

**Arbitration CAS 2016/A/4489 Beijing Renhe FC v. Marcin Robak, award of 13 February 2017**

Panel: Prof. Martin Schimke (Germany), President; Mr Lars Halgreen (Denmark); Mr Francesco Macri (Italy)

*Football**Compensation for breach of draft employment contract**Validity of draft employment contract**Ratification of a contract entered into by unauthorized representative**Pre-contract**Successful medical examination as condition of valid pre-contract/employment contract**Conclusion of valid transfer agreement as condition of valid pre-contract/employment contract**Culpa in contrabendo**Compensation for damages resulting from breach of pre-contract**Calculation of compensation under Article 17 RSTP and principle of “positive interest”*

- 1. Where a club has provided a signed version of a draft employment contract to a player, the club cannot later on claim that the respective contract did not enter into force because the individual(s) that had signed the draft employment contract on the club’s behalf lacked authorisation to conclude it, if the club had ratified the conclusion of the draft employment contract afterwards, e.g. by explicitly and publicly acknowledging its existence and failing to challenge its validity. Whether or not the signature on the draft employment contract was sealed – allegedly a requirement under Chinese law – does not change this in circumstances where the FIFA regulations and subsidiarily Swiss law are the law applicable to the case.**
- 2. The ratification of a contract entered into by an unauthorized representative (e.g. under Article 38(1) of the Swiss Code of Obligations (SCO)) does not have to be made actively, but the passive or tacit ratification suffices.**
- 3. Whereas the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a “pre-contract”, with respect to pre-contracts in football, CAS jurisprudence has acknowledged that this notion is well known in legal practice as a sort of “promise to contract” and has defined it as the reciprocal commitment of at least two parties to later enter into a contract. Unlike when concluding a contract, the parties to the pre-contract have not agreed on the essential elements of the contract, or at least the pre-contract does not reflect the final agreement. In some cases letters of intent can be considered as pre-contract as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention that the document is not the final contract and that it does not represent the definitive**

agreement between the parties, as it is well known that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought.

4. Whereas a definite employment contract cannot be made subject to the successful passing of a medical examination, there are no reasons why a “pre-contract” could not be made subject to such condition. This is because a medical examination of a football player is a crucial element for a club in deciding whether to contract a player or not which justifies that not the same restrictions apply to a draft employment contract as to a definite employment contract.
5. A player’s new club cannot argue that it was not bound by a “pre-contract” or definite employment contract with the player because the agreement was conditional upon the conclusion of a valid transfer agreement with the player’s former club, unless such condition is explicitly mentioned in the agreement. This is because the rules applicable to transfers foresee that the ordinary course of events would be for the club to first conclude a transfer agreement and only subsequently an employment contract.
6. As a preliminary contract is a contract under the law of obligations that creates the obligation to conclude a main contract at a later point in time, a party to the preliminary contract is not entirely free to exclude itself from the negotiations in relation to the conclusion of a final agreement. Instead, the parties must negotiate in good faith and should not abandon the negotiations without compelling reason for doing so. The duty to act in good faith already exists at the time of contractual negotiations and is known as *culpa in contrahendo*. Under Swiss Law *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of *culpa in contrahendo* requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner. It essentially constitutes an independent basis of liability, somewhere between a contract and a tort. According to Swiss legal doctrine, it is a special form of liability for breaches of trust.
7. Damages incurred in case of a breach of a “pre-contract” are generally lower than damages resulting from a definite contract, given that there is still a chance that no definite agreement will come about. Furthermore, the scope of Article 17(1) of the FIFA Regulations on the Status and Transfer of Players (RSTP) is not limited to definite employment contracts, but also the compensation for breach of a pre-contract can be calculated on this basis.
8. Not only in case of breach of a final contract, but also in case of breach of a pre-contract, the principle of the so-called “positive interest” applies.

I. PARTIES

1. Beijing Renhe FC (the “Appellant” or the “Club”) is a football club with its registered office in Beijing, People’s Republic of China. The Club is registered with the Chinese Football Association (the “CFA”), which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. Mr Marcin Robak (the “Respondent” or the “Player”) is a professional football player of Polish nationality.

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 and at the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.
4. In June 2014, the Club and the Polish football club Pogon Szczecin (“Pogon”) negotiated on a possible transfer of the Player from Pogon to the Club.
5. On 25 June 2014, the Player met with Ms Xiuli Hawken, President of the Club, in London to discuss the possible employment of the Player by the Club.
6. On 26 June 2014, the Club requested the Chinese Embassy to issue a visa in order for the Player to come to China to discuss the details of the employment contract.
7. On 27 June 2014, Mr Pengfei Liu sent a signed “*federative transfer agreement*” (the “Transfer Agreement”) to Pogon.
8. Also on 27 June 2014, Mr Pengfei Liu sent a signed “*draft of foreign football player employment contract*” (the “Draft Employment Contract”) to the Player. The Draft Employment Contract referred to a term of employment of two sporting seasons, *i.e.* from 1 July 2014 until 30 June 2016.
9. The Draft Employment Contract determines, *inter alia*, the following:

“1. [...] *In duration of the contract Party A will pay salary to Party B as follow [sic]:*

2014.07.01-2015.06.30 550,000 EURO NET

2015.07.01-2016.06.30 550,000 EURO NET

Match bonus for every league point is 1000 USD.

4. *Both Parties will sign official contract after the [Player] has passed medical examination in China. The rest of articles and details of official contract will be decided by both Parties through friendly negotiation*".
10. On 3 July 2014, Pogon allegedly returned a duly signed copy of the Transfer Agreement to the Club. Whether or not the Transfer Agreement was validly concluded is currently subject to litigation before the FIFA DRC.
 11. Also on 3 July 2014 (at 18:26 hour CET, *i.e.* GMT + 1), the Player allegedly returned a duly signed copy of the Draft Employment Contract to the Club.
 12. Whereas the Club maintains that the transfer deal was formally broken down on 3 July 2014 (at 09:02 Beijing time, *i.e.* GMT +8), *i.e.* before the Player returned the duly signed copy of the Draft Employment Contract, the Player maintains that the Club's representatives only informed him on 4 July 2014 that they "*considered the transactions as not finalised*", *i.e.* after he returned the duly signed copy of the Draft Employment Contract¹.
 13. On 14 July 2014, the Player called the Club to set a date for his arrival in order to enable him to execute his contractual obligations and to conclude the final contract with the Club.
 14. On 17 July 2014, the Player requested the Club for either the signing of the "final professional football player contract", or for the payment of EUR 1,100,000 as liquidated damages.
 15. Also on 17 July 2014, the Club answered that the Draft Employment Contract could not be executed due to a lack of agreement on the Transfer Agreement.
 16. On 18 July 2014, the Player called the Club to set a date for his arrival in order to enable him to execute his contractual obligations and to conclude the final contract with the Club.
 17. On 28 July 2014, the Player requested the Club to pay the amount of EUR 1,100,000 as liquidated damages for "*not signing the final contract and the unilateral termination of the contract*".
 18. On 29 July 2014, the Club informed the Player that it would not pay said amount, because it did not reach a transfer agreement with Pogon.
 19. On 1 August 2014, the Player signed a new employment contract with Pogon.

