Arbitration CAS 2016/A/4704 Liaoning FC v. Wisdom Fofo Agbo & Chinese Football Association (CFA), award of 6 April 2017

Panel: Prof. Martin Schimke (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Pat Barriscale (Ireland)

Football
Contractual dispute
Determination of the law applicable to the dispute
Respondent's standing to be sued
De novo proceedings
Admissibility of new documentation presented at appeal level
Condition for the entitlement to receive a contractual sign-on fee

1. **If an employment contract admittedly drafted by the club has an unclear wording, said contract explicitly referred to the dispute resolution system of the Fédération Internationale de Football Association (FIFA) and of the national football association, the parties implicitly chose the application of FIFA rules and regulations and of Swiss law by conferring jurisdiction to the CAS, and the aforementioned club failed to specify and to substantiate which provisions of national law might apply to the dispute, the parties' dispute must be decided pursuant to the various FIFA rules and regulations and subsidiarily pursuant to Swiss law.**

2. **If a respondent was not a party to the FIFA proceedings that led to the appealed decision and in the absence of said respondent's consent or of any specific procedural provisions of the FIFA Statutes and regulations and/or of the CAS Code that would allow one appellant to join/implead said respondent by a process analogous to a third party choice, said respondent cannot be compelled to participate in the proceedings related to said appealed decision.**

3. **The facts and the law are examined *de novo* by a CAS panel in accordance with the power bestowed on it by article R57 of the CAS Code. The panel is therefore not limited to the facts and legal arguments of the previous instance. In relation to issues regarding the procedure at the lower instance, it is well-established in CAS' case law that procedural defects in the lower instances can be cured through the *de novo* hearing before CAS.**

4. **The provisions of art. R57 para. 3 of the CAS Code needs to be implemented with restraint, *i.e.* in cases of abuse or bad faith, so as to preserve the fundamental *de novo* character of the review by the CAS.**

5. The signing fee is a contractual obligation and is not performance-related. In lack of any deviating agreement between the parties, upon signature/conclusion of the employment contract, a player's claim to the signing fee comes into existence and its amount is due, independently on the duration of the contractual relationship.

I. PARTIES

1. Liaoning Football Club (the "Appellant" or the "Club") is a football club with its registered office in Shenyang, China. The Club is registered with the Chinese Football Association.

2. Mr Wisdom Fofo Agbo (the "First Respondent" or the "Player") is a professional football player of Hong Kong nationality.

3. The Chinese Football Association (the "Second Respondent" or the "CFA") is a member of the *Fédération Internationale de Football Association* ("FIFA").

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts as established by the submissions made by the parties and the evidence examined in the course of the proceedings. 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 later legal discussion.

A. Background Facts

5. On 25 February 2015, the Club and the Player concluded an employment contract (the "Employment Contract"), valid from the date of its signing to 31 December 2015.

6. The Employment Contract states, *inter alia*, that

- the Player *"must be responsible to join the whole 2015 season's matches, before leaving the team"*;
- the Player has to *"[p]articipate in all matches, team training and special training discussions as well as other activities organized by the [Club]"*. (…) He *"cannot refuse to attend with any excuse"*.

7. Regarding the Player's salary, the Employment Contract contains, *inter alia*, the following terms:

> *"Article 10: Salary and Bonuses*
>
> *1. Salary: During the contractual period, [the Player's] month salary is 10.900 USD (net), The annual salary of 2015 for [the Player] reaches a total amount of 120.000 USD (net) which shall be paid to [the Player] evenly by 11 months in 2015, siganature* [sic] *fee for [the Player] in 2014 is: 50.000 USD (net).*

2. Each month of 15th, [the Club] will pay the last month salary to [the Player]".

8. On 27 February 2015, the Player participated in his first and only training session for the Club.

9. On 1 March 2015, the Player requested the Club to grant him leave to go to Canada to visit and take care of his wife who had suffered a car accident. The Club granted the Player leave.

10. On 31 March 2015, the Player requested the Club to extend his leave as his wife was still in poor physical condition. The Club accepted the Player's request for an extension of his leave.

