Arbitration CAS 2015/A/3923 Fábio Rochemback v. Dalian Aerbin FC, award of 30 October 2015

Panel: Mr Efraim Barak (Israel), Sole Arbitrator

Football
Breach of employment contract
CAS power of review regarding admissibility of evidence
Scope of competence of FIFA DRC related to employment disputes

1. **According to CAS jurisprudence, a CAS panel has a wide inherent discretion to exclude or admit certain evidence under Article R57.3 of the CAS Code based on the panel's own assessment of the case. This power can be executed in a wide range of circumstances to include, *inter alia*, abusive procedural behaviour, or in any other circumstances where a panel might, in its discretion, consider the request to admit new evidence either as unacceptable procedural conduct by a party or to be unfair or inappropriate having in mind the overall circumstances of the case and the rights and interests of all the parties to the proceedings. On the other hand, additional evidence presented by a party which did not engage in any abusive or otherwise unacceptable procedural conduct and which is completely in line with the arguments and evidence already presented in the previous proceedings should be admissible.**

2. **Based on the wording of article 22(b) of the FIFA Regulations, FIFA is apparently not only competent to deal with *employment disputes* between a club and a player in the narrow meaning of the term, which would refer to disputes that arose in respect of a specific employment agreement, but also in disputes between clubs and players that are *related to the employment*. Employment relations are much wider than employment agreements and may cover areas that are not referred to in a written employment agreement. Article 22(b) of the FIFA Regulations is therefore in principle not to be interpreted narrowly but rather in light of the overall nature and elements of a dispute and of the overall circumstances of the employment relations for the sake of establishing whether a dispute is related to the employment relations. In view of the *de novo* competence of CAS, a panel can make its own assessment as to whether there are specific elements suggesting that a separate agreement such as an image rights agreement was in fact meant to be part of the actual employment relationship between a player and a club and that it is therefore to be regarded as an addendum or a supplementary agreement to the employment contract for which FIFA DRC has competence.**

I. PARTIES

1. Mr Fábio Rochemback (hereinafter: the "Appellant" or the "Player") is a professional football player of Brazilian nationality.

2. Dalian Aerbin FC (hereinafter: the "Respondent" or the "Club") is a football club with its registered office in Dalian, People's Republic of China. The Club is registered with the Chinese Football Association (hereinafter: the "CFA"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: "FIFA").

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings. This 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.

4. On 7 February 2012, the Player and the Club concluded an employment contract (hereinafter: the "Employment Contract"), valid as from the day of signature until 30 November 2013.

5. The Employment Contract determines, *inter alia*, the following:

"ARTICLE 6 Use of Portrait Right

1. [The Player] has its [sic] own portrait right. [The Club] must not use [the Player's] portrait for profit purpose without [the Player's] prior consent.

2. [The Player] agrees that [the Club] and Chinese Football Association Super and First League Committees use [the Player's] portrait for free in social public welfare activities or in the promotional activities of [the Club] and Chinese Football Association Super and First League Committee, and [the Player] shall cooperate with them.

[…]

ARTICLE 7 Salary and Bonuses

1. The salary: in 2012 and 2013 season, the monthly salary for [the Player] is USD 5.000 net. The salary distribution date is before 7 days of next month.

ARTICLE 9 Welfare

[The Club] shall pay for five round-trip business class airfares for [the Player] from Brazil to China".

6. Also on 7 February 2012, the Player, the Club and the company Aerbin (Hong Kong) Investment Co., Ltd. (hereinafter: the "Company"), concluded a *"Personal Portrait Right Agreement"* (hereinafter: the "Image Rights Agreement").

7. The Image Rights Agreement determines, *inter alia*, the following:

"This Agreement is signed on a mutually voluntary basis by and between aforesaid three parties and intending to be legally bound.

1. [The Player] agrees that [the Club] has to right to his personal portrait from Feb. 7, 2012 to Nov. 30, 2013, totally 22 months. The Personal Portrait Right Fee shall be paid by [the Company] to [the Player].

2. [The Company] agree to pay [the Player] Personal Portrait Right Fee total USD 6.850.000 net. The specific time and amount of payment as follows:

- *Within 7 days after [the Player] signed the Employment Contract with [the Club], [the Company] shall pay [the Player] USD 2.000.000 net;*
- *From Feb. 2012 to Oct. 2013 (totally 21 months), [the Company] shall pay [the Player] USD 220.000 net per month, distribution date is before 7 days of next month;*
- *For Nov. 2013, [the Company] shall pay [the Player] USD 230,000 net, distribution date is before 7 days of next month.*

3. This agreement will be legally binding after signing-on. [The Club], [the Player], [the Company] shall be strict compliance with each others. If [the Company] does not pay [the Player] Personal Portrait Rights Fee according to the time and amount of this agreement, [the Club] shall take the full responsibility".

B. Proceedings before the Dispute Resolution Chamber of FIFA

8. On 27 January 2014, the Player lodged a claim with the FIFA DRC against the Club, requesting payment of an outstanding amount of USD 952,000 (*i.e.* USD 35,000 for 5 air tickets and USD 27,000 relating to bonuses on the basis of the Employment Contract and USD 890,000 as outstanding remuneration on the basis of the Image Rights Agreement), plus 5% interest *p.a.* as of 30 November 2013.

9. In spite of having been invited to do so by FIFA, the Club failed to respond to the Player's claim throughout the proceedings before the FIFA DRC.

10. On 25 September 2014, the FIFA DRC rendered its decision (hereinafter: the "Appealed Decision") with, *inter alia*, the following operative part:

"1. The claim of [the Player] *is partially accepted.*

2. [The Club] *has to pay to* [the Player]*, within 30 days as from the date of notification of this decision, the amount of EUR 28,500 related to air tickets , plus interest at the rate of 5% p.a. as from 30 November 2013 until the date of effective payment.*

3. [The Club] *has to pay to* [the Player]*, within 30 days as from the date of notification of this decision, the amount of USD 27,000 related to match bonuses, plus interest at the rate of 5% p.a. as from 30 November 2013 until the date of effective payment.*

4. In the event that the amounts due to [the Player] *are not paid by* [the Club] *within the stated time limits, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*

5. Any further claim lodged by [the Player] *is rejected.*

[…]".

