French. The CAS Court Office also invited Al Ain to comment within seven days on Mr. Marotta's request to submit the present matter to a sole arbitrator. It advised Mr. Marotta that he had to file his appeal brief or declare that his statement of appeal was to be considered as the appeal brief within ten days.
33. On 6 July 2017, Mr. Marotta applied for a 10-day extension of his deadline to file his appeal brief.

34. On 11 July 2017, Al Ain informed the CAS Court Office that it could not understand the statement of appeal filed by Mr. Marotta as it was in French. It submitted that the proceedings should be conducted in English and requested “*an extension of time limit of the arbitration panel (number of arbitrators) until Al Ain receives an English copy of the statement of Appeal or until receiving an English copy of the Appeal brief*”.
35. On 11 July 2017, the CAS Court Office:
- invited Mr. Marotta “*to indicate, [...] on or before 14 July 2017, whether he would accept that the present procedure be conducted in English; in the absence of an agreement the President of the CAS Appeals Arbitration Division will decide*”;
 - invited Mr. Marotta “*to express, within the same time limit, his position on the suspension of the time limit for the Respondents’ determination on the number of arbitrators*”;
 - informed the Parties that “*The time limit for (i) the Respondents’ determination on the number of arbitrators, (ii) for the filing of the appeal brief (...) are suspended until further notice from the CAS Court Office*”.
36. On 14 July 2017, Mr. Marotta requested that the proceedings be conducted in French and accepted that the time limit for Al Ain to decide on the number of arbitrators be suspended until a final decision on the language of the arbitration.
37. In an Order on language rendered on 26 July 2017 and notified the same day to the Parties, the Deputy President of the Appeals Arbitration Division of the CAS decided the following:
- “1. *The language of the arbitral procedure CAS 2017/A/5219 (...) is English;*
 2. *[Mr. Marotta] shall file an English translation of his statement of appeal, within ten (10) days from the notification of the present Order, by facsimile;*
 3. *[Mr. Marotta] shall file his appeal brief in English, with all accompanying exhibits in English, within ten (10) days from the notification of the present Order, by facsimile;*
 4. *[Al Ain] shall provide its position on the issue of the number of arbitrators within five (5) days from the receipt of the translated statement of appeal (...)*”.
38. On 9 August 2017, the CAS Court Office acknowledged receipt of Mr. Marotta’s translation into English of his statement of appeal as well as his appeal brief, filed on 7 August 2017. It invited Al Ain to submit its answer within the next 20 days.
39. On 15 August 2017, Al Ain requested the matter to be referred to a panel of three arbitrators and informed the CAS Court Office that it was appointing Mr. João Nogueira da Rocha, as arbitrator. It also requested the time limit to file the answer to be fixed after the payment by Mr. Marotta of his share of the advance of costs.

40. On 15 August 2017, the CAS Court Office took note of Al Ain's requests of 15 August 2017 and confirmed that the deadline to submit the answer was set aside. It required Al Ain to indicate whether it intended to pay its share of the advance of costs but did not receive a definitive position within the granted deadline.
41. On 31 August 2017, the CAS Court Office informed the Parties that *"the President of the CAS Appeals Arbitration Division deems that the circumstances of the present case justify its submission to a Panel composed of three arbitrators provided that [Al Ain] pays its share of the advances of costs, which will be requested to the parties. Consequently:*
 - *Both parties will be invited to pay advances of costs and the present decision can be reviewed in case of non-payment of its share of the advances of costs by [Al Ain];*
 - *Pursuant to Article R53 of the Code, [Mr. Marotta] is invited to nominate an arbitrator (...) within ten (10) days (...)"*.
42. On 8 September 2017, Mr. Marotta informed the CAS Court Office that he was appointing Mr. Olivier Carrard as arbitrator.
43. On 13 October 2017, Mr. Marotta requested a one-month extension of his deadline to pay his share of the advance of costs, as he was abroad for family purposes.
44. On 17 October 2017, the CAS Court Office took note of the fact that Al Ain had paid its share of the advance of costs and informed the Parties that Mr. Marotta's request of 13 October 2017 would be forwarded to the CAS Finance Director. *"In the meantime [Mr. Marotta's] time limit for the payment of his share of the advance of costs is considered as suspended from 13 October 2017 until further notice"*.
45. On 18 October 2017, Al Ain considered that Mr. Marotta's failure to pay his share of the advance of costs in a timely manner *"shall be deemed a withdrawal to this appeal and therefore the CAS shall terminate this arbitration with immediate effect"*.
46. On 19 October 2017, the CAS Court Office noted that the Appellant's request for a time extension had been filed within the granted time limit, that only the time-limit for the payment of the Appellant's share of advances of costs had been suspended, but this had not been the case with respect to the arbitration, and with reference to CAS consistent jurisprudence, it informed the Parties that *"the non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible"*. The CAS Court Office finally confirmed that Al Ain's request for a termination of the present procedure would not be dealt with and that the CAS Finance Director would shortly decide on Mr. Marotta's petition for an extension of the deadline to pay his share of the advance of costs, bearing in mind Al Ain's objection in this respect.
47. On 7 November 2017, the CAS Court Office acknowledged receipt of Mr. Marotta's payment of his share of the advance of costs and invited Al Ain to submit its answer within 20 days. It also informed the Parties that the Panel to hear the case had been constituted as follows: Prof.

