



Arbitration CAS 2007/A/1274 M. v. Ittihad Club, award of 18 December 2007

Panel: Mr. Hans Nater (Switzerland), President; Mr. Jean-Jacques Bertrand (France); Mr. Pantelis Dedes (Greece)

Football

Standing to sue (legitimatio ad causam) of a players' agent

Distinction between the legal personality of a company and that of one of its members

- 1. The legal personality of a company is distinct from that of its members. Such legal personality can be lifted in order to reveal underlying legal relationships only under exceptional circumstances, which are provided for by the applicable legislation.**
- 2. The fact that the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (art. 6 para. 1) allow only a licensed agent – and not a company – to file a claim before the FIFA Players' Status Committee regarding agent fees, cannot lead to the conclusion that an agent has the right to bring before the said body and under his own name a claim that belongs to companies of which he is a member, a shareholder or even the only owner; it is rather for the owner of the right, i.e. the legal entity, to seek judicial protection before the competent (state or arbitral) tribunals.**

M. (the “Appellant”) is a football players' agent licensed by the Italian Football Federation and legally domiciled in Italy.

Ittihad Club (“Ittihad” or the “Respondent”) is a club affiliated to the Saudi Arabian Football Federation, domiciled in Jeddah, Saudi Arabia.

M. together with another players' agent, V., as well as other natural and legal persons, is organised as a business with the name of P. Srl (“P”), a company legally seated in Italy.

During the months of July and August 2005 the Respondent contacted P. concerning a possible transfer of the players K. and J.

No written contract related to each of the transfers was entered into, neither between Respondent and M. nor between Respondent and P. However, Respondent provided P. with a cheque amounting to 200,000 EUR dated 28 July 2005 to be paid to the order of P. This cheque was duly presented for payment on 1 August 2005. However, the bank refused the payment due to insufficient funds. On 2 August 2005 P. sent to the Respondent an invoice amounting to 200,000

EUR regarding “*commissions on the transfer of the player K*”. asking for the payment to be made to P.’s bank account upon receipt of the invoice.

By letter dated 25 August 2005 to P., signed by Respondent’s President, the Respondent offered to pay the amount of 500,000 EUR to the English club Middlesbrough for a one-year loan to J., a monthly salary of 2,500 EUR to the player, and a commission of 300,000 EUR. The document does not specify the beneficiary of the commission offered by the Respondent to whom the commission should be paid by the Respondent.

The transfers of K. and J. to the Respondent indeed took place during the transfer period and with the involvement of the Appellant.

By letter dated 20 September 2005 to the Respondent, signed by the Appellant’s partner, V., P. complained about the non-payment of the commissions for the transfers of K. and J. and asked the Respondent to contact P. regarding the payment of 500,000 EUR within three days from the receipt of the letter. On 30 September 2005 P. sent to the Respondent an invoice amounting to 300,000 EUR regarding “*commissions on the transfer of the player J*”. asking for the payment to P.’s bank account upon receipt of the invoice. By letter dated 10 November 2005 to Mr F., a person that P. believed to be close to the Club, P.’s Director Mr T. complained about the delay in payment and requested F.’s assistance in reaching an amicable solution with the Respondent, before starting legal action.

On 9 December 2005 M. and V. filed a claim against the Respondent with FIFA Players’ Status Committee requesting: a) the amount of 200,000 EUR plus 5% interest as from 28 July 2005 in connection with the player K., b) the amount of 300,000 EUR plus 5% interest as from 31 August 2005 in connection with the player J., c) the reimbursement for the amount of 30 USD for the banking costs of the non-cashed cheque, d) the costs of the procedure before FIFA to be allocated to the Respondent due to its evident breach of contract. P. was not a party in the FIFA proceedings.

FIFA contacted the Respondent several times through the Saudi Arabian Football Federation. However, the Respondent never provided any answer to FIFA.

On 4 December 2006 the Single Judge of the FIFA Players’ Status Committee (the “Single Judge”) rendered his decision to reject the claim and order M. to pay the amount of 2,500 CHF for the costs of the proceedings.

This is an extract from the decision of the previous instance:

“In this context, the Single Judge pointed out that as far as the commission amounting to EUR 200,000 for the player K. is concerned, the Claimant explained that the said commission was orally agreed with the Respondent. Moreover, the Single Judge took due note that the Claimant provided a copy of a cheque amounting to EUR 200,000 dated 28 July 2005 to be paid to the order of P. in order to corroborate his claim.

In view of the above, the Single Judge deem it important to emphasised that based on the documentation contained in the file, it cannot be established that the Respondent agreed to pay to the Claimant any commission in connection with his alleged services as a players’ agent with respect to the transfer of the player K.