11. On 30 October 2014, the Club informed FIFA that *"all the payments were made by our club"*.

12. On 9 January 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

12. "[T]he Chamber first turned its attention to the [Player's] *claim based on the employment contract. According to the* [Player], *the* [Club] *owes him the amount of USD 35,000 relating to 5 business class round-trip air tickets. In this connection, while referring to art. 12 par. 3 of the Procedural Rules, which stipulates that any party claiming a right on the basis of an alleged fact shall carry the burden of proof, the Chamber highlighted that the* [Player] *had not presented any documentation corroborating the amount of USD 35,000. On the other hand, the Chamber took into account that said 5 air tickets were contractually due to the* [Player] *and that the* [Club] *had not replied to the claim. Hence, on the basis of the information provided by FIFA Travel and referring to the relevant terms of the employment contract, the Chamber decided that the* [Club] *must pay to the* [Player] *the amount of USD 28,500 for 5 business class round trip air tickets Brazil – China.*

13. Subsequently, the members of the Chamber pointed out that according to the employment contract, the [Player] *was entitled to receive match bonus payments depending on the match result and if he had been on the pitch during the relevant matches. According to the* [Player], *bonus payments totalling USD 27,000 remained unpaid. In this respect, the Chamber highlighted once more that the* [Club] *had not replied to the claim and that it, thus, has remained uncontested that the* [Player] *had rendered his services to the* [Club] *during the contractual duration. Therefore, the Chamber decided to accept the* [Player's] *claim relating to the outstanding match bonus payments and that the* [Club] *is liable to pay the amount of USD 27,000 to the* [Player] *for bonuses.*

14. In addition, taking into consideration the [Player's] *claim, the Chamber decided to award the* [Player] *interest at the rate of 5% p.a. on the above-mentioned amounts of USD 28,500 and USD 27,000, respectively, as of 30 November 2013 until the date of effective payment.*

15. Having established the above, the members of the Chamber turned to the [Player's] *claim based on the image rights agreement.*

16. In this regard, the Chamber had to establish whether, for formal reasons, it was competent to deal with this specific component or not. In fact, it appears that this part of the claim could possibly not be considered due to the Chamber lacking competence to deal with disputes related to image rights.

17. While analysing whether it was competent to hear this part of the claim, the Chamber wished to highlight that the image rights agreement in the matter at stake does not contain any employment-related elements, which, in the opposite case, may have led the Chamber to believe that it was not in fact an image rights

agreement but rather a separate agreement to the employment contract, i.e. directly linked to the services of the [Player] *as a player.*

18. As a general rule, if there are separate agreements, the DRC tends to consider the agreement on image rights as non employment-related and does not have the competence to deal with it on the basis of art. 22 of the Regulations. However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. Such elements, like, for instance, stipulations regarding bonuses, the use of a car, accommodation, which are typical for employment contracts and not for image rights agreements, do not appear to be included in the image rights agreement which is at the basis of the [Player's] *petition.*

19. Consequently, bearing in mind the above as well as art. 22 lit. b of the Regulations, which stipulates that the Chamber is competent to hear employment-related disputes (emphasis added), the Chamber decided that it cannot deal with the [Player's] *claim pertaining to the amount of USD 890,000 based on the image rights agreement".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 9 February 2015, the Player filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: "CAS"), in accordance with Article R47 and R48 of the Code of Sports-related Arbitration (hereinafter: the "CAS Code"), challenging the Appealed Decision. The Player nominated Mr Bernhard Heusler, Attorney-at-Law in Basel, Switzerland, as arbitrator.

14. On 20 February 2015, the Player filed his Appeal Brief, in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the challenge of the Appealed Decision, submitting the following requests for relief:

"1. To accept this appeal against the decision of the FIFA Dispute Resolution Chamber dated 20 January 2015 that partially rejected his claim.

2. To annul the segments of said decision that partially rejected the claim and to adopt an award that sentences the Respondent to pay the Appellant the total amounts claimed, plus 5% annual interest as from the dates when each of the payments were due.

3. To condemn the Respondent to the payment of CHF 50.000,00 as contribution towards his legal costs and other expenses incurred in connection with the present arbitration proceedings.

4. To condemn the Respondent to the payment of the full arbitration costs".

15. On 27 February 2015, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present appeal arbitration proceedings.

16. On 10 March 2015, the CAS Court Office, referring to the CAS Court Office letter of 17 February 2015 by which the Club was granted a deadline of ten days to nominate an arbitrator, informed the parties that in the absence of such nomination by the Club, the President of the

CAS Appeals Arbitration Division or his Deputy, would proceed with the appointment of an arbitrator *in lieu* of the Club.

17. On 26 March 2015, the CAS Court Office, referring to the CAS Court Office letter of 24 February 2015 by which the Club was granted a deadline of twenty days to file its Answer, a deadline that, based on an enclosed DHL report, expired on 23 March 2015, informed the parties that in view of the fact that no Answer was received or any communication from the Club, the Panel could nevertheless proceed with the arbitration and deliver an award.

18. On 27 March 2015, the Player informed the CAS Court Office of his preference for a hearing to be held.

19. On 1 April 2015, the Club informed the CAS Court Office that all letters from the CAS Court Office had been concealed *"because of intentional revenge from our club staff in charge of foreign affairs"*.

20. On 2 April 2015, the Club informed the CAS Court Office of its preference for a hearing to be held and reiterated its request, this time through counsel for the Club, to submit a response.

21. On 9 April 2015, the Player informed the CAS Court Office that the Club's request to submit a response should in principle be denied, however, should the Panel find it procedurally admissible, the Player indicated that he was *"ready to accept that the* [Club] *be granted a five day time limit to file a short written submission, summarizing its arguments. This would provide an opportunity for the* [Club] *to briefly expose its position, without producing any evidence as per R56, and allow the Panel and the* [Player] *to properly prepare the hearing"*.

22. On 30 April 2015, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

Mr Efraim Barak, Attorney-at-Law in Tel Aviv, Israel, as President;

Mr Bernhard Heusler, Attorney-at-Law in Basel, Switzerland; and

Mr Andrew de Lotbinière McDougall, Solicitor in Paris, France, as arbitrators.

23. On 11 May 2015, the CAS Court Office, on behalf of the Panel, informed the parties that, given the clear wording of Article R32 and R56 of the CAS Code, in the circumstances of this case, taking into account that the request was made after the expiry of the deadline to submit the Answer, the Club's request is denied. However, considering the proposal of the Player, the Panel indicated to be willing to accept the proposal of the Player and granted the Club a period of 10 days from the receipt of such letter by facsimile (not 5 as suggested by the Player) to submit its arguments in writing. This submission was however restricted to legal arguments and to factual arguments which directly derived from the documents submitted by the Player in the Appeal Brief. The Club was not allowed to submit any evidences nor any arguments based on facts that are not supported in the documents in the Appeal Brief.

24. On 26 May 2015, the CAS Court Office informed the parties that the Club had failed to submit any arguments in writing within the deadline prescribed.

25. On 30 June 2015, the Player applied for a reduction in the advance of costs and, should this not be possible, to submit the appeal to a sole arbitrator.

26. On 1 July 2015, the CAS Court Office informed the parties that the amount of the advance of costs could not be reviewed, but granted the Club a deadline to state whether it agreed with the Player's suggestion to submit the appeal to a sole arbitrator and that in the absence of an answer from the Club, this issue would be decided by the President of the Appeals Arbitration Division, or her Deputy.

27. On 7 July 2015, in view of the Club's failure to provide its position on the Player's suggestion to refer the appeal to a sole arbitrator, and with reference to its letter dated 1 July 2015, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division decided to submit the present matter to a sole arbitrator:

Mr Efraim Barak, Attorney-at-Law in Tel Aviv, Israel, as Sole Arbitrator;

28. On 22 July 2015, the Club informed the CAS Court Office that it was missing significant amounts of correspondence and that it missed that it was provided a period by which to respond to the Appeal Brief.

29. On 23 July 2015, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the Club was granted a period of 10 days to submit its arguments in writing, but that this submission should be restricted to legal arguments and to factual arguments which directly derive from the documents submitted by the Player in the Appeal Brief and that it was not allowed to submit any evidences nor any arguments based on facts that are not supported in the documents in the Appeal Brief.