Petros C. Mavroidis, President of the Panel, Mr. Olivier Carrard and Mr. João Nogueira da Rocha, arbitrators.

48. On 30 November 2017, Al Ain filed its answer together with an exception of inadmissibility in accordance with Article R55 of the Code.
49. On 18 December 2017 and in accordance with the Panel's instructions of 12 December 2017, Mr. Marotta filed his observations on the exception of inadmissibility raised by Al Ain.
50. On 19 December 2017 and in reply to the request of the CAS Court Office, Al Ain confirmed that it preferred for the matter to be decided solely on the basis of the Parties' written submissions, whereas Mr. Marotta expressed his inclination for a hearing to be held.
51. On 22 December 2017, the Parties were informed that the Panel had decided to hold a hearing, which was scheduled for 7 March 2018, with the agreement of the Parties.
52. On 6 February 2018, the CAS Court Office sent to the Parties the Order of Procedure, which was returned duly signed by both of them on 14 February 2018.
53. On 26 February 2018 and following the Appellant's various evidentiary requests, upon which the Respondent had been duly consulted, the CAS Court Office:
 - invited FIFA to provide "*Any information present within the Transfer Matching System relating to the transfer on loan of the player [A.] from the club Sunderland AFC to the club Al Ain FC*" as well as "*Any information present within the Transfer Matching System relating to the definitive transfer of the player [A.] from the club Sunderland AFC to the club Al Ain FC*".
 - ordered Al Ain to submit on or before 2 March 2018 at 2 pm (CET): "(...)"
 1. *Any contract and other related documentation it concluded with the Club Sunderland AFC relating to the loan of the player [A.];*
 2. *Any contract and other related documentation concerning the transfer of the player [A.] from the club Sunderland AFC to the Respondent;*
 3. *Any contract and other related documentation concluded between the Respondent and the player [A.] relating to his involvement with the club;*
 4. *Any document relating to the payment of a commission to the agent of the player [A.]".*
 - invited Mr. Marotta to submit on or before 2 March 2018 an English translation of the exhibit 12 to his appeal brief.
54. On 27 February and 2 March 2018 respectively, Mr. Marotta and FIFA complied with the instructions of the CAS Court Office of 26 February 2018. FIFA insisted that, as per its TMS GmbH's policy regarding data protection, the information that it provided to the CAS Court Office could not be shared with the Parties.

55. On 2 March 2018 and with reference to the letter of 26 February 2018 of the CAS Court Office, Al Ain filed a 6-page long paper accompanied by 94 pages of supporting documents. In its submission, Al Ain a) objected to the production of exhibit 12 to the appeal brief, b) made various comments on the documents it filed and c) insisted on their confidential nature.
56. On 6 March 2018, the documents filed by FIFA as well as by Al Ain were made available to all the Parties, which were required to use them exclusively in the framework of the present proceedings and to keep them confidential.
57. The hearing was held on 7 March 2018 in hotel Lausanne Palace, in Lausanne. The Panel members were present and assisted by Mrs. Pauline Pellaux, Counsel to the CAS, and by Mr. Patrick Grandjean, acting as *ad hoc* Clerk.
58. The following persons attended the hearing:
 - Mr. Marotta was present, accompanied by his legal counsel, Mr. Nicolas Blanc, assisted by Mr. Mikael Rentsch, acting as interpreter, and Mrs. Natacha Cotting, trainee.
 - Al Ain was represented by its in-house legal counsel, Mr. Islam Eid.
59. At the outset of the hearing, the Parties confirmed that they did not have any objection as to the composition of the Panel.
60. The Panel heard the following witnesses, who were examined and cross-examined by the Parties, as well as questioned by the Panel:
 - Mr. Maximilien Solazzi;
 - Mr. Mihaita-Ionut Curea.
61. Each witness was invited by the President of the Panel to tell the truth subject to the sanctions of perjury.
62. At the end of the hearing, the Parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected. After the Parties' final arguments, the President of the Panel closed the hearing and announced that the award would be rendered in due course.

IV. THE SUBMISSIONS OF THE PARTIES

A. Mr. Marotta

63. Mr. Marotta submitted the following requests for relief:

“The Appellant Gaetano MAROTTA has the honour to request the Court of Arbitration for Sport to rule as follows:

- I. *That the appeal be allowed.*

- II. *That the decision given by the single judge of the Players' Status Committee of 28 February 2017 be annulled.*
 - III. *That Al Ain FC be found to owe payment to Gaetano MAROTTA and that it be ordered to pay immediately the amount of EUR 1,500,000.00, plus interest of 5% per annum from 24 September 2013.*
 - IV. *That the costs of the arbitration be imposed on Al Ain FC.*
 - V. *That Al Ain FC be ordered to pay Gaetano MAROTTA a contribution towards the costs of his lawyer”.*
64. At the hearing before the CAS, Mr. Marotta declared that, on the basis of the documents filed by Al Ain on 2 March 2018, he was - for the first time - in the position to establish the exact moment of the Player's permanent transfer to Al Ain. Consequently, he amended his third request for relief contained in his appeal brief as follows:
- “III. That Al Ain FC be found to owe payment to Gaetano MAROTTA and that it be ordered to pay immediately the amount of EUR 1,500,000.00, plus interest of 5% per annum from 20 June 2012”.*
65. Mr. Marotta's submissions, in essence, may be summarized as follows:
- The Single Judge was wrong when he found that the representation contract was between Al Ain and Gama Sport & Events SA. He gave too much weight to the wording used by Al Ain in the exchanges of mails, which occurred between 4 and 6 September 2011. The Single Judge failed to take into account the fact that *“these documents were drawn up in English by a national of the United Arab Emirates. It is therefore necessary to be wary of the terms used, which may have a different meaning in the eyes of a person who is familiar with a different legal tradition. The literal meaning of the documents issued by AL AIN FC must therefore be assessed with great restraint”.*
 - It was the Parties' common intention that the representation contract was between Al Ain and Mr. Marotta personally:
 - *“In this case, the email exchanges concerning negotiations for the transfer of the player [A.] demonstrate that Mr. Gaetano MAROTTA in fact conducted negotiations with the clubs SUNDERLAND AFC and AL AIN FC personally and in his own name”.*
 - In particular, Mr. Marotta travelled in person to London in order to meet with the Player as well as with the representatives of Sunderland, *“thereby demonstrating his personal involvement in the negotiations underway at that time”.*
 - In its submissions filed before the Single Judge, Al Ain confirmed that it mandated Mr. Marotta (and not Gama Sport & Events SA) to negotiate with Sunderland the Player's permanent transfer. Thereby, Al Ain explicitly admitted that it was contractually bound to Mr. Marotta in person and not to his company.
 - In the event that the Panel comes to the conclusion that the representation contract was between Al Ain and Gama Sport & Events SA, it must be noted that the contract was

transferred to Mr. Marotta by way of a contractual assignment. Al Ain accepted such an assignment, when it confirmed to the Single Judge that it concluded a contract with Mr. Marotta in person.

- There is an abuse of right on the part of Al Ain to claim that Mr. Marotta and Gama Sport & Events SA are two distinct legal subjects. Mr. Marotta was the sole shareholder and sole director of his company, the activity of which was merely administrative in nature. In fact, the employees of Gama Sport & Events SA did nothing more than draft emails under Mr. Marotta's direction, transcribing his instructions.
- The representation contract between Mr. Marotta and Al Ain complies with all the formal requirements of the applicable FIFA regulations. It is therefore valid and binding upon Al Ain.
- In the event that the Panel finds that the representation contract between Mr. Marotta and Al Ain is to be considered invalid under FIFA regulations, then it should apply the Swiss legal provisions governing brokerage contracts; *i.e.* Articles 412 *et seq.* of the Swiss Code of Obligations (CO).
- It is unquestionable that it is Mr. Marotta's activity that led to the transfer of the Player from Sunderland to Al Ain. As a matter of fact, two days after it terminated the representation contract with Mr. Marotta, Al Ain hired the Player on a loan basis. The loan agreement was simply a sham designed to enable Al Ain to argue that Mr. Marotta did not obtain the Player's permanent transfer as he was instructed to. In this respect, it must be observed that the loan agreement was very unusual as Al Ain undertook to pay EUR 6,000,000 for a one-year loan of the Player and an additional EUR 2,000,000 for the Player's permanent transfer. It is obvious that Al Ain "*simulated a loan contract in order to cover up the effective sale of the player and to avoid paying the commission owed by it to Mr. Gaetano MAROTTA*". Is also extraordinary the fact that the representation contract with Mr. Rawad Georges Kassis was signed on 10 October 2011; *i.e.* over a month after the Player's loan became effective.

B. Al Ain

66. Al Ain submitted the following requests for relief:

"[Al Ain] therefore respectfully requests the Panel the following:

- 1- Admissibility
 - a- *This Appeal is inadmissible based on section "A" of this Answer;*
 - b- *Or to decide that the claim before FIFA is inadmissible based on section "D" of this Answer;*
- 2- *On a subsidiary basis in case the Panel found the case and the Appeal is admissible before the FIFA & CAS, to dismiss the present Appeal and to confirm the decision taken by the Single Judge of the Players' Statutes Committee of FIFA on 28 February 2017.*

3- *In all cases to allocate to the Appellant the costs and fees of this Appeal and the costs of the case before the FIFA and a contribution of CHF 10,000 toward the Respondents costs of these proceedings”.*

