Arbitration CAS 2014/A/3836 Admir Aganovic v. Cvijan Milosevic, award of 28 September 2015

Panel: Mr András Gurovits (Switzerland), Sole Arbitrator

Football
Players' Agent Contract
Applicable law in case of absence of choice of law provision
Burden of proof (discharge)

1. **In Appeals proceedings before the CAS, when an agreement between parties does not provide any choice of law provision, the parties cannot authorise the arbitral tribunal to render an arbitral award based on the principle *ex aequo et bono*, as there is no provision in Article R58 of the CAS Code authorising the arbitral tribunal to decide *ex aequo et bono* or in equity. However, the arbitral tribunal may apply the law that "it deems appropriate" and has to give reasons for such decision. This shall rather be considered as a clarification of the closest connection rather than an expression of the *ex aequo et bono* principle, and in practice, this could enable the arbitrators to apply the law that they want to see applied to the merits of the dispute. In case of the existence of a decision rendered by a FIFA decision-making body, the rules of FIFA and additionally Swiss law are applicable.**

2. **It is a generally accepted principle that each party must provide evidence for any fact on which it intends to rely. In case of a "one-word-against-another" situation, the party having the burden of proof has to provide further evidence supporting its position, for example by calling witnesses.**

I. THE PARTIES

1. Mr Admir Aganovic (the "Appellant") is a professional football player of Bosnian nationality, born on 25 August 1986, who is currently playing for the Swedish 2nd Division club Assyriska FF.

2. Mr Cvijan Milosevic (the "Respondent") is a football players' agent, licensed under the Union Royale Belge des Sociétés de Football-Association.

II. FACTS

3. The undisputed facts as presented by the parties are summarized herein. The disputed factual

elements will be discussed further below.

4. On 12 June 2009, the Appellant and the Respondent signed a *"contrat de médiation"* (the "Agreement") in accordance to which the Appellant engaged the Respondent as his agent.

5. The Agreement provided, inter alia, for the following

"2. Rémunération

L'agent de joueurs est rémunéré exclusivement par le mandant pour les services rendus.

a) Un joueur comme mandant

L'agent de joueurs perçoit une commission à hauteur de 7% du salaire de base brut Annuel réalisé par le joueur aux termes du contrat de travail négocié par son agent".

6. By ticking the relevant boxes on the contract form, the parties further agreed that the agent's commission was to be paid at the beginning of the employment relationship and that the Agreement was exclusive in respect of its subject matter.

7. On 1 July 2009, the Appellant and the Swiss club Neuchâtel Xamax S.A. (the "Club" or "Xamax") signed a *"Contrat de Travail pour Joueur non Amateur de Swiss Football League"* (the "Employment Contract"). In accordance to article 35 of the Employment Contract the Appellant was entitled to receive the following net yearly salary, excluding bonus:

Season 2010 – 2011: CHF 180,000;

Season 2011 – 2012: CHF 216,000.

The Sole Arbitrator is not in a position to ascertain, on the basis of the copy of the Employment Contract provided, the agreed salary for the 2009 – 2010 season. He however notes that, in paragraph no. 4 of the decision of 7 May 2014 (the "Challenged Decision") the Single Judge of the FIFA Players' Status Committee held that the Appellant's salary for that season was CHF 153,800 (net) and that in his Appeal Brief of 12 December 2014 the Appellant confirmed that the Single Judge's comments in paragraphs 1-9 of the Challenged Decision accurately reflect the facts, thus, also confirming the amount of the salary for the 2009-2010 season in the amount of CHF 153,800 (net).

8. On 28 January 2010, the Respondent lodged a claim with FIFA against the Appellant requesting from the latter payment of CHF 51,187 as a commission under the terms of the Agreement.

9. During the proceedings before the FIFA Players' Status Committee, the Appellant contested the Respondent's claim arguing that the latter had not been involved in the contract negotiations and was, thus, not entitled to the commission. The Appellant further argued that he was only employed and paid by Xamax during the first year of the Employment Contract. In the second year, he was loaned to a Romanian club, and in the third year Xamax had financial difficulties leading to bankruptcy of the club and therefore received no salary at all.

10. In the Challenged Decision, the Single Judge of the FIFA Players' Status Committee determined that, pursuant to the Agreement, the Respondent was entitled to a commission in the total amount of CHF 38,486. This amount equals to 7% of the net salaries for the seasons 2009-2010, 2010-2011, and 2011-2012. The Single Judge could not take into account the gross salary amounts that pursuant to the Agreement would have had to serve as a basis for calculating the 7% commission as the Respondent had not established the amount of such gross salary of the Appellant.