30. On 3 August 2015, the Club filed its submission, whereby it requested CAS to decide the following:

117 "The Club respectfully asks CAS to dismiss the appeal.

118 The Club respectfully asks CAS to uphold the DRC Decision.

119 The Club respectfully asks CAS to award it its legal costs of the arbitration, or a contribution thereto in the sum of CHF 60,000.

120 The Club respectfully asks CAS to order or direct that the Player pay the full arbitration costs".

31. On 17 August 2015, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the Club's request for exclusion of evidences (and testimonies) submitted by the Player on the basis of Article R57 of the CAS Code was rejected and that the grounds for such rejection would be included in the final award.

32. On 17 August 2015, upon request of the Sole Arbitrator, pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the present matter.

33. On 20 and 21 August 2015 respectively, the Club and the Player returned duly signed copies of the Order of Procedure.

34. On 27 August 2015, further to a request from the Sole Arbitrator, the Player provided a witness statement of Mr Vifran de Almeida Pompeu.

35. On 1 September 2015 a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

36. In addition to the Sole Arbitrator, Mr William Sternheimer, Managing Counsel & Head of Arbitration to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

    a) For the Player:

        1) Mr Nuno Rêgo, Counsel;
        2) Mr José Oliveira, Counsel;
        3) Mr Loïc Pfister, Counsel;
        4) Mr André Machado, Interpreter

    b) For the Club:

        1) Mr Adam Lewis QC, Counsel;
        2) Ms Liz Ellen, Counsel;
        3) Mr Robert Tomback, Counsel

37. The Sole Arbitrator heard evidence from Mr Vifran de Almeida Pompeu, personal advisor of the Player since 2003 and witness called by the Player and the Player himself.

38. Mr Vifran De Almeida Pompeu was invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury. Both parties and the Sole Arbitrator had the opportunity to examine and cross-examine the witness in person. After having had the opportunity to address questions also to the Player himself by videoconference, the parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

39. Before the hearing was concluded, the Player expressly stated that he did not have any objection with the procedure and that his right to be heard had been respected. The Club however reserved its position in respect of the fact that it was not allowed to present evidence and in respect of the non-application of Article R57 CAS Code.

40. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

41. The following outline of the parties' positions is illustrative only and does not necessarily encompass every contention put forward by the parties. However, the Sole Arbitrator has carefully considered all the written and oral submissions made by the parties, even if there is no specific reference to those submissions in the following summaries.

42. The Player's submissions, in essence, may be summarised as follows:

- The Player maintains that the central issue at stake in this appeal is the Player's submission that the salary he agreed to receive in retribution for playing for the Club was not stipulated in the Employment Contract but rather in the Image Rights Agreement.
- The Player purports that, while admitting the possibility that an image rights agreement might be nothing more than a separate agreement to the employment contract, *i.e.* directly linked to the services of the Player as a player, the Appealed Decision did not find sufficient elements to reach such conclusion in the matter at stake. The Player however finds that some very important facts were overlooked and that, with all due respect, the FIFA DRC merely focussed on formal aspects and on what was written in the agreements and disregarded tremendously meaningful pieces of context.
- The Player submits "15 connecting elements" to show that the Image Rights Agreement served no other purpose than to complement the Employment Contract with regards to the salary that the Player agreed to receive.
- The Player maintains that the FIFA Regulations are silent with regard to the interpretation of contracts and that, since Swiss law is subsidiarily applicable, the contracts need to be interpreted on the basis of article 18 of the Swiss Code of Obligations (hereinafter: the "SCO"), more specifically that this is a case of simulation and that Swiss law does not attach a primary importance to the wording used by the parties, but primarily focuses on the intent of the parties. In this respect, the Player argues that the intent of the parties when signing the Image Rights Agreement was to include in this agreement the actual salary to be paid by the Club to the Player.
- On this basis, the Player claims to be entitled to the final four instalments due under the Image Rights Agreement in the total amount of USD 890,000, *i.e.* his wages for the months of August, September, October (USD 220,000 each) and November 2013 (USD 230,000).
- Finally, with reference to the fact that the FIFA DRC awarded him only USD 28,500 for the air tickets, while he claimed USD 35,000, the Player avers that the full amount should have been awarded since it was not contested by the Club. The FIFA DRC's decision to consider additional elements in that regard was procedurally incorrect and

illegal, and should be disregarded. In any event, the Player should have had access to the elements that were acquired *ex officio* by the FIFA DRC. Now the Player was confronted with a surprise decision that references proof that he never had the chance to peruse, while if he would have had the opportunity he could have easily proven that the cheapest fare for a return ticket was over USD 9,000.

43. The Club's submissions, in essence, may be summarised as follows:

- The Club purports that any claim under the Image Rights Agreement fell outside the competence of the FIFA DRC, because the claim was not an *"employment-related dispute"* under that provision. The Club refers to jurisprudence of the FIFA DRC in arguing that a claim under a separate contract addressing image rights is only an employment-related dispute *"if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship"* because it *"contains stipulations* […] *which are typical for employment contracts and not for image rights agreements"*. The Club maintains that there are no such stipulations or elements in the Image Rights Agreement in the matter at hand.
- The Club argues that there can be no resort to the FIFA DRC, or to CAS, under an image rights agreement which does not (in contract to the Employment Contract) contain a reference to the FIFA DRC or to CAS, and one of the parties to which, bearing the primary payment obligation, is not a party to this arbitration.
- The Club finds that each of the various fifteen "connecting elements" relied upon by the Player, none of which relate to stipulations in the Image Rights Agreement, fall away when the correct test is applied.
- The Club maintains that the Player provided the Club with two separate benefits: his services on the pitch as a footballer, remunerated under the Employment Contract in the same way as other players of the Club, and his image as a foreign player which the Club and its then owner (the Company), would benefit from through the enhanced profile of the Club, remunerated under the Image Rights Agreement. In the present case, the Player had a value to the Club in line with his Employment Contract, but by far his greater value was to the Company, in line with the Image Rights Agreement.
- The Club contends that the Player either ignored the fact that the points he makes on his fifteen elements were either properly considered and taken into account by the FIFA DRC, or illegitimately resorts to entirely new evidence or factual assertion in support of them that was not before the FIFA DRC, notwithstanding that *"it was available to him or could reasonably have been discovered by him before the challenged decision was rendered"*. In the circumstances here, not least where the Club is not allowed to adduce evidence but is restricted to *"legal arguments and factual arguments which directly derive from the documents submitted by the Appellant in the Appeal Brief"*, it is respectfully submitted by the Club that it is necessary in order to maintain equality of arms and the rights of the defence, for CAS to apply Article R57 of the CAS Code to exclude any factual assertions or evidence now advanced by the Player that were not before the FIFA DRC.
- As to the application of Swiss law, the Club argues that the Player is incorrect that Swiss law allows one to ignore the plain meaning of written contracts, or to allege "simulation"

when that plain meaning is regarded as inconvenient, and an entirely different contractual arrangement is sought to be alleged. It does not. Resort to extraneous evidence is in order to aid interpretation of ambiguity in the written contracts. It is a serious matter to allege simulation and it cannot be done on the basis of the entirely inadequate evidence here.