B. Proceedings before the Dispute Resolution Chamber of FIFA

20. On 27 August 2014, the Player lodged a claim against the Club with the Dispute Resolution Chamber of FIFA (the "FIFA DRC"), claiming the amount of EUR 1,049,558.81, plus 5% interest. The amount of EUR 1,049,558.81 consisted of EUR 1,100,000 as remuneration between 1 July 2014 and 30 June 2016, EUR 67,245.37 (90 x USD 1,000) as prospected bonus remuneration, minus EUR 117,686.56 corresponding to the amount the Player would receive for the whole period of his new contract with Pogon.

¹ The Player refers in his submissions to the date of 4 June 2014, the Panel however considers this to be a dear typo.

21. On 24 March 2015, the Club submitted its position, requesting the claim of the Player to be dismissed.
22. On 26 November 2015, the FIFA DRC rendered its decision (the “Appealed Decision”), with 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 present decision, compensation for breach of contract in the amount of EUR 330,000 plus 5% interest p.a. on said amount as from 27 August 2014 until the date of effective payment.*

[...]”.
23. On 16 February 2016, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:
 - *“[...] From the outset, the members of the Chamber highlighted that there does not seem to be any disagreement between the parties as to the fact that the terms of the agreement were not performed. [The Club] did not contest such allegation made by the [Player]. The fundamental disagreement between the [Player] and [the Club] – and the central issue to the present dispute – is whether the draft contract signed between the parties established a valid and binding employment contract between the parties.*
 - *[...] Consequently, the Chamber, first and foremost, focused its attention on the question as to whether a legally binding employment contract had been concluded by and between the [Player] and [the Club].*
 - *In this regard, the Chamber recalled that in order for an employment contract to be considered as valid and binding, apart from the signature of both the employer and the employee, it should contain the essentialia negotii of an employment contract, such as (but not limited to) the parties to the contract and their role, the duration of the employment relationship and the remuneration agreed upon between the parties. After a careful study of the draft contract presented by the [Player], the members of the Chamber concluded that all such essential elements are included in the pertinent document, in particular, the fact that the contract establishes that the [Player] is entitled to receive remuneration, including a yearly salary and match bonuses, in exchange for his services to the [Club] as a [Player].*
 - *The Chamber then reverted to the arguments of [the Club] relating to the alleged circumstances that the draft contract did not contain the stamp of the [Club] and the signature of the [Player’s] agent, as well as that the draft contract had been signed on behalf of [the Club] by a non-authorized person, and that as a result of the aforementioned circumstances, the draft contract dated 27 June 2014 has no legal effect.*
 - *In this respect, the members of the Chamber decided that such argumentation cannot be upheld due to the fact that the player was in good faith to believe that the person signing the relevant agreement on behalf of [the Club] was legally authorized to sign it on behalf of [the Club]. In this regard, the Chamber wished to outline that the relevant contract was drafted on the letterhead of the [Club] and that the [Club] never put forward any explanation how Mr Liu Pengfei had obtained a copy of said*

document. What is more, in accordance with the principle of the burden of proof, the DRC outlined that [the Club] never provided documentary evidence demonstrating that the player was aware – at the moment of signing the pertinent agreement – of the alleged situation outlined by [the Club]. Furthermore, the members of the DRC underlined the fact that the validity of an employment contract is not dependent on the fact whether or not the agent of the [Player] signed the document, and/or the question whether the stamp of the [Club] is on the document.

- *In continuation, the Chamber turned to the argument put forward by [the Club] that no valid employment agreement was concluded between the parties, since it did not reach a valid transfer agreement with the former club of the [Player], [Pogon], and the fact that no ITC for the transfer of the [Player] was requested, as a result of which – according to [the Club] – the [Player] was not transferred to [the Club].*
- *In this regard, bearing in mind art. 18 par. 4 of the Regulations, the Chamber considered relevant to recall its jurisprudence in accordance with which the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which are of the sole responsibility of a club and on which a player has no influence. As regards the case at stake, [the Club] argued no ITC was requested. Bearing in mind that according to Annexe 3 of the Regulations an ITC request depends on the new club's application to the new association to register a professional, [the Club] is actually in the position to prevent the occurrence of the condition precedent of receipt of an ITC by wilfully choosing not to proceed with the application for an ITC request. Further, the Chamber observed that the contract dated 27 June 2014 was not made conditional upon the conclusion of a transfer agreement between [Pogon] and [the Club]. For these reasons, the members of the Chamber decided to reject [the Club's] arguments in this regard.*
- *Subsequently, the members of the Chamber turned to [the Club's] argument that according to the draft contract, the signing of the official contract would only take place after a medical examination in China would have been passed. In this respect, according to [the Club], it follows from said stipulation that the draft contract was not the official employment contract and that it can be assumed that [the Club] did not violate article 18 par. 4 of the Regulations, since it had set the medical examination as a prerequisite of signing an official employment contract with the [Player].*
- *In this framework, the members of the Chamber highlighted once more the fact that the draft contract itself contains the essentialia negotii, making it a valid employment contract. Further, the fact that the parties allegedly agreed that a medical examination would take place before signing an additional document, cannot lead to the conclusion that the draft contract was not a valid and binding employment contract. Having said that, the members of the Chamber further referred to art. 18 par. 4 of the Regulations which stipulates that "the validity of a contract may not be made subject to a positive medical examination and/or the granting of a work permit". The fact that the draft contract contained a clause stipulating that a medical examination would take place, is therefore of no influence in the present matter and would not affect the validity and enforceability of the draft contract signed by [the Club] and the [Player]. As a result of the aforementioned circumstances, the members of the Chamber decided to also reject [the Club's] arguments in this regard.*
- *On account of all of the above, the members of the Chamber concluded that by having signed the contract dated 27 June 2014, a valid and legally binding employment contract had been entered into by and between the [Player] and [the Club] on 27 June 2014".*

