



Arbitration CAS 2017/A/5374 Jaroslaw Kolakowski v. Daniel Quintana Sosa, award of 10 April 2018

Panel: Mr Mark Hovell (United Kingdom), President; Mr Fabio Iudica (Italy); Mr João Nogueira da Rocha (Portugal)

Football

Contractual dispute between a players' agent and a player

Applicable law

Players' agent contractual entitlement to a commission

Limitations to the players' agent exclusive mandate

Calculation of a commission due to a players' agent

Interest payable on a debt

- 1. It follows from Article R58 of the CAS Code that the “applicable regulations”, *i.e.* the statutes and regulations of the sports organisation that issued the appealed decision are applicable to the dispute irrespective of what law the parties have agreed upon. The parties cannot derogate from this provision if they want their dispute to be decided by the CAS. Article R58 of the CAS Code takes precedence over conflicting aspects of direct choice-of-law clauses and thus *in casu* the FIFA rules and regulations apply primarily.**
- 2. A players' agent is entitled to receive a commission even when he has not been actively involved in a transfer if a clause to this effect is explicitly and unequivocally stipulated in the parties' representation agreement.**
- 3. Agents can be appointed exclusively vis-à-vis another agent, but no football player should be forced to use an agent or restrained from concluding their own deal although they signed a representation contract. In the latter case, only a financial penalty would be due, if applicable, should one player chose to ultimately represent himself.**
- 4. Customarily, agents are rewarded for their efforts by a commission payment calculated by reference to a percentage of what the player is paid by his club, not what he might be paid. As such, the standard arrangement between a player and his agent is that the player (or sometimes the club on his behalf) pays the agent a percentage of his earnings from the contract of employment that he has with the club for the entire time that the contract of employment runs for. If it runs to the end of its term, then the agent does indeed get his commission on the total of the employment contract. If it ends prematurely, for whatever reason, the agent's entitlement to commission ends too.**
- 5. It is widely accepted under Swiss law that 5% interest *p.a.* is applicable on unpaid debts.**

I. PARTIES

1. Mr Jaroslaw Kolakowski (the “Agent” or the “Appellant”) is a football agent/intermediary of Polish nationality, domiciled in Warsaw, Poland, and licensed by the Polish Football Federation (the “PFF”).
2. Mr Daniel Quintana Sosa (the “Player” or the “Respondent”) is a Spanish citizen and professional football player, born in Las Palmas, Spain on 8 March 1987. He currently plays for Qarabag FK (“Qarabag”) in Azerbaijan.

II. FACTUAL BACKGROUND

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

A. Background facts

4. On 2 October 2013, the Agent and the Player concluded a representation contract, valid from 2 October 2013 until 1 October 2015 (the “Representation Contract”).
5. The Representation Contract contained the following material terms:

“1) Term of the contract

This agreement is a fixed term contract, it will take effect on 02.10.2013 and will terminate on 01.10.2015. The termination of this agreement could be made by the mutual consent only.

2) Remuneration

The Agent is entitled to receive a commission in amount of 10% of the total amount of the player’s contracts, which are signed with clubs, during the term of this Agreement - until 01.10.2015.

3) Exclusivity

*The Parties agree that on the power of this agreement, the player’s agent receives exclusive rights to negotiate and represent the player in any transfer activities regarding all **CLUBS WORLDWIDE**. The player is forbidden to sign a contract with any club, using the representation or help of any 3rd Parties or himself alone. In such case the Player will be obliged to pay the agent, within 14 days from the signing of the contract, a penalty in amount of 15% from the total amount of the signed contract.*

4) Regulations

Polish law and regulations of The Polish FA, including the regulations of FIFA and UEFA are valid and govern this agreement. The parties agree to adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the relevant associations, as well as public law provisions governing job placement and other laws applicable in the territory of the association, as well as international law and applicable treaties”.

6. On 29 September 2014, the Player signed an employment contract with Saudi Arabian club Al Ahli SC (“Al Ahli Employment Contract”). It is undisputed between the parties that the Agent was not involved in the Player signing the Al Ahli Employment Contract¹. The Al Ahli Employment Contract was valid from 28 September 2014 until 30 June 2017, and the Player was to be paid a total remuneration of EUR 1,950,000 as follows:
 - EUR 550,000 for the season 2014/15;
 - EUR 650,000 for the season 2015/16; and
 - EUR 750,000 for the season 2016/17.
7. On 1 February 2015, the Al Ahli Employment Contract was prematurely terminated. Accordingly, the Al Ahli Employment Contract was only valid for 4 months and the Player was only remunerated for that period.