- The Club further maintains that upholding the Appealed Decision does not prevent the Player from making his claim, but rather only requires him to make it in the proper forum, and against the proper party, in accordance with the appropriate law.
- The Club submits that the Appealed Decision as to the amount to be attributed to airfares is also unimpeachable, and again, it should not be open to the Player to adduce new evidence that he could have put before the FIFA DRC.

V. JURISDICTION

44. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes (2014 edition) as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

45. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.

46. The Sole Arbitrator observes that the Club does not object to the jurisdiction of CAS as such, but maintains that the FIFA DRC rightfully denied jurisdiction to address the Player's claim on the basis of the Image Rights Agreement and requests CAS to confirm that the FIFA DRC's decision was correct.

47. As this argument is not related to the jurisdiction of CAS, this issue will be dealt with in the section related to the merits of the case below.

48. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

49. The appeal was filed within the 21 days set by article 67(1) of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.

50. It follows that the appeal is admissible.

VII. APPLICABLE LAW

51. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarity, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

52. The Player submits that, as the parties have not determined any particular applicable national law, neither in the Employment Contract, nor in the Image Rights Agreement, Swiss law is applicable, additionally to the various regulations of FIFA.

53. The Club accepts that the FIFA Regulations govern the issues at stake here. The Club denies that the effect of Article R58 of the CAS Code and Article 66 of the FIFA Statutes is that Swiss law is to apply to the construction of the Employment Contract or the Image Rights Agreement or the supposed question of "simulation". The Club maintains that it is clear for the purposes of Article R58 of the CAS Code, that the implied choice of law for a contract for employment in China by a Chinese club, and for a contract for exploitation in China by a Chinese club of image rights, is Chinese law. Since the Club is precluded by CAS's direction from addressing this issue with expert evidence, the Club submits that the appropriate course for CAS is to determine the question, as did the FIFA DRC, by reference to its own jurisprudence, and without resort to Swiss law.

54. The Sole Arbitrator observes that article 15 of the Employment Contract determines as follows:

> *2. "The issues not covered in the contract will be executed in accord with related provisions of Labor Law, Contract Law and related regulations of FIFA, CFA and Chinese Football Association Super and First League Committee, or are written in the supplementary agreement.* […]
>
> *4. When the clauses of the contract are contradictory to the regulations of FIFA or CFA, the latter prevails".*

55. The Sole Arbitrator observes that the Image Rights Agreement does not contain a specific choice of law clause.

56. The Sole Arbitrator notes that article 66(2) of the FIFA Statutes stipulates the following:

> *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

57. The Sole Arbitrator finds that the parties, with their choice for the primary application of the FIFA Regulations in the Employment Contract are subject to article 66(2) of the FIFA Statutes. As such, in respect of the Employment Contract, the Sole Arbitrator will primary apply the various regulations of FIFA, in particular the FIFA Regulations and in case of a *lacuna* in these regulations, subsidiarily, Swiss law.

58. Insofar there is any doubt about the applicable version of the FIFA Regulations, the Sole Arbitrator observes that the Player lodged his claim against the Club with the FIFA DRC on

27 January 2014. As such, as determined by the FIFA DRC in the Appealed Decision and in the absence of any arguments from the Player as to why the 2010 edition of the FIFA Regulations would be applicable, the Sole Arbitrators finds that the 2012 edition of the FIFA Regulations shall be applied.

59. Finally, as will be discussed in detail below, the Sole Arbitrator finds that the Image Rights Agreement forms part of the actual employment relationship between the Player and the Club and that the Image Rights Agreement is to be regarded as an addendum or a supplementary agreement to the Employment Contract and that therefore also in respect of the Image Rights Agreement, primarily the various regulations of FIFA shall be applied and in case of a *lacuna* in these regulations, subsidiarily, Swiss law.

VIII. PRELIMINARY ISSUES

60. The Club argued in its written submissions that the evidence presented by the Player in the proceedings before CAS that were not already submitted in the proceedings before the FIFA DRC shall be excluded from the file on the basis of the third paragraph of Article R57 of the CAS Code.

61. The Sole Arbitrator observes that Article R57 of the CAS Code determines the following:

"The Panel has full power to review the facts and the law. […]

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. […]".

62. The Sole Arbitrator observes that the introduction of the third paragraph of Article R57 of the CAS Code has been discussed in CAS jurisprudence:

"A Panel's power to review an appeal on a de novo basis is well established in a long line of CAS jurisprudence. Indeed, this basis of review is, in essence, the foundation of the CAS appeals system and the standard of review should not be undermined by an overly restrictive interpretation of Article R57.3 of the Code.

The Panel's inherent discretion to exclude certain evidence under this provision of the Code is just that, i.e. a discretionary power to exclude (or admit) certain evidence based on the Panel's own assessment of the case at hand. Thus, the Panel is free to accept or reject any such evidence and doing such should not disrupt the fundamental principle of de novo review.

The Panel is of the opinion that Article R57.3 of the Code should be construed in accordance with the fundamental principle of the de novo power of review. As such, the Panel also considers that the discretion to exclude evidence should be exercised with caution, for example, in situations where a party may have engaged in abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence" (CAS 2014/A/3486, §51-53).

63. Legal scholars have even suggested a more conservative and restrictive view:

"[T]his new provision should be applied with caution, so as not to impinge upon the fundamental principle of de novo review by the CAS. The amendment may make sense in those cases where the CAS acts as a second instance arbitral tribunal, reviewing an award rendered by another arbitral panel at the end of genuine arbitral proceedings. But in appeals proceedings against decisions rendered by the hearing bodies of the sports-governing organizations, where the curing effect of a full, de novo review by the CAS assumes all its importance, we believe Panels should use the discretion now granted to them by Article R57 only in those cases where the adducing of pre-existing evidence amounts to abusive or otherwise unacceptable procedural conduct by a party".

64. As an example of such abusive conduct, the authors mention the following example:

"A club that files a totally unsubstantiated claim against another club before the FIFA Dispute Resolution Chamber with the obvious intent to put forward its case only once the FIFA decision should be appealed in CAS. In that case, the dispute resolution process provided for by FIFA would be de facto circumvented as the FIFA instance would be put in the difficult situation of having to make a decision based on a poorly substantiated case, with the risk that such decision would then be overturned by CAS simply because all the relevant arguments and evidence have been put forward (only) at that stage" (RIGOZZI/HASLER/QUINN, The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, Jusletter, 3 June 2013, p. 14).

65. The Sole Arbitrator considers that the opinion of the legal scholars should be understood in light of the opinion of the CAS Panel in CAS 2014/A/3486 in order to avoid a very restrictive approach that may lead to the understanding that this power of the Panel should be construed in a very narrow way.

66. The Sole Arbitrator fully agrees with the opinion of the CAS Panel in CAS 2014/A/3486 which is focused on (a) the wide inherent discretion of the Panel to exclude or admit certain evidence under this provision of the CAS Code based on the Panel's own assessment of the case at hand and (b) the idea that this power can be executed by the Panel in a wide range of circumstances to include, *inter alia*, abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider the request to admit new evidence either as unacceptable procedural conduct by a party or to be unfair or inappropriate having in mind the overall circumstances of the case and the rights and interests of all the parties to the proceedings.

