Arbitration CAS 2015/A/4039 Nashat Akram v. Dalian Aerbin Football Club, award of 3 February 2016

Panel: Mr Rui Botica Santos (Portugal), President; Mr Manfred Nan (the Netherlands); Mr Kok-Keng Lau (Singapore)

Football
Termination of a contract of employment between a player and a club
FIFA's competence to hear employment related disputes
Absence of just cause to terminate the contract
Determination of the compensation due

1. **FIFA's competence to hear disputes arising out of matters specified under article 22 of the FIFA RSTP seems to be limited to parties such as clubs, players, associations and coaches. Disputes involving any of these parties with third parties not mentioned under article 22 of the FIFA RSTP will generally not be entertained. However, if it is apparent from the facts and evidence that although the parties signed two contracts in the form of an "Employment Contract" and an "Image Rights Agreement", their intention *ab initio,* and understanding throughout the validity of these contracts, was to have them linked and to operate in *pari passu* as documents governing the employment relationship between the player and the employer/club, and that the third party mentioned in the image right agreement was merely brought in as a payment vehicle that would allow the employer to minimize the tax impact, one should consider that FIFA is therefore competent to hear any and all employment related disputes arising out of the club's employment relationship with the player in accordance with article 22 (b) of the FIFA RSTP.**

2. **Pursuant to CAS jurisprudence, just cause is said to exist where the breach has reached an extent that the injured party can no longer, and in good faith, be expected to continue the contractual relationship. In this respect, the validity of the relevant provision of the contract of employment should be assessed on a case by case basis with reference also made to the FIFA Commentary which although not a binding source of law, offers guidelines on contractual stability. As a guideline, Article 14.3 of the FIFA Commentary generally entitles a player to terminate his contract if he has not been paid for over 3 months. Therefore, in accordance with the doctrine of *pacta sunt servanda*, a club which has not exceeded this time limit should not be considered in breach of its contractual obligations to an extent whereby the player was entitled to regard the same as a serious breach giving rise to a right of termination.**

3. **According to article 17 of the FIFA RSTP, a player who has terminated his contract of employment with a club must compensate the latter. However, one should take into account the circumstances of the case notably the fact that the contracts were**

terminated at a time when the player was owed some monies for services he had already rendered. Therefore, according to article 323b (2) of the Swiss Code of Obligations, the amounts due to the player shall be offset and deduct from the compensation otherwise due to the club.

I. THE PARTIES

1. Nashat Akram (the "Appellant" or the "Player") is an Iraqi professional football player currently retired from playing football.

2. Dalian Aerbin FC (the "Respondent" or "Aerbin") is a Chinese professional football club affiliated to the Football Association of the People's Republic of China (the "CFA") and a member of the Fédération Internationale de Football Association (the "FIFA").

II. THE FACTUAL BACKGROUND

3. This matter is related to an appeal filed by the Player against the decision rendered by the FIFA Dispute Resolution Chamber (the "FIFA DRC") on 27 November 2014 (the "Appealed Decision"). The grounds of the Appealed Decision were notified to the Parties on 26 March 2015.

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and relevant documentation produced. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

A. The contractual relationship between the Parties

a) The negotiations between the Parties

5. By letter dated 24 January 2014 (the "Offer"), Aerbin offered to sign the Player on the following terms and conditions:

a) Contract length: 2 years (2014 – 2015 season of Chinese Super League)

b) Sign-on Fee: USD 200,000 net

c) Wage: USD 900,000 net for 2014 season

USD 900,000 net for 2015 season

d) Bonus: USD 2,000 for each win, USD 1,000 for each draw

USD 50,000 for the team finishing Top 3 of Chinese Super League

USD 100,000 for the team winning Champion of Chinese Super League

e) Flight: 3 Business Class round-trip tickets from Iraq to China each year

f) Accommodation: RMB 4,000 Yuan per month as apartment subsidy.

6. On 25 January 2014, the Player wrote to Aerbin accepting the Offer. He then flew to China together with his intermediary, Mr. Dezhbod (the "Intermediary"), with a view to undergo a medical examination and then transforming the Offer into a formal employment contract.

b) The Employment Contract and the Image Rights Agreement

7. The Appellant claims that during a meeting held on 10 February 2014, attended by him, the Intermediary, and representatives of Aerbin, Aerbin informed the Player that for tax purposes, it was ideal for the Parties to split the financial terms and conditions contained in the Offer into two separate contracts.

8. Consequently, on 10 February 2014, two contracts were signed. The **first contract** was entitled "Employment Contract for Players" (the "Employment Contract") and was entered into between the Player and Aerbin. The **second contract** was entitled "Personal Portrait Right Agreement" (the "Image Rights Agreement") and was entered into between the Player, Aerbin, and Aerbin (Hong Kong) Investment Limited ("Aerbin HK"). The Employment Contract and the Image Rights Agreement (collectively, the "Contracts") had a duration of two seasons, starting on 2 February 2014 and expiring on 31 December 2015.

9. The relevant parts of the Employment Contract provided as follows:

Clause 3 Living and Working Conditions & Health Protection.

1. [Aerbin] (…) shall provide [the Player] with clean, healthy, comfortable and convenient accommodation (…).

Clause 5 Use of Portrait Right

- *[The Player] has its own portrait right. [Aerbin] must not use [the Player's] portrait for profit purpose without [the Player's] prior consent.*
- *[The Player] agrees that [Aerbin] and China Football Association Super League Committee use [the Player's] portrait for free in social public welfare activities or in the promotional activities of [the Player] and China Football Association Super League Committee, and [the Player] shall cooperate with them.*
- *[The Player] agrees that [Aerbin] uses [the Player's] portrait for free in the advertisement promotion provided to sponsors.*

(…)

- *[The Player] agrees that [Aerbin] uses [the Player's] portrait upon consideration for other commercial advertisements and [the Player] shall receive 50 % of the advertisement earnings.*
- *[The Player] must not use its own portrait for advertisements and promotions without [Aerbin's] approval and [the Player] shall turn in 50 % of the income to [Aerbin].*

(…)

Clause 6 Salary and Bonuses

(…)

2. During the contract period, [Aerbin] shall pay [the Player] US Dollars 800,000 net as total salary and the whole amount shall be paid average-monthly (from February to November each year, US Dollars 40,000 net per month).

(…)

7. The salary distribution date is before 28 days of next month, and the work first pay later system is adopted.
(…)

Clause 9 Cancellation of the Contract

(…)

3. The Contract may be canceled by [the Player] by notifying [Aerbin] (…)

(2) If [Aerbin] is behind in payment of salary to [the Player] for over three months.

10. The relevant parts of the Image Rights Agreement stated as follows:

2. [Aerbin HK] agrees to pay [the Player] the Personal Portrait Right Fee total US Dollars 1,200,000 net. The specific time and amount of payment are as follows:

- Party C shall pay [the Player] US Dollars 400,000 net within 15 working days after three parties have signed this agreement. During the contract period, [Aerbin HK] shall pay [the Player] US Dollars 800,000 net and the whole amount shall be paid average-monthly) from February to December each year, US Dollars 40,000 net per month), the distribution date is before 28 days of next month.