67. The submissions of Al Ain, in essence, may be summarized as follows:

- Mr. Marotta failed to pay his share of the advance of the CAS costs in a timely manner. As a consequence, his appeal must be deemed withdrawn.
- Mr. Marotta lodged his claim before FIFA on 1 July 2013. However, Al Ain was notified of the existence of this procedure on 25 January 2017, *i.e.* more than 42 months later. As a consequence, the 2-year deadline to lodge a claim before FIFA (as provided under Article 25 para. 5 of the applicable Regulations on the Status and Transfer of Players) has not been complied with. In addition, Mr. Marotta failed to pay the advance of costs in a timely manner when he lodged his claim before FIFA. For those reasons, the Single Judge should have declared Mr. Marotta’s claim inadmissible.
- Al Ain has never entered into any contractual relationship either with Mr. Marotta or with Gama Sport & Events SA. It must be observed that the applicable FIFA Regulations set out the minimum requirements to be met for a representation contract to be valid. None of them has been fulfilled. In this respect, it must be observed that *“the Single Judge described the letter addressed from [Al Ain] to the Company as a “Statement”, it is also to note that [Mr. Marotta] described this statement as a “correspondence” which is not live to be a binding contract”.*
- There has never been a common intention to give a mandate to Mr. Marotta personally. All the emails sent between 4 and 6 September 2011 clearly establish that Al Ain was willing to do business with Gama Sport & Events SA and not with Mr. Marotta. The latter was merely acting as the legal representative of his own company and not on his own behalf. Therefore, Mr. Marotta is not entitled to any commission.
- *“[Al Ain’s] submission to FIFA dated 13 February 2017 was very clear while explaining the factual background of the false claim, when mentioned that Al Ain mandated Mr. Marotta - who was the representative of Gama Sport Management & Events SA -, Al Ain did not go throw (sic) a lot of explanation were all the documents submitted by both the Claimant and Respondent are self-explanatory”.*
- According to the emails exchanged between 4 and 6 September 2011, Gama Sport & Events SA was asked to negotiate and to conclude the permanent transfer of the Player from Sunderland to Al Ain. Obviously, this company failed to fulfil its task.
- Al Ain put an end to its relationship with Gama Sport & Events SA because the deal obtained by this company proved to be too expensive and outside its budget.
- Coincidentally, *“another player agent Mr. Rawad Georgas Kassis contacted a board member of Al Ain and offered the same player to be loaned to Al Ain with an option to purchase the player at the end of the loan, thus the transfer fee (Loan plus the option) will be paid over two years and will be suitable with Al Ain. (...) In light of this offer and after the successful negotiation of Mr. Rawad, Al Ain and*

Sunderland concluded the loan transfer agreement, and then Al Ain and the Agent Mr. Rawad signed the representation contract in a later stage when the Agent visited Al Ain at its premises on October 2011”.

- Gama Sport & Events SA failed to establish its significant involvement in the loan and permanent transfer of the Player from Sunderland to Al Ain.

V. JURISDICTION

68. The jurisdiction of the CAS, which is not disputed, derives from Articles 66 *et seq.* of the applicable FIFA Statutes (July 2012 edition) and Article R47 of the Code. It is further confirmed by the order of procedure duly signed by the Parties.
69. It follows that the CAS has jurisdiction to decide on the present dispute.
70. Under Article R57 of the Code, the Panel has the full power to review the facts and the law.

VI. APPLICABLE LAW

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

72. Pursuant to Article 66 para. 2 of the applicable FIFA Statutes, “[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”.
73. As a result, and in light of the foregoing, subject to the primacy of the applicable FIFA regulations, Swiss Law shall apply complementarily, whenever warranted. The Panel is comforted in its position by the fact that, in their respective submissions, all the Parties referred to Swiss law.
74. In his appeal brief, Mr. Marotta submits that *“the applicable law is that in force at the time the appeal was filed by the Appellant with the Court of Arbitration for Sport”*. According to him, *“In view of this the new Regulations on Working with Intermediaries that apply”*. He supports his position with a reference to *“The Code of the Court of Arbitration for Sport”* (by MAVROMATI/REEB, 2015, ad R58, N. 117, pages 550 and 551). However, this source is of no avail and certainly misleading. This comprehensive commentary, which offers an exhaustive article-by-article analysis of the CAS Rules, confirms indeed that *“the jurisdiction is determined at the time when the request was made and the version of the applicable rules is therefore the one in existence (and in force) when the appellant filed the appeal*

with the CAS". This reference only deals with the issues related to the *perpetuatio fori* and is in no way related to the rules applicable to the substance of the case.

75. In order to define which version of the FIFA regulations applies to the dispute in question, the date of the submission of the claim before FIFA is the most relevant criterion. Therefore, the general principle is that any case that has been brought to FIFA before the entering into force of the most recent version of the regulations, will be assessed according to the previous regulations; *i.e.* the regulations in force at the moment of the filing of the claim before FIFA. For instance, this rule has been expressly transcribed in:
- Article 26 para. 1 of the current edition of the Regulations on the Status and Transfer of Players ("RSTP") ("*Any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations*").
 - Article 21 para. 2 of the current edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules") ("*These rules are applicable to proceedings submitted to FIFA on or after the date on which these rules came into force*").
76. The present case was submitted to FIFA on 1 July 2013, *i.e.* after 25 July 2012, 1 December 2012, 1 January 2008, which are the dates when a) the FIFA Statutes, edition 2012, b) the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, edition 2012, c) the Regulations on the Status and Transfer of Players, edition 2012 and d) the Players' Agent Regulations, edition 2008, came into force. These are the editions of the rules and regulations under which the present case shall be assessed. It must be observed that, in his decision of 28 February 2018, the FIFA Single Judge came to the same conclusion.