III. PROCEEDINGS BEFORE CAS

11. The Appellant filed his statement of appeal on 3 December 2014 and, on 12 December 2014, filed his appeal brief pursuant to Article R51 of the Code of Sport-related Arbitration (hereinafter referred to as the "Code").

12. As the Appellant had, *inter alia*, requested a stay of the Challenged Decision the CAS Court Office reminded the Appellant of the CAS' practice pursuant to which a decision of a financial nature issued by a Swiss association (like FIFA) is not enforceable while under appeal. By email of 10 December 2014, the Appellant therefore withdrew his request for a stay.

13. By letter dated 16 December 2014, FIFA submitted a clean copy of the Challenged Decision to the CAS Court Office. In its letter, FIFA further informed the CAS Court Office that it renounced its right to intervene in the present arbitration proceeding.

14. On 19 January 2015, the Appellant submitted the Legal Aid Application Form requesting legal aid in respect of the present proceedings.

15. On 5 February 2015, the CAS Court Office informed the parties that, in accordance with article R50 para. 1 of the Code and in view of the circumstances of the case at hand, the present matter shall be referred to a Sole Arbitrator.

16. On 9 February 2015, the President of the International Council of Arbitration for Sport ruled that the Appellant's request for assistance for CAS administrative costs in the present proceedings was granted, while his request for assistance for his own costs, costs of witnesses, experts and interpreters, was denied.

17. By letter dated 18 February 2015, the CAS Court Office, pursuant to the terms of Article R54 of the Code, confirmed the appointment of the current Sole Arbitrator to adjudicate the present

appeal.

18. On 26 February 2015, the Respondent filed his answer.

19. By letter dated 10 March 2015, the Appellant requested to be given the right to respond to the Respondent's answer, *i.e.* in essence, that a second exchange of briefs take place, and by letter of the same day, the Respondent requested that a hearing take place in the present proceedings.

20. By letter of 23 March 2015, the CAS Court Office granted the Appellant a ten-day deadline to file his reply, and announced that the Respondent would, upon receipt of the reply, be granted a similar deadline to file his rejoinder. The CAS Court Office further informed the parties that a hearing would be held. After having checked availabilities of the parties, the hearing date was fixed on 15 April 2015.

21. On 1 April 2015, the Appellant submitted his reply, and on 8 April 2015 the Respondent submitted his rejoinder.

22. On 9 April 2015, the CAS Court Office sent out the Order of Procedure for execution by the parties. Both parties signed and returned the Order of Procedure on 14 April 2015.

23. On 15 April 2015, the hearing was held at the CAS Court Office in Lausanne, Switzerland. The Appellant personally attended the hearing and was assisted by his Counsel, Mr Anders Jemail. The Respondent was not assisted by his counsel, but was accompanied by his translator, Ms. Dominique Baz.

24. None of the parties called up witnesses or experts during the hearing.

25. At the end of the hearing, the parties confirmed that their right to be heard and to be treated equally had been respected.

IV. THE PARTIES' SUBMISSIONS

26. In his statement of appeal dated 3 December 2014, the Appellant submitted the following requests for relief:

"Mr Admir Aganovic requests that the Court of Arbitration for Sport (CAS) issues a new decision which replaces the appealed decision of the Player's Status Committee, and that the CAS, in such new decision, rejects the Respondent's claim in full".

27. In his written submissions the Appellant principally submits that:

a. Article 67 of the FIFA Statutes confers jurisdiction to the CAS to hear the present dispute.

b. While according to the Agreement the Respondent has the right to receive from the Appellant a fee of 7% of the gross remuneration the Appellant was entitled to under the Employment Contract, the Respondent has the burden of proof to demonstrate that he actually was involved in the negotiation of the Employment Contract. However, the Respondent was not involved in the negotiations.

c. The Appellant contacted the Respondent the day before he travelled to Switzerland for a try-out with the club in order to assist him during the negotiations process. They therefore agreed to meet at the Zurich airport to discuss about the Appellant's option to play with Xamax. However, the Respondent did not come and only showed up for a short meeting with the Appellant in Neuchâtel on his way to vacation in Croatia. During such meeting, the Appellant briefed the Respondent about the try-out and the contract proposal. Two days before the Employment Contract was supposed to be signed, the Appellant contacted the Respondent, but the latter did not provide any assistance and support.