(…)

4. This Agreement will be legally binding after signing-on. [Aerbin], [the Player] and [Aerbin HK] shall be strict compliance with each others. If [Aerbin HK] does not pay [the Player] the Personal Portrait Right Fee according to the time and amount of this Agreement, [Aerbin] shall take the full responsibility. The specific date of above payments shall comply with the current Foreign Exchange Management System of China.

(…)

7. This Agreement will become effective on the date it is signed and stamped by all parties.

c) The dispute between the Parties

11. On 13 March 2014, the Intermediary wrote to Aerbin regarding the non-payment of the signing-on fee of USD 400,000 under the Image Rights Agreement and requested Aerbin to pay the outstanding amount as soon as possible.

12. On 18 April 2014, the Player received USD 40,000, which is assumed to be the February salary arising from the Employment Contract.

13. On 22 April 2014, the Player placed Aerbin on notice and requested the payment of *"the signing fee (…)* [that] *shall be paid 15 days after signing the contract"* as well as his salary, without specifying which 'salary'.

14. On 23 April 2014, Aerbin wrote to the Player asking him to be patient and informed him that the remuneration claimed in his letter dated 22 April 2014 would be paid by 2 May 2014.

15. On 7 May 2014, a representative of Aerbin sent another e-mail informing the Player that *"*[he] *checked financial department yesterday but got nothing with the sign-on fee"* and that *"*[the Respondent] *cannot settle all these now except* [his] *salary"*. In this regard, the representative specifies that *"they will pay* [his] *outstanding salary and personal portrait fee in these couple of days"* adding that *"Everything depends on the attitude of our president"*.

16. On 8 May 2014, the Player put Aerbin in default again giving the latter a deadline until 15 May 2014 to pay half of the signing-on fee and until 30 May 2014 to comply with the rest of its obligations, *"otherwise case will be submitted the case to fifa by 1.6.2014"*.

17. On the same day, the Player received USD 40,000 from Aerbin HK. Although this amount was not specified, the Player assumed this payment was part of the remuneration arising from the Image Rights Agreement based on his claim in front of FIFA (cf. paragraph 23).

18. On 31 May 2014, the Player terminated the contractual relationship with Aerbin by stating as follows:

> *"Respectfully I would like to inform you that despite of my several notices by fax, email and sms regarding to Nashat Akram payment we have not respond from the club at all. According to the Club and the Player's contract the club has breaching the contract as the club hasnt paid salaries and signing fee for over 90 days, therefore, we are asking to breaking the contract accordingly"*.

19. On 7 June 2014, the Intermediary re-affirmed, by letter to Aerbin, that *"the player is entitle to break the contract as unpaid payment from the club"*.

20. On various occasions, *i.e.* on 24 June, 30 June and 12 July 2014, Aerbin wrote to the Player requesting him to report for duty and informed him of the fines that would be imposed on him for each day of delay. In these letters, Aerbin asserted that the Player only took part in three games because of a concealed serious injury, which constituted a reason to terminate the Employment Contract based on its provisions.

21. On 16 June 2014 and on 1 July 2014 respectively, Aerbin paid an amount of USD 40,000 to the Player.

22. On 23 August 2014, the Player and the Iraqi club Al Shorta Football Club ("Al Shorta") concluded an employment contract valid as of 15 August 2014 until the end of the 2014-15 football season, according to which the Player was entitled to a total remuneration of IQD 550,000,000 (approx. USD 465,000 on 23 August 2014).

B. The FIFA Dispute Resolution Chamber Proceedings

23. On 28 May 2014, the Player lodged a claim before FIFA against Aerbin requesting FIFA to hold that *"the player has right to cancel his contract as the Respondent hasn't paid his salary for last 3 months"* and to be awarded USD 640,000 as outstanding remuneration, broken down as follows:

    a) USD 120,000 corresponding to three monthly salaries of March, April and May 2014 due in accordance with the Employment Contract;

    b) USD 120,000 corresponding to three monthly instalments of March, April and May 2014 dues in accordance with the Image Rights Agreement; and

    c) USD 400,000 corresponding to the lump sum due *"within 15 working days after three parties have signed this agreement"*, as per the Image Rights Agreement.

24. In his claim, the Player explains that he left Aerbin on 25 May 2014 after the latter released him for the half season break. In addition, the Player asserts that prior to signing the Employment Contract, he successfully passed a medical examination.

25. On 15 July 2014, Aerbin replied to the claim and lodged a counterclaim against the Player, requesting to be awarded with the amount of USD 5,000,000 as *"loss compensation"*. In this regard, Aerbin explains that *"the* [Appellant] *non-professional behaviour has already caused serious damage to the interest and reputation of the Respondent"* and *"seriously affected the normal training of our First Team"*.

26. In its counterclaim, Aerbin sustains that the salaries for February, March and April 2014 were paid to the Player. In support of its assertion, Aerbin submitted an excel sheet drafted by its own administration according to which three payments: two equal payments of CNY 244,000 (approx. USD 39,500) and a third payment of CNY 243,516 (approx. USD 39,400). These payments were made on 28 March, 28 April and 28 May respectively.

27. In continuation, Aerbin argued that the Player has been absent from training since 26 May 2014, *i.e.* almost 7 weeks, which constitutes a breach of contract. In this respect, Aerbin outlines the various requests that were made to the Player (cf. see paragraph 20).

28. In his reply, the Player stated that the documents provided by Aerbin only evidence that one payment was made before the termination of the Employment Contract, *i.e.* the payment made on 18 April 2014. The other two were made after the termination and therefore do not have any influence on the Player's just cause to terminate the Employment Contract.

29. In light of the foregoing, the Player amended his claim and requested:

a) USD 560,000 as outstanding remuneration, broken down as follows:

b) USD 40,000 corresponding to the salary for May 2014 due in accordance with the Contract; and

c) USD 120,000 corresponding to the instalments for March, April and May 2014 due in accordance with the Image Rights Agreement; and

d) USD 400,000 corresponding to the signing-on fee due in accordance with the Image Rights Agreement.

e) USD 2,000,000 as compensation for the Player's loss of a chance of playing and earning money as well as the damage to his reputation.

30. On 27 November 2014, the FIFA Dispute Resolution Chamber rendered the Appealed Decision and held as follows:

1. The claim of the Claimant / Counter-Respondent, Nashat Akram, is rejected.

2. The counterclaim of the Respondent / Counter-Claimant, Dalian Aerbin FC, is partially accepted.

3. The Claimant / Counter-Respondent is ordered to pay to the Respondent / Counter-Claimant ***within 30 days*** *as from the date of notification of this decision, compensation for breach of contract in the amount of USD 690,000.*

4. The intervening party, Al Shorta, is jointly and severally liable for the payment of the aforementioned compensation.

5. In the event that the amount due to the Respondent / Counter-Claimant in accordance with the above-mentioned point 3 is not paid by the Claimant / Counter-Respondent within the stated time limit, 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.