B. Proceedings before FIFA

8. On 9 February 2015, the Agent filed a claim at the FIFA Players’ Status Committee (“PSC”) against the Player, alleging that the Player breached the Representation Contract by signing the Al Ahli Employment Contract without his knowledge or involvement. The Agent requested the amount of EUR 225,000 as penalty under clause 3 of the Representation Contract, along with interest at 5% *p.a.* from 13 October 2014.
9. On 8 May 2017, the Single Judge of the FIFA PSC (“Single Judge”) rendered his decision as follows (the “Appealed Decision”):

- “1. The claim of the Claimant, Jaroslaw Kolakowski, is partially accepted.*
- 2. The Respondent, Daniel Quintana Sosa, has to pay to the Claimant, Jaroslaw Kolakowski, **within 30 days** as from the date of notification of this decision, the outstanding amount of EUR 34,375.*
- 3. Any further claims lodged by the Claimant, Jaroslaw Kolakowski, are rejected.*

¹ The Panel also notes that in the FIFA file which was provided by FIFA to the Panel in these proceedings, there was a signed ‘Declaration’ by Al Ahli SC dated 10 February 2017 confirming that the Agent was not involved in the transfer of the Player to the club.

4. *If the aforementioned amount is not paid within the aforementioned deadline, an interest rate of 5% per year shall apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision".*

10. The grounds of the Appealed Decision were notified to the parties on 3 October 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 24 October 2017, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code Edition 2017"), the Agent filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") challenging the Appealed Decision and requesting the following prayers for relief:

"The appellant requests the CAS to sentence the Respondent Daniel Quintana Sosa to:

- 1) *Pay the Appellant Jaroslaw Kolakowski the outstanding amount pursued before the FIFA's Players' Status Committee i.e. set aside the amount adjudicated by the Single Judge of the FIFA's Players' Status Committee, the amount of 190.625 EUR along with the interest on the principal amount of 225.000 EURO in the rate of 5% per annum on that amount due since 13-10-2014;*
- 2) *bear all of the costs of the proceedings;*
- 3) *sentence the Respondent Daniel Quintana Sosa to pay the Appellant Jaroslaw Kolakowski the legal fee and other expenses incurred by Jaroslaw Kolakowski".*

12. In his Statement of Appeal, the Agent requested the appointment of a Sole Arbitrator to resolve this dispute, but if the matter was to be submitted to a panel of three arbitrators, he nominated Mr Fabio Iudica, Attorney-at-Law, Milan, Italy, as an arbitrator.

13. On 4 November 2017, in accordance with Article R51 of the CAS Code, the Agent filed his Appeal Brief with the CAS confirming his prayers for relief.

14. On 13 November 2017, the CAS Court Office wrote to the parties enclosing a copy of the Appeal Brief filed by the Agent. The CAS Court Office requested the Player to file his Answer pursuant to Article R55 of the CAS Code within 20 days of receipt of the letter.

15. On 20 November 2017, in accordance with Article R53 of the CAS Code, the Player nominated Mr João Nogueira da Rocha, Attorney-at-Law, Lisbon, Portugal, as an arbitrator.

16. On 11 December 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to this case was constituted as follows:

President: Mr Mark Hovell, Solicitor, Manchester, England

Arbitrators: Mr Fabio Iudica, Attorney-at-Law, Milan, Italy
Mr João Nogueira da Rocha, Attorney-at-Law, Lisbon, Portugal

17. On 11 December 2017, in accordance with Article R55 of the CAS Code, the Player filed his Answer to the Agent's Appeal. In his Answer, the Player made the following request for relief:

"Terms in which the Appeal presented should be rejected and the contested decision [be upheld] in full".

18. On 14 December 2017, the Player wrote to the CAS Court Office stating that he preferred for a hearing to be held in this matter, and if a hearing was held, he would call two witnesses as well as testifying himself.
19. Additionally on 14 December 2017, the Agent wrote to the CAS Court Office stating that since the Player's Answer was filed after the prescribed deadline, it should be considered late and inadmissible.
20. On 14 December 2017, the CAS Court Office wrote to FIFA to request a copy of its complete case file in relation to this matter. On the same date, the CAS Court Office wrote to the parties stating the following:

"I acknowledge receipt of the Respondent's answer filed by courier on 11 December 2017, a copy of which is enclosed, by courier, for the Appellant's attention.