67. Based on the above-mentioned view, the Sole Arbitrator finds that the Player did not engage in any abusive or otherwise unacceptable procedural conduct and does not consider it either unfair or inappropriate to admit the new evidence presented by the Player for the first time in the proceedings before CAS.

68. In reaching this conclusion, the Sole Arbitrator also took into consideration the fact that the Club did not answer the player when it was asked to pay the outstanding amounts before the Player submitted his claim before the FIFA DRC and the fact that the Club failed to submit any defence before the FIFA DRC. It is the Sole Arbitrator's understanding that the Player would have submitted such evidence in case the Club would have answered to the Player or would have submitted a defence denying the claim based on counter arguments. However, as the Club totally ignored the notifications in respect of the debt and ignored the proceedings

before the FIFA, the Player decided to add the evidence after having received the grounds of the Appealed Decision on 9 January 2015, as part of his appeal in order to support his position. However, the additional evidence is completely in line with the arguments and evidence already presented by the Player in the proceedings before the FIFA DRC.

69. Consequently, for the above-mentioned reasons, and as already communicated to the parties by letter of the CAS Court Office dated 17 August 2015, the Sole Arbitrator decided that the Club's request for exclusion of evidences (and testimonies) on the basis of Article R57 of the CAS Code is rejected.

IX. MERITS

A. The Main Issues

70. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:

a) Is the FIFA DRC in general competent to adjudicate claims based on image rights agreements and, if so, which criteria are relevant in such assessment?

b) Was the FIFA DRC competent to adjudicate the Player's claim based on the Image Rights Agreement?

c) If so, is the Player entitled to the amounts claimed on the basis of the Image Rights Agreement?

d) Is the Player entitled to a higher amount of compensation in respect of the flight tickets as was awarded by the FIFA DRC?

a) Is the FIFA DRC in general competent to adjudicate claims based on image rights agreements and, if so, which criteria are relevant in such assessment?

71. The Sole Arbitrator observes that the FIFA DRC considered the following in respect of its competence to assess the Player's claim on the basis of the Image Rights Agreement:

- *"While analysing whether it was competent to hear this part of the claim, the Chamber wished to highlight that the image rights agreement in the matter at stake does not contain any employment-related elements, which, in the opposite case, may have led the Chamber to believe that it was not in fact an image rights agreement but rather a separate agreement to the employment contract, i.e. directly linked to the services of the [Player] as a player.*
- *As a general rule, if there are separate agreements, the DRC tends to consider the agreement on image rights as non employment-related and does not have the competence to deal with it on the basis of art. 22 of the Regulations. However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. Such elements, like, for instance, stipulations regarding bonuses, the use of a car, accommodation, which are*

typical for employment contracts and not for image rights agreements, do not appear to be included in the image rights agreement which is at the basis of the [Player's] petition.

- *Consequently, bearing in mind the above as well as art. 22 lit. b of the Regulations, which stipulates that the Chamber is competent to hear employment-related disputes (emphasis added), the Chamber decided that it cannot deal with the [Player's] claim pertaining to the amount of USD 890,000 based on the image rights agreement".*

72. The Player maintains that the FIFA DRC overlooked some very important facts and that it merely focused on formal aspects and on what was written in the agreements and *"disregarded tremendously meaningful pieces of context"*. The Player provided a list of 15 "connecting elements" that allegedly connect the Image Rights Agreement to the Employment Contract.

73. The Club avers that, in accordance with well-established jurisprudence of the FIFA DRC, it was correctly determined by the FIFA DRC that any claim to entitlements under the Image Rights Agreement fell outside the competence of the FIFA DRC under article 22(b) of the FIFA Regulations. The Club argues that *"as in all other cases of a claim under an image rights agreement, the Player is to be left to pursue a remedy in the normal way, and not by resort to the narrow sporting jurisdiction of the FIFA DRC"*.

74. The Sole Arbitrator starts his analysis by reviewing the wording of the heading of article 22 and paragraph (b) of the FIFA Regulations:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: […]

b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;

75. The Sole Arbitrator observes that based on the wording of this provision (*i.e.* ***employment-related disputes***), FIFA is apparently not only competent to deal with ***employment disputes*** between a club and a player in the narrow meaning of the term, which would refer to disputes that arose in respect of a specific employment agreement, but also in disputes between clubs and players that are **related to the employment**. Employment relations are much wider than employment agreements and may cover areas that are not referred to in the written employment agreement. Therefore, employment-related disputes are by all means a wider range of disputes than just disputes over employment agreements. The Sole Arbitrator finds that article 22(b) of the FIFA Regulations is therefore in principle not to be interpreted narrowly but rather the FIFA DRC and CAS, when asked to interfere through an appeal, should take into consideration the overall nature and elements of the dispute in light of the overall circumstances of the employment relations for the sake of establishing whether the dispute is related to the employment relations.

76. The Sole Arbitrator observes that the FIFA DRC, as appears from the reasoning in the Appealed Decision, indeed does not interpret its competence narrowly and would in principle consider itself competent to adjudicate a claim based on an image rights agreement if such additional agreement *"was in fact meant to be part of the actual employment relationship"*. Here again, the FIFA DRC chose to use the wording *employment relations* which is a wider concept than *employment agreements*.

77. The Sole Arbitrator observes that this criterion that is set out in the Appealed Decision is in line with the wide terminology of article 22 (b) of the FIFA Regulations, even if at a first sight it seems as if it has no direct legal basis in the FIFA Regulations and apparently derives from a policy established by the FIFA DRC in its jurisprudence.

78. The Sole Arbitrator is thus faced with a situation where he needs to review whether this criterion implemented by FIFA is just, fair and, if so, if it has been applied correctly in the matter at hand, or whether the FIFA DRC should have accepted competence to adjudicate the Player's claim on the basis of the Image Rights Agreement.

79. The assessment that is apparently made by the FIFA DRC to determine whether an additional agreement *"was in fact meant to be part of the actual employment relationship"* appears to be that there need to be specific elements of the separate agreement suggesting that it was in fact meant to be part of the actual employment relationship, failing which the FIFA DRC will not consider itself competent.

80. The Sole Arbitrator does not find such assessment to be inappropriate. However, the examination of the additional agreement should be executed in a wider context based on the question whether this additional agreement was meant to be part of the employment relationship and, as such, led to an employment-related dispute. If there is indeed no link between a separate agreement and the actual employment relationship, a dispute arising out of the separate agreement can hardly be described as employment-related.

81. However, the Sole Arbitrator observes that the FIFA DRC in the Appealed Decision continued by determining which kind of specific elements could justify the proposition that a separate agreement was indeed meant to be part of the actual employment relationship: *"for instance, stipulations regarding bonuses, the use of a car, accommodation, which are typical for employment contracts and not for image rights agreements"*.

82. The Sole Arbitrator adheres with the FIFA DRC that these specific elements would indeed indicate that a separate agreement *"was in fact meant to be part of the actual employment relationship"*. The Sole Arbitrator agrees with the FIFA DRC that this list of elements is not exhaustive, contrary to what the Club appears to submit. The Sole Arbitrator finds that the reference to *"for instance"* in the above-mentioned quote, shows that this list is not intended to be exhaustive. Indeed, should the specific examples mentioned be absent in an individual case, other elements may still lead one to the conclusion that a separate agreement *"was in fact meant to be part of the actual employment relationship"*. The assessment to be made should therefore not be limited to examining the presence of such examples but as already explained, should be done in a wider perspective.