d. Further, while the name of the Respondent appears on the Employment Contract, the latter had not signed it which is an indication that he was not involved in the negotiations. In addition, on the fax copy of the Employment Contract which the Respondent submitted, the name of the latter was not included, so that consequently, at the date of signing, the Respondent's name was not on the Employment Contract.

e. The Appellant received his contractually agreed salary from Xamax only during the first contract year, *i.e.* during the 2009-2010 season. The following season he was playing on a loan basis for Romanian club FC Gaz Metan (earning EUR 62,500), and thereafter he returned to Xamax for the 2010-2011 season where he, however, did not earn any salary due to the financial difficulties of the club finally resulting in the club's bankruptcy in January 2012.

28. Neither in his answer dated 26 February 2015, nor in his rejoinder, did the Respondent submit any specific prayer for relief. The Sole Arbitrator, however, holds that the Respondent's submissions are to be understood as a request to confirm the Challenged Decision.

29. To support his position, in his written submissions the Respondent principally submits that:

a. The Respondent had been the agent of the Appellant for several years, *i.e.* since the year 2003 and, thus, well before the signing of the Agreement which is the subject matter of the present arbitration.

b. The Respondent directly assisted the Appellant with the negotiation of the Employment Contract with Xamax, and he was also directly involved on the day when the Appellant signed the Employment Contract.

c. On 1 July 2009, the Respondent travelled to Switzerland to negotiate the Employment Contract of the Appellant. The Respondent knows the financial requirements of the Appellant

with whom he worked for many years and so the parties agreed on the Appellant's salary.

d. On the next day, *i.e.* 2 July 2009, the Appellant, who knew that the Respondent was on vacation in Croatia together with his family, faxed the Employment Contract to the Respondent's hotel asking him to check the salary amounts by the latter. Subsequently, the Appellant signed the Employment Contract. All this happened the day before the Employment Contract was signed as it would have been absurd to fax the Employment Contract, and inquire as to whether or not to sign it, had it already been signed before.

e. The fact that the Respondent's name is mentioned on the Employment Contract is a further indication that he was involved. The club would not have added the name of the Respondent had he not been regarded as the player's agent.

f. Without the help of the Respondent the Appellant would not have been able to negotiate the terms of the Employment Contract.

30. The parties' presentations of the most relevant facts of the case during the hearing were inconsistent. This will be discussed in more detail below.

V. JURISDICTION

31. According to Article R27 of the Code *"These Procedural Rules* [the ones of the Code] *apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).*

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity related or connected to sport".

32. Further, Article R47 of the Code provides as follows:

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

33. The Agreement does not provide any arbitration clause. The jurisdiction of the CAS, thus derives from Article 67 para. 1 of the FIFA Statutes according to which a decision of FIFA maybe appealed to the Court of Arbitration for Sport in Lausanne. The parties further signed the order of procedure which provides, in its article 1, that *"Mr. Admir Aganovic (the Appellant) relies on article 67 of the FIFA Statutes as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by Mr Cvijan Milosevic (the Respondent) and is confirmed by the signature of the present order".*

34. It follows that the requirements of Articles R27 and R47 of the Code being satisfied, the CAS has jurisdiction to decide on the appeal against the Challenged Decision dated 7 May 2014. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law and may issue a de novo decision, partially or entirely, superseding the appealed decision.

VI. ADMISSIBILITY

35. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the Statutes or Regulations of the Federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty one days from the receipt of the decision appealed against […]".

36. The Challenged Decision was passed on 7 May 2014 and the FIFA Players' Status Committee communicated the grounds to the parties by letter dated 13 November 2014. The 21-day deadline to file the appeal, thus, elapsed on 4 December 2014. By submitting his statement of appeal on 3 December 2014, the Appellant complied with the 21-day deadline.