6. The Respondent / Counter-Claimant is directed to inform the Claimant / Counter-Respondent and the intervening party 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.

7. Any further claim lodged by the Respondent / Counter-Claimant is rejected.

31. The Appealed Decision was based on the following grounds:

a) The FIFA DRC in this particular case had no jurisdiction to entertain matters regarding the Image Rights Agreement because contrary to Article 22 (b) of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"), the said agreement did not contain any employment related elements;

b) The Player terminated the Employment Contract when he was only owed his March and April 2014 salaries. Non-payment of two months salaries is not a just cause for termination;

c) Compensation for breach of contract is assessed on a case by case basis. Article 17.1 of the FIFA RSTP allows the FIFA DRC to consider the old and the new contract in striving to arrive at the economic value attributed to a player. The value remaining under the Player´s contract with Aerbin as at 30 May 2014 (i.e. the date of termination) was USD 680,000. On the other hand, the Player would have earned USD 700,000 had he stayed with Al Shorta until 31 December 2015 (the date his Employment Contract with Aerbin would have expired). Consequently, the Player was to compensate Aerbin with the average remuneration between the values due or remaining under his old and new contracts respectively, i.e. USD 690,000; and

d) Pursuant to Article 17.2 of the FIFA RSTP, Al Shorta was jointly and severally liable as the new club regardless of whether or not it had induced the Player's breach.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. The Appellant filed its Statement of Appeal dated 14 April 2015 before the Court of Arbitration for Sport (the "CAS"), pursuant to article R48 of the Code of Sports-related Arbitration (edition 2013) ("CAS Code"). The CAS acknowledged receipt of the Statement of Appeal on 16 April 2015.

33. The Appellant appointed Mr. Manfred Nan, Attorney-at-law in Arnhem, The Netherlands, as arbitrator.

34. On 21 April 2015, the CAS Court Office sent a letter to Al Shorta with an invitation to join these proceedings as a party.

35. On 22 April 2015, Al Shorta replied to the invitation as follows: *"With many respect give our professional player (NASHAT AKRAM ABID ALI ESSA) clearance to go to any club the player want according to his request"*.

36. On 23 April 2015, the CAS acknowledged receipt of the letter from Al Shorta. The CAS stated that the context of the letter was unclear and that the CAS Court Office was not sure whether Al Shorta wished to participate in this appeal. Follow-up correspondence was sent by the CAS Court Office to Al Shorta inviting it to participate in the procedure. Al Shorta did not answer those letters.

37. On 24 April 2015, the Appellant filed his Appeal Brief together with documents and evidence it intended to rely on.

38. On 4 May 2015, the CAS Court Office informed the Parties that Al Shorta did not reply on the invitation to join the proceedings. Therefore, the CAS Court Office informed the Parties that it was presumed that it was not interested in participating.

39. On 22 May 2015, the Respondent filed its Answer together with exhibits it intended to rely on. The Respondent did not appoint an arbitrator within the time limit, and therefore the President of the Division appointed Mr. Kok-Keng Lau, attorney-at-law in Singapore, the Republic of Singapore, as arbitrator *in lieu* of the Respondent's appointment.

40. On 26 May 2015, the CAS Court Office invited the Parties to state whether they wanted a hearing or preferred to have the matter decided on the basis of their written submissions.

41. On 16 June 2014, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:

President: Mr. Rui Botica Santos, Attorney-at-law, Lisbon, Portugal

Arbitrators: Mr. Manfred Nan, Attorney-at-law, Arnhem, The Netherlands and Mr. Kok-Keng Lau, Attorney-at-law, Singapore, the Republic of Singapore

42. On 20 July 2015, the CAS Court Office issued an Order of Procedure, which was duly signed by both Parties (24 July 2015 by the Appellant; 27 July 2015 by the Respondent).

43. On 15 September 2015, a hearing was held at the CAS Alternative Hearing Centre in Shanghai, China. At the outset of the hearing, both Parties confirmed that they had no objection to the composition of the Panel.

44. At the hearing, the Panel was assisted by Mr. Brent J. Nowicki, Counsel to the CAS. In addition, the following persons (including witnesses) attended the hearing:

For the Appellant

- Mr. J.G. Kabalt (counsel) (in-person)
- Mr. P.M. Hoogstad (counsel) (in-person)
- Mr. Nashat Akram (Player) (by video or telephone conference)
- Mr. Dezhbod (Intermediary) (by video or telephone conference)

For the Respondent

- Ms. Liz Ellen (counsel) (in-person)
- Mr. Adam Lewis QC (counsel) (in-person)
- Mr. Lv Feng (Club Manager) (in-person)
- Mr. Gao Xiang (Assistant of Club Manager) (in-person)

45. At the end of the hearing, the Parties stated that they were satisfied with the manner in which the hearing had been conducted and that their right to be heard had been respected.

IV. THE PARTIES' RESPECTIVE POSITIONS

46. The following outline is a summary of the main arguments of the Appellant and the Respondent and does not comprise each and every contention put forward by the Parties. However, the Panel has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written submissions, the documentary evidence, the content of the Appealed Decision and the oral submissions at the hearing were all taken into consideration. The witness testimonies were also taken into consideration and such reference will be made in the merits section, if and when appropriate.

A. The Appellant's submissions

47. It is the Appellant's position that he terminated the employment relationship with just cause. As there is a link between the Employment Contract and the Image Rights Agreement, the delayed payment of salary by Aerbin should be considered as a justifiable reason for termination of both contracts with just cause.

48. The Appellant's submissions can in essence be summarized as follows:

a) The link between the Employment Contract and the Image Rights Agreement

aa) The contractual relationship between the Parties started with signing the Offer. Until the meeting on 10 February 2014, the Respondent never mentioned any division concerning the payment obligation of Aerbin towards the Player, neither about any separation between 'salary' and 'Image Rights Fee'. During the meeting, the representatives of Aerbin emphasised that the separation was only a formal, political separation that was necessary for tax reasons. The representatives assured the Player that Aerbin would remain responsible at all times for the payment of the total remuneration of USD 2,000,000 to the Player in two years (as was agreed in the Offer).

ab) The Employment Contract and the Image Rights Agreement have the same term (from 10 February 2014 until 31 December 2015), were signed by the Parties at the same time and by the same persons (the Player and Aerbin´s representative, Mr. Shangbin).

ac) The link between the two Contracts arises also from the clauses 3 and 4 of the Image Rights Agreement:

Clause 3 stipulates that: *"If* [the Player] *is personally punished for serious breach of law, serious breach of discipline or serious violation of social ethics and suspended over one month by FIFA, AFC or CFA, the fine will be borne by* [the Player]*, meanwhile* [Aerbin] *can determine additional fine within the range of 50% maximum of the monthly Personal Portrait Right Fee"*.