11. A returning date was never fixed. And in fact, the Player never returned to the Club.

12. On 14 January 2016, the Player signed an "Announcement" (the "Announcement" or the "Termination Letter"), which contained the following wording:

> *"I am FOFO (…) here announce that I did not play for Liao Ning Football Club in the season of 2015 CSL because of my own problem (emergency happened from my family member) and now I want to terminate the contract with Liao Ning Football Club give up all the power and all the money in the contract e.g.: salary, signfee* [sic]*, bonus and so on in the contract and myself will not appeal any kinds of money from anywhere like: CFA and FIFA. And here I apply to the club do not appeal myself any kinds of money from any where like: CFA and FIFA. And allowed me to transfer to any club as a free player. Thanks a lot for your cooperation and understanding".*

B. Proceedings before the FIFA Dispute Resolution Chamber

13. On 30 June 2015, and completed on 28 September 2015, the Player brought a claim against the Club to the FIFA Dispute Resolution Chamber (the "FIFA DRC") requesting payment of his salaries *"for six months, from February 2015 to present (August 2015), plus my signing-fee (of $50,000)".*

14. On 14 October 2015, the FIFA DRC sent a fax to the CFA with the following wording:

> *"Dear Sir,*
> *We wish to inform you and your affiliated club, Liaoning FC, that the player, Wisdom Fofo Agbo lodged a claim against Liaoning FC in front of FIFA. In this respect, please find enclosed herewith a copy of the player's correspondence for your and Liaoning FC's perusal.*
>
> *In view of the foregoing, we kindly invite Liaoning FC to provide us with its position to the claim lodged by the player, along with any documentary evidence it deems useful in its support,* ***by no later than 3 November 2015.***
>
> *(…)*
>
> *With reference to art. 9 par. 5 of the Procedural Rules, we kindly ask the Chinese Football Association to immediately forward the present documents to Liaoning FC, which are considered to have been communicated*

properly to Liaoning FC within the next four days. In this regard, we wish to highlight that according to art. 9 par. 5 of the Procedural Rules failure by the Association to comply with this instruction may result in disciplinary proceedings in accordance with the FIFA Disciplinary Code.

We thank you in advance for your kind cooperation in this matter and for forwarding the present documents to Liaoning FC without delay.

Yours faithfully

On behalf of the Dispute Resolution Chamber

Mario Flores Chemor Legal Counsel Players' Status".

15. On 4 December 2015, the FIFA DRC sent a fax to the CFA stating that it had not received any correspondence from the Club in response to the fax dated 14 October 2015. The FIFA DRC notified the CFA in the same letter that the investigation phase of the present matter was closed and no further submissions from the parties would be admitted to the file. Furthermore, the FIFA DRC requested that the CFA provide it with a fax number for the Club and to forward the present fax to the Club.

16. On 7 December 2015, by fax dated 7 November 2015, the CFA declared to FIFA that the Club's fax number was 0086-24-31877344.

17. On 10 March 2016, the FIFA DRC sent a fax to the CFA in which the CFA was informed that the matter at hand was going to be submitted to the FIFA DRC for a formal decision on 18 March 2016. This fax was also sent to the supposed fax number of the Club (0086-24-31877344). The fax could not be sent to said number; FIFA DRC received a (fax) NON Delivery Notification.

18. On the same day, *i.e.* on 10 March 2016, the FIFA DRC sent a fax to the CFA with the following wording:

"Dear Sirs,

We revert to the above-mentioned matter and wish to provide you with another copy of our letter of today, which we enclose hereto.

Since it appears that the fax number of your affiliated club, Liaoning FC is not operative, we kindly ask you to ***immediately*** *forward our letter of today to your affiliated club.*

We thank you in advance for your valuable cooperation and for informing your affiliated club, Liaoning FC of the above.

Yours faithfully

On behalf of the Dispute Resolution Chamber

Mario Flores Chemor Legal Counsel Players' Status".

19. On 10 or 11 March 2016, the Appellant received FIFA's letter of 10 March 2016, which had been forwarded by the CFA.

20. On 15 March 2016, the Club informed FIFA that the Club had not been aware of the pending FIFA proceedings until receipt of the faxes of 10 March 2016. The Club demanded that FIFA – *inter alia* – provide the Club with the Player's written submissions, that it grant the Club permission to file submissions within 24 hours, and that it grant the Club the right to submit new evidence at a later stage. The Club claimed that there had been no dispute between the Club and the Player. Furthermore, the Club referred to the Announcement signed by the Player in which he was purported to have waived all pecuniary claims stipulated in the Employment Contract.

21. On 16 March 2016, FIFA granted the Club a 24-hour deadline to provide a document from the CFA in which the CFA declared that it had not forwarded to the Club the claim lodged by the Player.

22. On 17 March 2016, the Club informed FIFA that it had requested the demanded document from the CFA. The Club claimed that it could not be confirmed with certainty that the CFA had properly forwarded the FIFA communications to the Club, due to the fact that the CFA was unable to find a corresponding fax delivery notification. Furthermore, the CFA had not yet replied to the Club's written request. The Club demanded that FIFA declare the closure of the case or, alternatively, extend the investigation phase and send to the Club the Player's written submissions.