37. The Sole Arbitrator therefore holds that the appeal is admissible.

VII. APPLICABLE RULES OF LAW

38. Pursuant to Article R58 of the Code, *"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 decisions".*

39. Pursuant to Article 66 para. 2 of the FIFA Statutes, *"[…] CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

40. The Sole Arbitrator notes that the Agreement does not provide any choice of law provision. However, during the hearing, both parties declared that the Sole Arbitrator shall be entitled to decide the dispute *ex aequo et bono.*

41. Although the parties have authorised the Sole Arbitrator to render an arbitral award based on the principle *ex aequo et bono*, the latter finds that there is no provision in Article R58 of the Code authorising the arbitral tribunal to decide *ex aequo et bono* or in equity, but the arbitral tribunal may apply the law that *"it deems appropriate"* and has to give reasons for such decision. This shall rather be considered as a clarification of the closest connection rather than an expression of the *ex aequo et bono* principle, and in practice, this could enable the arbitrators to apply the law that they want to see applied to the merits of the dispute (*MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, 2015, Kluwer Law International, no. 132 ad Article R58, p. 555*).

42. Being in presence of a decision rendered by a FIFA decision-making body and in view of the fact that the Agreement signed by the parties does not contain any choice of law provision, the Sole Arbitrator holds that the rules of FIFA, in particular the RSTP, and additionally Swiss law, are applicable.

VIII. MERITS

a) The burden of proof

43. Article R51 para. 1 of the CAS Code provides that *"the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely"*, while Article R55 para. 1 of the CAS Code provides that as part of his answer brief the Respondent shall submit, among other things, *"any exhibits or specification of other evidence upon which the Respondent intends to rely"*. This is in line with the generally accepted principle that each party must provide evidence for any fact on which it intends to rely.

44. Furthermore, under Swiss law, Article 8 of the Swiss Civil Code provides that *"Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact"*.

45. The Sole Arbitrator finds that such principle has been confirmed by the constant jurisprudence of the CAS in the following terms: *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof,* i.e. *it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue, In other words, the party which asserts facts to support its rights has the burden of establishing them (…). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (*e.g.* CAS 2003/A/506, para. 54; CAS 2009/A/1810&1811, para. 46 and CAS 2009/A/1975, para. 71 *et seq.*).

46. In the case at hand and in accordance with the aforementioned principle, this means that the Respondent has the burden of proof to provide convincing evidence that he fulfilled the requirements under the Agreement entitling him to claim the agreed commission.

b) The relevant facts

aa) The presentation of the facts by the parties in their written submissions

47. The parties do not dispute the existence of the Agreement. It is not contested that, in June 2009, they signed the Agreement, pursuant to which the Respondent was acting as the Appellant's agent. In particular, it is not contested that pursuant to Clause 2 of the Agreement *"L'agent de joueurs es rémunéré exclusivement par le mandant pour les services rendus (sic)"*, *i.e.* that the Appellant shall pay the agreed commission only for services actually rendered by the Respondent (free translation by the Sole Arbitrator). It is also not disputed that, if the Respondent had rendered the agreed services, he would be entitled to the commission agreed in the Agreement. However, the parties disagree

about the amount that would be due should it be determined that the conditions for the commission are fulfilled.

48. While the Appellant submits that he signed the Employment Contract without the help of the Respondent, the latter pretends that he was involved into the negotiations process and that, prior to signing the Employment Contract, the Appellant had sought his advices and, only after having received such advices, signed the Employment Contract. In other words, the parties disagree about a core factual point, *i.e.* the role of the Respondent in connection with the negotiation and entering into force of the Employment Contract. Therefore, the Sole Arbitrator has analysed the evidence that the parties have submitted in this respect.

49. The core documentary evidence available to the Sole Arbitrator with regard to the signing of the Employment Contract consists of two copies of said agreement that the parties have submitted together with their submissions. Based on both copies of the Employment Contract, one may conclude that the Appellant and the club Xamax signed the Employment Contract. However, there is an important inconsistency between the two copies. While the copy provided by the Appellant as *"Appendix B"* indicates on the front page under Clause 2 that the Respondent is the Appellant's agent, the copy submitted by the Respondent as *"Annex 4"* does not indicate any name of any player's agent, and the relevant box foreseen for inclusion of the player's agent's name is empty. As both documents are copies of the signed Employment Contract, the Sole Arbitrator may conclude that the name of the Respondent was included on the Employment Contract only after its execution by the parties thereto. The Appellant explained that he had received the copy of the Employment Contract he submitted as *"Appendix B"* from the club and it must have been the club that had written the Respondent's name on the Employment Contract. The Respondent did not provide another explanation.