In particular, the Single Judge pointed out that the copy of the cheque amounting to EUR 200,000 dated 28 July 2005 clearly states that it should be paid to the order of the company P. and not personally to the Claimant.

Turning his attention to the claim of the Claimant with regard to the commission amounting to EUR 300,000 in connection with the player J., the Single Judge took due note that the Claimant provided a copy of an offer made by the Respondent to P. dated 26 August 2005 duly signed by the Respondent's president. According to the said offer the Respondent proposed to pay the amount of EUR 500,000 to an English club for an one-year loan of the player J., a monthly salary of EUR 2,500 to the said player and a commission of EUR 300,000. However, the document does not specify to whom the commission should be paid by the Respondent.

In this respect, and in view of the considerations contained under the above points II. 7-10, the Single Judge concluded that based on the documentation at his disposal, it cannot be established that the Respondent agreed to pay to the Claimant any commission in connection with his alleged services as a players' agent with respect to the transfer of the player J.

In particular, the Single Judge pointed out that the copy of the offer made by the Respondent dated 26 August 2006 is clearly addressed to P. and does not specify to whom the commission should be paid by the Respondent”.

By facsimile dated 4 April 2007, FIFA notified the motivated decision of the Single Judge with reasons to the parties.

By letter dated 23 April 2007 the Appellant and P. filed a Statement of Appeal with CAS against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 4 December 2006.

By letter dated 2 May 2007 the Appellant filed its Appeal Brief and required from CAS the following:

- “1. To fully cancel the decision taken by the Single Judge of the FIFA Players' Status Committee*
- 2. To order to the Respondent to pay to M./P. Srl the amount of EURO 200.000.- plus 5% interest as from July 28 2005 in connection with the transfer of the football player K. from the French club AS Monaco to Ittihad Saudi club.*
- 3. To order to the Respondent to pay to M./P. Srl the amount of EURO 300.000.- plus 5% interest as from 31 August 2005 in connection with the transfer of the football player J. from the English club FC Middlesbrough to Ittihad Saudi club.*
- 4. To order to the Respondent the reimbursement of a sum of USD 30.- in connection with costs incurred following the presentation by the Appellant to an Italian bank of a non-covered bank cheque issued by the Respondent.*
- 5. To order to the Respondent the payment of the Appellant of a reasonable sum to be fixed by the Appeal body to cover the costs of the current procedure as well as those caused by the procedure before FIFA”.*

In support of his claims, the Appellant submitted *inter alia* the following:

“The kind of activity described in [Article 1 of the FIFA Players' Agents Regulations] is exactly the one which has been successfully undertaken by M. on behalf of P. at the specific request of Ittihad Club for some fees which had been determined in advance by the parties in both cases and which have never been contested as such by the Saudi club.

[...]

It must further be underlined in that respect that the fact that the beneficiary of payments indicated on the documents issued by Ittihad was P. and not M. or V. is really a detail since this company is in fact formed by the two gentlemen who work together and are both in possession of a players' agents license issued by the FIGC (see P. company profile [...]). The Regulations specifically allow to an agent to organise his occupation as a business as long as he performs the work of agent by himself, which has definitely been the case for the two transfer deals concluded on behalf of Ittihad ([...] article 13 of the Regulations).

[...]

Concrete work has been provided by M. in two cases where he had been asked to intervene. There is evidence that the work he had been asked to undertake has been done. There is evidence that a remuneration had been agreed upon in case of success and there is evidence that the amount of the remunerations had been agreed in both cases (once through a cheque having to be considered as formal recognition of an oral agreement, once through a fax constituting an offer which has subsequently be accepted by conclusive acts). Finally, there is evidence that the mandates given have been executed successfully”.

A hearing was held in Lausanne on 2 October 2006. During the hearing the Respondent requested the appeal to be dismissed on the ground that the Appellant was not the legitimate owner of the rights in dispute. Furthermore, and for the first time at the hearing, Respondent raised the following two objections related to the jurisdiction of CAS and the applicable law: a) there is no arbitration agreement between the parties naming the CAS as the appeals body; b) the applicable law in the present case is not the Swiss law, i.e. the law of the seat of FIFA, as FIFA is not a party to the dispute. The Respondent stated that it might be time-barred to raise these arguments at this stage of the procedure.

LAW

Competence of the CAS to rule on its own jurisdiction

1. In accordance with Swiss Private International Law, the CAS has the power to decide upon its own jurisdiction.
2. Art. 186 of the Swiss Private International Law Act states:
 - “1. *The arbitral tribunal shall rule on its own jurisdiction.*
 2. *The objection of lack of jurisdiction must be raised prior to any defence on the merits.*
 3. *In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision”.*
3. According to the Award on Jurisdiction rendered by the CAS in the case CAS 2005/A/952 para. 6.3, the principle that the tribunal shall rule on its own jurisdiction “*is the embodiment of the widely recognized principle in international arbitration of 'Kompetenz-Kompetenz'*”. On this basis the CAS

went on to decide the preliminary issue of jurisdiction before it would consider addressing the substantive issues in question.