23. On 18 March 2016, the FIFA DRC passed the following decision (the "Appealed Decision")

> 1. *The claim of the Claimant, Wisdom Fogo Agbo, is accepted.*
>
> 2. *The Respondent, Liaoning FC, is ordered to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, the amount of USD 115,400.*
> 3. *In the event that the amount due to the Claimant in accordance with the above-mentioned number 2. is not paid by the Respondent, interest at the rate of 5% p.a. will fall due as of expiry of the aforementioned time limit and the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.*
>
> 4. *The Claimant is directed to inform the Respondent, immediately and directly, of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

24. On 1 April 2016, the Appealed Decision was delivered to the parties.

25. On 11 April 2016, the Club requested that FIFA provide it with the grounds of the Appealed Decision.

26. On 17 June 2016, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

> *5. Subsequently, the Chamber took note that the Respondent's reply was submitted to FIFA only after the parties had been duly informed that the investigation-phase of the matter at hand had been closed and that no further submissions would be admitted to the file.*
>
> *6. With the aforementioned in mind, the DRC referred to art. 9. Par. 3 of the Procedural Rules, in accordance with which if no statement or reply is received before the time limit expires, a decision shall be taken upon the basis of the documents already on the file, as well as to art 9. Par. 4 of said rules which stipulates that parties shall not be authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation.*
>
> *7. The DRC decided thus not to take into consideration the reply of the Respondent when assessing the matter at hand. Consequently, the members of the DRC concluded that they shall take a decision upon the statements and documents presented by the Claimant only.*
>
> *8. As a consequence of the aforementioned, the members of the Chamber duly noted that according to the Claimant, the Respondent had failed to pay his salaries "for six months, from February 2015 to present (August 2015)".*
>
> *9. Taking into account the documentation presented by the Claimant in support of his petition, the DRC concluded that the Claimant had substantiated his claim pertaining to outstanding remuneration with sufficient documentary evidence. Nevertheless, the Chamber emphasised that, as the contract was concluded on 25 February 2015 and that the latter provided for 11 monthly salaries, the first salary was payable in March 2015.*
>
> *10. On account of the aforementioned considerations, the DRC established that the Respondent failed to remit the Claimant's remuneration in the total amount of USD 115,400 corresponding to his salaries as of March 2015 until August 2015 plus the sign-on fee.*
>
> *11. Consequently, the Chamber decided that, in accordance with the general legal principle of pacta sunt servanda, the Respondent is liable to pay the Claimant outstanding remuneration in the total amount of USD 115,400.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 8 July 2016, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 *et seq.* of the Court of Sports-related Arbitration (the "CAS Code"). In its submissions, the Appellant requested the Appeal to be heard by a Sole Arbitrator appointed by the President of the CAS Appeals Arbitration Division.

28. By letter dated 11 July 2016, the CAS Court Office requested the Club to complete the Appeal according to Article R48 para. 3 of the CAS Code, namely to provide the CAS Court Office with the full address of the First Respondent, within three days.

29. On 15 July 2016, the Appellant informed the CAS Court Office that it had tried its best to obtain the address of the First Respondent, by repeatedly contacting FIFA, the Asian Football Confederation, the Player himself, the Hong Kong Football Association, and the new club of the Player, namely the South China Football Team, but none of the parties had been willing to provide the Club with the address. The Club requested CAS to accept the address of the South China Football Team as the official address of the Player.

30. On 18 July 2016, the Appellant informed the CAS Court Office that it had contacted FIFA again on 15 July 2016, requesting the address of the Player and informing it that the Club was waiting for FIFA's answer. The Appellant informed CAS that it had contacted the Hong Kong Football Association and also the Player himself and had asked them for the Player's address but had been unsuccessful. The Appellant reiterated that, in any case, the address of the South China Football Team was sufficient for CAS to consider it as the official address of the Player.

31. On 18 July 2016, the CAS Court Office initiated the present proceedings and invited the Respondents to provide their positions with respect to the Appellant's request that a Sole Arbitrator be appointed within a deadline of 5 days.

32. On 18 July 2016, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code. The Appellant submitted the following requests for relief:

> 1. *Fully accept the present appeal against the Decision of the FIFA Dispute Resolution Chamber dated 18th March 2016;*
>
> 2. *Determine that:*
>
> a. *To set aside the appealed FIFA Decision;*
> b. *Declare that no compensation shall be paid to the Respondent;*
> c. *Request FIFA to provide the Appellant with the Claim submitted by the Respondent before FIFA DRC;*
> d. *Condemn the Respondent to pay the entirety of the CAS Costs;*
> e. *Condemn the Respondent to pay the Appellant a compensation for the legal fees and expenses incurred in relation with this case.*
>
> *Alternatively,*
>
> 3. *In case the Honourable Panel finally determines that CFA is finally needed to be considered as a party (Second Respondent) in this procedure:*

a. Request the CFA the disputed sending proof of the facsimile sent to the Appellant with regard to the Claim.