*I understand from this notification that the Respondent had failed to file the hard copies of his answer within the deadline prescribed at Article R55 of the Code of Sports-related Arbitration. Therefore, as per the content of my letter of 11 December 2017, the Appellant is invited to state, by **today**, whether he would agree to the admissibility of the answer".*

21. On 15 December 2017, the CAS Court Office wrote to the parties stating, *inter alia*, that the Agent had failed to indicate within the prescribed deadline whether he wished for a hearing to be held in this matter or whether he wished for an award to be rendered on the basis of the written submissions. Accordingly, further instructions from the Panel regarding the admissibility of the Answer and the holding of a hearing would follow in due course.
22. On 18 December 2017, the CAS Court Office wrote to the parties informing them that, in accordance with Articles R55 and R31 of the CAS Code, the Panel had decided to declare the Answer filed by the Player on 4 December 2017 as inadmissible - with the motivation for this decision to be included in the final Award. Further, in the same letter, the CAS Court Office informed the parties that in accordance with Article R57 of the CAS Code, the Panel had decided to hold a hearing by teleconference and suggested a hearing date of 16 January 2018.
23. Also on 18 December 2017, FIFA wrote to the CAS Court Office submitting a copy of the complete FIFA file.

24. On 20 December 2017, the Player wrote to the CAS Court Office reiterating, *inter alia*, his request to call two witnesses at a hearing.
25. On 20 December 2017, the CAS Court Office wrote to the parties stating that since the Player's Answer was deemed inadmissible, he was not allowed to call any witnesses to be heard as pursuant to Article R44.2 of the CAS Code, parties could only call witnesses and experts that they have specified in their written submissions.
26. Also on 20 December 2017, the Player wrote to the CAS Court Office reiterating yet again his request for the witnesses to be heard by the Panel at a hearing, along with his own testimony.
27. On 21 December 2017, the CAS Court Office wrote to the parties and informed the Player that he was a party to the proceedings and not a witness so he could participate in any hearing. Further, the content of the CAS Court Office's letter dated 20 December 2017 was maintained.
28. On 27 December 2017, in light of difficulties regarding confirming a hearing date and the parties' proposed witnesses and required translators, the CAS Court Office wrote to the parties stating that:

"The parties are advised that the Panel wishes to keep costs to a minimum bearing the amounts at stake in mind, but has concerns that a hearing by telephone could be difficult if translators are needed.

In view of the above, the Panel wishes to suggest to the parties that the matter be dealt with on the papers should the Appellant reconsider its position regarding the admissibility of the answer".
29. On 3 January 2018, the Player wrote to the CAS Court Office stating that he agreed for the matter to be dealt with on the papers so long as the Agent reconsidered his position regarding the admissibility of the Answer.
30. On 5 January 2018, the Agent wrote to the CAS Court Office confirming that he had reconsidered his position on the admissibility of the Answer and agreed for the Answer to be admitted. Further, the Agent considered that neither a hearing nor a second round of written submissions was necessary.
31. On 8 January 2018, the CAS Court Office wrote to the parties confirming that, in accordance with Article R57 of the CAS Code, the Panel would render an Award based on the parties' written submissions and that no hearing would be held in this matter. On the same date, the CAS Court Office provided the parties with the Order of Procedure for this matter.
32. On 8 January 2018, the Agent submitted a signed copy of the Order of Procedure.
33. On 12 January 2018, the Player submitted a signed copy of the Order of Procedure.

IV. THE PARTIES' SUBMISSIONS

34. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

A. The Agent's submissions

35. In summary, the Agent argued the following:

1. *The quantum of damages*

36. The Agent submitted that the exclusivity clause in the Representation Contract (*i.e.* clause 3) was included "*to prevent [sic] negative outcome of the Player's potential disloyalty*". It was undisputed that the Player entered into the Al Ahli Employment Contract without the Agent's knowledge or involvement, which was a breach of clause 3.

37. The Al Ahli Employment Contract was concluded on 29 September 2014 and the Representation Contract was valid until 1 October 2015. At the FIFA PSC, the Player argued that he had terminated the Representation Contract 7 October 2014. However, as the Single Judge noted in the Appealed Decision, not only did the Player fail to establish just cause for terminating the Representation Contract, the purported termination was still 8 days after the conclusion of the Al Ahli Employment Contract. Accordingly, it was also undisputed that the Player entered into the Al Ahli Employment Contract while the Representation Contract was still in force.

