Arbitration CAS 2014/A/3525 Changchun Yatai Football Club Co. Ltd. v. Marko Ljubinkovic, award of 17 February 2015

Panel: Mr Lars Halgreen, (Denmark), President; Mr José María Alonso Puig (Spain); Mr Michele Bernasconi (Switzerland)

Football
Termination of a contract of employment with just cause
Good physical condition as a material condition for a professional football player
Interpretation of the silence of one party according to the principle of good faith
Burden of proof in the CAS jurisprudence and the FIFA Rules
Deregistration of the player and denial of appropriate training as "just cause" under Art. 17 of the FIFA RSTP

1. **It is a material condition for a professional football player that he keeps himself fit and in top physical condition, and that the club provides him with the appropriate training and medical facilities to do so. The latter serves a dual purpose in the sense that it enables the player to fulfil his contractual obligations, but it also fulfills an essential requirement for a professional sportsman to be at the top of his game in order to uphold his market value as a player. These principles have been confirmed in many CAS cases and remains a crucial part of the employment relationship between a club and a professional football player.**

2. **In accordance with the general principles developed by international arbitration practice, the silence on one party's side is to be interpreted in accordance with the *bona fide* principle. This principle has been construed by CAS jurisprudence as a conceptual tool for a CAS panel to determine how a statement or a general manifestation by a party could have been reasonably understood by the other. When the common intentions of the parties cannot be established, the contract has to be interpreted according to the principle of good faith. The judge must determine how a statement by a party could be reasonably understood by the other party, based on the particular circumstances of the case.**

3. **CAS jurisprudence has repeatedly interpreted the burden of proof to mean that any facts pleaded have to be proved by those who plead them. When a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. These rules are clearly enshrined in art. 12 para. 3 of the FIFA Rules Governing the Procedures of the PSC and the DRC.**

4. **A player who arbitrarily and without any contractual basis is deregistered as a player for the club and, thereafter, is denied appropriate training and medical facilities has just cause to terminate the contract with the club.**

I. THE PARTIES

1. Changchun Yatai Football Club Co. Ltd. (the "Club" or the "Appellant") is a Chinese football club playing in the Chinese Super League and affiliated with the Chinese Football Association.

2. Mr Marko Ljubinkovic (the "Player" or the "Respondent") is a professional football player and a Serbian national.

3. The Appellant and the Respondent together shall hereinafter be referred to as the "Parties".

II. FACTUAL BACKGROUND

4. The circumstances and provisions discussed below constitute a summary of the relevant facts and evidence as set forward by the Parties in their respective written submissions and during the hearing. This factual background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out where relevant, in connection with the legal discussion.

5. On 22 February 2012, the Parties signed an agreement (the "Employment Contract") which was to be valid as from the date of signature and *"until the end of the 2013 CLS league"* (i.e. the 2013 Chinese Super League). According to the calendar of the Chinese Football Association, the 2013 Chinese Super League ended on 3 November 2013.

6. The relevant provisions of the Employment Contract provide the following:

"Article 1: Term of the Contract

The term of this contract is for two season(s), and shall commence on 22.02.2012 and shall continue until the end of the 2013 CSL league, unless earlier terminated pursuance to this Contract.
…

Article 5:

Party B (the player) must keep himself in top physical condition in order to compete to his maximum ability and refrain from any action that may be unfavorable to Party A.

According to this principle, Party B must:

1. Participate in all matters, team training and special training as well as other activities organized by Party A. Obey the management rules of team.
…

Article 5.12:

Party A may at its sole discretion reassign Party B to different Position between the Senior Team and the Reserves Team of the Club to meet the needs of the Club in according to Party B's ability, performance and state. During the period of Party B to be sent to the Reserves Team, Party B has not rights to take the salary as stipulated of the contract, party B only takes the 1500 RMB salary by as the currency formal of Chinese of Reserves Team. Party B should not have the rights to claim on the appeal of any kinds or demand the compensation.
…

Article 7: Salary and bonuses.

1. The contract is signed, Party A shall pay to Party B 20.000 EUR/net as salary per month on 12 of each month in 2012 season, and in 15 days after signing this contract Party A will pay to Party B 50.000 EUR as signing fee; in 2013 season Party A shall pay to Party B 25.000 EUR/net as salary per month on 12 of each month (only if Party A agree prolong contract with Party B till to end of 2013 CSL season).
…

Article 8: In addition to paying the amount stipulated in the Contract, Party A shall ensure:

3. Party A should provide necessary medical treatment and cost treatment in case of injury because of training and playing in matches arranged by Party A.

4. Party A shall provide party B with training lawn field and other training facilities up to the standards set forth by CFA.
…

Article 16:

1. Whatever the reason, Party B without the written permission of the club leaving the team without permission, do not participate in activities, work, training or competitions within more than 24 hours (including the first 24 hours), fined 5,000 U.S. dollars; more than 24 hours-48 hours 10,000 fine dollars; after each additional 24 hours increased by a fine of 10,000 dollars, and Party the right to unilaterally terminate the contract without any liability.
…

Article 24:

In 10 working days after the end of 2012 season (Chinese Super League and CFA CUP matches), Party A have right terminate this contract with Party B without any compensation, Party A also will not pay to Party B the rest salary.

Article 25:

This contract shall be written in both Chinese and English in four originals with each party holding one, has equal legal validity, Chinese version shall prevail in case of any discrepancy between the two versions.
…

Article 27:

This Contract shall be governed by the published and publicly available laws and regulations of the PRC, FIFA and the Sports-related codes of CAS. The parties shall strive to resolve any dispute arising out of or in relation to this contract through friendly negotiation. If the dispute remains unresolved through friendly negotiation, each party may submit the dispute to the China Football Association or FIFA for arbitration. The arbitral award shall be final and binding upon the parties".