Clause 4 stipulates that: *"This Agreement will be legally binding after signing-on.* [Aerbin], [the Player] *and* [Aerbin HK] *shall be strict compliance with each others. If* [Aerbin HK] *does not pay* [the Player] *the Personal Portrait Right Fee according to the time and amount of this Agreement,* [Aerbin] *shall take the full responsibility. The specific date of above payments shall comply with the current Foreign Exchange Management System of China".*

ad) Since it is common in professional football that a club can fine a player for improper behaviour, and that the imposition of the fine usually takes place by withholding sums which would otherwise be due to the player from his salary, the monthly Personal Portrait Right Fee referred to in Clause 3 of the Image Rights Agreement should be considered to be (disguised) salary. Furthermore, the connectedness and effective responsibility (clause 4) is confirmed by the e-mail from Aerbin to the Player of 7 May 2014 in which Aerbin recognizes the indebtedness of the salary, the signing-on fee and the Image Rights Fee.

ae) Furthermore, in that same e-mail dated 7 May 2014, a representative of Aerbin informed the Player that: *"*[he] *checked financial department yesterday but got nothing with the sign-on fee"*, as a result of which only the salary of the Player could be paid. Apparently, Aerbin had to receive the signing-on fee (USD 400,000) from a third party first, before paying it to the Player himself. Since contractually the signing-on fee had to be paid by Aerbin HK, not only was the indebtedness of the signing-on fee by Aerbin to the Player recognised by this e-mail, it also confirmed that the obligation to pay the signing-on fee, which arises from the Image Rights Agreement and not from the Employment Contract, is on Aerbin itself instead of Aerbin HK.

af) That the Image Rights Fee has to be considered as disguised salary, is also emphasized by the fact that Aerbin HK did arguably nothing with the agreed right to the image of the Player from 10 February 2014 to 31 December 2015.The Image Rights Agreement of the Player seems to be an empty shell, since the Parties agreed in clause 5 of the Employment Contract that the Player was not free to use his own image for advertisement and promotions without Aerbin's approval and upon payment of 50% of his income to Aerbin. On the basis of the latter, the Player had to pay 50% of the agreed Image Rights Fee (USD 1,200,000 net) to Aerbin while Aerbin declared itself responsible to pay this full Image Rights Fee to the Player ex. clause 4 of the Image Rights Agreement and the e-mail of 7 May 2014.

ag) The Image Rights Agreement is a bogus contract and does create rights or obligations for Aerbin and does contain employment-related elements. It has the appearance that the construction with the Employment Contract linked to the Image Rights Agreement is only conceived by Aerbin to evade payment of certain (wage) taxes and contributions and has nothing to do with exploiting image or portrait rights. The Image Rights Agreement is directly linked to the services of the Player as a player and it was meant to be part of the actual employment relationship.

b) Termination of the employment contract with just cause

ba) Aerbin stated before the FIFA DRC that it paid the salary of the months February, March and April 2014. The Appellant received on both 16 June 2014 and on 1 July 2014 around USD 40,000 respectively from Aerbin.

bb) On 31 May (the date on which the Appellant terminated the Employment Contract) an amount of USD 600,000 net was outstanding, containing:- Salary: March and April (USD 40,000 + USD 40,000)

- Image Rights Fees: February, March and April (USD 40,000 + USD 40,000 + USD 40,000)
- Signing-on fee arising from the Image Rights Agreement: USD 400,000

bc) Since the Appellant terminated the Employment Contract with just cause, he was a free agent (31 May 2014). Therefore, as he was a free agent, the Appellant cannot be held liable to pay to Aerbin any compensation.

bd) The Appellant furthermore always behaved as a professional and always showed up at training sessions and treatments with the medical staff. There is no evidence which demonstrates a lack of professionalism towards the first team training sessions.

c) The Appellant is entitled to compensation

ca) The Appellant states that the Respondent is liable to pay compensation for damages suffered by the Player as a consequence of the breach of contract (the persistent non-payment) within the protected period.

cb) Primary, the Appellant is entitled to receive his full salary for the months of February, March and May 2014, next to the signing-on fee. Besides, Aerbin is obliged to fulfil all agreed financial conditions of the employment relationship until the 31st of December 2015, the remaining period of the employment relationship. This leads to an amount of USD 1,938,350 net, consisting of:

The 2014 season:

- *salary* *USD 680,000* - *signing-on fee* *USD 400,000*
- *airline tickets* *USD 20,000*
- *apartment subsidy* *USD 4,550*
- *match winning bonuses* *USD 6,000*

The 2015 season:

- *salary* *USD 800,000*
- *airline tickets* *USD 20,000*

- *apartment subsidy* *USD 7,800*
- *Interest* *P.M.*

cd) Subsidiarily, in case the Panel would consider that there is no link between the Employment Contract and the Image Rights Agreement, the Image Rights Agreement does not create any rights or obligations for Aerbin and does not contain any employment-related elements, the Player is still entitled to receive the full Image Rights Fee from Aerbin ex clause 2 of the Image Rights Agreement. Since the Player never received any Image Rights payment from Aerbin HK, Aerbin is jointly and severally liable for payment of those amounts. The Appellant claims subsidiarily an amount of USD 1,200,000 net, consisting of:

The 2014 season:

- *salary* *USD 400,000*
- *signing-on fee* *USD 400,000*

The 2015 season:

- *salary* *USD 400,000*
- *Interest* *P.M.*

ce) Furthermore, Panel should sanction Aerbin in accordance with article 17 paragraph 4 FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") and ban Aerbin from registering new players, either nationally or internationally, for two registration periods. In case the Panel does not have the power to do so, the Panel should refer the case back to the FIFA DRC.

cf) Lastly, the Appellant submits that Al Shorta did not induce the Player to his termination, since the interest of Al Shorta in the Player dates back to about the middle of August and the Player did not terminate the employment relationship without just cause.

49. The Appellant concludes its submissions by requesting the CAS:

1. To accept the present appeal against the challenged decision;

2. To set aside the challenged decision;

3. To establish that Aerbin breached the employment contract with Akram without just cause during the protected period;

4. To establish that Akram validly unilaterally terminated the employment contract with Aerbin with just cause;

5. To condemn Aerbin primary to pay to Akram compensation in the amount of USD 1.938.350,00 plus 5% interest as from 31 May 2014 until the effective date of payment;

6. To condemn Aerbin subsidiary to pay to Akram compensation in the amount of USD 1.200.000,00 plus 5% interest as from 31 May 2014 until the effective date of payment;

7. To impose sporting sanctions on Aerbin or alternatively to send the case back to the FIFA Dispute Resolution Chamber for imposing sporting sanctions on Aerbin;

8. To condemn Aerbin to the payment in favour of Akram of the legal expenses incurred;

9. To establish that the costs of the arbitration procedure shall be borne by Aerbin.

B. The Respondent's submissions

50. It is the Respondent's submission that the Employment Contract and the Image Rights Agreement were separate agreements providing for different things and with different parties (so far as the primary obligation to pay is concerned). The Image Rights Agreement was not part of the Employment Contract. It did not contain rights or obligations typical to employment contracts.