83. In this respect, the Sole Arbitrator agrees with the Player that the approach of the FIFA DRC in the present case appears to have been quite formalistic in the sense that it rightfully determined that the examples of connecting elements were not present in the Image Rights Agreement, but that the FIFA DRC did not look beyond these narrow examples, while other elements were available to it. The Appealed Decision in any event does not show that other elements were taken into account besides the non-exhaustive list of examples mentioned.

84. Admittedly, the Player also advanced a number of "connecting elements" in the proceedings before CAS that were not advanced in the proceedings before FIFA and could therefore not have been taken into account by the FIFA DRC.

85. However, the Sole Arbitrator fully agrees with the following reasoning of the Sole Arbitrator in CAS 2012/A/2900:

> *"CAS jurisprudence shows that the type of decision which an appeal panel may make is described in the second sentence of Article R57 of the CAS Code which states that the appeal panel "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance". This description does not seek to limit the powers of the appeal panel or that it can only act if it finds error in the initial decision or award (CAS 2008/A/1574). Indeed, CAS appeals arbitration proceedings allow the parties ample latitude not only to present written submissions with new evidence, but also to have an oral hearing during which witnesses are examined and cross-examined, evidence is provided and comprehensive pleadings can be made (CAS 2009/A/1880-1881, §18). CAS does not act as an administrative court reviewing an act of an administrative authority where, usually, the scope of review is characterised by minimum standards of scrutiny, mostly procedural, and the administrative court may not substitute its own judgement for that of the administrative authority. Typically, administrative courts may only control the fairness and correctness of the previous procedure, the way in which the decision was arrived at, the reasons given for the decision, the competence of the body adopting the decision and the like. In contrast, it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision (CAS 2009/A/1880-1881, §22)"* (CAS 2012/A/2900, §98).

86. As such, in view of the *de novo* competence of CAS in appeals arbitration proceedings arising from a FIFA decision, the Sole Arbitrator will now make his own assessment as to whether there are specific elements suggesting that the Image Rights Agreement was in fact meant to be part of the actual employment relationship between the Player and the Club.

b) Was the FIFA DRC competent to adjudicate the Player's claim based on the Image Rights Agreement?

87. The Player argues that there are 15 "connecting elements" in the matter at hand from which it derives that the Image Rights Agreement was meant to be part of the actual employment relationship between the Player and the Club, which the Club disputes.

88. The 15 "connecting elements" adduced by the Player are titled by the Player as follows:

> *"1. The employment contract and the image rights agreement jointly correspond to the Club's initial proposal.*

2. *Both agreements were signed simultaneously.*
3. *The image rights agreement is printed on the club's letterhead, as was the proposal of 25 January.*
4. *A club official is the Company's representative in the image rights agreement.*
5. *The Company does not acquire the Player's image rights – the Club does, but the Company pays for it.*
6. *The Club is subsidiarily responsible for the payments.*
7. *The image rights agreement contains no other provisions apart from the payments to the Player.*
8. *The Player never participated in any sort of endorsement.*
9. *The salary amount stipulated in the employment contract is not credible.*
10. *The Player would not terminate his fine contract with Grêmio to sign a financially worse contract with the Respondent.*
11. *The salary is disproportionate to other stipulations between the parties.*
12. *The signing bonus initially had the shape of an "Additional Agreement", but then it was formalized into the image rights agreement together with the monthly payments that were part of the player's remuneration.*
13. *The bank slips description, filled in by the payer, is "payment for employment contract".*
14. *The Club had incentives to enter into separate agreements and to involve a company from Hong Kong.*
15. *The salary paid by the Club was discounted from the salary paid by the Company".*

89. The Club argues that each of the 15 "connecting elements" relied upon by the Player, none of which relates to stipulations in the Image Rights Agreement, fall away when the correct test is applied and that none of these elements establish that the Image Rights Agreement in fact forms part of the Employment Contract.

90. The Club further maintains that the Player provided the Club with two separate benefits: his services on the pitch as a footballer, remunerated under the Employment Contract in the same way as other players of the Club, and his image as a foreign player which the Club and its then owner (the Company), would benefit from through the enhanced profile of the Club, remunerated under the Image Rights Agreement. In the present case, the Player had a value to the Club in line with his Employment Contract, but by far his greater value was to the Company, in line with the Image Rights Agreement.

91. The Sole Arbitrator does not deem it necessary to address each and every "connecting element" adduced, but will restrict himself to the arguments he deems crucial to support his conclusion.

92. First of all, the Sole Arbitrator deems it crucial that the Club was a party to the Image Rights Agreement and that it is determined in such contract that *"[i]f* [the Company] *does not pay* [the Player] *Personal Portrait Right Fee according to the time and amount of this agreement,* [the Club] *shall take the full responsibility"*.

93. The Sole Arbitrator finds that the Player may therefore initiate legal action against the Club, without being required to involve the Company in the proceedings. This would have been problematic if the Club was not a party to the Image Rights Agreement or if the Club had no responsibility in respect of the payments due on the basis of such contract and would indeed have been an important indication that the Image Rights Agreement was not in fact meant to be part of the actual employment relationship, but this is not the case here. Because the Club is directly responsible to pay the amounts due on the basis of the Image Rights Agreement, the Sole Arbitrator finds that the Club's argument that *"the Player had a value to the Club in line with his Employment Contract, but by far his greater value was to the Company, in line with the Image Rights Agreement"* must be dismissed. If this were true, the Club should not have assumed responsibility for the payments due on the basis of the Image Rights Agreement. Now it is indeed an indication that the Image Rights Agreement was in fact meant to be part of the actual employment relationship.

94. In continuation, the Sole Arbitrator observes that on 25 January 2012, the Club approached the Player for the first time with a *"Contractual Agreement"*, by means of which the Club made a contractual proposal to the Player, determining, *inter alia*, that *"the transfer shall only be closed under the following conditions:*

1. Salary for the Player: USD 2.425.000 net a year.

2. The term of contract is from Feb. 1, 2012 till to the end of the 2013 season.

3. Signing-on Fee is USD 2.000.000 net. […]".

95. The Sole Arbitrator considers it relevant that the *"Contractual Agreement"* did not make reference to the fact that the Company would be a party in the contractual arrangements. The Sole Arbitrator observes that the Player and the Club finally concluded the Employment Contract and that the Image Rights Agreement was concluded between the Player, the Club and the Company, but that the total value of these two agreements aligns with the value of the *"Contractual Agreement"*. The Sole Arbitrator finds that this is an indication that it was the Club's intention that the Image Rights Agreement would form part of the employment relationship between the Player and the Club, or at least that the Player could have understood the Club's proposal as such.

96. The Club's argument that pre-contract discussions are irrelevant is dismissed. The Sole Arbitrator finds that these pre-contract discussions are relevant in construing the actual intention of the parties with the conclusion of the Employment Contract and the Image Rights Agreement.