38. Clause 3 of the Representation Contract stated that in the event the Player signed an employment contract with a club without the Agent's involvement, the Agent would be entitled to "*15% from the total amount of the signed contract*". The total value of the Al Ahli Employment Contract was EUR 1,950,000, and as the Agent was entitled to 15% of this, the Agent submitted that he was entitled to EUR 292,500 of commission as damages. However, the Agent acknowledged that he had decided to only pursue the amount of EUR 225,000 at FIFA.

39. In the Appealed Decision, the Single Judge agreed, in principle, with the Agent's claims that the Player breached the Representation Agreement. However, for reasons which were "*arbitrary, unjust and unrighteous*", the Single Judge only granted him damages of EUR 34,375, instead of the EUR 225,000 which the Agent requested.

40. The Player has not appealed the Appealed Decision, which means that he has accepted his responsibility to pay the contractual penalty. This Appeal to the CAS is therefore solely regarding the amount of damages to be granted to the Agent.

41. The Agent submitted that the Single Judge erred in reducing the amount of damages awarded to him on the basis that the Al Ahli Employment Contract was terminated after 4 months.

Firstly, the wording of clause 3 explicitly provided for the damages to be calculated based on the total amount of the signed contract, not a *pro-rata* amount. Secondly, the Single Judge only ascertained information regarding the termination of the Al Ahli Employment Contract through FIFA TMS, so the reasons for termination were not known.

42. The Agent made reference to the ‘transfer market’ website which stated that the Player was transferred from Al Ahli to his current club, Qarabag, for EUR 800,000 on 27 February 2015. Accordingly, the Agent submitted that the termination of the Al Ahli Employment Contract seemed like a “*natural consequence*” of the said transfer, which was followed by the Player signing an employment contract with Qarabag. As such, “*there was no reason whatsoever neither legal nor factual*” for the Single Judge to have reduced the amount of damages awarded in the manner he did.

2. *Interest applicable*

43. The Agent noted that whilst he claimed 5% interest *per annum* from 13 October 2014 at FIFA on the outstanding amount, the Single Judge in the Appealed Decision failed to award him interest as he deemed that interest could not run over the penalty for “*lack of contractual basis*”.
44. The Agent argued that pursuant to clause 4 of the Representation Contract, Polish law and the regulations of the Polish FA governed the Representation Contract, along with the regulations of FIFA and UEFA. In that regard, the Agent submitted that article 481(1) of the Polish Civil Code stated:

“if the debtor delays in making a performance in money the creditor may demand interest for the time of the delay even if he suffered no damage whatever and if the delay was a result of circumstances for which the debtor is not liable”.

45. The Agent submitted that the rate of interest was higher in Poland than it was in Switzerland, however the rate of 5% *per annum* should be applicable in the present matter pursuant to Articles 73(1) and 104(1) of the Swiss Civil Code of Obligations (“CO”), which state:

“Art. 73

1. Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.

(...)

Art. 104

1. A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract”.

46. Accordingly, the Agent requested damages in the amount of EUR 225,000, plus interest of 5% *per annum* from the date of 13 October 2014.

B. The Player's submissions

47. The Player's arguments were exceptionally brief, and can be summarised as follows:

1. The quantum of damages

48. The Player argued that clause 3 of the Representation Contract (the exclusivity clause) was a penalty clause which was expressly prohibited and therefore "*null and void according to the regulations of FIFA and UEFA and according to Polish law and the Regulations of the Polish FA*".

49. The Player also argued that clause 3 should be null and void because it prohibited the Player from signing a new contract by himself, which was "*not valid in the light of FIFA Regulations, Polish law and the Regulations of Polish FA*".

50. The Player submitted that the reduced amount of damages granted by the Single Judge in the Appealed Decision was correct, as the amount claimed by the Agent was "*manifestly abusive and totally disproportionate both to the amounts actually received by the respondent and to the work actually done by the appellant or for reasons of equity*".

51. Accordingly, the Player claimed that the Agent's claim should be rejected entirely.

2. Interest applicable

52. The Player did not make any written submissions specifically regarding the issue of interest.

V. JURISDICTION OF THE CAS

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

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

54. Moreover, the Agent relied on Article 58 of the FIFA Statutes. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.

55. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

56. The Statement of Appeal, which was filed on 24 October 2017, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.
57. It follows that the Appeal is admissible.
58. For completeness, the Panel notes that the Player's Answer was filed outside of the prescribed time limit pursuant to Article R55 of the CAS Code. However, although the Agent had initially objected to the admissibility of the Player's Answer and the Panel had deemed it inadmissible, on 5 January 2018, the Agent reconsidered his position and expressly agreed for the Answer to be deemed admissible and waived his request for a hearing to be held. The Panel was satisfied to therefore deem the Answer admissible and rendered an Award on the written submissions. This was confirmed by the Order of Procedure which was duly signed by both parties. Accordingly, all the written submissions by the parties were admissible.