51. The Respondent's submissions can in essence be summarized as follows:

a) The CAS jurisdiction

aa) The FIFA DRC only considered the claim in relation to the Employment Contract because the FIFA DRC did not have jurisdiction over the Image Rights Agreement. According to the Respondent, the CAS lacks such jurisdiction as well. This is because the primary party holding the benefit and burden of the Image Rights Agreement, besides the Appellant, is a third party, namely Aerbin HK. Aerbin HK is not subject to an arbitration agreement providing either FIFA or CAS with jurisdiction to consider disputes relating to the Image Rights Agreement. Aerbin HK is not a party to the Employment Contract. The FIFA DRC held that it did not have jurisdiction to consider the part of the claim relating to non-payment under the Image Rights Agreement.

ab) If the CAS agrees with the FIFA DRC and/or with the Respondent's submissions on this point that the Image Rights Agreement is a separate agreement, then it has no jurisdiction to consider the Appellant's claim for monies under that agreement. The Image Rights Agreement does not contain an arbitration clause providing FIFA (and thus CAS) with jurisdiction to consider disputes, whereas the Employment Contract does (clause 12.3). If there is a breach of the Image Rights Agreement, the Appellant has a remedy in the national courts, but not before either domestic or international football arbitral tribunals, and the Defendant in such proceedings would be, primarily at least, Aerbin HK.

b) The payment of the salary and the termination

ba) Under the terms of the Employment Contract, the Appellant was not permitted to terminate the Employment Contract for non-payment of salary on 30 May 2014. None of his March, April or May salaries could have been 3 months late on that date. The Respondent paid his March salary before 28 June 2014. The Appellant would have only

been entitled to terminate the Employment Contract under clause 9.3 (2) after 28 September 2014 in respect of the May salary, to the extent it had not been paid by that date.

bb) The separate Image Rights Agreement is an agreement primarily between the Appellant and Aerbin HK. While the Respondent is a party to the Image Rights Agreement and has some rights and obligations, it is a minor party. The obligation to pay the fee falls still on Aerbin HK, and all the Image Rights Agreement adds is that the Respondent shall take responsibility for Aerbin HK's failure to meet the legal obligation on it.

bc) Clause 3 of the Image Rights Agreement does provide a right to the Respondent – however only a right in respect of the rights and obligations in the Image Rights Agreement, not any rights with respect to the Employment Contract. This clause 3 contrasts similar provisions in the Employment Contract.

bd) The sums payable under the Image Rights Agreement were not *"disguised salary"* and should not be treated as salary for the purposes of the claim. The written contracts between the Parties should not be disregarded. Where there is evidence of a written agreement, the presumption is that this reflects the actual agreement between the Parties. If the Appellant seeks to go behind the actual terms of the written agreements, the burden is on him to prove some other agreement. That burden on him can only be met by *"compelling evidence"* (CAS 2013/A/3091). Whatever the Parties may or may not have agreed before they entered the written agreements, the written agreements superseded their previous oral agreements or negotiations, and the written agreements governed the employment relationship.

c) The Image Rights Agreement is not part of the Employment Contract

ca) The FIFA DRC was right not to consider any claim under the Image Rights Agreement. This is consistent with the jurisprudence of the FIFA DRC (*C. v. A*, decision dated 13 December 2013 and *A. v. O*, dated 17 January 2014). There are no provisions in the Image Rights Agreement which one would normally regard as more typical of an employment contract. The amounts paid for the Appellant's Image Right is not described as 'salary' and there is a clear distinction in both, the express language, obligation and indeed the parties.

cb) The Image Rights Agreement is not part of the Employment Contract, considering the following aspects:

- The fact that the agreements are both of the same term is not extraordinary. An Image Rights Agreement with a football club will normally be for the same term as the employment contract with it.
- The main contracting party to the Image Rights Agreement is Aerbin HK, which is a separate legal entity and is not a party to the Employment Contract.

- The fact that the Respondent can impose a fine equal to an amount of the 50% of the monthly fee paid under the Image Rights Agreement if the Appellant is suspended for serious misconduct by the football authorities for over a month does not suggest that the Image Rights Agreement is part of the Employment Contract. The fine is intended to reflect the value of the Appellant's image in such circumstances.
- The fact that the Respondent has responsibility if Aerbin HK does not meet its obligations under the Image Rights Agreement does not mean the Employment Contracts are not separate contracts containing distinct obligations.

d) The Appellant did not terminate the Employment Contract with just cause

da) Article 14 of the FIFA RSTP does not provide that a player may terminate a contract for just cause if he has not been paid more than two monthly salaries. On the contrary, FIFA's Commentary on the RSTP makes clear that just cause must be determined on a case-by-case, but that the non-payment for over 3 months is likely to allow a player to terminate, whereas *"under normal circumstances, only a few weeks' delay in paying a salary would not justify the termination of an employment contract"*. In CAS 2006/A/1180 the CAS held that non-payment of salary can amount to just cause, but only provided that the non-payment is of a substantial amount and there have been adequate warnings of breach. Different jurisprudence shows that FIFA and CAS are particularly careful to determine that the breach is substantial on the facts before determining it entitles the player to terminate for just cause under article 14 FIFA RSTP.

db) If the Appellant is unable to meet the heavy burden on him to prove payments under the Image Rights Agreement were actually part of his salary, he is unable to meet the threshold entitling him to justify his termination of the Employment Contract under the article 14 FIFA RSTP jurisprudence.

dc) The Appellant requests the CAS imposes sporting sanctions on the Respondent pursuant to article 17.4 of the FIFA RSTP. The Appellant failed to set out any basis upon which he is suggesting that the CAS has jurisdiction to impose such a ban. In any event, the Respondent denies that imposing sporting sanctions on the Respondent would be appropriate in the circumstances.

e) Al Shorta induced the Player to terminate the Employment Contract

ea) The Appellant's new club, Al Shorta, induced the Appellant to terminate the Employment Contract for the following reasons:

- Al Shorta has not appealed the decision of the FIFA DRC, despite being a party subject to that decision.
- The Appeal brief is submitted for and on behalf of the Appellant and not Al Shorta. It is a peculiar submission to be made on behalf of the Appellant that Al Shorta ought not to be liable for his breach.

- The FIFA DRC made expressly clear that their decision *"is independent from the question as to whether the new club has induced the contractual breach"* but is based on the well-established jurisprudence of the FIFA DRC and of CAS (i.e. strict liability).
- It is not apparent from the decision of the FIFA DRC that Al Shorta has been subject to any sporting sanctions in any event, and, as set out above, there is no appeal by it on this matter.

52. The Respondent concludes his submissions by requesting the CAS:

1. To dismiss the appeal;

2. To order that the Appellant shall pay the amount of compensation and interest ordered by the FIFA DRC to the Respondent forthwith;

3. To order that the Appellant shall pay the Respondent its costs of this arbitration pursuant to R.64.5 of the CAS Rules.