50. Against the above background, the Sole Arbitrator holds that *"Appendix B"* submitted by the Appellant is no sufficient evidence to demonstrate that the Respondent had actually rendered services in accordance with the Agreement and, in particular, acted as the Appellant's agent. Moreover, because the copy of the Employment Contract submitted by the Respondent as his *"Annex 4"* does not mention him at all, it is not established that the Appellant, by signing the Employment Contract, confirmed that the Respondent was his agent and was duly assisted by the latter during the negotiations process ending up to the signing of the Employment Contract. It is rather established that, when the club and the Appellant signed the Employment Contract, the Respondent was not mentioned as agent and that the name of the Respondent must have been put on the Employment Contract after its signature. Based on the documentation available, the Sole Arbitrator concludes that the copy of the Employment Contract provided by the Respondent as *"Annex 4"* may not have been available to the Single Judge of the FIFA Players' Status Committee as the Challenged Decision makes reference only to that copy of the Employment Contract on which the Respondent was mentioned as the Appellant's agent.

51. As the Employment Contract does not prove that the Respondent acted as the Appellant's agent with respect to the negotiation process of the Employment Contract, it shall be analysed whether the other documentary evidence submitted by the parties allows to ascertain the Respondent's role

in connection with the conclusion of the Employment Contract.

52. The Respondent submitted, as *"Annex 1"*, a number of representation contracts between him and the Appellant which show that the Appellant had already engaged the Respondent as his agent a few years ago. The Sole Arbitrator, however, holds that these agreements do not prove that the Respondent was providing services with respect to the Employment Contract with Xamax. Likewise, the documents that the Respondent submitted as *"Annex 2"* are not suitable to give evidence of the Respondent's endeavours in connection with the Employment Contract. These documents are not written in English (and the Respondent did not provide any translation), so that the Sole Arbitrator is not in a position to ascertain their exact scope. Indeed, these documents relate, in accordance with the Respondent's comments, to previous interventions on behalf of the Appellant, so that such documents are of no relevance with respect to the Respondent's role in connection with the Employment Contract. *"Annex 1"* and *"Annex 2"* submitted by the Respondent merely demonstrate that the Appellant and the Respondent had been collaborating for years.

53. *"Annex 3"* submitted by the Respondent consists of some handwritten notes. According to the Respondent, these notes were taken by him. The Sole Arbitrator does not consider these notes as sufficient evidence for the disputed facts. The Respondent did not provide any explanation as to how the compilation of figures provided in *"Annex 3"* is to be understood, and lacking any guidance or explanation, the Sole Arbitrator is not in position to draw any conclusion relevant for the case at hand on the basis of these figures.

54. *"Annex 4"*, finally, provides a copy of the (signed) Employment Contract. As it has already been discussed above, this copy does not mention any person as the Appellant's agent. *"Annex 4"* is a copy of the Employment Agreement signed by the club and the Appellant. However, it is not signed by the Respondent, and the Respondent is not mentioned as the Appellant's agent. For these reasons, the Sole Arbitrator holds that *"Annex 4"* is not suitable either to support the Respondent's position.

55. As the documentary evidence submitted by the Appellant does not support the Respondent's position either, the Sole Arbitrator analysed whether any information was provided at the hearing that would support the Respondent's position.

bb) The oral presentation of the facts by the parties during the hearing

56. The statements made by the parties during the hearing confirmed that not only the parties' views differ in respect of the role of the Respondent in general, but also in respect of various important details of the present case. Among others, while the Respondent explained at the hearing that he was in Neuchâtel on 1 July 2009 in order to discuss the terms of the Employment Contract with a representative of the club Xamax, the Appellant stated that he had a short meeting with the Respondent on 25 June 2009 only and that the Respondent was not present in Switzerland thereafter.

57. Further, while the Respondent admitted that it was not him who had established the contact with the club, but rather another individual, Mr. Ibrakovic (the Appellant's former coach with the Bosnian U21 national team), the Respondent still explained that he negotiated the terms of the Employment Contract on 1 July 2009 together with a representative of the club while the Appellant was already practising Xamax first team. The Appellant, however, explained that it was Mr. Ibrakovic who had negotiated the terms of the Employment Contract and that the Respondent was not involved at all.

58. In addition, the Respondent explained that, on 2 July 2009, a representative of the club (in the presence of the Appellant) sent the Employment Contract by fax to the Respondent for his perusal to a hotel in Slovenia where he was staying those days. The Appellant, however, denied that he was aware of or involved in the sending of the Employment Contract by fax to the Respondent.