33. On 20 July 2016, the Player himself replied that he did not agree with the Appellant's request for a Sole Arbitrator.

34. On 26 July 2016, the CAS Court Office noted that the Second Respondent had not provided its position on the Appellant's request for a Sole Arbitrator. In addition, the CAS Court Office invited the Respondents to state whether they intended to pay their shares of the advance of costs in the present proceedings.

35. On 29 July 2016, the Player informed the CAS Court Office that he intended to pay his share of the advance of costs.

36. On 2 August 2016, the CAS Court Office noted that the Second Respondent had failed to state whether it was intending to pay its share of the advance of costs and informed the parties that the President of the CAS Appeals Arbitration Division would decide on the number of arbitrators in due course.

37. On 3 August 2016, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the present matter to a Panel of three arbitrators.

38. On 8 August 2016, the Player filed his answer in accordance with Article R55 of the CAS Code. The Player submitted the following requests for relief:

a. Reject and throw out the Appellant's appeal;
b. Uphold and confirm the FIFA DRC decision of 18 March 2016;
c. Enforce the FIFA DRC decision of 18 March 2016;
d. Order the Appellant to reimburse the Respondent for legal expenses incurred;
e. Query and determine a punishment for the Appellant.

39. On 12 August 2016, the Appellant nominated Mr Michele Bernasconi, Attorney-at-law in Zurich, Switzerland, as an arbitrator.

40. On 17 August 2016, the CAS Court Office noted that the Second Respondent had failed to file an answer to the Appeal Brief within the prescribed deadline or any other communication in the present proceedings. In the same letter, the CAS Court Office asked the parties whether they preferred a hearing to be held in this matter or the issuing of an award by the Panel based solely on the Parties' written submissions.

41. By letter dated 23 August 2016, the Appellant announced its preference for the Panel to issue an award based solely on the parties' written submissions and, should the Panel need further clarification from the parties, suggested a second round of written submissions instead of a hearing.

42. On 23 August 2016, the CAS Court Office noted that the Respondents had failed to jointly nominate an arbitrator within the prescribed deadline. The parties were informed that the President of the CAS Appeals Arbitration Division, or her Deputy, would appoint an arbitrator *in lieu* of the Respondents.

43. On 24 August 2016, the Player informed the CAS Court Office of his preference for an award based solely on the parties' written submissions and submitted that a second round of submissions should be allowed if the Panel considered it necessary.

44. On 4 October 2016, in accordance with Article R54 of the CAS Code and on behalf of the President of the CAS Appeal Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted as follows:

> Prof. Martin Schimke, Attorney-at-Law in Dusseldorf, Germany, as President;
> Mr Michele Bernasconi, Attorney-at-Law in Zurich, Switzerland; and
> Mr Pat Barriscale, Barrister in Limerick, Ireland, as Arbitrators.

45. On 11 October 2016, FIFA informed the CAS Court Office that it was renouncing its right to intervene in the present arbitration proceedings.

46. On 8 November 2016, FIFA, upon request of the Panel pursuant to Article R57 of the CAS Code, provided CAS with a copy of its file of the present matter.

47. On 5 December 2016, the CAS Court Office informed the parties of the Panel's decision to allow a further round of submissions, limited to the rationale and circumstances surrounding the *"Announcement 14 January 2016"*. The Appellant was granted a deadline of 20 days for filing its submissions in this respect. The Player was granted a similar deadline of 20 days from the receipt of the Appellant's additional submissions for filing his reply thereto.

48. On 23 December 2016, the Appellant filed its submissions to the *"Announcement 14 January 2016"*.

49. On 12 January 2017, by letter dated 12 December 2016, the Player filed his reply to these submissions of the Club.

50. On 19 January 2017, and after further consultation of the parties on 12 January 2017, the CAS Court Office informed the parties that the Panel had decided to render an award on the basis of the parties' written submissions.

51. On 24 January 2017, the Player signed the Order of Procedure and returned it to the CAS Court Office.

52. On 25 January 2017, the Club signed the Order of Procedure and returned it to the CAS Court Office.

53. In particular, the Appellant and the First Respondent expressly confirmed that their right to be heard has been respected.

54. On 31 January 2017, the CAS Court Office noted that the Second Respondent had failed to sign and return the Order of Procedure within the prescribed deadline.

55. By letter dated 4 February 2017, the Appellant filed additional submissions.

56. By letter dated 6 February 2017, the Player filed a reply thereto and requested that the Panel decide on the admissibility of said letter of the Appellant.