VII. APPLICABLE LAW

59. Article 187(1) of the Swiss Private International Law Act ("PILA") provides - *inter alia* - that "the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected". This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA².
60. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to the conflict-of-law rules contained therein, in particular to Art. R58 of the CAS Code³.
61. Whether such indirect choice of law can be accepted here, appears questionable, since the Representation Contract contains a direct choice-of-law clause in favour of Polish law, FIFA's and UEFA's Regulations. Clause 4 of the Representation Contract stated:

"4) Regulations

Polish law and regulations of The Polish FA, including the regulations of FIFA and UEFA are valid and govern this agreement. The parties agree to adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the relevant associations, as well as public law provisions governing job placement and other laws applicable in the territory of the association, as well as international law and applicable treaties".

² CAS 2014/A/3850, at para. 48.

³ See for example CAS 2014/A/3850 at para. 49; CAS 2008/A/1705 at para. 9; CAS 2008/A/1639 at para. 21.

62. According to the predominant view in the legal literature, an indirect choice of law is - in principle - always superseded by a direct choice of law⁴. However, this Panel finds that this principle shall not apply here. The reason why the predominant view in the legal literature holds is that, generally speaking, the rules of the arbitral institutions do not wish to limit the parties' autonomy in any respect⁵. This, however, is not true in the context of appeals arbitration procedures before the CAS.
63. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *"Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.
64. It follows from this provision that the "applicable regulations", *i.e.* the statutes and regulations of the sports organisation that issued the Appealed Decision (here: FIFA) are applicable to the dispute irrespective of what law the parties have agreed upon. In the Panel's view the parties cannot derogate from this provision if they want their dispute to be decided by the CAS and, indeed, the parties did not derogate in the case at hand, as FIFA's Regulations were 1 of the 3 direct choices made. To conclude, therefore, this Panel finds that Article R58 of the CAS Code takes precedence over the conflicting aspects of the direct choice-of-law clause contained in the Representation Contract and that, thus, the FIFA rules and regulations apply primarily.
65. The Panel observes that Article 57(2) of the FIFA Statutes (2016 edition) stipulates the following:
- "The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.
66. The above provision makes it clear that the FIFA rules and regulations have been drafted against the backdrop of a certain legal framework, *i.e.* Swiss law. Thus and in summary, the Panel will apply the various rules and regulations of FIFA and whenever issues of interpretation arise with respect to the FIFA rules and regulations, the Panel will resort to Swiss law.
67. The Panel further notes that pursuant to the submissions of the parties, the only area in which Polish law differs to Swiss law in any of the issues applicable in this dispute is the rate of interest on unpaid debts (which is higher in Polish law than in Swiss law). However, the Agent explicitly stated in his written submissions that the interest rate under Swiss law should be applicable here, not the rate under Polish law. Accordingly, in practical terms Swiss law is applicable subsidiarily on all the relevant issues in this dispute.

⁴ See BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edition, Bern 2015, No. 1393; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International*, 2nd edition, Bern 2010, No. 618; see also BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123.

⁵ BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123.

VIII. MERITS OF THE APPEAL

A. The main issues

68. The Panel notes that it is undisputed between the parties that the Player entered into the Al Ahli Employment Contract without the Agent's knowledge or involvement, and therefore acted in breach of the Representation Contract. Accordingly, the only issues to be considered by the Panel revolved around the amount of damages to be awarded to the Agent.
69. As such, the Panel observes that the main issues to be resolved are:
- a) Is the Agent entitled to commission even though he did not act on the Player's behalf regarding the Al Ahli Employment Contract?
 - b) Should the amount of commission/damages awarded to the Agent be reduced due to the premature termination of the Al Ahli Employment Contract?
 - c) Is interest applicable to the award of damages, and if so, at what rate?
 - d) What is the total amount of damages to be awarded to the Agent?