VII. ADMISSIBILITY

77. Al Ain claims that the appeal is inadmissible at CAS level because of Mr. Marotta's alleged failure to timely pay his share of the advance of costs.
78. On 13 October 2017, Mr. Marotta requested a one-month extension of his deadline to pay his share of the advance of CAS costs, as he was abroad for family purposes. On 17 October 2017, the CAS Court Office informed the Parties that Mr. Marotta's request would be forwarded to the CAS Finance Director. "*In the meantime [Mr. Marotta's] time limit for the payment of his share of the advance of costs is considered as suspended from 13 October 2017 until further notice*". Mr. Marotta eventually paid his share of the advance of costs.
79. Al Ain claimed that, on the basis of Article R32 of the Code, the postponement of the payment of the advance of costs by Mr. Marotta could only be granted in three distinct circumstances, namely, a) upon application on justified grounds, or b) after consultation with the other party (or parties), or c) by the President of the Panel or, if she/he has not yet been appointed, the President of the relevant Division. Al Ain submitted that none of the requirements set by Article R32 of the Code were met. Moreover, failing valid reasons for the requested extension of the

deadline, Al Ain objected to it. Under all these circumstances, Mr. Marotta's appeal should be deemed withdrawn and therefore the CAS should terminate this arbitration with immediate effect.

80. The Panel finds no reasons to depart from the position expressed in the CAS precedents CAS 2010/A/2144; CAS 2010/A/2170; CAS 2010/A/2171, which confirm that the issue of the advance of costs is an administrative issue which is dealt with by the CAS Court Office. The deadline fixed by the CAS is only an indicative delay and not a mandatory time limit. The non-payment of the advance of costs within the deadline prescribed cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with Article R64.2 of the CAS Code.
81. Furthermore, Mr. Marotta submitted it within the deadline provided by Article R49 of the Code as well as by Article 67 para. 1 of the applicable FIFA Statutes. It complies with all the other requirements set forth by Article R48 of the Code.
82. For all the above reasons, the appeal is admissible.

VIII. ADDITIONAL EVIDENCE

83. Article R44.1 para. 2 of the CAS Code provides that:

“Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances”.

84. On 27 February 2018, Mr. Marotta filed a free translation of the exhibit 12 to his appeal brief. Al Ain objected to the production of this document. Considering that the original version of this document was filed together with the appeal brief and that its translation into English is the direct consequence of the Order on language rendered on 26 July 2017 by the Deputy President of the Appeals Arbitration Division of the CAS, the Panel decided that this document could be admitted into evidence.
85. On 26 February 2018, the CAS Court Office informed the Parties that the Panel had accepted Mr. Marotta's evidentiary requests submitted in his appeal brief. In this context:
 - on 2 March 2018, Al Ain filed a 6-page long paper accompanied by 94 pages of supporting documents. The submission of these documents was denied by the Panel, which considered that they did not comply with its request of 26 February 2018 and were meant to supplement or amend Al Ain's arguments in a manner incompatible with Article R56 of the Code.
 - On 2 March 2018, FIFA filed the requested documents, which were admitted into evidence and made available to the Parties.

IX. MERITS

86. The main issues to be resolved by the Panel is whether the appeal was admissible at FIFA level and, in the affirmative, whether Mr. Marotta has a direct and personal monetary claim against Al Ain.

A. Admissibility at FIFA level

87. Regarding the admissibility of the claim filed before FIFA, Al Ain argues that it was notified of its existence more than 42 months after it was lodged. Consequently, and in Al Ain's view, the 2-year deadline to lodge a claim before FIFA was not respected.

88. Article 25 para. 5 of the RSTP provides that "*The Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute*". According to FIFA Commentary on the RSTP, *ad* Article 25 of the edition 2005 RSTP (which has an identical wording to Article 25 para. 2 of the edition 2012 RSTP), a party waives its right to lodge a claim with the FIFA deciding bodies, if more than two years have elapsed from the event giving rise to the dispute. In the present case, the claim was lodged before the Single Judge on 1 July 2013, *i.e.* less than two years after Mr. Marotta allegedly entered into contact with Al Ain and Sunderland (in September 2011). Consequently, it cannot reasonably be argued that Mr. Marotta waived his rights to lodge a claim before FIFA and the fact that Al Ain was notified of the claim much later is irrelevant.

89. At the hearing before the CAS and for the first time, Al Ain submitted that Mr. Marotta paid the advance of FIFA costs outside of the 2-year deadline stipulated under Article 25 para. 2 RSTP with the consequence that his claim could not be considered as filed in a timely manner.

90. Pursuant to Article 12 para. 3 of the Procedural Rules, "*Any party claiming a right on the basis of an alleged fact shall carry the burden of proof*". Al Ain has not substantiated the facts on which it relies with respect to the alleged late payment of the advance of FIFA costs. Hence, its argument in this regard must be dismissed without further consideration.

B. Existence of a direct and personal monetary claim

91. The Panel having concluded that the claim before FIFA was admissible, it shall now determine whether Mr. Marotta has a direct and personal monetary claim against Al Ain.

92. In this respect, it will be necessary to establish whether he is entitled to receive a commission from Al Ain with respect to the Player's transfer from Sunderland to Al Ain. In this context, the following aspects must first be assessed:

- a) Was there a contractual relationship between Al Ain and Mr. Marotta or between Al Ain and Gama Sport & Events SA?