7. It is undisputed that the Player received the sign-on fee in the amount of EUR 55,000 net in March 2012, and that he received four salaries as of June 2012, for a total of EUR 80,000 net. He also received his contractual bonuses up to this point of time.

8. The Player played 12 of 16 matches of the Chinese Super League and scored one goal. The rest of the matches in the first half of the 2012 season, the Player missed due to minor injuries, but he was sitting on the bench in one match of the 10th round playing on 12 May 2012. The Player also played a Cup match on 27 June 2012, where he scored two goals. The last time he played for the Club was on 9 June 2012, in a match in which he played 90 minutes.

9. According to the Player's statement before FIFA, he was informed by his head coach, Mr Svetozar Sapuric, on 13 July 2012 that the Club did not want to register him as a player for the second half of the season. The reason for the Club's decision was allegedly that the Club had signed another foreign player, and that the limitation on foreign players did not allow the Club to have him registered anymore, at least not as a first team player.

10. According to the Player, he had not been warned or informed about the Club's plan to deregister him, and had never been sanctioned or punished by the Club for any prior disciplinary incidents.

11. After the Player was informed of the Club's decision, the Player nevertheless travelled with the team to the away match against the club Chandong Luneng, which was to be played on the same day – 13 July 2012. When he returned on 14 July 2012, he was allegedly told by the coach that he was not allowed to participate in the training sessions with the first team anymore. According to the Player, he was also told that he should look for another team as soon as possible. Allegedly, he did not receive any further oral or written reasons or instructions from the Club and was not allowed to join the training of the Club's the first and second team. It is undisputed that the Player was hereafter deregistered as a first team player, and never registered as a second team player with the Chinese Football Association or the Chinese Super League.

12. In order to keep himself at a competitive level, the Player, on his own initiative, trained himself without any assistance from the coaching or medical staff beginning on 19 July 2012.

13. On 23 July 2012, the Player's European agent, Mr Zoran Rasic, sent a facsimile to the Club outlining the circumstances under which his client had been deregistered and not permitted to train with either the first or second team. Mr Rasic asked that the Club immediately provided the appropriate training facilities for his client, and include him in the training sessions with the first or the second team. In addition, he asked the Club to provide him with a declaration that the Player was allowed to look for another engagement or to find an appropriate team under the same financial conditions. On 25, 27 and 31 July, and again on 3 August 2012, Mr Rasic, on behalf of the Player, sent numerous reminders by facsimile to the Club urging them to grant the Player permission to participate in the training sessions in accordance with his contract. In the last reminder dated 3 August 2012, the agent requested the Club to provide the Player with adequate training requirements prior to 6 August 2012 failing which he would immediately take legal measures without any further warning. Thus, on 7 August 2012, in a registered letter to the Club, the Player terminated the contract *"with immediate effect and with just cause due to the unilaterally breach of the contract… for unfulfilled training/medical requirements according to the FIFA Regulations on the Statute and Transfer of Players, art. 14 and 17.1".*

14. On the same day, 7 August 2012, the Club sent a notice to the Player, stating that the Club had been told by the coaching staff that the Player had not trained with the team for 7 days, and that the team translator could not get in touch with the Player by telephone. The notice informed the Player that he should return to the Club and participate with the team training before 10 August 2012. To the extent the Player did not return to the Club by August 15, the Club maintained the right to unilaterally terminate the contract and claim the Player liable for breach of contract.

15. The Club's notice letter was received by the Player/Player's agent on 13 August 2012, and upon receipt, the Player asked for a legally signed letter with a readable signature. On 15 August, the Player received the same letter on the Club's letterhead, but still without a readable signature.

16. On 15 August 2012, the Player refuted the accusations laid against him by the Club. Notwithstanding various attempts during the month of August and beginning of September to settle the case amicably, the Parties were unable to reach a settlement. So on 12 September 2012, the Player launched a claim against the Club in front of FIFA.

17. In his claim before FIFA, the Player made the following requests for relief:

a) To uphold that the contract was unilaterally and gravely breached by the Respondent without just cause due to inadequate training conditions for more than 24 days consecutively, according to the FIFA RSTP, IV Art. 14, and Swiss law CO, art. 328 & 337;

b) To confirm that the proper termination of the contract with just cause by the Claimant is admissible due to violation with the contractual obligations by the Respondent, according to the FIFA RSTP, IV, Art. 14., resp. according to Swiss law CO, art. 328 & 337.

c) To uphold the right of the Claimant to receive the outstanding debt for salaries and the compensation until the end of his contract, i.e. 30 November 2013, according to the FIFA RSTP, IV, 14 & 17.1, resp. according to Swiss law CO, Art. 324, 328, 335a), 337, par. 1.a), Art. 337b par. a) & 339 par. 1., as follows:

Due amounts (season 2012)

i) Salary for July 2012 due on 12.07.12	*EUR*	*20,000*
ii) Salary for February 2012(22.-29. Febr.; 8 of 29 days of € 20,000)	*EUR*	*5,517*
Due amounts Sub-Total 1	*EUR*	*25,517*
Compensation (seasons 2012 & 2013):		
iii) Season 2012 5 salaries (Aug.-Dec. '12) of EUR 20,0000	*EUR*	*100,000*
iv) Season 2013 11 salaries (Jan.-Nov. '13) of EUR 25,000	*EUR*	*275,000*
Compensation Sub-Total 2	*EUR*	*375,000*
Total (Sub-Total 1 & 2)	***EUR***	***400,517***

v) 5% interest rate p.a. is applicable for the outstanding remunerations of EUR 25,517 (under i-ii), and for the compensation in the amount of EUR 375,000 (under iii-iv), by deducting possible income during the aforesaid period from the compensation, according to the FIFA RSTP, art. 17.1., resp. Swiss law CO, Art. 104, 337b par. a) and 339 par. 1.

d) To impose disciplinary sanctions on the Respondent, according to FIFA RSTP, IV. Art. 17.4.