These issues will be considered in turn.

a) *Is the Agent entitled to commission even though he did not act on the Player's behalf regarding the Al Ahli Employment Contract?*

70. As noted above, it is undisputed between the parties that the Agent did not act for the Player in negotiating the Al Ahli Employment Contract. However, the Agent notes that clause 3 of the Representation Contract states as follows:

“3) Exclusivity

*The Parties agree that on the power of this agreement, the player's agent receives exclusive rights to negotiate and represent the player in any transfer activities regarding all **CLUBS WORLDWIDE**. The player is forbidden to sign a contract with any club, using the representation or help of any 3rd Parties or himself alone. In such case the Player will be obliged to pay the agent, within 14 days from the signing of the contract, a penalty in amount of 15% from the total amount of the signed contract”.*

71. Accordingly, the Agent submits that he is still entitled to 15% of the total value of the Al Ahli Employment Contract, even though he did not act for the Player in concluding the contract. Conversely, the Player argued that the abovementioned clause was null and void “*according to the regulations of FIFA and UEFA and according to Polish law and the Regulations of the Polish FA*”.
72. The Panel notes that it is common to see representation contracts which are exclusive, such that players cannot use another agent in a deal whilst under contract with them. However, it is

also not uncommon to see an agent work on a potential transfer or new employment contract for a player during the term of a representation contract, but ultimately get ‘cut out’ of the deal by the player who decides to then act for himself at the last minute when signing for a new club and/or signing a new employment contract. Accordingly, it is not unusual to see clauses in representation contracts where an agent is paid commission irrespective of whether he acts on a deal or not.

73. The panel in CAS 2013/A/3104⁶ stated:

“Although the Bureau of the Player’s Status Committee had held in August 1998 that the Player’s Agent’s activities must be causal to the conclusion of employment contract and that, as a general rule (emphasis added), if an employment contract was signed without the involvement of a particular player’s agent, the player concerned did not owe any commission to the agent, this rule is not without exception. Thus, it is clearly recognized that an agent is entitled to claim a commission, even when he has not been actively involved in a transfer, if a clause to this effect is explicitly and unequivocally stipulated in the Representation Agreement. The Panel agrees with the Respondent that a clause of this effect is explicitly and unequivocally stipulated in Clause 6 (D) in the Representation Agreement”.

74. In the above case however, the agent was entitled to the same commission (*i.e.* 10%) regardless of whether he acted in a transaction or not. In the present matter, the Panel considers that clause 3 of the Representation Contract goes much further than an ordinary exclusivity clause for two reasons; (a) it explicitly forbade the Player from acting for himself; and (b) it entitled the Agent to a penalty rate of commission of 15% if the Player acted for himself - as opposed to 10% which the Agent would ordinarily have been entitled to under clause 2 of the Representation Contract.

75. On balance, the Panel concludes that clause 3 of the Representation Contract should be interpreted down to what the industry norm would be. The Player should always be entitled to act for himself on a transfer or employment contract and forbidding him from doing so would be a violation of his rights. Agents can be appointed exclusively vis-à-vis another agent, but no player should be forced to use an agent or restrained from concluding their own deal, subject only to a financial penalty should they chose to ultimately represent themselves. Further, the Panel concludes that there was a deterrent effect in clause 3 of the Representation Contract which was to discourage the Player from negotiating/signing a contract without the Agent’s involvement. The parties agreed on this clause when entering into the Representation Contract and pursuant to the principle of *pacta sunt servanda*, subject to the below it is not unreasonable for the Agent to be entitled to a penalty commission rate of 15%.

76. The Panel concludes that the applicable rate of commission was 15%. The principal amount on which that rate is applicable is considered below.

⁶ CAS 2013/A/3104, at para. 63.

b) *Should the amount of commission/damages awarded to the Agent be reduced due to the premature termination of the Al Ahli Employment Contract?*