- Observing that the Club did not contest that it had not performed its obligations under the employment contract, the FIFA DRC established that the Club breached the contract and should pay compensation to the Player. In application of Article 17(1) of the Regulations on the Status and Transfer of Players (the “Regulations”), *“the Chamber proceeded with the calculation of the monies payable to the [Player] under the terms of the employment contract until 30 June 2016 and concluded that the [Player] would have received in total EUR 1,100,000 as salaries had the contract been executed until its expiry date. As regards the [Player’s] claim relating to the estimated loss of USD 90,000 for bonuses relating to the 2014/2015 and 2015/2016 season, the members of the Chamber stressed that the payment and the amount of such bonuses are linked to matches to be played in the future, i.e. after the termination of the relevant contract, and, therefore, are fully hypothetical. Consequently, the Chamber decided not to include these amounts for the calculation of the amount of compensation.*
- *[...] The Chamber noted that, on 1 August 2014, the [Player] had already signed a new employment contract with his former club ([Pogon]) and that, from that date and until 30 June 2016, he was entitled to an income of (approximately) EUR 118,000 during said period of time.*
- *The Chamber further referred to its constant practice and the general obligation to mitigate damages and considered it important to point out that, although the employment contract was fully valid and enforceable, the execution of the contract had never started. The Chamber deemed that such circumstance should be taken into consideration in the calculation of the amount of compensation for breach of contract.*
- *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that [the Club] must pay the amount of EUR 330,000 to the [Player] as compensation for breach of contract.*
- *In addition, taking into account the [Player’s] request, the Chamber decided that [the Club] must pay to the [Player] interest of 5% p.a. on the amount of compensation as of the date on which the claim was lodged, i.e. 27 August 2014, until the date of effective payment.*
- *The Chamber concluded its deliberations in the present matter by establishing that any further claims lodged by the [Player] are rejected”.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 4 March 2016, the Club lodged a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (the “CAS Code”), challenging the Appealed Decision. The Club also applied for a stay of execution of the Appealed Decision and to suspend the proceedings pending the outcome of the *“dispute of transfer agreement between the Appellant and Pogon”* before FIFA. Finally, the Club nominated Mr Lars Halgreen, Attorney-at-Law in Copenhagen, Denmark, as arbitrator.
25. On 14 March 2016, the CAS Court Office provided the Club with a copy of the most recent public preliminary decision rendered by CAS where the question of the stay of execution of a monetary award was decided upon, holding that a decision of a financial nature issued by a

private Swiss association is not enforceable while under appeal. The Club was invited to inform the CAS Court Office whether it wished to maintain or withdrew its application for a stay.

26. On 15 March 2016, the Club filed its Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Club challenged the Appealed Decision, submitting the following requests for relief:

- “1. To cancel the decision made on 26 November 2015 and to order new decision confirming the Appellant does not carry liability of compensation to the Respondent;*
- 2. To further and selectively cancel the original decision and to order new decision declaring the Appellant does not need to pay compensation of EUR 330,000 and 5% interest per annum to the Respondent. This is due to such amount is unreasonably high and without any evidences and legal grounds;*
- 3. To further and selectively suspend the procedures of this case, until the judgment of the dispute of transfer agreement case between the Appellant and Pogon Szczecin S.A. has been decided and effective;*
- 4. To order the cost of appeal to be paid by the Respondent to the Appellant, as the fees of defence;*
- 5. To order all CAS administration cost and cost for arbitrators to be paid by the Respondent to CAS”.*

27. On 18 March 2016, the CAS Court Office granted the Club a deadline of three days to indicate whether it wished to maintain or withdraw its request for stay of execution of the Appealed Decision, failing which the Player would be granted a deadline to file its position on the Club’s application.

28. On 22 March 2016, in the absence of an answer received from the Club, the CAS Court Office invited the Player to file his position on the Club’s application for stay of execution of the Appealed Decision.

29. On 24 March 2016, the Player requested the Club’s application for stay of execution of the Appealed Decision to be dismissed.

30. Also on 24 March 2016, the Player nominated Mr Francesco Macri, Attorney-at-Law in Piacenza, Italy, as arbitrator.

31. On 31 March 2016, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings.

32. On 5 April 2016, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided not to suspend the present procedure.

33. On 8 April 2016, the Player filed its Answer, in accordance with Article R55 of the CAS Code. The Player submitted the following requests for relief:

- “a) sustain a decision of the FIFA Dispute Resolution Chamber rendered on 26th November 2015;*
- b) order the Appellant to pay all the costs of the proceedings to the Respondent;*

- c) order the Appellant to pay to CAS all CAS administration costs and costs for arbitrators”.*
34. On 12 and 15 April 2016 respectively, upon being invited by the CAS Court Office to express their views, the Player informed the CAS Court Office that he did not deem it necessary to hold a hearing, whereas the Club indicated that its preference was for a hearing to be held.
 35. On 13 April 2016, the CAS Court Office provided the parties with an Order on Provisional and Conservatory Measures pronounced by the Deputy President of the Appeals Arbitration Division, dismissing the Club’s application for stay of execution of the Appealed Decision.
 36. On 15 April 2016, the Club requested leave from CAS to be provided with an additional chance to permit the submission of a witness statement of Mr Pengfei Liu and to allow him to participate as a witness.
 37. On 20 April 2016, the Player objected to the filing of new exhibits or further evidence by the Club.
 38. On 4 May 2016, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted as follows:
 - Prof. Dr. Martin Schimke, Attorney-at-Law in Dusseldorf, Germany, as President;
 - Mr Lars Halgreen, Attorney-at-Law in Copenhagen, Denmark; and
 - Mr Francesco Macri, Attorney-at-Law in Piacenza, Italy, as arbitrators.
 39. On 28 June 2016, upon the request of the President of the Panel pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file related to the proceedings leading to the Appealed Decision.
 40. On 29 July 2016, the Club requested the Panel to use its discretion pursuant to Article R44.3 of the CAS Code and to order the examination of Mr Jacques Lichtenstein and Mr Liu Pengfei as witnesses. In addition, the Club requested the Panel to order the Player to produce certain documents.
 41. On 4 August 2016, the Player requested the Club’s requests to be dismissed and submitted further evidence.
 42. On 31 August 2016, the CAS Court Office, on behalf of the Panel, informed the parties as follows:
 - *“The Appellant’s request to order the examination of Mr Pengfei Liu and Mr Jacques Lichtenstein as witnesses is admitted; Mr Jacques Lichtenstein will be heard only with regard to the content of the negotiations between the clubs and between the Appellant and the Respondent;*