18. On 30 August 2013, the FIFA's Dispute Resolution Chamber rendered the following decision (without grounds) (the "FIFA Decision"):

1. The claim of the Claimant, Marko Ljubinkovic, is partially accepted.

2. The Respondent, Changchun Yatai FC, has to pay to the Claimant, ***within 30 days*** *as from the date of notification of this decision, outstanding remuneration in the amount of EUR 20,000 plus 5% interest p.a. on said amount as of 12 September 2012 until the date of effective payment.*

3. The Respondent has to pay to the Claimant, ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 330,500 plus 5% interest p.a. on said amount as of 30 August 2013 until the date of effective payment.*

4. If the aforementioned sums plus interest are not paid by the Respondent within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

19. The FIFA Decision was communicated with grounds to the Parties on 20 February 2014.

III. ARBITRAL PROCEEDINGS

A. Proceedings before the CAS

20. On 13 March 2014, the Appellant filed his Statement of Appeal before the Court of Arbitration for Sport (CAS) against the FIFA Decision. The Appellant nominated Mr José María Alonso Puig as arbitrator in the present proceedings.

21. On 18 March 2014, the CAS Court Office acknowledged receipt of the Appellant's appeal. In accordance with Art. R51 of the Code of Sports-related Arbitration (the "Code"), the Appellant was notified to file with CAS within 10 days following the expiry of the time limit for the appeal, a brief stating the facts and legal arguments giving rise to the appeal together with all exhibits.

22. On 24 March 2014, the Player informed the CAS Court Office that he nominated Mr Michele A.R. Bernasconi as arbitrator.

23. On 24 March 2014, the Appellant filed its appeal brief with the CAS Court Office in accordance with Article R51 of the Code.

24. On 31 March 2014, FIFA informed the CAS Court Office that it renounced its right to intervene in the present arbitration proceedings.

25. On 26 May 2014, the Respondent filed its answer with the CAS Court Office in accordance with Article R55 of the Code.

26. On 3 June 2014, the CAS Court Office informed the Parties that the Panel appointed to hear the case was constituted as follows:

President: Mr Lars Halgreen, Attorney-at-law, Copenhagen, Denmark.

Arbitrators: Mr José María Alonso Puig, Attorney-at-law, Madrid, Spain
Mr Michele A.R. Bernasconi, Attorney-at-law, Zurich, Switzerland

27. On 27 August 2014 and 1 September 2014, the Appellant and Respondent, respectively, signed and returned the Order of Procedure to the CAS Court Office.

B. The hearing

28. On 17 September 2014, a hearing was held at the CAS headquarters in Lausanne. The Panel was assisted at the hearing by Legal Counsel to the CAS, Mr Christopher Singer.

29. The Appellant was represented by Mr Lucas Ferrer, Attorney-at-law in Barcelona, Spain and Mr Alejandro Pascual, Attorney-at-law in Shanghai, China. The Appellant called the following witnesses:

- Mr Li Feng, FIFA License Agent (via video link)
- Mr Gao Jing Gang, General Manager of the Appellant (via video link)
- Mr Gilbert Jiang, Lawyer/translator, Shanghai China (via video link)

30. The Respondent appeared in person and was represented by Mr Gianpaolo Monteneri and Ms Anna Smirmova, Attorneys-at-law in Zurich, Switzerland, and assisted by Mr Zoran Rasic, football agent in Zurich, Switzerland.

31. The witness testimony may be summarized as follows:

(i) The testimony of Mr Li Feng, FIFA License Agent

32. Mr Li Feng stated that he had been an an agent for 15 years and had represented more than 100 players. He was introduced to the Respondent through European FIFA agent Peter Bazic, who had introduced him to the Club and the coach. In this matter, he did not act as an agent for the Club, and did not receive any remuneration from the Club. He did not receive remuneration directly from the Respondent, but was entitled to a share of Mr Bazic's agent's fee. With respect to the Club's training sessions, he explained that the first and the second team trained together, and that he had watched many trainings. He denied that he had told the Respondent that he could leave the Club. He explained that in China a player does not need to be registered with the Chinese Football Association to play for the second team as long as he had an employment contract with a club. Moreover, he explained that a Chinese club may only have a certain number of foreign players registered, but he did not know how many players the Club had registered in June 2012. He believed, however, that the quota for foreign players on the first team was full. Therefore, the Club had to deregister a player to be able to register a new foreign player. He could not remember whether the Club in fact had registered another player instead of the Respondent. He further explained that he was not present when the Player signed the contract with the Club in Cyprus. He explained that he had met several times – at least three times between 13 July and 7 August – with the Respondent to discuss the Player's employment wth the Club. More specifically, he spoke with the Respondent after a friendly match on 28 July against the German club Wolfsburg. His assistant, a Mr Maxim, had also talked with the Respondent, and he had corresponded with Mr Bazic on a number of occasions. He explained that he previously had received agent fees from the Club in connection with other transfers of players. He had worked on other transfers with the Club for four years. Finally, he explained that there was a reserve team league in China, but one did not need to be registered with the

Chinese Football Federation to play. He had been present during one training session in mid/late July, and the Respondent was present at that time.