97. The Sole Arbitrator finds the testimonies of Mr Vifran De Almeida Pompeu and the Player relevant and credible. Mr Vifran De Almeida Pompeu testified that it was a crucial aspect in the contractual negotiations that the Club would be responsible for the payment of the amounts set out in the Image Rights Agreement. The Sole Arbitrator understands that the Player did not mind whether he received the amounts indicated in the *"Contractual Agreement"* as salary under the Employment Contract or as remuneration under the Image Rights Agreement, as long as he would receive these sums and as long as the Club was responsible

for the payment. The Sole Arbitrator understands that the Player did not mind to be of service to the Club by allowing it to pay him under the Image Rights Agreement as it was understood that this would be more interesting for the Club because such remuneration would fall under a more advantageous tax regime.

98. The Sole Arbitrator also observes that the Player was never paid the full amounts he was entitled to under the Image Rights Agreement, but that all these payments were reduced with the salary the Player was entitled to receive under the Employment Contract. The Sole Arbitrator finds this to be another indication that the Image Rights Agreement was closely related and was meant to form part of the actual employment relationship. In fact, the Image Rights Agreement provided the total amounts to be paid by the Club to the Player, which was subsequently reduced with the salary to be paid by the Club to the Player under the Employment Contract.

99. Furthermore, the Sole Arbitrator observes that the Player was entitled to a salary of USD 5,000 net under the Employment Contract and to match bonuses of USD 3,000 for each match won, USD 1,000 for each draw, USD 100,000 if the Player would be voted as the most valuable player of the Chinese Super League, USD 100,000 if the Club would win the Chinese Super League and USD 200,000 if the Club would win the AFC Champions League. Article 8 of the Employment Contract further determines that the Club would have to let the Player negotiate an employment contract with another club if that club makes a bid of more than USD 5,000,000 for the Player.

100. The Sole Arbitrator finds these bonuses and the *"Minimum Fee Release Clause"* to be disproportionate in comparison with the Player's salary of USD 5,000 net per month, if the remuneration due to the Player under the Image Rights Agreement would not form part of the employment relationship. As such, the Sole Arbitrator considers this to be another indication that the Image Rights Agreement was meant to be part of the actual employment relationship.

101. In addition, the Sole Arbitrator observes that there is no evidence at his disposal showing that the Player ever engaged in any sponsorship events or other activities that would have reasonably justified the payments of the amounts set out in the Image Rights Agreement. The Club's argument that the Player did participate in such events was denied by the Player. The Player and Mr Vifran De Almeida Pompeu also denied that any official shirts with his name were sold as merchandising, corroborating this with the statement that the Club did not sell any official shirts with players' names on it, but only fake shirts. Mr Vifran De Almeida Pompeu also stated that he did not believe the statement of counsel for the Club that 30% of the merchandise sold by the Club was related to the Player. Mr Vifran De Almeida Pompeu did however confirm that the Player attended five or six official dinners, but that all players of the Club attended these events. The Player also confirmed to have attended certain dinners and a lunch with sponsors, but always with the whole team. The Sole Arbitrator finds that the mere attendance of five or six dinners by the Player together with the rest of the team over the term of two football seasons does in principle not justify the proposition that the remuneration under the Image Rights Agreement is to distinguished from the employment relationship between the Player and the Club.

102. Finally, the Sole Arbitrator observes that, pursuant to the Image Rights Agreement *"*[w]*ithin 7 days after* [the Player] *signed the Employment Contract with* [the Club]*,* [the Company] *shall pay* [the Player] *USD 2.000.000 net;"*. The Sole Arbitrator considers this to be another important element establishing that the Image Rights Agreement was indeed meant to be part of the employment relationship. In this respect, the Sole Arbitrator considers the Player's reference to a decision of the FIFA DRC dated 7 June 2013 to be relevant since this decision, *inter alia*, determines the following in the analysis as to whether an image rights agreement *"was in fact meant to be part of the actual employment relationship"*:

"In the case at hand, such elements appear to exist, in particular, the agreement contains inter alia a signing-on fee, bonuses and flight tickets, which are typical for employment contracts and not for image rights agreements" (C v. F, decision of the FIFA DRC dated 7 June 2013, §15).

103. As such, the presence of a clause similar to the one included in the Image Rights Agreement in the matter at hand was presumed to be typical for an employment contract and not for an image rights agreement by the FIFA DRC. The Sole Arbitrator acknowledges that the presence of only a signing-on fee in the image rights agreement would maybe not have been sufficient for FIFA to come to this result, but finds that this clause is at least another indication that the Image Rights Agreement was in fact meant to be part of the actual employment relationship.

104. Finally, the Sole Arbitrator finds it important to refer to the following articles in both agreements:

The Employment Contract determines the following:

"ARTICLE 6 Use of Portrait Right

1. *[The Player] has its [sic] own portrait right. [The Club] must not use [the Player's] portrait for profit purpose without [the Player's] prior consent.*
2. *[The Player] agrees that [the Club] and Chinese Football Association Super and First League Committees use [the Player's] portrait for free in social public welfare activities or in the promotional activities of [the Club] and Chinese Football Association Super and First League Committee, and [the Player] shall cooperate with them.*

105. While the Image Rights Agreement determines the following:

"This Agreement is signed on a mutually voluntary basis by and between aforesaid three parties and intending to be legally bound.

1. [The Player] *agrees that* [the Club] *has to right to his personal portrait from Feb. 7, 2012 to Nov. 30, 2013, totally 22 months. The Personal Portrait Right Fee shall be paid by* [the Company] *to [the Player].*
2. [The Company] *agree to pay [the Player] Personal Portrait Right Fee total USD 6.850.000 net".*

106. The Sole Arbitrator notes that the Company was indeed supposed to pay the fees to the Player under the Image Rights Agreement (while the Club was also responsible for these payments) however, the right to use the Player's portrait was given under the same agreement to the Club and not to the Company! One should therefore ask the following: if indeed the Player already granted the Club the right to use his portrait "for free", why should a third party agree to pay the Player USD 6,850,000 net as consideration for exactly the same right that was already given for free?

107. In view of all the above, the Sole Arbitrator finds that the Image Rights Agreement *"was in fact meant to be part of the actual employment relationship"* and that it is therefore to be regarded as an addendum or a supplementary agreement to the Employment Contract. This is indeed in accordance with the practice of the FIFA DRC when it came to the conclusion that a separate agreement was meant to be part of an actual employment relationship, according to the jurisprudence submitted by the Club (C v. A, decision of the FIFA DRC dated 13 December 2013, §13; A v. O, decision of the FIFA DRC dated 17 January 2014, §6).

108. It is because of the above that the Sole Arbitrator finds that the FIFA DRC was competent to adjudicate the Player's claim on the basis of the Image Rights Agreement, despite the fact that the Image Rights Agreement does not contain a specific arbitration clause. Since the Image Rights Agreement was also signed by the Club, the Club was also responsible for the payments under this agreement. The Image Rights Agreement was therefore part of the agreements governing the employment relationship between the parties and, as such, the dispute regarding the payments under the Image Rights Agreement is an employment-related dispute over which the FIFA DRC has competence.