V. LEGAL ANALYSIS

A. Jurisdiction of the CAS

53. The jurisdiction of the CAS derives from Article R47 of the CAS Code and Article 67 of the FIFA Statutes (edition 2015).

54. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. It therefore follows that the CAS has jurisdiction to decide the present dispute.

55. The CAS Court Office noted that the Respondent in its Answer does not confirm the jurisdiction of the CAS concerning the issues related to the Image Rights Agreement. According to the Respondent, the CAS cannot have jurisdiction over an appeal from a decision from the FIFA DRC in respect to matters the FIFA DRC never had jurisdiction over in the first place. Therefore, the CAS only has jurisdiction upon this matter (the amounts deriving from the Image Rights Agreement) if it decides to consider that the Image Rights Agreement is part of the Employment Contract. However, the CAS will decide upon this matter based upon the merits of this case.

56. The Appellant on his part requests that sporting sanctions be imposed on the Respondent in the event of the CAS finding the Player to have terminated the Employment Contract with just cause. However, given the Appellant´s failure to join FIFA as a party to these proceedings, the Panel cannot entertain or award these prayers in the event that it finds the Player´s termination to have been justified.

B. Admissibility

57. In accordance with Article 67.1 of the FIFA Statutes, *"[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"*.

58. The grounds of the Appealed Decision were notified on 26 March 2015 and the Statement of Appeal was filed on 14 April 2015. This was within the required 21 days.

59. It follows that the appeal is admissible. Furthermore, no objection has been raised by the Respondent on this point.

C. Applicable Law

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

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

61. Article 66.2 of the FIFA Statutes so 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.

62. Therefore, the Panel holds that the dispute must be decided in accordance with the FIFA Regulations and supplemented by Swiss law, if necessary.

VI. MERITS OF THE APPEAL

63. Based on the Parties' written submissions and the discussions held during the hearing, the Panel has identified the following issues needed resolve the present matter:

a. Are the Employment Contract and the Image Rights Agreement linked?

b. Did the Player terminate his contractual relationship with or without just cause?

c. Depending on the findings on the questions above, what are the legal consequences for both of the Parties?

64. The Panel shall here below determine each of the aforementioned issues in turn.

A. Are the Employment Contract and the Image Rights Agreement linked?

65. It is Aerbin's assertion that the Image Rights Agreement was not part of the Employment Contract and that the CAS lacks jurisdiction to consider matters arising from the Player's claim for monies under the Image Rights Agreement. In this regard, Aerbin agrees with the FIFA DRC and adds that the Image Rights Agreement was entered into with a third party who has neither been named as a party in these proceedings nor was party to an arbitration agreement providing for FIFA or CAS jurisdiction.

66. The Player asserts that the Contracts are linked. He states that the Parties intended to reduce the terms and conditions of the Offer into a formal contractual document and that the reason for splitting the terms of the Offer into two documents (the Employment Contract and the Image Rights Agreement) as explained by Aerbin in a meeting held on 10 February 2014, was for tax purposes only.

67. The FIFA DRC appears to have declined jurisdiction on grounds of the Image Rights Agreement having been entered into between the Player, Aerbin and a non FIFA member, *in casu* Aerbin HK, thereby concluding that the Image Rights Agreement in this case did not meet the requisites of an employment related contract as required under article 22 (b) of the FIFA RSTP.

68. Article 22 (b) of the FIFA RSTP partially states as follows:

Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: (b) employment-related disputes between a club and a player of an international dimension (…).

69. FIFA's competence to hear disputes arising out of matters specified under article 22 of the FIFA RSTP seems to be limited to parties such as clubs, players, associations and coaches. Disputes involving any of these parties with third parties not mentioned under article 22 of the FIFA RSTP will generally not be entertained.

70. The first question therefore is whether the Image Rights Agreement is strictly speaking a contract between a player and a third party not recognized under article 22 of the FIFA RSTP.

71. Whereas the parties named in the Image Rights Agreement are the Player, Aerbin and Aerbin HK, the actual signatories thereto are Aerbin and the Player. This is despite clause 2 of the Image Rights Agreement stipulating that Aerbin HK was to pay the USD 400,000 signing-on fee only after all *"three parties* [had] *signed* [the] *agreement"*. The Panel also notes that under clause 4 of the Image Rights Agreement, Aerbin undertook "full responsibility" to pay the Player the amounts due in the unlikely event of Aerbin HK defaulting, and Aerbin has neither before the CAS nor the FIFA DRC sought to join Aerbin HK as a party and/or argued that the Image Rights Agreement was purely and/or exclusively entered into between the Player and Aerbin HK.

72. It is therefore apparent that the Image Rights Agreement is part of the Employment Contract, with Aerbin HK merely brought in as a payment vehicle that would allow Aerbin to minimize the tax impact.

73. The Panel further establishes additional grounds linking the Image Rights Agreement with the Employment Contract.

74. Looking at the Offer, the Panel notes that it contains a total package of USD 2,000,000 in fixed remuneration and makes no reference to image rights payments being regarded as part of a separate contract. In fact, the Offer states that there is only one contract to be concluded and labels the amounts to be paid thereunder as "wage". The USD 2,000,000 fixed package was indeed reflected in the two Contracts, with the Employment Contract bearing an overall fixed package of USD 800,000 and the Image Rights Agreement an overall fixed package of USD 1,200,000 including USD 400,000 as a signing-on fee.

75. During the hearing, the Player's Intermediary informed the Panel that the USD 400,000 signing-on fee had been arrived at as a result of the 10 February 2014 negotiations during which the Player agreed to reduce his initial demand for an annual salary of USD 1,200,000 to USD 1,000,000 per year. Aerbin neither rebutted nor contested this testimony.

76. Clause 5 of the Employment Contract also provided strong indications as to why the Parties did not in actual fact require a separate contract to govern the use of the Player's image rights, and that the Image Rights Agreement was merely a sham agreement presumably aimed at moderating the tax implications regarding employment related matters. Through clause 5 of the Employment Contract, the Player consents to how and when Aerbin shall use and explore his image rights, and the Parties also seem to have fixed the consideration to be paid to the Player for consenting to Aerbin using his image rights. This makes a further and separate Image Rights Agreement redundant.

77. Besides the fact that the Image Rights Agreement was not necessary in view of clause 5 of the Employment Contract, the Image Rights Agreement also contradicts clause 5. The Image Rights Agreement stipulates that the Player's image rights are to be vested in the Club's related entity, Aerbin HK. This follows among others from clause 1 of the Image Rights Agreement, which states that Aerbin HK has the right to exploit the image rights of the Player and in exchange the Player shall receive image rights fees. However, clause 5.1 of the Employment Contract operates on the assumption that the Player owns his own image rights and has the right to grant licenses to Aerbin and third parties to be able to exploit the Player's image rights instead of the Player himself.