(ii) The testimony of Mr Gao

33. Mr Gao explained that he is currently the general manager of the Club, but in the Summer of 2012 he served as team manager and assistant coach. During that time, the general manager and the head coach led the dialogue with the Player with respect to his contract. However, he could confirm that all training and medical facilities were provided to the Player by the Club during the month of July 2012 and until the termination notice was received in the beginning of August 2012. He explained that the Club was unable to get in contact with the Player and that therefore the Club was not able to pay to the Player the salary for the remaining part of July. Mr Gao stated that 31 July 2012 was the closing day of the transfer window in China, and he confirmed that the Club had registered a new foreign player to play for the first team in the second half of the season.

(iii) The testimony of Mr Marko Ljubinkovic

34. Mr Ljubinkovic gave testimony as a party in these proceedings. He explained that he spoke with the head coach on 13 July 2012 and was told that the Club wanted to bring in a new player at his position and therefore he could not play the scheduled match the next day. He was told that somebody from the Club would contact him to discuss further. Nobody from the Club contacted him, and he was not allowed to train with the first team. He was very surprised to receive this message as he was not injured at the time and had played most of the matches in the first part of the season (on 9 July, he had played 90 minutes and scored two goals in a cup match). After his conversation with the head coach, he went to the training ground and asked for a clarification of his situation. He has never discussed an offer with anybody from the Club that he could receive the same salary and play in the second team. He denied that Mr Li Feng or his assistant Maxim were acting as his agents as he considered them to be representatives of the Club. So around 19 July he started to train on his own. There was no coaching staff, and he was all alone. He spoke a few times with the translator, but even the latter could not help him. He continued to train on his own until 6 August 2012. He was not allowed access to the Club's normal medical facilities, including massage and physical therapist treatments etc. He explained that he felt that the Club had lost all interest in him as a player as of mid-July 2012 and from that point on the Club totally ignored him, as the many requests for dialogue sent by his agent remained unanswered. Finally, he explained that he had a very difficult time finding another employer when he returned from China. The dispute with the Club had also been a great financial burden on him.

35. Following the testimonies, the Parties presented their closing statements and conclusions. Both Parties declared at the end of the hearing that they had not objection with respect to the formation of the Panel, nor the way in which the proceeding had been concluded, and that their right to be heard and to be equally treated had been granted.

C. The post hearing submissions

36. Upon request by the Panel, the Respondent submitted additional information concerning his employment following the termination of his contract with the Club. This information would include the remuneration received from his two subsequent employers in Serbia, namely FK Rad Belgrade (28 August 2012 – 31 January 2013) and FC Radnicki Nis (8 February 2013 – 31 December 2013).

37. Moreover, the Appellant submitted the representation contract between the agent Li Feng and the Player, signed in Beijing on 21 February 2012 at the hearing. According to the contract, it was valid in China for 24 months taking effect on 21 February 2012 until 21 February 2014. The Player's agent was to receive a commission amount to 0 per cent of the annual gross basic salary due to the Player.

38. On 29 September 2014, the CAS Court Office received a facsimile from the Player outlining the duration of employment contracts between the Player and the Clubs FC Rad Belgrade and FC Radnicki Nis following the termination of the contract with the Club. The facsimile also outlined the remuneration received by the Player from the period of 28 August 2012 to 31 December 2013. A copy of the original contract in the Serbian language together with a translation of relevant clauses into English were subsequently submitted by the Player.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant

39. In the Statement of Appeal, the Club challenged the FIFA Decision, submitting the following requests for relief:

1. Declare its jurisdiction over the present matter;

2. To accept this appeal against the FIFA Decision of the Dispute Resolution Chamber dated 30 August 2013;

3. Consequently, to adopt an award annulling said decision and declaring that:
a) The decision of the FIFA Dispute Resolution Chamber dated 30 August 2013 is annulled; and
b) The Respondent terminated with no just cause the Employment Contract it had signed with the Appellant;
c) The Respondent shall pay an indemnity to the Appellant. Its corresponding calculation will be indicated in the Appeal Brief.

4. Order that Respondent shall reimburse the Appellant for legal expenses to be determined ex aequo et bono by the Panel, added to any and all CAS administrative and procedural costs eventually incurred by the Appellant.

5. To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees

6. Awarding any such other relief as the Panel may deem necessary or appropriate.

40. In support of its requests for relief, the Appellant's submissions, in essence, may be summarized as follows:

Applicable law

a) Given the nature of the dispute between the Parties, i.e. whether an Employment Contract was terminated with just cause, the Panel shall primarily apply the FIFA Regulations on the Statute and Transfer of Players (hereinafter the "FIFA RSTP") (2010 edition) and, where applicable, the laws of the People's Republic of China.

The merits

b) The Appellant did not breach the Employment Contract by transferring the Player to the reserve team because the contract expressly permitted such transfer in Art. 5.12 with a decrease in salary and benefits. This decision was within the realm of a football clubs's authority based on the wording of the contract and the principle of *"pacta sunt servanda"*.

c) In this matter, the Respondent accepted such demotion after being told by the head coach, on 13 July 2012, that he would be relegated to the reserve team for the last part of the 2012 season. The deregistration and relegation to the reserve team was in fact never an issue raised by the Respondent directly to the Appellant, as these grounds were first raised in the Respondent's claim to FIFA. Assessing the Respondent's letter of termination, dated 7 August 2012, it is obvious that the only real complaints of the Respondent were those concerning the training and medical services. Thus, the deregistration and the relegation to the second team was never presented to the Appellant as grounds for termination and could therefore at no rate constitute a breach of contract by the Appellant.

d) The Respondent did not have "just cause" to unilaterally terminate the Employment Contract because he has not presented sufficient proof that he was denied training and medical services or that the Appellant denied the Player's access to join the reserve team.