- b) If there was a contractual relationship between Al Ain and Gama Sport & Events SA, is there an abuse of right to claim that Mr. Marotta and Gama Sport & Events SA are two distinct legal subjects?
- c) If there was a contractual relationship between Al Ain and Gama Sport & Events SA, has it been assigned to Mr. Marotta?

a) ***Was there a contractual relationship between Al Ain and Mr. Marotta or between Al Ain and Gama Sport & Events SA?***

93. In order to establish whether a contract has been entered into, who the parties to the contract are and what the exact scope of the contractual relationship is, the judge must interpret the parties' declarations of intent. At first, he must seek to discover the true and mutually agreed upon intention of the parties, if necessary empirically, on the basis of circumstantial evidence (Decision of the Swiss Federal Tribunal, 4A_155/2017, 12 October 2017, consid. 2.3; ATF 132 III 268 consid. 2.3.2, 131 III 606 consid. 4.1). Are to be taken into account the content of the statements made – whether they are written or oral - but also the general context; *i.e.* all the circumstances, which could give an indication as to the real intention of the parties. The statements made prior to the conclusion of the contract are relevant as well as the subsequent events and conduct of the parties (ATF 118 II 365 consid. 1, 112 II 337 consid. 4a). The judge must assess the situation according to his general experience of life (ATF 118 II 365 consid. 1 and references). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422). The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood its declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422). The relevant circumstances in this respect are only those which preceded or accompanied the declaration of intent and not the subsequent events (Decision of the Swiss Federal Tribunal, 4A_155/2017, 12 October 2017, consid. 2.3; and references).
94. In the present case and on the basis of the documents on record, it is obvious that all the parties involved understood that Mr. Marotta was acting on behalf of Gama Sport & Events SA:
- On 4 October 2011, Al Ain sent an email to “*Gama Sport & Events SA (...) “represented by Marotta Gaetano”*”.
 - The same day, Al Ain confirmed that it “*gives its exclusive authorization to **Gama Sport Management & Events SA (...), Represented by Marotta Gaetano**, to make enquiries on its behalf in regard to a potential playing contract for the [Player]*”.
 - On 5 and 6 September 2011, Mr. Maximilien Solazzi sent to Al Ain two emails, whereby he made reference to “*our proposal*” (and not Mr. Marotta’s proposal). In case of questions, Al Ain could call Mr. Solazzi or Mr. Marotta indifferently.

- To each of his above messages, Mr. Maximilien Solazzi attached an offer printed on a document with Gama Sport & Events SA letterhead, which reads as follows:
 - *“Following your conversation with Mr. Marotta (Gama Sport Management & Events SA) please find our proposal after the transfer of the [Player] in according to the mandate received from the Al Ain FC”.*
 - *“Following your conversation with Mr. Marotta (Gama Sport Management & Events SA), we send to you our definitive proposal for the transfer of the [Player] in according to the mandate received from the Al Ain FC”.*

In both cases, the name of Mr. Marotta is closely associated with Gama Sport & Events SA and a reference is made to *“our proposal”*. In addition, at the bottom of these documents, at the appropriate place for the signature, there is the following indication:

*“Gama Sport & Events SA
Gaetano Marotta”*

- In an exchange of mails between Mr. Maximilien Solazzi and Mrs. Margaret Byrne, the latter seemed to suggest that Sunderland would accept to pay ***“10% commission for Gama sport (900’000.00 Euros) upon signing the contract or when is the international transfer of player”***.
 - In case of questions, the representatives of Sunderland were invited to call Mr. Maximilien Solazzi or Mr. Marotta, indifferently.
 - On 6 September 2011, Mr. Maximilien Solazzi sent to Mrs. Margaret Byrne a new offer, which confirmed a *“10% commission for Gama Sport (900’000.00 Euros) upon signing the contract or when is the international transfer of player”*.
 - In a subsequent message and in order to avoid any misunderstanding that could have arisen from her previous messages regarding the commission to be paid, Mrs. Margaret Byrne insisted that, should the Player’s transfer be confirmed, Sunderland *“will then speak with the player/his agent about paying commission of € 500,000 to your company as we are not responsible for this”*.
95. In the course of the present proceedings, Mr. Marotta submitted that *“these documents were drawn up in English by a national of the United Arab Emirates. It is therefore necessary to be wary of the terms used, which may have a different meaning in the eyes of a person who is familiar with a different legal tradition. The literal meaning of the documents issued by AL AIN FC must therefore be assessed with great restraint”*. In other words, Mr. Marotta is suggesting that Al Ain’s command of English was such that the words used by it did not reflect its real intention. Such an assertion is quite criticisable for itself but it is also completely unsubstantiated. Moreover, it is inconsistent with the own terms used by Mr. Maximilien Solazzi and by Mrs. Margaret Byrne, whose English skills can certainly not be questioned. It appears that Mr. Marotta entered into contact with the representatives of Al Ain and of Sunderland and both clubs understood that he was acting on behalf of Gama Sport

& Events SA. Mr. Maximilien Solazzi's emails of 6 September 2011 are also unequivocal ("*10% commission for Gama Sport (900'000.00 Euros)*").