77. The Agent submitted that pursuant to clause 3 of the Representation Contract, he was entitled to 15% of the ‘total value’ of the Al Ahli Employment Contract. As the total value of the Al Ahli Employment Contract was EUR 1,950,000, the Agent claimed to be entitled to EUR 292,500 of commission. However, in the proceedings before the FIFA PSC, the Agent decided to only claim the amount of EUR 225,000. Accordingly, the Agent was claiming damages of EUR 225,000 at the CAS.
78. Conversely, the Player submitted that the Al Ahli Employment Contract was terminated on 1 February 2015, *i.e.* only 4 months and 2 days into the 3 year contract, so “*the amount claimed is manifestly abusive and totally disproportionate both to the amounts actually received by the [Player] and to the work actually done by the [Agent]*”.
79. The Panel notes that the Single Judge concluded in the Appealed Decision that the Al Ahli Employment Contract was terminated after 5 months, and calculated the amount of income the Player would have earned under the contract as five months of salary, which equated to EUR 229,165 (*i.e.* 5/12 x EUR 550,000). However, the Panel notes that the active term of the contract was in fact only 4 months and 2 days, which suggests that the Player only earned EUR 183,333 (*i.e.* 4/12 x EUR 550,000) of income from Al Ahli. The Panel determined to use this figure when calculating the amount of damages to be awarded to the Agent.
80. Considering that the Player earned EUR 183,333 of income under the Al Ahli Employment Contract, the Panel notes that the amount being claimed by the Agent as damages (*i.e.* EUR 225,000) amounts to 123% of the total income earned by the Player whilst he played for Al Ahli. Indeed, even if the Panel were to consider - as the Single Judge did in the Appealed Decision - that the agreement was terminated after 5 (and not 4) months, the amount being claimed would still equate to 102% of the income earned by the Player whilst at the club.
81. In the Panel’s experience, the standard industry practice is for agents to be paid by way of a commission of the monies their client earns under a contract of employment that they negotiate for this client. They share in the remuneration their client earns from their services in negotiating a contract with a club. The Panel has seen agents that demand a lump sum (typically a lawyer representing a player), but on the whole, agents take a share of what they manage to achieve by way of remuneration for a player from a club through his employment contract. Further, if a player signs a long term contract with a club using the services of agent A, but mid-way through, signs a new contract with the same club or moves clubs and signs with another club, but uses the services of agent B, then the commission due to agent A ends with the old contract of employment and agent B becomes entitled to commission for his services by way of reference to the new contract of employment. The rationale for such an approach seems reasonable as it would not seem fair for an agent to be paid commission on wages that a player had not yet earned, or indeed would never earn. However, the Panel notes that the Representation Contract did not provide for any such a yearly payment mechanism – it simply stated the Agent was entitled to 10% (or 15% if the Player represented himself) of the total value of any contract as commission.

82. The Panel turns to Article 18(1) of the Swiss Code of Obligations (“Swiss CO”), which states as follows:

“When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement”.

83. The Panel acknowledges that the parties freely agreed to clauses 2 and 3 of the Representation Contract, but also considers pursuant to the above cited provisions of the Swiss CO that it should take into account all the circumstances relevant to this particular matter as well as the intentions of the parties when entering into their agreement.
84. Having considered the arguments from both parties, on balance, the Panel concluded that it would be nonsensical, and even perverse, for a football player to lose money from working because he had to pay commission to an agent. If the Panel were to award the Agent damages of EUR 225,000 in these circumstances, the Player would have, in effect, paid the Agent EUR 41,667 for the right to have played for Al Ahli for free for four months. This is all the more absurd given that the Agent did not even act for the Player in concluding the Al Ahli Employment Contract. The Panel considers that having to pay his entire earnings (and more) from a contract with a club to an agent irrespective of whether that said agent negotiated his deal or not, could not have been the intention of the parties when entering into the Representation Contract.
85. If the Player had completed the full 3 year term of the Al Ahli Employment Contract, then he would have had an opportunity to financially benefit from the entirety of the agreement. In those circumstances, it would have been reasonable for the Agent to be awarded commission on the total value of the contract. However, in both ends of this timeline, the most important word is “commission” and the fact that it is stated as a percentage. In the Panel’s experience, most agents are rewarded for their efforts by a commission payment calculated by reference to a percentage of what the player is paid by his club. Not what he might be paid. A player may be transferred, he may settle his contract with a club, he may be injured and have to retire before the end of his contract with the club or he may be such a success, that the club and the player tear up his first contract and he’s awarded an improved contract. There are so many unknowns in football. As such, the standard arrangement between a player and his agent is that the player (or sometimes the club on his behalf) pays the agent a percentage of his earnings from the contract of employment that he has with the club, that the agent negotiated on his behalf, for the entire time that the contract of employment runs for. If it runs to the end of its term, then the agent does indeed get his commission on the total of the employment contract, however, if it ends prematurely, for whatever reason, the agent’s entitlement to commission ends too. The Panel saw no evidence that the parties here intended to move from the standard practice in football.
86. Accordingly, the Panel agrees with the Single Judge and concludes that clauses 2 and 3 of the Representation Contract should be interpreted to award the Agent commission based on the income *actually* earned by the Player under any employment contract. In the present

circumstances, pursuant to Article 18(1) of the Swiss CO, the Panel concludes that the amount of commission that the Agent is entitled to should be reduced to EUR 27,500 (*i.e.* 15% of EUR 183,333).