e) The Respondent has made several inconsistent claims as to whether he had been denied to join the first and/or the second team. In the letters by the Respondent's agent, Mr. Zoran Rasic, of 25, 27 and 31 July and 3 August, he is demanding the reincorporation of the Respondent into the first team only. Hence, it is the Appellant's contention that this fact confirms that the Respondent was certainly allowed to join the reserve team, but he refused to do so.

f) As the Respondent has been provided with adequate training conditions, at least in the second team, and appropriate equipment and medical care, the Respondent did not have "just cause" to terminate the Employment Contract on 7 August 2014.

g) On the contrary, the Appellant had "just cause" to unilaterally terminate the Employment Contract, because the Respondent was absent from training sessions with the Appellant for 7 days, in direct violation of the Employment Contract.

h) Based on Art. 16 and 16.1 of the Employment Contract, the Respondent violated the contract after being duly notified by the Appellant in writing on 7 August 2014 of his 7-day absence from training without having permission or justification for being absent. In light of the contract language and well-established CAS jurisprudence, the Appellant had grounds to proceed with the termination of the Employment Contract with "just cause", even though the Club did not at the time make the decision to proceed with the actual termination of the contractual relationship with the Player.

i) The Appellant has at all times dealt with the Respondent in good faith and is beyond reprehension though the same cannot be said about the Respondent's behavior.

j) Hence, the Appellant is entitled to compensation as a result of the Player's breach of contract, and according to the length and the remaining days of the Employment Contract, the final amount with which the Respondent shall compensate the Appellant amounts to EUR 131,536.

k) In case the Panel does not award the Appellant compensation for the Player's breach of contract, the Appellant should not be ordered to pay any compensation to the Respondent, because the Club did not breach the Employment Contract, and if it is ordered to pay compensation, such compensation shall be greatly reduced from the compensation calculated in the FIFA Decision.

l) In this respect, the Appellant finds the remuneration level in the employment contract between the Respondent and FC Rad Belgrade to be "absolutely suspicious". It seems unbelievable that a player who was earning EUR 20,000 a month as a basic salary will join a new club in which his monthly wages amount to EUR 300. Furthermore, all remunerations received by the Respondent, both from his employer FC Rad Belgrade and FC Radnicki Nis, should be taken into account, including any bonuses, sign-on fees, cars, apartments and other benefits of value as to reduce the final compensation, if any.

B. The position of the Respondent

41. In his answer, the Respondent has submitted the following requests for relief:

1. To reject the appeal;
2. To uphold the challenged decision;
3. To condemn the Appellant to the payment in favor of the Respondent of the legal expenses incurred;
4. To establish that the costs of the arbitration procedure shall be borne by the Appellant.

42. In support of its requests for relief the Respondent's submissions, in essence, may be summarized as follows:

Applicable law:

a) The Respondent submits that in accordance with Art. R58 of the CAS Code and Art. 66(2) of the FIFA Statutes, the matter shall be decided based on the FIFA regulations, more specifically, the FIFA RSTP, and Swiss law shall apply complementarily. Thus, Chinese law should not be applicable and has no relevance to the solution of the pertinent dispute.

The merits:

b) Overall, the Respondent submits that he terminated the Contract with just cause on 7 August 2012. In support hereof, the Respondent submits that the undisputed deregistration by a player without prior consent represents a severe violation of the FIFA RSTP, in particular Art. 5, par. 1 and 11 and it constituted in itself a breach of contract without "just cause", which allowed the Respondent to terminate the contract in accordance with Art. 17, par 1 of the FIFA RSTP.

c) The Respondent strongly rejects that he implicitly or explicitly should have accepted an offer made by the Club to deregister him and relegate him to the second team. These actions clearly demonstrate that the Club acted in a thoroughly careless manner by excluding the Player from the trainings of the first team and by depriving him of medical assistance and subsequently request to restore his status as a player in the Club.

d) The Respondent received all relevant information from the coach, who was only in charge of the training and coaching of the players, not the contract negotiations. The coach had no power to make any offers, which in a binding way would obligate the Club. Despite numerous attempts in writing at the end of July and in beginning of August, the Club management never reacted to any of the requests for dialogues/clarifications put forward in a constructing manner, demonstrating good faith on the part of the Player.

e) The refusal on the part of the Appellant of the Player's right to participate in the training sessions with the first team as well as in the matches of the Appellant in the Chinese Super League, constitutes a gross violation of the Respondent's professional rights. The actions of the Appellant thus violates Art. 28 of the Swiss Civil Code and Art. 328 of the Swiss Code of Obligations.

f) Moreover, the actions of the Appellant towards the Respondent are also a violation of the Respondent's personal rights under Swiss law, as established by the Swiss Federal Tribunal in decision 137III303 (4a_53/2011 of 28 April 2011). In this decision, the Swiss Federal Tribunal confirmed among other things that certain categories of employees have the legal right to perform their skills, because otherwise their market value would diminish; namely artists, surgeons and professional sportsmen.

g) The Respondent submitted that no deregistration was needed for a reassignment/relegation to the reserve team. The decision to deregister the Player meant that: a) he was deprived from practicing football with the first team of the Appellant b) he was not formerly reassigned to

train with the second team c) since July 2012 the Respondent has not received any salary and d) the Respondent did continuously complain about the situation in question. The sum of all of these actions shall thus be considered a material breach of the employment relationship by the part of the Club.

h) The Respondent submits that Art. 5.12 of the Employment Contract, which sets out a unilateral right of the Club to reassign the Respondent from one team to another without the right to maintain the same salary, as set out under the Contract is a *"clausula leonina"*, as it is clearly abusive in the respect of the employment rights of the Respondent. Consequently, the Panel should consider the provision of Art. 5.12 as null and void.