- *The Appellant's request that the Panel invite the Polish Football Association to provide copy of the "initial and subsequent employment contracts" entered into between the Respondent and Pogon is dismissed;*
 - *Pursuant to Article R44.3 of the Code of Sports-related Arbitration, the Respondent is ordered to produce a copy of the employment contract entered into between the Respondent and Lech Poznan on 12 June 2015 by 7 September 2016".*
43. On 7 September 2016, the Player provided the CAS Court Office with the employment contract entered into between him and the Polish football club Lech Poznan on 12 June 2015 and an English translation thereof.
44. On 4 October 2016, the Player and the Club returned duly signed copies of the Order of Procedure to the CAS Court Office.
45. On 18 October 2016, the Club informed the CAS Court Office that Mr Lichtenstein failed to respond to the invitation to attend the CAS hearing and that Mr Pengfei Liu would attend the hearing by tele- or video-conference.
46. On 19 October 2016, 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.
47. In addition to the Panel, Mr Daniele Boccucci, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:
- For the Club:
- Mr David Casserly, Counsel;
 - Ms Zhang Rui, Counsel;
 - Ms Ge Qing, Counsel
- For the Player:
- Mr Marcin Robak, the Player;
 - Mr Jan Lukomski, Counsel;
 - Ms Alicja Zapedowska, Interpreter.
48. The Panel heard evidence from Mr Pengfei Liu, liaison of Mr Lichtenstein in China. The witness was invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. Both parties and the Panel had the opportunity to examine and cross-examine the witness in person.
49. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

50. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.
51. On 4 November 2016, the Player submitted the following requests to the Panel:
- I. *Provide the Panel with his statement on claims and arguments made by the Appellant during the Panel's hearing held on 19 October 2016 and testimony given during the hearing by a witness, Mr Pengfei Liu;*
 - II. *Submit a motion to the Panel to allow the Respondent to produce this written statement pursuant to R44.2 of the Code of Sports-related Arbitration;*
 - III. *Submit a motion to the Panel to add to case file two documents, which may have an importance regarding the establishing of the actual facts of the case, i.e. an e-mail sent on 27 June 2014 by Mr Lichtenstein to Mr Pengfei Liu and an e-mail sent on 30 June 2014 by Mr Lichtenstein to Mr Liu and Mr Dayong. The Respondent wishes to underline that these documents were not known to him prior to hearing on 19 October 2016”.*
52. On 8 November 2016, the CAS Court Office, on behalf of the Panel, informed the parties that the Player's letter was unauthorised and unsolicited and, therefore, would not be taken into file.
53. The Panel confirms that it carefully heard and took into account in its 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 arbitral award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

54. The Club's submissions, in essence, may be summarised as follows:
- The Club submits that Mr Pengfei Liu and Mr Jacques Lichtenstein were not authorised by the Club to act as its representative and were therefore not entitled to sign any agreements/contracts on behalf of the Club.
 - The Club argues that the Player's employment contract with Pogon had not expired at the time of conclusion of the Draft Employment Contract with the Club. The Player was therefore not a free agent. The Club could therefore only register the Player with the consent of Pogon. However, no transfer agreement was reached with Pogon. The Club maintains that, regardless of whether it is stipulated in an employment contract between a new club and a player, the conclusion of an effective transfer agreement between the new club and the former club regarding the transfer should be a prerequisite for the player to join the new club successfully. The Club refers to a situation whereby the FIFA DRC will decide that no effective transfer agreement is concluded between the Club and Pogon, then how about the effectiveness of the Draft Employment Contract? The Club believes that it is obviously not able to come into

effect. Because of this reason, the Club requests the proceedings to be suspended pending the outcome of the dispute regarding the Transfer Agreement before the FIFA DRC.

- The Club denies to have signed the Draft Employment Contract. The Club argues that in China a signature must be *“in the format of seal”*. Even in the CFA, *“it strictly demands seal is necessary when clubs sign employment contracts, and also to include “paging seal”*. The Club does not agree with the reasoning of the FIFA DRC in the Appealed Decision that this argumentation cannot be upheld due to the fact that the Player was in good faith to believe that the person signing the relevant agreement on behalf of the Club was legally authorised to sign it on behalf of the Club. Mr Jacques Lichtenstein however had no authority to represent the Club.
- The Club was represented by Ms Hawken, President of the Club, in the meeting with the Player. The Club submits that there was no basis for the FIFA DRC to conclude that the Player was in good faith believing that Mr Pengfei Liu was authorised to represent the Club. With reference to Chinese law, the Club submits that the party claiming “apparent agency” carries the burden of proof in this respect.
- The Club further submits that the Draft Employment Contract does not contain all *essentialia negotii*, because it does not describe the Player’s duties under such agreement. The Draft Employment Contract clearly does not comply with the requirements of an employment contract under the regulations of the CFA.
- The Club also puts forward that the Draft Employment Contract makes a clear distinction between “Draft” and “Official contract” in Article 4. The Player was aware that certain prerequisites had to be fulfilled before an “Official contract” could be signed. By signing the Draft Employment Contract, the Player consented to the above situation.
- The Club furthermore disagrees with the conclusion of the FIFA DRC that, should the Draft Employment Contract be considered validly concluded, the Club is to be held responsible for the premature termination without just cause. The Club finds that also Pogon and the Player himself are responsible. Because of this, the Club’s liability shall be *“responsible for 30% of the liability at most”*.
- The Club maintains that the Player concluded a new employment contract with Pogon 34 days after the conclusion of the Draft Employment Contract with the Club. By being able to sign a new employment contract with Pogon in such short period, the Player can hardly justify that he was willing to establish an employment relationship with the Club and that the compensation for breach of contract claimed by the Player is disproportionate.
- The Club considers the compensation awarded to the Player to be too high and groundless because the Player did not incur any losses, because the Draft Employment Contract was never executed and because the Player’s salary with Pogon between 1

August 2014 and 30 June 2016 was EUR 118,000. At most, the compensation shall therefore be limited to EUR 118,000.