78. Comparing the Employment Contract and the manner in which the Image Rights Agreement has been drafted also seems to suggest that the Parties were well aware that the Image Rights Agreement was not really intended to act as an image rights contract *per se*, but to serve as a document through which the rest of the financial terms contained in the Offer would be reflected so that Aerbin would presumably be in a better position from a tax point of view. This is also corroborated by the fact that the Image Rights Agreement was also drafted and executed on Aerbin's letter head.

79. The assumption that the Image Rights Agreement was merely a sham, is strengthened by the fact that Aerbin has never used the image of the Player. This could be considered as quite peculiar, since the amounts the Player shall receive in exchange for the exploitation of his image are relatively high.

80. Indeed, and unlike the Employment Contract, the Image Rights Agreement neither contains routine contractual clauses such a dispute resolution, governing law or termination clause. Following Aerbin's failure to adduce any evidence in rebuttal, it can only be presumed that the Image Rights Agreement was meant to supplement the monies due under the Employment Contract.

81. The Panel is aware that clause 13.2 of the Employment Contract provided the Parties with the possibility of entering into supplementary agreements and that the same had to be *"submitted with the contract to China Football Association Super League Committee"*, failing which the said agreements would *"not be acknowledged"*. There is no evidence that the Image Rights Agreement was submitted to the China Football Association Super League Committee. Therefore, it cannot be regarded and/or acknowledged as a supplementary agreement at least within the meaning of clause 13.2 of the Employment Contract. However, it can and must be regarded as a document which complements the amounts due under the Employment Contract in order to have the Player receive a fixed pay in accordance with the terms of the Offer.

82. Put together, the above facts and evidence strongly indicate that although the Parties signed two contracts in the form of the Employment Contract and the Image Rights Agreement, their intention *ab initio,* and understanding throughout the validity of these contracts, was to have them linked and to operate in *pari passu* as documents governing the employment relationship between the Player and Aerbin.

83. Consequently, FIFA was competent to hear any and all employment related disputes arising out of Aerbin's employment relationship with the Player in accordance with article 22 (b) of the FIFA RSTP.

84. Although Article R57 of the CAS Code empowers the Panel *"to review the facts and the law"* by issuing *"a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*, the majority of the Panel is of the opinion that the case should not be sent back to FIFA, as in the view of the majority of the Panel the issue of whether the Contracts are linked was decided by FIFA as a substantive issue in the case. The FIFA DRC did in fact consider the Image Rights Agreement and then reached the conclusion that the said agreement did not contain any employment related elements. Besides, there are no procedural grounds based upon which the case should be referred back to FIFA.

85. Therefore, in exercise of the powers granted to it under Article R57 of the CAS Code, the Panel proceeds to review the facts and the law de novo.

B. Did the Player terminate his contractual relationship with or without just cause?

86. In bringing his contractual relationship with Aerbin to an end on 31 May 2014, the Player stated that *"the club hasnt paid salaries and signing fee for over 90 days"*.

87. The Player particularly asserts that Aerbin was in breach of the Image Rights Agreement by failing to pay his signing-on fee of USD 400,000, which he claims fell due on 3 March 2014 (i.e. 15 working days following the signature of the Image Rights Agreement) and by failing to pay his February, March and April dues under both the Employment Contract and the Image Rights Agreement respectively broken down as follows:

Employment Contract			**Image Rights Agreement**		
Month	Alleged outstanding salary	Date due	Month	Alleged outstanding instalment	Date due
February 2014	USD 40,000	28 March 2014	February 2014	USD 40,000	28 March 2014
March 2014	USD 40,000	28 April 2014	March 2014	USD 40,000	28 April 2014
April 2014	USD 40,000	28 May 2014	April 2014	USD 40,000	28 May 2014

88. Whereas during the FIFA DRC proceedings, the Player also stated that Aerbin had forced him to live on his own expenses, it became apparent during the CAS hearing and also in his CAS submissions that Aerbin had reimbursed all his living and travelling expenses and that he was not basing his termination on grounds that Aerbin had also allegedly breached its duty to cater for his housing and travelling expenses.

89. The question therefore is whether the termination of the Contract was justified for not having been paid his March, April and May 2014 dues as agreed under the Employment Contract and the Image Rights Agreement, as well as the USD 400,000 signing-on fee.

90. Looking at the facts, it is not in dispute that the Player was paid USD 40,000 on 18 April 2014. This was the first payment he ever received from Aerbin and the majority of the Panel is of the opinion that it can be assumed that this amount related to his February 2014 salary as due under the Employment Contract (see para. 12 *supra*). This understanding is indeed corroborating by the Player himself as evidenced from his FIFA DRC claim, wherein he requested his March, April and May 2014 payments and the signing on fee of USD 400,000, with nothing to the effect that he regarded the USD 40,000 transfer made on 18 April as having offset part of his USD 400,000 signing on fees.

91. Thereafter, the Player received another USD 40,000 on 8 May 2014 through of a transfer made by Aerbin HK. Given that Aerbin HK was one of the signatories to the Image Rights Contract, the majority of the Panel finds that this amount can only be attributed to the Player's February 2014 Image Rights Agreement instalment (see para. 17 *supra*).

92. The majority of the Panel therefore assumes that the Player had been paid all his February 2014 dues prior to terminating his contractual relationship with Aerbin.

93. What remained outstanding as at the date of termination, *i.e.* 31 May 2014 was – in the opinion of the majority of the Panel - his USD 400,000 signing-on fee and his March and April 2014 payments since the amounts of the month May were due only as from 28 June 2014. Therefore, the amounts due on 31 May 2014 under the Employment Contract and the Image Rights Contract are respectively broken down as follows:

Employment Contract		**Image Rights Agreement**	
Outstanding payment	Month	Outstanding payment	Month
USD 40,000	March 2014	USD 40,000	March 2014
USD 40,000	April 2014	USD 40,000	April 2014

94. Pursuant to clause 9.3.2 of the Employment Contract and clause 2 of the Image rights Contract, the March and April 2014 amounts respectively due under the Employment Contract and the Image Rights Contract were to be paid on the 28th day of the following month, i.e. on 28 April and 28 May 2014 respectively. These amounts had not been paid by the time the Player terminated the Contract on 31 May 2014, and had been delayed by 33 and 3 days respectively. Furthermore, the signing-on fee fell due within 15 working days following the signature of the Image Rights Agreement, i.e. on 3 March 2014.

95. The question therefore is whether the Player was justified in bringing his contractual relationship to an end at the time of termination. The Panel finds that this shall be established strictly based on the grounds invoked in the termination notice.

96. Pursuant to CAS jurisprudence, just cause is said to exist where the breach has reached an extent that the injured party can no longer, and in good faith, be expected to continue the contractual relationship (CAS 2008/A/1447 and CAS 2008/A/1517).