i) The Respondent submits that the Appellant has throughout the whole period of time failed to demonstrate good faith in relation with the Respondent. In particular, the Respondent refers to the numerous letters received by the Appellant from Mr Zoran Rasic regarding the employment status of the Player. The Club has before FIFA stated that the name of Zoran Rasic *"was strange to the Club"* and thus it did not pay attention to him. In doing so, the Appellant did not even pay attention to the power of attorney attached with the letter of the Respondent dated 23 July 2012. Such an attitude by the Appellant is worth reprehension, and clearly shows bad faith on the latter in the communication with the Respondent. Moreover, the Respondent strongly denies that Mr Li Feng has acted as his representative in the employment relationship with the Appellant. He has never concluded any mandate or representation contract with Mr Li Feng, and Mr Li Feng was at no time the agent and/or representative of the Respondent, whereas he is commonly known for representing the Appellant in international transfers.

j) Finally, the Respondent submits that he was forced to search for any new employment as soon as possible, when he had terminated his contract with the Club with "just cause". As it is commonly known in football, in August, it is extremely difficult for players to join new clubs as many clubs have already formed their squads, and national and international club competitions have started. Obviously, the bargaining power of the Player, who urgently needed to find a club to keep fit, maintain his professional skills and earn money for a living, was very low. The Player's contractual relationships with FC Rad Belgrade and FK Ratnicki Nis was thus a direct result of the weak bargaining position of the Player and is not in any way suspicious. Nevertheless, the total remuneration due to the Respondent for the entire duration of his contracts with the Clubs was EUR 19,500, and this amount was acknowledged and deducted in the FIFA Decision.

V. LEGAL ANALYSIS

A. Jurisdiction

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

An appeal against the decision of a Federation, Association or sports related body may be filed with the CAS in so far as the statutes or regulations of the said body so provide, or as the Parties have concluded a specific

arbitration agreement, and in so far 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.

44. Article 27 of the Employment Contract provides as follows:

This Contract shall be governed by the published and publically available laws and regulation of the PRC, FIFA and the Sport-related codes of CAS. The parties shall strive toresolve any dispute arising out or or in relation to this contract through friendly negotiation. If the dispute remains unresolved through friendly negotiation, each party may submit the dispute to the China Football Association or FIFA for arbitration. The arbitral award shall be final and binding upon the parties.

45. No objections have been raised by the Respondent as to the jurisdiction of the CAS or the applicability of Art. 27 of the Employment Contract. Moreover, both Parties signed the Order of Procedure without reservations in this respect. Therefore, the Panel confirms that the CAS has jurisdiction to hear this dispute.

B. Admissibility of the appeal

46. 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

47. The FIFA Decision was communicated to the Parties on 20 February 2014 and the Appellant subsequently filed its Statement of Appeal on 13 March 2014. Moreover, no objections to the admissibility of the appeal have been raised by the Respondent and both Parties signed the Order of Procedure without reservations in this respect. Accordingly, the Panel concludes that the Appeal has been filed within the 21-day deadline foreseen in Art. 67, par 1 of the FIFA Statutes, and that therefore the appeal is admissible.

C. Applicable law

48. Article R58 of the CAS Code provides as follows:

The Panel shall decide a 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.

49. Article 27 of the Employment Contract contains the following provision regarding choice of law*:*

This contract shall be governed by the published and publicly available laws and regulations of the PRC [People's Republic of China], FIFA and the Sports related codes of CAS…

50. As a result of the above provision in the CAS Code, the Panel concludes that the FIFA RSTP shall primarily apply. As mentioned, it has remained disputed among the Parties whether subsidiarily Swiss law or the laws of the People's Republic of China should apply. However, based on the submissions of the Parties, the Panel is not satisfied that in the present matter, the subsidiary application of either of the mentioned state law rules would lead to a different result. Therefore, this issue can be left open.

D. Scope of the Panel's review

51. According to Article R57 of the CAS Code:

The Panel shall have full power to review the facts and the law. It may issue a new decision, which replaces the Decision challenged, or annul the Decision and refer the case back to the previous instance…

E. The merits

52. The following issues shall be determined by the Panel in these proceedings:

Question 1: Did either of the Parties terminate the Employment Contract with just cause?

Question 2: If so, what should be the consequences of such a termination?

(i) Analyzing Question 1

53. In order to resolve the first question at hand, it is important that the Panel outlines the relevant context and factual circumstances which have been presented in these proceedings.

54. From the evidence presented in this matter, the Panel notes that the Player received his sign-on fee, salary and bonuses in accordance with the terms of the Employment Contract from the commencement of his employment in February 2012 until June 2012. He played 12 out of 16 matches of the Chinese Super League as a first team player registered with the Chinese Football Association. After some minor injuries, he played one match of the 10th round on 12 May 2012. On 9 June 2012 he played 90 minutes in a further match and he played also in a Cup match on 27 June 2012.

55. Based on the written submissions, and the statements at the hearing, the Panel has also noted that the Player had not prior to 13 June 2012 received any sanctions or reprimands from the Club for any disciplinary incidents. Up until this date, he had participated in the regular training

sessions with the first team and had full access to the training grounds and medical facilities provided by the Club, in accordance with the Employment Contract.