B. The Respondent

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

- The Player maintains that Mr Jacques Lichtenstein acted as intermediary throughout the entire negotiation procedure. However, Mr Pengfei Liu acted as the Club's representative throughout the entire negotiation procedure.
- The Player received the Draft Employment Contract from a person who acted as the Club's representative, it was duly signed in a place where the signature should be made, it contained all the data of the parties and all the conditions regulating their rights and obligations and it had the letterhead of the Club.
- The Player maintains that the person who signed the Draft Employment Contract on behalf of the Club appears to have been Mr Sun Ming, who "*according to current Respondent's knowledge may have been club's director at the time*". The Player concludes that he acted in good faith and had no reason to have any doubts whatsoever that the Draft Employment Contract did not constitute an offer from the Club.
- The Player argues that a valid Transfer Agreement was concluded between the Club and Pogon. It was only because the Club finally did not want to have the Player in its squad that he concluded a new employment contract with Pogon.
- The Player also submits that he accepted the offer of the Club before it made certain reservations regarding its offer. The Player refers to Article 5(1) of the Swiss Code of Obligations ("SCO") in arguing that the Draft Employment Contract was validly accepted and entered into force.
- The Player puts forward that the lack of a club's seal cannot be perceived by any means as a factor that would make the Draft Employment Contract null and void. Even if mandatory under Chinese law, this argument cannot be taken into account as the contract complied with the requirements of FIFA.
- According to the Player, the Draft Employment Contract contains all the *essentialia negotii* of an employment contract and that, based on Article 2(1) of the SCO, it is presumed to be binding notwithstanding any reservation on secondary terms.
- In respect of the new employment contract concluded with Pogon, the Player states that he waited 34 days for the Club to execute the agreement. He therefore missed the entire pre-season. Only after this period he concluded a new employment contract with Pogon.

- The Player also agrees with the Appealed Decision in respect of the compensation for breach of contract awarded to him. The FIFA DRC rightly took into account in its decision the salary that the Player would earn with the Club in determining the compensation to be paid. This element is specifically set out in Article 17(1) of the Regulations. Although the amount of EUR 330,000 is three times lower than the amount claimed, the Player recognizes that the amount awarded is in accordance with well-established jurisprudence of the FIFA DRC.

V. JURISDICTION

56. The jurisdiction of CAS, which is not disputed, derives from Article 67(1) of the FIFA Statutes (2015 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.
57. The jurisdiction of CAS is further confirmed by the parties by means of their signatures on the Order of Procedure.
58. It follows that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY

59. The appeal was filed within the deadline of 21 days set by Article 67(1) of the FIFA Statutes. The appeal complies with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.
60. It follows that the appeal is admissible.

VII. APPLICABLE LAW

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

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
62. The Panel notes that no specific choice of applicable law is made by the parties in the Draft Employment Contract.
63. The Club does not put forward any specific submissions regarding the applicable law, but refers in its submissions to provisions of Chinese contract law.

64. The Player argues that when deciding a dispute before the FIFA DRC, FIFA's regulations shall prevail over any national law chosen by the parties. The Player additionally refers to Swiss law in his written submissions.
65. The Panel is satisfied to accept the primary application of the various regulations of FIFA as the parties elected to submit their dispute to the FIFA DRC and subsequently to CAS.
66. Article 66(2) of the FIFA Statutes determines 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”.
67. The Panel finds that the various regulations of FIFA shall be applied primarily, and subsidiarily Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA. Where the Club specifically relies on Chinese law, the Panel will assess the relevance thereof in respect of such specific references.

VIII. MERITS

A. The Main Issues

68. The main issues to be resolved by the Panel are:
 - i) Was the Draft Employment Contract validly concluded?
 - ii) What is the nature of the Draft Employment Contract?
 - iii) Did the Club breach the Draft Employment Contract?
 - iv) If so, what amount of damages is the Player entitled to receive from the Club?
- i) Was the Draft Employment Contract validly concluded?*
69. The Panel observes that Mr Pengfei Liu testified during the hearing that he was not authorised by the Club to send the Draft Employment Contract to the Player for him to sign it. Rather, he stated that he signed the Draft Employment Contract on behalf of the Club and that he did not inform the Club that he sent this document to the Player. He also testified that he considered to have done nothing wrong as the Draft Employment Contract was not sealed, which is allegedly a legal requirement in China for a contract to be valid.
70. The Panel also observes that the Player testified that he did not verify in any way whether Mr Pengfei Liu was authorised to represent the Club in concluding the Draft Employment Contract. The Player also stated that after the signing of the Draft Employment Contract he waited to be invited to come to China to undergo the medical examination before he would be officially presented as a new player of the Club. The Player considered the medical examination a *“stage that has to happen before getting to the Club”*. Following a question from counsel for the Player

whether he considered that the employment contract was dependent on the result of the medical examination, the Player answered “no”.

71. Although the Panel finds the issue of whether or not Mr Pengfei Liu was authorised by the Club to conclude a contract on its behalf interesting, and despite the extensive submissions and pleadings of counsels in this respect, it does not deem it necessary to examine this issue in more detail because, in any event, the Panel finds that the Club ratified the conclusion of the Draft Employment Contract with the Player afterwards.
72. Indeed, the Player testified that before he received the Draft Employment Contract he met with Ms Hawken, the owner of the Club, and Mr Lichtenstein in London on 25 June 2014 and that he was expecting to receive a contractual proposal from the Club after this meeting. The Player further testified that he received the Draft Employment Contract from his Agent, Mr Symon Patanovski, and that it already contained a signature at the location where the Club was supposed to sign and that it was in compliance with the discussions that had taken place in London earlier.
73. The Panel observes that after the alleged conclusion of the Draft Employment Contract, representatives of the Club made statements such as “[t]he pre-contract could not be executed because the two clubs could not make transfer deal on time” (email of Mr Zhang Yue to counsel for the Player dated 17 July 2014) and “[t]he player employment contract has not been signed due to the reason that the federal rights of the Player was not transferred to Guizhou Renhe FC” (email of Mr Zhang Yue to counsel for the Player dated 29 July 2014), following a request from counsel for the Player to pay the Player compensation for breach of contract based on the Draft Employment Contract (*i.e.* the Club did not deny the existence or the validity of the Draft Employment Contract, but rather argued that no definite employment contract could be concluded and that it therefore did not have any obligations *vis-à-vis* the Player on the basis of the Draft Employment Contract).
74. On the basis of these two statements, the Panel has no doubt to conclude that the Draft Employment Contract was validly ratified by the Club and that the entry into force was not prevented by the lack of authorisation of Mr Pengfei Liu or Mr Lichtenstein. Insofar these two persons were not authorised to conclude the Draft Employment Contract directly with the Player, this omission was repaired by the fact that the Club explicitly acknowledged the existence of the Draft Employment Contract (*i.e.* by means of the reference to “pre-contract” in Mr Zhang Yue’s email of 17 July 2014) and failed to challenge the validity thereof. The Panel finds that the Player could legitimately understand that the Club considered itself to be bound by the Draft Employment Contract. The absence of a seal does not make this any different.
75. Pursuant to a free translation into English of Article 38(1) of the SCO, “[w]here a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract”.
76. Contrary to the position of counsel for the Club at the hearing, the Panel finds that no active ratification was required, but that the passive or tacit ratification of the Draft Employment Contract by the Club sufficed.