Jurisdiction

4. Art. R55 of the Code states:

“Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS an answer containing:

- *a statement of defence;*
- *any defence of lack of jurisdiction;*
- *[...]*

If the Respondent fails to submit its response by the given time limit, the panel may nevertheless proceed with the arbitration and deliver an award”.

5. Art. R56 of the Code provides the following:

“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer”.

6. The Respondent, despite several extensions of the time limit to submit the Answer, failed to submit an Answer. Therefore, Respondent’s objection to the jurisdiction of CAS is belated.
7. Moreover, the Respondent accepted the jurisdiction of CAS by signing the Procedural Order which states on page 1, para. 1 the following: *“The jurisdiction of the CAS in the present case is based on articles 60 and 61 of the FIFA Statutes, and is confirmed by the signature of the present Order by the parties”.*

Applicable law

8. The Respondent, despite several extensions of the time limit to submit the Answer, failed to submit an Answer. Therefore, Respondent’s objection related to the non-applicability of the FIFA Rules and, subsidiarily, Swiss law, is belated.
9. Art. 58 of the Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

10. The Procedural Order which was duly signed by Respondent contained an explicit reference to art. R58 of the Code.

11. When an appeal is filed with the CAS from a decision of FIFA, art. 59 para. 2 of the FIFA Statutes is applicable:

“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”.

On the basis of this provision of the FIFA Statutes, it is apparent that in the absence of an express choice by the parties of rules of law different to those provided for by the FIFA Statutes, the various regulations of FIFA and, complimentarily, Swiss law is applicable when a FIFA decision is appealed to the CAS.

12. During the course of these dispute resolution proceedings, both the Appellant and the Respondent voluntarily submitted the dispute for resolution before FIFA and subsequently the CAS. Therefore, *in casu* the subject matter of this dispute is to be decided in accordance with FIFA’s rules and regulations and, complimentarily, in accordance with Swiss law.

Admissibility

13. The appeal was filed on 23 April 2007, within the deadline provided by art. 61 para. 1 of the FIFA Statutes and indicated in the challenged decision, i.e. within 21 days after notification of the decision on 4 April 2007. It follows that the appeal is admissible.

Merits

14. The main issue of the present dispute is whether M. is the person entitled to receive certain agency fees allegedly owed to him for the transfers of the players K. and J.

15. In order for the Appellant to succeed in his appeal, he has to substantiate and prove primarily that a contract was concluded between him and the Respondent regarding the transfers. The Appellant admitted that no written contract was entered into and submitted in his Appeal Brief that *“An oral agreement ... had clearly been concluded”.*

16. Art. 1 para.1 of the FIFA Players’ Agents Regulations provides as follows:

“The players’ agent is a natural person who, for a fee, on a regular basis introduces a player to a club with a view to employment or introduces two clubs to one another with a view to concluding a transfer contract, in compliance with the provisions mentioned below”.

Art. 13 of the same Regulations reads:

“A players’ agent may organize his occupation as a business as long as his employees’ work is restricted to administrative duties connected with the business activity of a players’ agent. Only the players’ agent himself is

entitled to represent and promote the interests of players and/or clubs with other players and/or clubs. The players' agent shall send the national association that issued him the licence a list of his employees at least once a year. Each employee shall have featured on the list for at least three months before being officially confirmed in office. The players' agent shall immediately notify his national association of any elimination from the list. The elimination then takes immediate effect".

17. Art. 6 para.1 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber provides as follows:

"Parties are members of FIFA, clubs, players, coaches or licensed match and players' agents".

18. By definition, P. is a legal entity, according to Italian law distinct from its members-shareholders-owners. Had M. acted on behalf of P., as he submitted in his Appeal Brief, P. should have been a Party to these proceedings. However, M. admitted that he was the sole Appellant.

19. In evaluation of the parties' submissions the Panel takes into consideration:

As far as the transfer of K. is concerned, the Respondent provided the company P. with a cheque amounting to 200,000 EUR dated 28 July 2005 to be paid to the order of P.

Furthermore, on 2 August 2005 P. sent to the Respondent an invoice regarding "commissions on the transfer of the player K." asking for the payment to be made to P.'s bank account.

Regarding the transfer of J., which took place within the same transfer period, the Respondent's president sent on 25 August 2005 a written offer to P. The transfer indeed took place and P. sent on 30 September 2005 to the Respondent an invoice regarding "commissions on the transfer of the player J." asking for the payment to be made to P.'s bank account.