56. Judging from the Player's testimony at the hearing, the Panel notes that the head coach of the Club, Mr Svetozar Sapuric, informed the Player on 13 June that the Club wished to deregister him for the second half of the season because of the quotas for foreign players in the Chinese Football Association. A new player had been acquired by the Club and the Club wished to deregister the Player in order to be able to register the new foreign player. The exact conversation between the Player and his coach is disputed in this case, and in order to evaluate the truthfulness of the Player's statement, the Panel has put emphasis on the fact that the head coach, Mr Sapuric, has not appeared as a witness during these proceedings, and the statement of the Player is thus not challenged by the statements of the other person participating in the conversation. In addition, Mr Gao has in his witness statement confirmed that the Player was in fact deregistered and that a new player was registered with the Chinese Football Association.

57. With respect to the critical question about the Player's access to training facilities and medical treatment while being deregistered, the Panel notes that it is an obligation for the Player in accordance with Art. 5 of the Employment Contract, to keep himself *"in top physical condition in order to compete to his maximum ability…"*. Equally, according to Art. 8 of the Employment Contract it is the Club's obligation to ensure *"the necessary medical treatment and cost treatment in case of injury",* and to provide *"training lawn field and other training facilities up to the standard set forth by the Chinese Football Association"*.

58. Given these contractual obligations of the Parties, the Panel is of the opinion that it is a material condition for a professional football player that he keeps himself fit and in top physical condition, and that the Club provides him with the appropriate training and medical facilities to do so. The latter serves a dual purpose in the sense that it enables the Player to fulfill his contractual obligations, but it also fulfills an essential requirement for a professional sportsman to be at the top of his game in order to uphold his market value as a player. These principles have been confirmed in many CAS cases and remains a crucial part of the employment relationship between a club and a professional football player.

59. When evaluating the evidence as regards the Player's continued access to adequate training facilities and medical treatment after 14 June 2012, the Panel has put emphasis on the following established facts:

- The Player has in his testimony and in his written submissions stated that he had not, in any way, accepted the Club's decision to deregister him and subsequently to relegate him to the second team without proper access to training and medical facilities. Again, the Panel has not been presented with any evidence from the Club in the form of a written letter, e-mails or witness statements from the head coach or any other persons from the coaching or medical staff to rebut the Player's statement. The Panel is thus satisfied that the Player was not provided with any explanation or guidance by the Club after the head coach had told him that the Club could not use him anymore in the first team because of the quota for foreign players.

- Moreover, the Player has explained that nobody from the Club management approached him afterwards with an explanation/clarification of his situation, and he was ignored by everybody when he appeared on the training facilities. Therefore, he started to train on his own initiative around 19 July, until he terminated his contract with the Club on 7 August 2012.

60. In reaching this conclusion, the Panel has put a significant amount of importance on the fact that the Player's agent contacted the Club on numerous occasions in writing and presented a power of attorney signed by the Player. None of these letters were answered by the Club and, more importantly, nobody from the Club management made a whole-hearted attempt to contact the Player in person to make a good faith attempt to resolve the matter.

61. In this respect, the Panel is of the opinion that the many letters sent by the Player's agent (dated 25, 27, 31 July and 3 August 2012) must be construed as an important part of the reasons the Player terminated the employment relationship by letter dated 7 August 2012. The Panel finds that the relationship between the Parties was governed by the Employment Contract, and that this relation must be interpreted in accordance with the general principles developed by international arbitration practice. In particular, the Panel believes that the silence on the Club's side shall be interpreted in accordance with the *bona fide* principle (cf. CAS 2006/A/1062 and CAS 2008/A/1447; see also art. 2 of the Swiss Civil Code). This principle has been construed by CAS jurisprudence as a conceptual tool for the Panel to determine how a statement or a general manifestation by a party could have been reasonably understood by the other. Thus, according to CAS 2005/O/985: *"When the actual common intentions of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to determine how a statement or an external manifestation by a party could have been reasonably understood by the other party, based on the particular circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422)"*. In the present case, the Panel believes that for the conduct of the Club to be considered in good faith, it should have answered the Player's agent letters by denying the allegations made against the Club and by stating that the Player still had access to training facilities and medical treatment while deregistered. In view of the above, the Panel concludes that the Club did not act in good faith when it remained silent despite the numerous letters sent by the Player's agent, and that the Club's behavior must be interpreted as a tacit admission of the claims made by the Player's agent.

62. In these proceedings, the Panel has rejected the Club's arguments that it did not know how to respond to Mr Rasic' numerous facsimiles, or that training and medical facilities had in fact been available to the Player during the whole period up until 7 August 2012. The Panel is of the opinion that the Club has not lifted the burden of proof assigned to it as Appellant. In this regard, it should also be noted that CAS jurisprudence has repeatedly interpreted the burden of proof to mean that any facts pleaded have to be proved by those who plead them (CAS 2011/A/2625). According to CAS 2007/A/1380, *"This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. These rules are clearly enshrined in art. 12 para. 3 of the FIFA Rules Governing the Procedures of*

the Players' Status Committee and the Dispute Resolution Chamber and were duly taken into consideration by the DRC". Thus the Panel finds no evidence that the statements submitted by the Club are correct given the written submissions and all the evidence provided during these proceedings.

63. In consequence, the Panel has come to the conclusion that the Player was entitled to terminate his contract with "just cause" in accordance with Art. 17 of the FIFA RSTP. The Panel finds that the primary justification for the "just cause" termination lies in the fact that the Player arbitrarily and without any contractual basis was deregistered as a player for the Club and, thereafter, was denied appropriate training and medical facilities. This unilateral and undisputed action by the Club, which metaphorically speaking left the Player "out in the cold" and denied him the appropriate training and medical facilities, confirms the impression that the Club really did not care much about the Player anymore. It seems therefore very believable that the Player was invited to find a new club as soon as possible. Therefore, the Panel is satisfied that the Player had valid reasons to terminate the Employment Contract.