77. The Panel feels itself comforted by legal literature in this respect:

“Die (Nicht-)Genehmigung ist grundsätzlich formlos möglich [...] und kann daher auch konkludent, z.B. durch Vertragsdurchführung [...] oder die Berufung auf Rechtsfolgen des Geschäfts [...] erfolgen. Schweigen bedeutet jedoch im Zweifel [...] und jedenfalls bei Fristsetzung nach Abs. 2 Nichtgenehmigung” (HONSELL H. (Ed.), *Obligationenrecht*, 2014, p. 174).

Freely translated into English:

“The (non-)approval is basically informal and can therefore also be implied, for example by execution of the contract or by relying on the legal consequences of the transaction. However, in case of doubt, silence shall mean non-approval, certainly in cases where a time-limit is set”.

78. The Club’s argument that it withdrew the offer in respect of the Draft Employment Contract before it was accepted by the Player must be dismissed for the same reason; the Club ratified the Draft Employment Contract afterwards (*i.e.* again Mr. Zhang Yue’s email of 17 July 2014: *“Mr. Robak was satisfied with our offer”*).

79. Insofar the Club argues that the validity of an effective employment contract was implicitly made conditional upon the conclusion of a transfer agreement between the Club and Pogon, the Panel finds that also this argument must be dismissed. Although a transfer agreement is in some way a tripartite constellation, the Draft Employment Contract in no way indicates that the validity thereof was made conditional upon the conclusion of a contract between one of the parties to the Draft Employment Contract (*i.e.* the Club) and a third party. Importantly however, and as will be examined in more details below, the Panel finds that the Draft Employment Contract is not a definite employment contract, but only a “pre-contract”. The Panel finds that these two kinds of agreements cannot simply be equated.

80. Consequently, the Panel finds that the Draft Employment Contract was validly concluded and entered into force.

ii) What is the nature of the Draft Employment Contract?

81. As already alluded to above, the Panel finds that the Draft Employment Contract cannot simply be equated to a definite/final employment contract. But that does not mean that the parties did not want to legally bind themselves at all through the Draft Employment Contract. What it could be construed as instead is a so-called preliminary contract/pre-contract.

82. According to general principles of law (for Switzerland see for example SFT 113 II 31 p. 35; SFT 118 II 32 p. 33), a preliminary contract is a contract that obligates the contracting parties to conclude another contract under the law of obligations, which is then called the *main contract*. It is a legal act creating a relationship of obligation, which is fulfilled by concluding the main contract. It therefore obligates someone to obligate himself/herself again at a later point in time.

83. The Panel observes that another CAS panel determined the following in respect of “pre-contracts” in football:

“Starting with the argument of the existence of a “precontract”, the Panel first noted that the FIFA Regulations and Swiss law do not provide a specific, explicit definition of a “precontract”. This notion is however well known in legal practice and the Panel would define it as the reciprocal commitment of at least two parties to enter later into a contract, a sort of “promise to contract” (in French: “promesse de contracter”). The clear distinction between a “precontract” and a “contract” is that the parties to the “precontract” have not agreed on the essential elements of the contract or at least the “precontract” does not reflect the final agreement. On the contrary, if the interpretation of the “precontract” leads to the conclusion that the parties agreed on all the essential elements of the final contract, on the basis of the general principles applicable to the conclusion of a contract as defined under Article 1 et seq. of the Swiss Code of Obligations (SCO), the “precontract” would be nothing else but the final contract (see notably Art. 1 and 2 par. 1 SCO). In this respect, the Panel stressed that it was well known that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought. This risk is covered by specific wordings that one can find for instance in letters of intent, which can in some cases be considered as “precontract” as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention that the document is not the final contract and that it does not represent the definitive agreement between the parties” (CAS 2008/A/1589, para. 13).

84. Although the CAS panel in CAS 2008/A/1589 concluded that the relevant contract was not a “pre-contract” but a definite employment contract because it contained all the *essentialia negotii*, the Panel in the present proceedings finds that several elements lead it to the conclusion that the Draft Employment Contract is a “pre-contract” rather than a definite employment contract.
85. First, the word “draft” in the title of the contract already indicates that it is not a final contract.
86. Second, the first sentence of clause 4 of the Draft Employment Contract shows that an “official contract” would be concluded “after the [Player] has passed medical examination in China”.
87. Third, the second sentence of clause 4 of the Draft Employment Contract shows that “the rest of articles and details of official contract will be decided by both Parties through friendly negotiation” [emphasis added by the Panel].
88. Fourth, in his email dated 17 July 2014, Mr Zhang Yue of the Club himself states that “[t]he pre-contract could not be executed because the two clubs could not make transfer deal on time” [emphasis added by the Panel].
89. Other indications for this are that the Draft Employment Contract does not contain a description of the duties of the Player, something you would normally expect to be adopted in a definite employment contract, and fails to set out conditions related to the Player’s accommodation, flight tickets and car.
90. For the reasons set out above, the Panel finds that the Draft Employment Contract does not contain all the *essentialia negotii* and cannot be considered as a definite employment contract.
91. Turning its attention to the finding of the FIFA DRC in the Appealed Decision that an employment contract cannot be made subject to the successful passing of a medical

examination, the Panel finds that this applies in particular to definite employment contracts. Whereas it is clear why definite employment contracts cannot be made subject to a successful medical examination (in absence of objective criteria the fulfilment of this condition is arbitrary because it can be unduly influenced by the Club at will), the Panel fails to see why a “pre-contract” cannot be made subject to such condition. Indeed, specifically in the matter at hand, the Panel finds that it was not unreasonable for the Player and the Club to want some kind of certainty in the form of a “pre-contract” before having the Player come over to China to subject himself to a medical examination.