59. Without any witness being present, the Sole Arbitrator concludes that these discrepancies between the parties as to the relevant facts of the matter cannot be clarified.

cc) Inconsistencies between statements of facts in the parties' briefs and the statements made during the hearing

60. When analysing the evidence submitted by the parties, the Sole Arbitrator noticed some inconsistencies between the Respondent's discussion of the facts in his written submission and his statements made orally during the hearing.

61. In his rejoinder, the Respondent explained that on 2 July 2009 the Appellant travelled to Switzerland to sign the Employment Contract, while during the hearing the Respondent explained that on 1 July 2009 the Appellant was already with the club as the training had started on such 1 July 2009.

62. Still in his rejoinder, the Respondent further explained that the Appellant sent a copy of the Employment Contract to the Respondent who was in Croatia on vacation with his family. During the hearing, however, the Respondent explained that he was, at that time when he received the fax message, in Slovenia. He was there neither on vacation, nor together with his family.

63. Moreover, while in his rejoinder the Respondent explained that the Appellant had sent him the Employment Contract for review, the Respondent pointed out during the hearing that it was the club's sports director (and not the Appellant) who had sent the Employment Contract by fax.

64. Finally, in his rejoinder, the Respondent explained that the Employment Contract had been sent to him one day after it was signed. Given that the fax copy of the Employment Contract produced with the file bears the sending date of 2 July 2009, the signing should have taken place on 1 July 2009. The Respondent, however, explained during the hearing that signing occurred on 2 July 2009.

65. On the other hand, the Sole Arbitrator did not notice any contradiction between the Appellant's briefs and his statements during the hearing.

66. The fact that the Respondent's presentation of various aspects in his written submissions and in his oral presentation during the hearing was inconsistent as well as that the latter did not present any witness who would have supported his contentions raise some doubts as to the plausibility and reliability of such contentions.

dd) Circumstancial evidence for the Respondent's involvement

67. While the Sole Arbitrator finds that there is no clear evidence that would prove the Respondent's involvement in the negotiation and conclusion of the Employment Contract, he also notes that there are some indications or circumstantial evidence that may support the Respondent's view.

68. First, it is remarkable that on the copy of the Employment Contract provided by the Appellant, the Respondent is indicated to be the Appellant's agent. Although this document indicates that the Respondent's name was included in the Employment Contract only after the signing of the Employment Contract, it is still to be noted that it was the Appellant who had submitted this copy of the Employment Contract. During the hearing, the Appellant explained that it must have been the club who had put the Respondent's name onto the Employment Contract after signing. The Appellant, further, explained that he had introduced the Respondent to the club as his agent (although denying that the latter played a role in the negotiation and execution of the Employment Contract at hand), so that probably for such reason the club included the Respondent's name on the Employment Contract. The Respondent did not provide any other explanation as to the inclusion of his name in the Employment Contract. The presentation of these facts may be considered as an indication that the Appellant regarded the Respondent as his agent also in respect of the Employment Contract.

69. Second, pursuant to the terms of the Agreement, the representation by the Respondent of the Appellant was exclusive. The Appellant, however, explained that it was another individual, Mr. Ibrakovic, who had established contact with the club Xamax and arranged the terms of the Employment Contract. The Appellant, further, submitted a written statement of Mr. Ibrakovic confirming the foregoing. While during the hearing the Respondent acknowledged the fact that the contact with the club had been established by Mr. Ibrakovic, he maintained that the Appellant was not allowed to rely on the assistance of Mr. Ibrakovic and that it was the Respondent who had negotiated the terms of the Employment Contract. Given that the Respondent acknowledged that the contact to the club had been established by Mr. Ibrakovic (the Respondent referred to this as a *"fait admis"*), the Sole Arbitrator considers the witness statement of Mr. Ibrakovic submitted by the Appellant as admissible, although Mr. Ibrakovic was not cross-examined at the hearing.

70. The Sole Arbitrator further holds that, pursuant to the terms of the Agreement, the Appellant was probably not allowed to engage Mr. Ibrakovic and to use of his services. In light of the foregoing, it cannot be excluded that such behaviour may not have been fully in compliance with the Agreement. However, this possible breach and the existence of the exclusivity clause *per se* do not prove the Respondent's involvement in the negotiation of the Employment Contract, but may have served as a basis for a claim of the Respondent for compensation for breach of contract which he, however, did neither submit nor substantiate.