64. The Panel is well aware of the fact that according to Art. 5.12 of the Employment Contract, the Club had the right, at its sole discretion, to reassign the Player to a different position in the senior team or the reserve team, and that during the period in which the Player played with the reserve team, the Player had no right to take the salary as stipulated in the Employment Contract. Notwithstanding the legitimacy of this provision under Chinese labor law, the Panel concludes that the relegation to the reserve team is, however, not in itself the issue at hand in these proceedings. As pointed out above, it is the Club's unilateral decision to deregister the Player combined with the denial of medical and training facilities that forms the legal and contractual basis of the termination.

65. Thus, the Panel, after having considered all the relevant facts and circumstances presented during these proceedings, is satisfied that had the Club properly reassigned the Player to the reserve team, and granted to the Player full access to raining and medical facilities, the issues at stake would be, if any, others than those that need to be dealt with today. In fact, also all the letters of the representative of the Player would have had another content.

66. Accordingly, the Panel holds that on the basis of the applicable FIFA RSTP, the Player was entitled to terminate the Employment Contract with the Club on 7 August 2012 with "just cause". Put simply, the Appellant was not able to convince the Panel that under the FIFA RSTP, under Chinese or Swiss law, the Player was not entitled to terminate the Employment Contract. In reaching this conclusion, the Panel therefore dismisses the Club's claims and arguments that the Player on his part has breached his contractual obligations by not attending the training sessions. Consequently, the Panel also dismisses the Club's clam for financial damages for the alleged breach of contract.

(ii) Analyzing question 2

67. Having established that the Player was entitled to terminate the Employment Contract with the Club with "just cause", the Panel will now deal with the issue of financial damages. Taking into

consideration Art. 17, par 1 of the FIFA RSTP, the Panel finds that the Respondent is entitled to receive an amount of money as compensation for breach of contract in addition to any outstanding payments due on the basis of the Employment Contract.

68. With respect to the outstanding payment of the Player's salary for the month of July 2012 in the amount of EUR 20,000 pursuant to Art. 7 of the Employment Contract, the Panel concurs with the FIFA Decision and awards the Player an amount of EUR 20,000 in compensation for the unpaid salary of July 2012. The Panel also concurs with the FIFA Decision that the Player is entitled to 5 per cent interest p.a. on said amount as of 12 September 2012 until the day of effective payment.

69. With respect to awarding compensation for breach of contract for the remaining part of the contract, i.e. from August 2012 until November 2013, the Panel holds that the amount of compensation pursuant to Art. 17, par 1 of the FIFA RSTP shall be calculated, unless otherwise provided for in the contract, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including, in particular, the remunerations and other benefits due to the Player under the existing contract and/or the new contract, the time remaining on the existing contract, up to a maximum of 5 years, and depending on whether the contractual breach fell within the Protected Period.

70. According to these principles, the FIFA Decision concluded that the amount of EUR 350,000 (i.e. the Player's salary as from August 2012 until October 2013), should serve as a basis for the final determination of the amount of compensation for breach of contract. Based on the evidence presented during these proceedings, on the requests for relief submitted by the Respondent and taking in consideration the CAS jurisprudence in cases concerning compensation for termination with just cause, the Panel concurs with the FIFA Decision in establishing that EUR 350,000 would be the proper amount of compensation for the Club's breach of contract in this case.

71. From this amount of compensation, the FIFA Decision has deducted an amount of EUR 19,500 equal to the payments received by the Player under his new employment contracts in the period as from September 2012 until and including June 2013.

72. The Panel concurs in principle with the FIFA Decision's reduction of the compensation for breach of contract based on the Player's obligation to mitigate his losses following the termination of the Contract. However, based on the information provided by the Player in the post-hearing submissions, the Panel is of the opinion that his salary in the period from July until and including October 2013 (4 x EUR 1,500 = EUR 6,000) should also be deducted from the compensation for breach of contract to off-set the total earnings by the Player until November 2013. The total reduction to be made from the compensation should therefore amount to EUR 25,500. Thus, in view of the Panel, the total compensation due to the Player after all applicable reductions amounts to EUR 324,500. This minimal reduction leads to a very partial acceptance of the appeal filed by the Club.

73. With respect to interest, the Panel concurs with the FIFA Decision that an interest of 5% p.a. of the amount of EUR 324,500 should be added as of 30 August 2013 until the date of effective payment.

VI. CONCLUSIONS

74. Accordingly, the Panel rules that the Club is liable to pay a compensation of EUR 20,000 for unpaid salary in the month of July 2012 to the Player plus 5 per cent interest p.a. on said amount as of 12 September 2012 and until the date of effective payment. In addition hereto, the Club is liable to pay a compensation for breach of contract for the remaining part of the contract (August 2012 – November 2013) in the amount of EUR 324,500 plus 5 per cent interest p.a. on said amount as of 30 August 2013 until the date of effective payment. Against this background, all other or further requests of the Parties shall be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Changchun Yatai Football Club Co. Ltd on 13 March 2014 against the Decision issued on 30 August 2013 by FIFA's Dispute Resolution Chamber is partially upheld:

2. Changchun Yatai Football Club Co. Ltd is ordered to pay to Mr Marko Ljubinkovic EUR 20,000 plus 5 per cent interest p.a. on said amount as of 12 September 2012 until the date of effective payment, and in addition hereto an amount of EUR 324,500 plus 5 per cent interest p.a. on said amount as of 30 August 2013 until the date of effective payment.

3. The Decision by FIFA's Dispute Resolution Chamber issued on 30 August 2013 is otherwise confirmed.

4. (…).

5. (…).

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