57. On 7 February 2017, the CAS Court Office informed the parties that the Panel declared the letters of the parties dated 4 and 6 February 2017 as inadmissible and irrelevant.

IV. SUBMISSIONS OF THE PARTIES

58. The Panel confirms that it had carefully taken into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if they are not specifically summarised or referred to in the present Arbitral Award.

A. The Appeal

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

- First, the Appellant claims a violation of the right to be heard and alleges that it had not been properly informed about the proceedings before the FIFA DRC. Prior to 10 March 2016, the Club had never been informed by FIFA or by any other third party of the present dispute. In the letter dated 10 March 2016, it had only been informed that the matter at hand would have been submitted to a meeting of the FIFA DRC on 18 March 2016. The Club did not have any chance to defend itself in the proceedings before the FIFA DRC. The Club informed FIFA about the procedural irregularities but had not succeeded in being given a fair proceeding. In addition, FIFA had failed to take the submitted Announcement signed by the Player into consideration in the Appealed Decision.

- The Club was neither at fault nor was it guilty of any negligence in the proceedings before the FIFA DRC. The Club could not be held responsible for the CFA's failure to forward FIFA's correspondences to the Club. Therefore, in its decision, CAS must take into consideration the full content, including all the facts, statements, and evidence of the present appeal, *i.e.* the appeal submissions should not be limited in any way and every right of the Club that may have been violated during the first instance proceedings must be subsequently cured by means of the present appeal. If this is the case, the

Appellant's request to include the CFA as the Second Respondent should be automatically withdrawn.

- Regarding the financial obligations set out in the Employment Contract, the Appellant argues that the Player is not entitled to any compensation.

- The Player participated in only one training session for the Club. The Player did not play in one single official match arranged by the Club. The Player did not fulfil any of his obligations of the Employment Contract. Because the Respondent did not perform for the Club, the Club was not obligated to pay the salaries, *i.e.* it was not obligated to unilaterally perform its obligations under the Employment Contract. In addition, the Employment Contract expressly provides that the Player must – *inter alia* – participate in the 2015 season's matches before leaving the team. Similar rules and wording are provided in the CFA Basic Requirements for Players' Labour Contracts and in CAS jurisprudence.

- The Club granted the Player temporary leave. However, the granting of such leave does not mean that the Player has the right to decide how long that leave will be. The Player should have returned within a reasonable time at least. Instead, he was absent for the whole season.

- The Player failed to prove that he is entitled to the salaries for the time of his leave. According to CAS jurisprudence, the Player has the burden of proving that the Club authorized or acquiesced in the Player's various absences, that the Club acquiesced in or agreed to the duration of each of these absences, and that the Club agreed to continue paying the Player's salary during his absence.

- The Player never notified the Club before filing his claim before the FIFA DRC. In accordance with established CAS jurisprudence, the Player should have sent a reminder or a notice of default to the Club before filing the claim.

- Finally, the Appellant argues that, in the Announcement, the Player expressly, voluntarily, and consciously waived/renounced all pecuniary claims in the Employment Contract.

- The Player requested the Club to provide him with a release letter confirming his free-agent status. After this conversation, both parties amicably agreed to the mutually exchange the release letter and the Announcement. The Club demanded the Announcement as a means of protecting itself against any potential claims by the Player in relation to the Employment Contract. The Player never raised any objections to exchanging the Announcement. Furthermore, the Club never refused to send a release letter to the Player. The Player's allegations that he had no option but to sign the Announcement are groundless.

- A connection between the Announcement and the procedure before FIFA cannot be established because at that time the Club was not aware of the dispute.

B. The answer from the Player

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

- Regarding the alleged violation of the right to be heard, the Player argues that the Appellant intentionally ignored FIFA's letters and notifications. The CFA was not entirely responsible for forwarding FIFA's correspondence to the Club.

- As to the Club's financial obligation towards the Player, the Player argues that the Club granted him leave to go to Canada.

- The Club breached the Employment Contract by not fulfilling its obligations to pay the sign-on fee and the salaries to the Player.

- The Player had on several occasions requested his (outstanding) salary from the Club. Therefore a dispute had arisen between the parties, which led to the filing of the claim with FIFA.

- The special circumstances that led to the Player's leave to go to Canada are comparable to a situation in which a player gets injured. In such situations, a club has to continue paying the player's salary.

- The Player asked the Club for a release letter, but the Club refused to provide him with such a letter before a termination letter was signed.

- Because of this, the Player signed the Announcement in exchange for a release letter so that he could play for another club. The Announcement was signed two weeks after the Employment Contract expired and is therefore null and void.