A few days earlier, on 20 September 2005, V., acting for P., had complained through a letter about the non-payment of the commissions for the transfers of K. and J. and asked the Respondent to contact P. regarding the payment of 500,000.- EUR. In this letter addressed to the Respondent V. mentioned:

"As agreed, your club had to pay our company the amounts of € 300.000/00 (threehundredthousand/00) for the J. transfer and 200.000/00 (twobundredthousand/00) for the K. transfer as commissions needed for our assistance [...] Please contact us within three days from the receipt of the present letter to agree the way of the needed payment: after such term, we shall start all the legal procedure against your club" [emphasis added].

In its letter of 10 November 2005 P.'s General Director, Mr T., asked a third person that he believed to be close to the Respondent to assist in reaching an amicable solution with the Respondent. In this letter P. asserts that:

"[...] the Saudi Arabian Club "AL ITTIHAD" still owes our company P. [...] the amounts of 300,000.00 € (threehundredthousand/00) for the transfer of player J. and 200.000,00 € (twobundredthousand/00) for the transfer of the player K." [emphasis added].

Finally, the initial claim before the Single Judge was filed in the name of the Appellant and of his partner, V.

20. All the above documents were provided by the Appellant, in support of his claims. Statements contained in these documents that were made by P.'s representatives, i.e. the Appellant's partners or employees, were not disputed as regards their veracity by the Appellant.

The Respondent submitted that P. was the counterparty and not the Appellant. This submission is supported by the fact that the Respondent issued a cheque corresponding to the commission for the transfer of K. to be paid to the order of P. and confirmed by P.'s behaviour, i.e. the invoice regarding the same transfer which was sent by P. to Respondent. Thus, it was not the Appellant who asked for the payment of the commission on 2 August 2005, but the company P.

As a consequence, the next step the Respondent undertook in seeking the arrangement of a transfer, i.e. in late August 2005, was the submission of an offer to P. That letter did not specify the recipient of the agent fee. However, on 30 September 2005 P. sent again an invoice to confirm that the recipient of the mandate and therefore of the relevant remuneration would be P. Moreover, P. through its representatives attempted a number of times to contact the Respondent asking for payment threatening to initiate legal action.

21. The Appellant submitted that "*the company structure has merely been the addressee of the documents issued by the [Respondent]*". However, the evidence presented clearly demonstrates that the majority of the documents in the correspondence between P. and the Respondent were sent by P., and, *a fortiori*, without a noticeable participation of the Appellant. Also, in its own Appeal Brief the Appellant describes himself as "*a football players' agent licensed by [the Italian Football Federation] who acts for the company P. Srl*" [emphasis added]. In addition, in the same Appeal Brief the Appellant refers to his involvement as follows: "*The kind of activity described in [Article 1 of the FIFA Players' Agents Regulations] is exactly the one which has been successfully undertaken by M. on behalf of P. at the specific request of Ittihad Club for some fees*" [emphasis added].

The Appellant submitted that "*the fact that the beneficiary of payments indicated on the documents issued by Ittihad was P. and not M. or V. is really a detail since this company is in fact formed by the two gentlemen who work together and are both in possession of a players' agents license*". The Panel does not agree with such argument. Regardless of the company's profile which indicates a number of natural and legal persons other than the Appellant and V. as partners, the Panel points out that the legal personality of a company is distinct from that of its members. Such legal personality can be lifted in order to reveal underlying legal relationships only under exceptional circumstances, which are provided for by the applicable legislation. Such a request has not been filed with CAS and is not the subject of the present proceedings.

22. In face of the above evidence the Panel concludes that the Appellant did not enter into an agreement with the Respondent at any stage of the transfer of K. and J. It is likely, but not upon the Panel to decide in these proceedings that the Respondent mandated P. to arrange

the said transfers and, P. performed the mandate, as the Regulations provide, through the licensed FIFA players' agents M. and V.

The fact that the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (art. 6 para.1) allow only a licensed agent – and not a company – to file a claim before the FIFA Players' Status Committee regarding agent fees, cannot lead to the conclusion that an agent has the right to bring before the said body and under his own name a claim that belongs to companies of which he is a member, a shareholder or even the only owner; it is rather for the owner of the right, i.e. the legal entity, to seek judicial protection before the competent (state or arbitral) tribunals.

23. Based on the above the appeal must be dismissed without any further consideration of the merits of the case, since the Appellant does not have a right to file a claim against the Respondent (*legitimitio ad causam*) on the basis of the abovementioned representation contracts.

The Court of Arbitration for Sport rules:

1. The Appeal filed by M. on 23 April 2007 against the decision issued on 4 December 2006 by the Single Judge of the FIFA Players' Status Committee is dismissed.
2. The decision issued on 4 December 2006 by the Single Judge of the FIFA Players' Status Committee is confirmed.

(...)