96. In addition, from the evidence above, it appears that Mr. Marotta negotiated with Sunderland a commission for Gama Sport & Events SA and another commission with Al Ain. The situation was so ambiguous that Mrs. Margaret Byrne had to "*stress that your mandate is not with Sunderland AFC hence we are not paying commission to Gama Sport. Any commission you are seeking must be paid by Al Ain FC*". In a further email, Mrs. Margaret Byrne seems to consider the possibility for the Player or his agent to pay the commission (Sunderland "*will then speak with the player/his agent about paying commission of € 500,000 to your company as we are not responsible for this*").
97. As a result, it is not clear at all, who, at the end, was to pay for a commission. In this regard, even the amount of the agent's fee is uncertain. It varied substantially as it went from EUR 800,000 up to EUR 900,000 and then down to EUR 500,000. The sum of EUR 500,000 (apparently to be paid by the Player or his agent) was actually the last amount ever mentioned in the string of emails exchanged between the various interested parties.
98. The only parameter - which remained unchanged throughout the various negotiations - was that the commission was to be paid to Gama Sport & Events SA.
99. Mr. Marotta seeks to avail himself of the submissions filed by Al Ain on 13 February 2017 before FIFA, in which the club made no specific distinction between Mr. Marotta and Gama Sport & Events SA. In the Panel's view, this document is of no relevance to interpret the parties' intention clearly expressed in September 2011, *i.e.* over 5 years earlier. In its submission of 13 February 2017, Al Ain was answering in very general terms to the claim lodged before FIFA by Mr. Marotta. The club focused all of its argumentation on the inexistence of the claim and did not address the specific question of the actual identity of the creditor of the agent's commission. Mr. Marotta has not proven that this issue was raised before the Single Judge and the fact that Al Ain did not deal with it cannot be interpreted against the club. From the content of the submission of 13 February 2017, it is clear that the reference to Mr. Marotta comprises obviously both Mr. Marotta and Gama Sport & Events SA, indifferently.
100. Based on the circumstances of the case and in view of the documents available, the Panel finds that, in the mind of all the participants to the negotiations of 4 - 6 September 2011, Mr. Marotta was indeed acting in the name and on behalf of Gama Sport & Events SA. The representatives of Al Ain and of Sunderland were in contact with Mr. Marotta but also with Mr. Solazzi, who was at their disposal - just like Mr. Marotta - in case they had further questions to ask regarding the transfer of the Player. They had no reason to believe that Mr. Marotta was acting on his own behalf. None of the emails exchanged between 4 and 6 September 2011 make a reference to a commission to be paid to Mr. Marotta. On the contrary, all the documents (including the written offers drafted by Gama Sport & Events SA) specifically provide that the commission was to be paid to the company. Much more, the written offers were drafted on a paper with Gama Sport & Events SA letterhead, which specifically refers to "*our offer*" and carried the signature of the company. At the time of the negotiations lead by Mr. Marotta, Gama Sport & Events SA existed and had its own legal personality. At the hearing before the CAS, Mr. Marotta even admitted that he had acted as the governing body ("*organ*") of Gama Sport & Events SA,

which is consistent with Article 55 para. 1 and 2 of the Swiss Civil Code (“*The governing bodies express the will of the legal entity. They bind the legal entity by concluding transactions and by their other actions*”).

101. In light of the foregoing, the Panel finds that, if there was a commission resulting from a representation contract, only Gama Sport & Events SA was entitled to its payment.

b) *If there was a contractual relationship between Al Ain and Gama Sport & Events SA, is there an abuse of right to claim that Mr. Marotta and Gama Sport & Events SA are two distinct legal subjects?*

102. Mr. Marotta submits that he is the sole shareholder of the company Gama Sport & Events SA as well as the only member of its board of directors. Hence and according to him, “*It should thus amount to the abuse of a right to consider that the contract supposedly concluded with the company GAMA SPORT & EVENT SA is not binding on Mr. Gaetano MAROTTA personally. Applying the federal case law cited [below], it should rather be considered that the legal relations that bind the company also bind its owner. This means that Mr. Gaetano MAROTTA may personally seek payment of the commission due to him*”.

103. In support of his position, Mr. Marotta relies on a decision of the Swiss Federal Tribunal, which he translated as follows (Decision of the Swiss Federal Tribunal, 4A_384/2008, 9 December 2008, consid. 4.1):

“[i]t is not possible to adhere without reservation to the formal existence of two legally distinct persons where all or almost all of the assets of a company limited by shares belong to the same natural or legal person either directly or indirectly; in spite of the fact that different persons are involved on a formal level, the persons are not independent as the company is a simple instrument in the hands of its author, who economically is at one with it; it must therefore be admitted in some sense that, according to the economic reality, the persons involved are identical and that the legal relations binding on one are also binding upon the other; this will be the case whenever the fact of relying on the existence of different persons constitutes an abuse of a right or has the effect of manifestly impairing legitimate interests (principle of transparency (Durchgriff)); ATF 121 III 319 consid. Sa/aa p. 321 and the judgment cited; cf also ATF 132 III 489 consid. 3.2 p. 493, 737 consid. 2.3 p. 742; 128 II 329 consid. 2.4 p. 333”.

104. Mr. Marotta only partially translated the decision of the Swiss Federal Tribunal, which insisted on the fact that the legal independence of a “*one man company limited by share*” is the rule and it is only exceptionally, or in case of abuse of rights, that the company’s independence should be disregarded (Decision of the Swiss Federal Tribunal, 4A_384/2008, 9 December 2008, consid. 4.1).