C. The answer from the CFA

61. As stated above, the CFA has failed to file an answer within the deadline prescribed at Article R55 of the CAS Code.

V. JURISDICTION

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

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

accordance with the statutes or regulations of that body".

63. CAS' jurisdiction derives from this provision and Article 58 para. 1 of the FIFA Statutes (edition 2016), which 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".*

VI. ADMISSIBILITY

64. Since the appeal was submitted by the Appellant within the deadlines provided for by Article R49 of the CAS Code as well as by Article 58 of the FIFA Statutes (edition 2016), it is admissible. It also complies with all other requirements set forth in Article R48 of the CAS Code. Moreover, the Respondents did not challenge the admissibility of the appeal.

VII. APPLICABLE LAW

65. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

66. Article 57 para. 2 of the FIFA Statutes (edition 2016) provides:

> *"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. Article 23 of the Employment Contract provides:

> *"This contract comes with in the jurisdiction of the Chinese law; any dispute will be resolved by consolation. If it is cannot be resolved both sides, send it to the CFA and FIFA to adjudicate".*

68. The Appellant submits in this regard:

> *"In conclusion and pursuant to Article R58 of CAS Code, the present dispute shall be resolved according to FIFA regulations and, on subsidiary basis, according to Swiss law, with the important exception that, for any issue related to the Employment Contract, Chinese law shall be taken into account".*

69. The First Respondent takes no position on this issue.

70. First, the Panel observes that Article 23 of the Employment Contract does not constitute a clear and straightforward choice of law clause, such as one that reads *"[a]ny dispute arising out of or in*

connection with this contract shall be settled according to (…) law" or *"[t]his Employment Agreement shall be governed by and construed in accordance with the law of (…)".*

71. Second, as explained, the parties accepted the jurisdiction of CAS as established in the FIFA Statutes, without any reservation.

72. According to recognised CAS case law, an agreement conferring jurisdiction on CAS is an implicit choice of law by the parties within the meaning of the first alternative of Article 187 (1) of the Swiss Private International Law Act (see CAS 2014/A/3850 para. 45 *et seq*; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Art. R58 no. 101 with further references). As a result, and in light of the above-cited Articles R58 of the CAS Code and Art. 57 para. 2 of the FIFA Statutes, both parties chose the various FIFA regulations and additionally Swiss law as the applicable rules of law.

73. The question remains as to what should apply when the parties have made an implicit (indirect) choice of law, but at the same time have also explicitly specified which law is to apply to the dispute in general or to a specific aspect of it, for example in an employment contract as alleged by the Appellant in the case at hand.

74. In the present case, the Panel notes that the Club has in no way substantiated its argument as to why Chinese law should be applied instead of Swiss law in relation with the Employment Contract. It also has failed to provide the Panel with any information concerning any provision of Chinese law that the Appellant would have considered relevant for the present matter. As a result, considering the unclear wording of the Employment Contract, admittedly drafted by the Club itself, that the Parties in the Employment Contract explicitly referred to the dispute-resolution system of FIFA (and of CFA), that they implicitly chose the application of FIFA rules and regulations and of Swiss law, and that the Club failed to specify and substantiate which provisions of Chinese law might apply, the Panel holds that the present dispute must be decided pursuant to the various FIFA rules and regulations and subsidiarily pursuant to Swiss law.

VIII. MERITS OF THE DISPUTE

A. Preliminary issue: standing to be sued of CFA

75. Regarding the Second Respondent, the Panel finds that it has no standing to be sued in the present proceedings. It is evident that the Second Respondent was not a party to the FIFA proceedings that led to the Appealed Decision. In the absence of the Second Respondent's consent or of any specific procedural provisions of the FIFA Statutes and regulations and/or of the CAS Code that would allow the Appellant to join/implead the Second Respondent by a process analogous to a third party notice, the Second Respondent cannot be compelled to participate in the appeals arbitration on that Appealed Decision.

76. The foregoing notwithstanding, the Panel regards the Appellant's request to join the CFA as the Second Respondent as having been withdrawn due to the considerations below.

B. Merits

77. The Appellant submits that the Appealed Decision is flawed for procedural and substantive reasons. With respect to the procedural aspects of the Appealed Decision, the Club maintains that it was deprived of the opportunity to reply to the Player's claim in the previous instance, *i.e.* it did not have the opportunity to state its position on the case at hand and to argue that FIFA had not accepted the Termination Letter as evidence for the Club's view.