92. The panel notes and emphasizes in this context in particular the fact that the Player was well aware and accepted that he had to pass the medical examination, before he would get to the Club. By that admission, the Player was therefore not of the impression that the signing of the Draft Employment Agreement alone was a definite and final contract, but that important, medical preconditions had to be fulfilled before a final agreement could eventually come in place.
93. The view that a “pre-contract”, as opposed to a definite employment contract, may be made conditional upon the successful passing of a medical test appears to be supported also by FIFA. For example, in a decision of 24 October 2011, the FIFA DRC Judge reasoned as follows:

“Based on the clear wording of the aforementioned article of the Regulations [Article 18(4)], the DRC judged [sic] was eager to emphasize that par. 3 and 4 of said pre-contract [the clauses based on which the validity of the pre-contract was made conditional upon the successful passing of a medical examination] are to be considered as ambiguous and its application as arbitrary, since they lead to an unacceptable result based on non-objective criteria, which entitles the Respondent to unilaterally terminate the contract depending on the positive results of a medical examination carried out after the signature of the contract. Therefore, the DRC judge concluded that such clause inserted in an employment contract could not be considered as valid and pointed out that the lack of objective criteria by the application of the relevant rule would lead to an unjustified disadvantage of the Claimant’s financial rights and to the destabilization of a contractual relationship concluded in good faith by both parties.

Notwithstanding, the DRC judge was equally eager to stress that the pre-contract, according to the explicit wording of its par. 4, is a temporary agreement and that such condition was known to the Claimant by the time of its signature. By having agreed to sign the pre-contract, the player also accepted the condition of its provisory nature and of its possible, but not necessary, conversion into a permanent employment relationship with the Respondent, in case certain pre-requisites should be fulfilled” (Decision of the FIFA DRC Judge as published on the FIFA website, 24 October 2011, para. 16-17).

94. The Panel finds that by signing the Draft Employment Contract both parties accepted that the Player would have to pass a medical examination in China before a definite employment contract would be concluded.
95. The Panel finds that clause 4 of the Draft Employment Contract is perfectly valid, precisely because a definite employment contract is something else than a “pre-contract”. As alluded to above, one can understand that both the Player and the Club wanted to have some kind of certainty before the Player would come over to China to subject himself to a medical

examination. A medical examination of a football player is indeed a crucial element for a football club in deciding whether to contract a player or not and, in the opinion of the Panel, justifies that the Draft Employment Contract is not considered as a definite employment contract. There is no reason for the Panel to assume that the Club used this clause in bad faith, especially since it never invited the Player to subject himself to a medical examination.

96. Different from the condition in respect of the medical examination, the allegedly implied condition that a transfer agreement would have to be concluded between the Club and Pogon before a definite employment contract could be concluded with the Player is not adopted in the Draft Employment Contract.
97. The issue of whether a “pre-contract”, or indeed a definite employment contract, is automatically conditional upon the conclusion of a transfer agreement, regardless of whether such condition is explicitly set out in the relevant contract, is an important question for the practice of transferring football players. The Panel finds that it would indeed have been for the Player and the Club to make the Draft Employment Contract explicitly conditional upon the conclusion of a valid transfer agreement between the Club and Pogon. The Panel considers it important in this respect that a player usually does not have any influence on the negotiations between the two clubs, whereas the player’s new club, by acting in one way or another, can unilaterally decide whether this condition will be complied with or not.
98. The Panel considers this interpretation to be in line with jurisprudence of the FIFA Players’ Status Committee (the “FIFA PSC”):

“[T]he Regulations are based on the following concept: first, the player’s former club and the new club should find an agreement and sign the relevant contract regarding the transfer of the player. Then, the medical examination should be performed and only then, with these prerequisites established and after careful research and taking all appropriate steps, the player and his new club should sign an employment contract” (Decision of the Single Judge of the FIFA PSC as published on the FIFA website, 19 March 2013, para. 14).
99. Indeed, the ordinary course of events for the Club would be to first conclude a transfer agreement with Pogon and only subsequently an employment contract. In the light of this, the Panel finds that it would have been for the Club to make explicitly clear to the Player that the validity of the Draft Employment Contract was conditional upon the conclusion of a transfer agreement with Pogon.
100. The Panel finds that, under the specific circumstances in the matter at hand, the Player and the Club clearly did not have the intention to conclude an official binding employment contract as both were aware that certain conditions would have to be complied with before it would enter into force. The Draft Employment Contract served as some kind of warranty for the contractual parties that they would not withdraw from the negotiations lightly and, indeed, already agreed on some of the main terms of the employment relationship.
101. Consequently, the Panel finds that the Draft Employment Contract is to be considered as a “pre-contract” rather than a definite employment contract.

iii) Did the Club breach the Draft Employment Contract?

102. As explained above, a preliminary contract is a contract under the law of obligations that creates the obligation to conclude a main contract at a later point in time. It already follows from this that a party to the preliminary contract is not entirely free to exclude itself from the negotiations in relation to the concluding of a final agreement. Instead, the parties must negotiate in good faith and should not abandon the negotiations without a compelling reason for doing so.
103. This duty to act in good faith already exists in fact at the time of contractual negotiations – *i.e.* independent of the existence of a written preliminary contract, letter of intent, or similar things – and is known as *culpa in contrahendo*. *Culpa in contrahendo* under the here applicable Swiss Law means the negligent/intentional breach of pre-contractual duties. A finding of *culpa in contrahendo* requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault [includes intent and negligence]. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is later concluded – certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner. It essentially constitutes an independent basis of liability, somewhere between a contract and a tort. According to Swiss legal doctrine, it is a special form of liability for breaches of trust (see for example SFT 120 II 331 p. 335, 336).
104. It is clear that the aforementioned duties would have to apply even more so when the contractual negotiations have already found their way into a written preliminary contract, as in the one concluded by the Club and the Player in the present case.
105. Taking all this into consideration, the Panel finds that the Club did not negotiate the conclusion of a definite employment contract in good faith because it did not invite the Player to come to China to subject himself to the medical examination referred to in the Draft Employment Contract. Rather, the Club explicitly instructed the Player not to come to China. By doing so, the Club clearly violated a specific commitment that it had already made at the level of the preliminary contract. In other words, the inviting of the Player was definitely the next step towards the concluding of a final employment contract, and it was something that the Player was entitled to expect and to demand and through which the Club – at least for the time being – would have fulfilled its duties to act in good faith as described above.
106. Indeed, the Panel finds that the reason invoked by the Club for abandoning the negotiations (*i.e.* the fact that an employment contract could not allegedly be concluded with Pogon) is not a valid reason as this was not a condition explicitly set out in the Draft Employment Contract. The fact that a valid transfer agreement could not allegedly be concluded with Pogon is something that falls within the responsibility of the Club.
107. The Club did not submit any other reasons that might have justified the breaking off of the negotiations.