87. However, the Panel notes that this amount (EUR 27,500) is in fact lower than the amount of damages granted to the Agent in the Appealed Decision (EUR 34,375). The Panel also acknowledges that the Player did not appeal the Appealed Decision and accordingly, the Panel is unable to award an amount lower than that granted to the Agent in the Appealed Decision, as that would violate the principle of *ultra petita*. Accordingly, the amount of damages (subject to interest, which is discussed below) to be awarded to the Agent is EUR 34,375.

c) *Is interest applicable to the award of damages, and if so, at what rate?*

88. In the Appealed Decision, the Single Judge determined that interest would not be applicable on any award of damages to the Agent, as “*interest cannot run over the penalty for lack of contractual basis*”. The Agent disputed this ruling and argued that under both Polish law and Swiss law, interest should be payable on the amount of commission awarded as damages.
89. The Agent submitted that whilst the rate of interest was higher in Poland than it was in Switzerland, the rate of 5% *per annum* should be applicable in the present matter pursuant to Articles 73(1) and 104(1) of the Swiss CO, which state:

“Art. 73

1. Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.

(...)

Art. 104

1. A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract”.

90. The Panel notes that the Player did not make any submissions specifically regarding the issue of interest, but did broadly state that the Appealed Decision should be upheld, *i.e.* that interest was not applicable.
91. In summary, the Panel disagrees with the conclusion of the Single Judge and accepts the Agent’s arguments. Regardless of the rationale of the Single Judge in rejecting the claim for interest in the Appealed Decision, the Panel notes that it is widely accepted under Swiss law (see for example the provisions of the Swiss CO cited above), that 5% interest is applicable on unpaid debts. The Panel notes that even though the Agent pointed out that Polish law provided for a higher rate of interest, he only claimed interest of 5%, further the Panel has determined that Swiss law is applicable to the case at hand.

92. In relation to the date at which interest should begin to accrue, the Panel notes that the Al Ahli Employment Contract was entered into on 29 September 2014, however the Agent has only requested interest to be awarded from 13 October 2014. This appears to be because under clause 3, the Player had 14 days to make the required payment. Accordingly, the Panel is satisfied to award interest of 5% *per annum* from 13 October 2014.
93. In relation to the principal amount on which interest should be calculated, the Panel acknowledges that whilst it concluded that the Agent was only entitled to EUR 27,500 of damages, the amount of damages ultimately awarded in this Award is EUR 34,375, as it would have been *ultra petita* for the Panel to award an amount lower than the Appealed Decision.
94. In the Appealed Decision, the Single Judge determined that interest was not applicable at all. For the reasons stated above, the Panel rejected this conclusion and determined that interest was, in fact, applicable. Accordingly, the Panel concludes that it has the autonomy to determine the issue of interest in the manner it deems most appropriate - *i.e.* it was not bound by the Appealed Decision or restricted by the prayers for relief submitted (or not submitted) by the Player. In the present circumstances, the Panel determines that the amount of interest that the Agent would have been entitled to was 5% *per annum* on the part of the commission awarded above that he *should* have been paid by the Player, *i.e.* EUR 27,500.
95. As such, the Panel concludes that the amount of interest applicable in this dispute is 5% *per annum* on EUR 27,500, from 13 October 2014 until the date of effective payment.

d) *What is the total amount of damages to be awarded to the Agent?*

96. For the reasons stated above, the Panel conclude that the Agent should be awarded the following total damages:
- EUR 34,375 of commission, and
 - Interest of 5% on the amount of EUR 27,500 from 13 October 2014 until the effective date of payment.

B. Conclusion

97. In summary, the Panel has determined to:
- Reject the Agent's request to increase the amount of damages awarded to him under the Appealed Decision (and in fact determined that the amount awarded to the Agent could have, in fact, been lower except for the fact that the Player did not file an appeal); and
 - Uphold the Agent's request for interest of 5% *per annum* to be imposed, however only on the amount of EUR 27,500; and

- Therefore award the Agent a total amount of damages of EUR 34,375, plus interest of 5% *per annum* on the amount of EUR 27,500.
98. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel considers that the Appeal by the Agent against the Appealed Decision has been partially upheld.
99. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 24 October 2017 by Jaroslaw Kolakowski against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 8 May 2017 is partially upheld.
2. Point 2 of the operative part of the decision rendered by the Single Judge of the FIFA Players' Status Committee on 8 May 2017 is amended as follows:

Daniel Quintana Sosa shall pay to Jaroslaw Kolakowski an amount of EUR 34,375 (thirty four thousand and three hundred and seventy five Euros), plus 5% interest *p.a.* on the amount of EUR 27,500 (twenty seven thousand and five hundred Euros) as from 13 October 2014 until the date of effective payment.

3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.