78. In this regard, the Panel first notes that the facts and the law are examined *de novo* by the Panel in accordance with the power bestowed on it by Article R57 of the CAS Code. The Panel is therefore not limited to the facts and legal arguments of the previous instance. In relation to issues raised by the Appellant regarding the procedure at the lower instance, it is well-established in CAS case law that procedural defects in the lower instances can be cured through the *de novo* hearing before CAS (see CAS 2015/A/4162 paras. 70 *et seq.*, CAS 2014/A/3848 paras. 53 *et seq.*, CAS 2013/A/3256 paras. 261 *et seq.* each with further references). In view of the above, the Panel holds that any possible procedural flaws in the proceedings before the FIFA DRC are cured in these *de novo* arbitration proceedings.

79. The aforementioned conclusion must, however, be distinguished from the discretion a CAS panel has to exclude evidence (in this case possibly the presentation of the Termination Letter with the Appeal Brief) pursuant to Article R57 of the CAS Code.

80. The third paragraph of Article R57 of the CAS Code provides as follows:

> *"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 (…)".*

81. Regarding the discretion a CAS panel has to exclude evidence on this basis, the Panel observes that legal scholars have expressed the opinion that such discretion should be exercised by a CAS panel with caution:

> *"The new provision raised some criticism, and it has been (rightly) supported that it should be used with restraint in order to preserve the fundamental de novo character of the review by the CAS"* (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 519).

> *"This provision appears to excessively limit the right to be heard (which includes the right to submit evidence (SFT 4A_600/2010, §4.1)) and to contradict the de novo character of CAS proceedings, by creating an unwarranted link between the evidence presented during the internal proceedings of a sports organization and the evidence presented before the CAS. Given that CAS arbitration is alternative to State jurisdiction, and has thus a legal nature which is very different from that of the intra-association proceedings held within sports organizations, it is submitted that CAS arbitrators should resort to this discretionary power to exclude evidence only in the most extreme cases, e.g. when it is utterly evident that a party is acting in bad faith and is ambushing the other party"* (COCCIA M., International Sports Justice: The Court of Arbitration for Sport, European Sports Law and Policy Bulletin, Issue I-2013, p. 58).

> *"[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 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"* (RIGOZZI/HASLER/QUINN, The 2011, 2012 and 2013 revisions of the Code of Sports-related Arbitration, Jusletter, 3 June 2013, p. 14).

82. As an example of such abusive conduct, the latter scholars provide 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".*

83. The Panel finds that there is no evidence of bad faith or otherwise unacceptable procedural conduct on the part of the Club, at least not to the extent required to exclude the evidence presented in the present appeal arbitration proceedings. In this respect, it must be noted that the Club contacted FIFA several times and requested it to take the Termination Letter into consideration after it had been informed for the first time on 10 March 2016 about the claim the Player had filed before the FIFA DRC. The Panel is of the opinion that the Club did not obtain any procedural advantage from filing the Termination Letter in the proceedings before the FIFA DRC after the investigation phase was closed. In fact, the opposite is true: the late filing resulted in an unfavourable judgment for the Club, which then required the Club to challenge the Appealed Decision.

84. The Panel therefore finds that the submission of the Termination Letter by the Club within the present CAS proceedings is admissible.

85. As for the substantive flaws with regard to the Appealed Decision, the main issues to be resolved by the Panel are:

    i. Was the Player entitled to any salaries and/or pecuniary claims at all?

    ii. In case the Player was entitled to salaries and/or pecuniary claims, have those claims lapsed?

i. Was the First Respondent entitled to any salaries and/or pecuniary claims at all?

a) Signing fee of USD 50,000

86. The Employment Contract (Art 10.1.) provides that the *"siganature [sic] fee for [the Player]* ***in 2014*** *is:50.000USD(net)".*

87. According to CAS 2010/A/2049, guideline 4 and para. 15:

> *"the signing fee is a contractual obligation and is not performance-related (unlike premiums or bonuses which necessarily are dependent on a player's performance)".*

88. This corresponds to the fact that the Club obtained the federative/transfer rights of the Player at that moment when the Player and the Club signed/concluded the Employment Contract.

89. In the case at hand, the Employment Contract has not only be concluded, but has even started to be executed (as of the date of the first training session on 27 February 2015 at the latest).