108. Consequently, the Panel finds that the Club breached its obligations *vis-à-vis* the Player under the Draft Employment Contract and is liable for the failure to sign the “official” contract, *i.e.* the final Employment Contract in the form requested by the CFA.

iv) If so, what amount of damages is the Player entitled to receive from the Club?

109. Just like the obligations deriving from a “pre-contract” are not the same as those deriving from a definite contract, the damages resulting from a “pre-contract” are not the same either. Indeed, the damages incurred in case of a breach of a “pre-contract” are generally lower as one needs to be conscious that there is still a chance that no definite agreement will come about.

110. Even if the Panel would follow the Club’s argument and conclude that no transfer agreement was concluded because of Pogon (*i.e.* Pogon being the wrongdoer), the Panel finds that Pogon cannot be held responsible for the Club’s breach of the Draft Employment Contract, for Pogon is not a party thereto. The Panel finds that the Club is therefore solely liable for any damages incurred by the Player.

111. In the matter at hand, the Player found new employment soon after the breach. His damages therefore remained fairly limited because the Player successfully mitigated his damages.

112. The Panel finds that the Player, on the one hand, lost a significant financial opportunity if one compares the terms of the Draft Employment Contract with the employment contract finally concluded with Pogon, however, on the other hand, it was for example not certain that the Player would pass the medical examination had he been invited to undergo such examination and that the parties would reach an understanding in respect of the “*rest of the articles and details of official contract*” in accordance with clause 4 of the Draft Employment Contract. The Panel finds that this uncertainty must be taken into account in awarding compensation for breach of contract to the Player.

113. The Panel finds that the scope of Article 17(1) of the Regulations is not limited to definite employment contracts, but that also the compensation for breach of a “pre-contract” can be calculated on this basis. Indeed, Article 17(1) of the Regulations is headed “*consequences of terminating a contract without just cause*”.

114. Article 17(1) of the Regulations determines as follows:

“In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration 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 five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period”.

115. The Panel takes due note of previous CAS jurisprudence establishing that the purpose of Article 17 of the Regulations is basically nothing else than to reinforce contractual stability, *i.e.* to

strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player (CAS 2008/A/1519-1520, para. 80, with further references to: CAS 2005/A/876, p. 17: “[...] it is plain from the text of the FIFA Regulations that they are designed to further ‘contractual stability’ [...]”; CAS 2007/A/1358, para. 90; CAS 2007/A/1359, para. 92: “[...] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability [...]”; confirmed in CAS 2008/A/1568, para. 6.37).

116. In respect of the calculation of compensation in accordance with Article 17 of the Regulations and the application of the principle of “positive interest”, the Panel follows the framework as set out by a previous CAS Panel as follows:

“When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.

As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or “expectation interest”), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.

The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also Wylter, Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (...).

The principle of the “positive interest” shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations” (CAS 2008/A/1519-1520, at para. 85 et seq.).

117. The Panel finds that the legal framework set out above and the principle of positive interest are applicable to the present case and that it has a considerable scope of discretion in awarding compensation.
118. The Panel notes that the Draft Employment Contract refers to a starting date of 1 July 2014, whereas the Player only found new employment with Pogon on 1 August 2014. The Player therefore certainly incurred damages in this specific month, that is the loss of the salary, but, on

the other side, as the aggrieved party, he did not provide the proof of any other specific expenses or damages except the total amount written in the pre-contract.

119. The Club submits that its liability shall be limited to 30% of the losses as recognised by the FIFA DRC in the Appealed Decision. The Club argues that it shall be taken into account that the Draft Employment Contract was signed on 27 June 2014 and that the Player already found new employment on 1 August 2014. The Club concludes that the compensation to be awarded to the Player shall in any event not be higher than EUR 118,000 (which is equivalent to the Player's salary with Pogon between 1 August 2014 and 30 June 2016).
120. The Player argues that the assessment made by the FIFA DRC in respect of the compensation awarded to him is in accordance with the Regulations and well-established jurisprudence of the FIFA DRC and that the resulting amount of compensation of EUR 330,000 is fair.
121. Under the circumstances, the Panel considers it just and fair that the Club shall compensate the Player with the salary he would have received during this month if a definite employment contract would have been concluded with the Club. Since the Club was supposed to pay the Player an annual salary of EUR 550,000 net, the Player would normally have received a monthly salary of EUR 45,833 net.
122. Due to the flagrant difference between the salary that the Player was supposed to earn with the Club (EUR 1,1 million net for the 2014/2015 and 2015/2016 sporting season) and the salary due on the basis of the employment contract concluded by the Player with Pogon (EUR 173,048 for the 2014/2015 and 2015/2016 sporting season – although the Club argued during the hearing that this amount is EUR 183,048), the Panel deems it appropriate to award the Player the equivalent of at least another month salary under the terms of the Draft Employment Contract (*i.e.* in any case further EUR 45,833). Taking into account all circumstances and the course of the events, the Panel is of the view that a total compensation of EUR 100.000 is just and fair in the case at hand.
123. Consequently, the Panel finds that the Club shall pay compensation for breach of the Draft Employment Contract to the Player in the amount of EUR 100.000, with interest at a rate of 5% *p.a.* accruing as from 18 July 2014 (*i.e.* the date after the Club first confirmed to the Player that the Draft Employment Contract could not be executed).

B. Conclusion

124. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:
 - i) The Draft Employment Contract was validly concluded and entered into force.
 - ii) The Draft Employment Contract is to be considered as a “pre-contract” rather than a definite employment contract.
 - iii) The Club breached its obligations *vis-à-vis* the Player under the Draft Employment Contract.

- iv) The Club shall pay compensation for breach of the Draft Employment Contract to the Player in the amount of EUR 100,000, with interest at a rate of 5% *p.a.* accruing as from 18 July 2014.

125. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 4 March 2016 by Beijing Renhe FC against the decision issued on 26 November 2015 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is partially upheld.
2. Beijing Renhe FC is ordered to pay compensation for breach of contract to Mr Marcin Robak in the amount of EUR 100,000 (one hundred thousand Euro) with interest at a rate of 5% (five per cent) *per annum* accruing as from 18 July 2014.

(...)

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