71. Third, at the hearing, the Respondent quite precisely described the course of the contract negotiations on 1 July 2009. He even mentioned the name of the club's sports director (Mr. Paolo Urfer) with whom he was negotiating the terms of the Employment Contract, and his explanations did not appear implausible. However, the Appellant denied these explanations of the Respondent. In such a *"one-word-against-another"* situation, the Respondent, having the burden of proof, should have provided further evidence supporting his position, and, in particular, he should have called the sports director (or any other official of the club at the time) as a witness, which he, however, failed to do so.

ee) Conclusion

72. Considering the submissions made by the parties, the evidence they have submitted, the oral information provided during the hearing and the fact that no witness was called in support of the parties' positions, the Sole Arbitrator holds that there is some circumstantial evidence that would indicate that the Respondent was involved - if not in the establishing of the contact with the club, but at least in the negotiation of the Employment Contract. However, the Sole Arbitrator must conclude that, on balance, the Respondent, having the burden of proof for his involvement, did not provide sufficient evidence that would allow the Sole Arbitrator to conclude that he had actually been negotiating the terms of the Employment Agreement. The Respondent failed, in particular, to call any witness that would have confirmed his presentation of the course of action. Moreover, the presentation of the facts by the Respondent, *i.e.* his presentation provided in his written briefs and his explanations made orally at the hearing, was inconsistent in some significant aspects. Finally, although the Agreement foresaw an exclusivity undertaking in favour of the Respondent, and by relying on the services of Mr. Ibrakovic the Appellant may have breach his commitment, the Respondent elected not to request and substantiate compensation for breach of the Agreement, a fact that prevents the Sole Arbitrator to assess the matter from such perspective.

c) Legal considerations

The parties disagree as to whether or not the Respondent is entitled to claim the commission agreed in the Agreement. The Sole Arbitrator has first to establish the right and obligations of the Respondent by interpreting the terms of the Agreement. He concludes that the contractual provisions under the Agreement relevant for the present dispute are quite scarce. Article 2 of the Agreement provides that *"L'agent de joueurs est rémunéré exclusivement par le mandant pour les services rendus"*, *i.e.* that the Respondent shall compensated *exclusively for services rendered* (free translation by the Sole Arbitrator). Further, Clause 2.a) of the Agreement sets out that *"L'agent de joueurs perçoit une commission à hauteur de 7% du salaire de base brut Annuel réalisé par le joueur aux termes du contrat de travail négocié par son agent"*, *i.e.* that the Respondent shall be entitled to a commission of 7 % of the annual gross salary that the Appellant realises under an employment agreement *negotiated by the Respondent* (free translation by the Sole Arbitrator).

The Sole Arbitrator finds that, pursuant to the Agreement, the Respondent shall only be entitled to a commission if he effectively rendered the contractually agreed services, *i.e.* in the case he negotiated the terms of the Employment Contract. In order for the Respondent to be entitled to a commission, it is thus not sufficient to having entered into the Agreement with the Appellant

and being his agent. The Agreement rather foresees that the Respondent must take an active role and negotiate the terms of the Employment Contract on behalf of the Appellant.

In a next step, the Sole Arbitrator assessed whether or not it was proven that the Respondent is entitled to a commission. In accordance with Article 8 of the Swiss Civil Code and with generally accepted principles, the Sole Arbitrator holds that the Respondent has the burden of proof to demonstrate his active involvement in connection with the negotiation and signature of the Employment Contract. The Sole Arbitrator, in light of the above, finds that the evidence available in the file does not allow him to conclude that the Respondent acted in accordance with Clause 2. a) of the Agreement and actively negotiated the terms of the Employment Contract. As the Respondent did not demonstrate that the conditions of Clause 2 a) of the Agreement are fulfilled, the latter is not entitled to claim a commission whatsoever and the Appellant is released to pay such a commission in accordance with Clause 2. a) of the Agreement.

d) Conclusion

73. Based on all the above, the Sole Arbitrator finds that the Respondent is not entitled to any commission agreed under the Agreement. For this reason, the Challenged Decision is set aside.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 December 2014 by Admir Aganovic against the decision issued by the Single Judge of the FIFA Players' Status Committee on 7 May 2014 is upheld.

2. The decision issued by the Single Judge of the FIFA Players' Status Committee on 7 May 2014 is set aside.

(…)

5. All other and further claims for relief are dismissed.