90. Therefore, in lack of any deviating agreement between the parties, upon conclusion of the Employment Contract, the Player's claim to the signing fee of USD 50,000 came into existence; the amount of the signing fee is, therefore, due to the Player, independently on the duration of the contractual relationship. Whether or not the Player waived his right to receive the signing fee is a separate legal issue that will be dealt with below.

b) Salaries of USD 10,900 per month

91. Article 10 of the Employment Contract provides the following:

> *"1. Salary: During the contractual period, [the Player's] month salary is 10.900USD(net), The annual salary of 2015 for [the Player] reaches a total amount of 120.000USD(net) which shall be paid to [the Player] evenly by 11 months in 2015, siganature [sic] fee for [the Player] in 2014 is:50.000USD(net).*
>
> *2. Each month of 15th, [the Club] will pay the last month salary to [the Player]".*

92. According to this provision, the first salary/instalment of USD 10,900 came into existence and was due for payment on 15 March 2015. This is because 11 (eleven) instalments had been agreed for the contractual period, which means that the first one became due for payment on 15 March 2015 regardless of whether you call it the *"February Salary"* or *"March Salary"* or *"February/March Salary".*

93. At that time, the Respondent had been released from his contractual obligations. However, no special agreement exists addressing the issue whether or not the Respondent was entitled to his salary during this official period of release. Therefore the question arises as to whether the Respondent was nevertheless entitled to the first monthly salary/instalment despite his absence

from work. This question need not be answered, however, if it is determined that the Respondent had waived his entire pecuniary claims arising from the Employment Contract (salaries, signing fee, etc.) by signing the Termination Letter. The same applies to the question of whether and to which extent the other instalments commencing 15 April 2015 (next due date of the second monthly salary) came into existence at all. This analysis also need not be made if it were determined that all of the Respondent's pecuniary claims lapsed when he signed the Termination Letter. Therefore the Panel will first review the foregoing issues within the following considerations.

ii. Lapsing of claims

94. According to the explicit wording of the signed Announcement, the Player waived/renounced all pecuniary claims set out in the Employment Contract.

95. The Player asserts that he was in a "special" situation when he signed the Announcement. He did not *"have any option to sign the Termination letter"* because otherwise the Club would have refused to give him a release letter allowing him to sign a contract with a different football club.

96. The Club asserts that it never refused to send the release letter to the Player. The Club argues that after the expiration of the Employment Contract, the Player requested that the Club provide him with the release letter. The parties agreed to mutually exchange the release letter and the Announcement. The Club argues that it is common practice in the world of football to sign such an Announcement, especially when there is still a risk that a party will assert a claim after ending the contractual relationship with the other party in good faith.

97. Furthermore, the Club claims that there were several ways for the Player, who had more than 15 years of professional experience in football, to avoid signing the Announcement, and therefore to avoid acting against his free will (as the Player alleges). The release letter was not a prerequisite to the Player's being able to sign a new contract with another club. The new club of the Player would also have known that there was no risk in signing a player whose contract with another club had already ended. And even if there had been any problems regarding the Player's registration with the new club, the Player would have been able to be provisionally registered according to Annex 3 Articles 8.2.3 and 8.2.6 of the FIFA RSTP.

98. The Club maintains that the principle *pacta sunt servanda* demands that the Player must have a strong argument to be able to escape the obligations he undertook in the Announcement.

99. The Panel finds that by signing the Announcement, the Player did indeed waive his pecuniary claims against the Club. The wording of the Announcement is clear and does not allow any other interpretation.

100. The Player has not submitted any reliable evidence to support the argument advanced by himself of the alleged non-validity of the Announcement/Termination Letter. The Panel does therefore not see any reason to question the validity of the Announcement.

101. The Panel is not satisfied that the Club has forced the Player to sign the Termination Letter. The corresponding argument advanced by the Player has not been substantiated and no convincing evidence has been submitted.

102. The Player's argumentation is even less convincing to the Panel in light of the different options that were open to him and a new, third club. There was, for example, the possibility of registering him provisionally pursuant to the aforementioned provisions of the FIFA RSTP. In fact, additionally, at the time of signing the Announcement (on 14 January 2016), the FIFA proceedings involving the very same claims set out in the Employment Contract were already pending. In these proceedings, the Player could have had presented his situation to the FIFA DRC, before signing the Announcement/Waiver purportedly against his free will.

103. For all these reasons, the present case leads the Panel to quote a consideration made by another CAS panel in another case (CAS 2014/A/3848):

> *"If the Player was of the view that he was still entitled to a certain amount of salary over 2012 he should not have signed a document specifically stating that he was not".*

104. Therefore by signing the Termination Letter, the Player waived all of his pecuniary claims set out in the Employment Contract. An analysis as to whether and to what extent he was originally entitled to them is, therefore, not needed.

IX. CONCLUSION

105. On the basis of the foregoing, and after taking all the evidence produced and all arguments made into due consideration, the Panel upholds the Appeal.

106. 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 7 July 2016 by the Liaoning Football Club against the decision issued on 18 March 2016 by the FIFA Dispute Resolution Chamber is upheld.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 18 March 2016 is set aside.

3. No compensation shall be paid by Liaoning Football Club to Mr Wisdom Fofo Agbo.

4. (…).

5. (…).

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