105. The above decision was confirmed in a very recent decision of the Swiss Federal Tribunal (4A_155/2017, 12 October 2017, consid. 5.1). In this decision, the High Court observed that usually, it is the respondent (natural person) to a legal action, who - in an abusive manner - seeks to hide himself behind the legal personality of his company and to invoke the company’s legal independence to contest his standing to be sued. The Swiss Federal Tribunal left open the question of whether the claimant (natural person) in a legal action, who has created a legal entity

for the exercise of his commercial activity, can use the “*Durchgriff principle*” (that is, liberally translated, the principle that allows to pierce the corporate veil, and acknowledge rights to a physical person that otherwise belong to a legal entity) to act in the place of his company (holder of the disputed right), on the ground that, economically speaking, he and his company are the same person. It also remains unanswered the question on whether such a claimant could argue of the defendant’s bad faith to submit that he does not have the standing to sue in spite of his economical identity with his company (*ibidem*, consid. 5.2).

106. For the *Durchgriff* principle to be applicable, it must be established that Mr. Marotta is the sole shareholder of Gama Sport & Events SA (or that there is an economical identity between him and his company), *and* that there is a misuse of the legal independence of the “*one man company limited by share*” to fraudulently obtain an unjustified advantage (*ibidem* 5.1).
107. In order to establish that he is the sole shareholder of Gama Sport & Events SA, Mr. Marotta only filed a statement, dated 7 July 2017, signed by himself, confirming that he “*bold - and always held - the totality of the shares of that company*” and the testimony of, one of Gama Sport’s employee, Mr. Solazzi.
108. Such statements are not sufficient to establish the fact that Mr. Marotta is the sole shareholder of Gama Sport & Events SA. He could indeed have filed much more convincing evidence, such as the shares themselves or at least the register provided under Article 697 l) CO. Absent of any such evidence, there is no indication on whether he is the actual holder of the shares or their beneficial owner, if they have been assigned, and what rights are actually attached to the shares under his possession. For this reason alone, the *Durchgriff* principle is not applicable.
109. Furthermore, Mr. Marotta suggests that there is an automatic abuse of right, contrary to the principle of good faith, on the part of any debtor, who claims that a contract signed with a “*one man company limited by share*” is not binding on its sole shareholder personally. He did not substantiate in any manner such an allegation, which must therefore be disregarded without further consideration.
110. Mr. Marotta has not satisfied his burden to prove that he was the sole shareholder of Gama Sport & Events SA and that Al Ain’s conduct constituted an abuse of right, which prevails over the general rule that a company is a distinct legal subject and that its independence should only be disregarded in exceptional cases. Hence, the requirements to apply the *Durchgriff* principle in the present dispute are not met.
111. In addition, the Panel observes that until 1 April 2015, and in accordance with Article 6 para. 1 of the applicable Procedural Rules, the parties entitled to lodge a claim, and thus have standing to sue before FIFA, were a) member associations; b) clubs; c) players; d) coaches, e) licensed match agents or f) player’s agents. At the time, only natural persons could carry out players’ agents’ activities (see Article 3 para. 1 of the applicable Players’ Agents Regulations). In such a context, one could argue that the fact that only natural persons could lodge an agent-related claim before FIFA oriented Mr. Marotta in his choice of bringing - in an abusive manner - a suit against Al Ain on his behalf instead of on behalf of Gama Sport & Events SA, which would not have had the standing to sue before FIFA but only before the national civil courts of Al

Ain. However, this argument does not need to be assessed by the Panel since the *Durchgriff* principle is in any manner not applicable in the present case.

c) *If there was a contractual relationship between Al Ain and Gama Sport & Events SA, has it been assigned to Mr. Marotta?*

112. Mr. Marotta submits that if there had been a contract between Al Ain and Gama Sport & Events SA, it was assigned to him.

113. The assignment of a contract requires the agreement of all the stakeholders (Decision of the Swiss Federal Tribunal, 4A_650/2014, 5 June 2015, consid. 6.1). Mr. Marotta claims that Al Ain agreed to such an assignment through its submission filed on 13 February 2017 before FIFA. As the Panel has already pointed out, this document has been drafted in very general terms and was only meant to answer to the claim lodged before FIFA by Mr. Marotta. From the content of the submission of 13 February 2017, it is clear that the reference to Mr. Marotta comprises obviously both Mr. Marotta and Gama Sport & Events SA, indifferently. In its submissions before FIFA, Al Ain only dealt with the well-founded nature of the claim and not with the identity of the creditor. Under these circumstances, Al Ain did not expressly agree to the assignment of a contract from Gama Sport & Events SA to Mr. Marotta. In this respect, it must also be observed that Mr. Marotta has not established that, in his claim before FIFA, he acted in reliance on an assignment of contract, which was agreed upon by Al Ain.

d) *Conclusion*

114. In light of the foregoing considerations, the Panel comes to the conclusion that Mr. Marotta has no contractual claim against Al Ain. He has therefore no standing to sue the club and the Appealed Decision must be upheld in its entirety.

115. The above conclusion makes it unnecessary for the Panel to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Gaetano Marotta against the decision issued by the Single Judge of the FIFA Players' Status Committee on 28 February 2017 (case nr. Iza 13-02374) is dismissed.
2. The decision issued by the Single Judge of the FIFA Players' Status Committee on 28 February 2017 (case nr. Iza 13-02374) is upheld.
- (...)
5. All other motions or prayers for relief are dismissed.