109. Furthermore, since the Image Rights Agreement is to be regarded as an addendum or a supplementary agreement to the Employment Contract, the former forms part of the latter. Since the competence of the FIFA DRC over the Employment Contract is not disputed and clearly derives from article 14 of the Employment Contract, the FIFA DRC also had competence over the Image Rights Agreement.

110. The Sole Arbitrator feels comforted in this conclusion by the fact that the Image Rights Agreement does not contain any "boiler plate" provisions such as clauses regarding the choice of law and jurisdiction. Different from the argument of the Club, the Sole Arbitrator finds that it appears that this is not the result of the fact that English was not the first language of the Player and representatives of the Club and that it was not provided with legal advice, but because the Player and the Club understood that it was an addendum or a supplementary agreement to the Employment Contract, which did contain such "boiler plate" provisions.

111. In view of the above, the Sole Arbitrator does not deem it necessary to enter into the Player's arguments regarding the legal concept of simulation under Swiss law.

112. Consequently, the Sole Arbitrator finds that the FIFA DRC was competent to adjudicate the Player's claim against the Club on the basis of the Image Rights Agreement.

c) If so, is the Player entitled to the amounts claimed on the basis of the Image Rights Agreement?

113. Since it has been determined that the FIFA DRC was competent to adjudicate the Player's claim on the basis of the Image Rights Agreement, the Sole Arbitrator observes that, pursuant to Article R57 of the CAS Code, he *"may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

114. In view of the fact that the Club did not dispute the Appealed Decision in respect of the compensation it had to pay to the Player on the basis of the Employment Contract and because the Club did not advance any arguments in respect of the proportionality of the Player's claim on the basis of the Image Rights Agreement, the Sole Arbitrator does not consider it opportune to refer the matter back to the FIFA DRC.

115. In view of the fact that it remained undisputed by the Club that neither the Club nor the Company had paid the Player the amounts he was entitled to receive under the Image Rights Agreement as from August 2013 until the end of the employment relationship (*i.e.* 30 November 2013), the Sole Arbitrator finds that the Player is in principle entitled to the remuneration due under the Image Rights Agreement for the months of August (USD 220,000), September (USD 220,000), October (USD 220,000) and November 2013 (USD 230,000), *i.e.* a total amount of USD 890,000.

116. With reference to article 3 of the Image Rights Agreement determining that *"[i]f* [the Company] *does not pay* [the Player] *Personal Portrait Right Fee* according *to the time and amount of this agreement,* [the Club] *shall take the full responsibility"*, the Sole Arbitrator finds that the Club is liable to pay such amounts to the Player, in the absence of any payment having been received from the Company.

117. Since article 7(1) of the Employment Contract determines that *"[t]he salary* distribution *date is before 7 days of next month"*, the Sole Arbitrator finds that the above-mentioned salaries fell due on the seventh day of the following month, *i.e.* respectively on 7 September, 7 October, 7 November and 7 December 2013.

118. However, the Sole Arbitrator observes that the Player, in his initial claim before the FIFA DRC requested for interest at a rate of 5% *per annum "to be accounted for since the end of the contractual term, which was November, the 30th, 2013, until the date of effective payment"*.

119. The Sole Arbitrator finds that the Player's claim in the present appeals arbitration proceedings exceeds the scope of the litigation before the FIFA DRC in the sense that the Player now claims a higher amount of interest. In the absence of any justification for the fact that this was not anticipated for in the Player's claim before the FIFA DRC, the Sole Arbitrator finds that the Player's claim is inadmissible insofar it exceeds his claim before the FIFA DRC.

120. Consequently, the Sole Arbitration finds that the Player is entitled to the amount of USD 890,000 as outstanding remuneration under the Image Rights Agreement, plus interest at a rate of 5% *per annum* as follows until the effective date of payment:

Interest over USD 660,000 (USD 220,000 x 3) as from 30 November 2013;

Interest over USD 230,000 as from 7 December 2013

d) Is the Player entitled to a higher amount of compensation in respect of the flight tickets as was awarded by the FIFA DRC?

121. The Sole Arbitrator observes that the Player initially claimed an amount of USD 35,000 (USD 5,000 per round trip) for air tickets from the Club in the proceedings before the FIFA DRC, but that the FIFA DRC only awarded an amount of USD 28,500 *"on the basis of the information provided by FIFA Travel"*.

122. In this respect, the Player argues that he was denied access to the information provided by FIFA Travel, which information was acquired *ex officio* by the FIFA DRC and that he was therefore confronted with a surprise decision based on evidence he never had the chance to peruse.

123. The Club argues that its obligation under the Employment Contract in relation to airfares was simply to reimburse the Player for round trip flights that he actually took. Furthermore, the mere absence of the Club from the proceedings before the FIFA DRC does not mean that the FIFA DRC simply had to accept whatever valuation was put on flights not taken by the Player.

124. The Sole Arbitrator observes that article 9 of the Employment Contract determines as follows:

"[The Club] *shall pay for five round-trip business class airfares for [the Player] from Brazil to China"*.

125. The Sole Arbitrator observes that the value of the airfares have not been determined in the Employment Contract and finds that, as was admitted by Mr Vifran De Almeida Pompeu during the hearing, the Player used to provide the Club with information regarding his expenses in respect of airfares, following which the Club would remunerate the Player. If the Player would not take a flight, the Club would not reimburse the Player. Since the Player left China after the expiration of the employment relationship, the Player was no longer required to take round-trip flights from China to Brazil.

126. Consequently, in the absence of any evidence being presented by the Player as to expenses incurred related to airfares, the Sole Arbitrator finds that the Player's claim in respect of the airfares should have been dismissed in case the Club would have submitted an independent appeal against the Appealed Decision.

127. In view of the fact that the Club did not lodge an independent appeal against the Appealed Decision, the Sole Arbitrator finds that the Appealed Decision shall be confirmed in respect of the airfares (*i.e.* awarding an amount of USD 28,500 to the Player), since ruling otherwise would constitute a ruling *ultra petita*.

128. Consequently, the Sole Arbitrator finds that the Player is not entitled to a higher amount of compensation in respect of the flight tickets as was awarded by the FIFA DRC.

B. Conclusion

129. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Sole Arbitrator finds that:

a. The FIFA DRC was competent to adjudicate the Player's claim against the Club on the basis of the Image Rights Agreement.

b. The Player is entitled to receive from the Club the amount of USD 890,000 as outstanding remuneration under the Image Rights Agreement, plus interest at a rate of 5% *per annum* as follows until the effective date of payment:
   - Interest over USD 660,000 (USD 220,000 x 3) as from 30 November 2013;
   - Interest over USD 230,000 as from 7 December 2013

c. The Player is not entitled to a higher amount of compensation in respect of the flight tickets as was awarded by the FIFA DRC.

130. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 February 2015 by Mr Fábio Rochemback against the Decision issued on 25 September 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.

2. Dalian Aerbin FC shall pay to Mr Fábio Rochemback, in addition to the amounts of the Decision issued on 25 September 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association, the amount of USD 890,000 (eight hundred and ninety thousand United States Dollars), plus interest at a rate of 5% *per annum* accruing as follows until the effective date of payment:

   a. Interest over USD 660,000 as from 30 November 2013;
   b. Interest over USD 230,000 as from 7 December 2013

(…)

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