97. In CAS 2007/A/1352, it was held that *"[i]n order for the Sole Arbitrator to consider that there is a just cause, the concerned party's situation must be of a certain level of seriousness"*, whereas the panel in CAS 2009/A/1956 held at paragraph 25 that *"(…) a termination of contract with immediate effect, for just cause, is to be declared only in circumstances where the employee has committed a serious breach of the contract. According to Swiss law, which applies additionally, and as emphasized by the FIFA Dispute DRC in the appealed decision, the termination of the contract with immediate effect is to be applied as ultima ratio"*. Although the latter case concerned termination by an employer, the Panel finds it relevant in as far as it emphasizes the need for the party at fault to have committed a serious breach of contract.

98. The Panel also deems it relevant to seek guidance from the FIFA Commentary, which although not a binding source of law *per se*, serves to guide panels in establishing situations which lead to just cause.

99. Article 14.2 of the FIFA Commentary states as follows:

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

100. The Panel must now establish whether the different outstanding payables amount to a serious breach justifying a player's termination of a contract.

101. In this particular case, the Parties had defined and agreed on what would amount to a serious breach that would give rise to just cause for termination. Clause 9.3.2 of the Employment Contract determines as follows:

Clause 9 Cancellation of the Contract

(…)

3. The Contract may be canceled by [the Player] by notifying [Aerbin] (…)

(2) If [Aerbin] is behind in payment of salary to [the Player] for over three months.

102. As such, the Parties had agreed that the Player would have had just cause to terminate the Contract had he not been paid his salary in accordance with the Employment Contract for more than 90 days. It is also significant that the Player has not challenged the validity of this clause.

103. From the facts, it is not in dispute that the Player's March and April salaries had only been delayed by 33 and 3 days respectively.

104. Therefore, and in accordance with the doctrine of *pacta sunt servanda*, the majority of the Panel finds that Aerbin had not breached its contractual obligations to an extent whereby the Player was entitled to regard the same as a serious breach giving rise to a right of termination. A serious breach would, in the eyes of the Parties, only have arisen had Aerbin delayed any of the Player's dues by 90 or more days.

105. Even assuming clause 9.3.2 of the Employment Contract had been brought to debate, the majority of the Panel takes the view that its validity or otherwise should be assessed on a case by case basis with reference also made to the FIFA Commentary (*in casu* Article 14.3) which although not a binding source of law, offers guidelines on contractual stability. As a guideline, Article 14.3 of the FIFA Commentary generally entitles a player to terminate his contract if he has not been paid for over 3 months. This is not the case at hand.

106. The case by case approach to termination of contracts *vis-à-vis* the specificities of this case also point towards the following prevailing facts and circumstances which the majority of the Panel finds to be a significant aid in assessing the validity of clause 9.3.2 of the Employment Contract:

- **The Player's experience**: the Player was a seasoned professional who previously played for several clubs in Asia and one in Europe and was assisted by his Intermediary when engaging Aerbin on the terms and conditions of their contractual relationship. He was well acquainted with the process of contract negotiation and was well aware of clause 9.3.2 of the Employment contract. He also accepted to start working and to be paid on the 28th of every following month and did not insist on being paid at the end of each month;
- **The Parties' contractual relationship and arrangements**: the Player was happy to have both employment related contracts split into two. He also accepted to be paid on the 28th day of every following month as opposed to the usual end of current month payment. He knew or ought to have known this to be rather uncommon yet he never raised any issue in this regard during the life of the Contracts; and
- The **contractual practice in Chinese football**: it is apparent that most Chinese professional football contracts contain clauses such as clause 9.3.2 which only allow players to terminate their contracts if clubs delay their salaries by 3 or more months. It is therefore assumed that foreigner players desirous of signing relatively big professional football contracts with Chinese clubs sought (or should have) prior legal advice on the consequences of such clauses.

107. Notwithstanding the above, the Player's conduct, in particular the following acts, suggest that he was intent on ending his stay at Aerbin, or at least uninterested in continuing to render his services to Aerbin:

- Incorrectly stating in his termination notice that he had not been paid for "over 90 days" whilst at the same time failing to give particulars of the amounts due;

- Informing Aerbin that he would submit the matter to the FIFA DRC on 1 June 2014, only to file his FIFA claim on 27 May 2014; and
- Being unreceptive to the thought of rescinding his decision to terminate the Contract despite several post termination requests from Aerbin on 24 and 30 June 2014 and 11 July 2014 and payments on 16 June and 1 July 2014.

108. Aerbin on its part tried to revive the contractual relationship through its letters dated 24 and 30 June and 11 July 2014, and by making post termination payments of USD 40,000 each on 16 June and 1 July 2014 respectively. It, however, suffices to say that the Panel does not approve Aerbin's conduct of delayed payments and reiterates that contracts signed in good faith must be honoured and fulfilled on time.

109. The Panel therefore finds Aerbin's non-payment of the outstanding salaries and sign-on fee as having been in breach of its contractual obligations. Considering the prevailing facts and circumstances of this particular case, namely the terms and conditions of the agreed Contracts, the majority of the Panel, do not view Aerbin's breaches as a valid just cause to justify the Player's termination on 31 May 2014 under the prevailing facts and circumstances.

110. In relation to the signing-on fee, the Panel notes that it fell due within 15 working days following the signature of the Image Rights Agreement, i.e. on 3 March 2014. Given the Panel's finding on the link between the Contracts, the majority of the Panel considers that the Player would only have had just cause to terminate the Contract had he not been paid the signing-on fee within 90 days counting from 3 March 2014. Therefore, the 90 days period agreed under clause 9.3.2 of the Employment Contract would only have been triggered on 3 June 2014 and, therefore, in the view of the majority of the Panel, the Player did not have just cause to terminate the Contract on 31 May 2014.

111. As a consequence of the majority decision in this respect, the remainder of the reasoning of the present arbitral award shall also be considered as rendered by majority.

C. What consequences befall the Player?

112. Having found the Player to have terminated his contractual relationship with Aerbin without just cause, the Panel must determine the legal consequences that follow.

113. Article 17 of the FIFA RSTP deals with the *"Consequences of terminating a contract without just cause"* and paragraph 1 thereof states that *"[i]n all cases, the party in breach shall pay compensation"*.

114. It therefore follows that the Player must compensate Aerbin.

115. In arriving at the USD 690,000 as the amount of compensation, the FIFA DRC looked at the average between the value remaining under the Player's Employment Contract (USD 680,000) and the value reflected in the Player's new employment contract with Al Shorta (USD 700,000).

116. Aerbin has not appealed the FIFA DRC Decision.

117. On his part, the Player's case is primarily limited to a contention that he had just cause to terminate his contractual relationship with Aerbin and that he is therefore entitled to compensation.

118. The Player has, however, requested the Panel in his submissions to *"mitigate the amount due to Aerbin of USD 690.000,00 awarded by the DRC to nil, or to an amount to* [be] *determine*[d] *by the Panel in good justice"*. However, he has not adduced any evidence or arguments grounding his request to particularly have the criteria applied by the FIFA DRC in arriving at a compensation of USD 690,000 reviewed. The Player has consequently failed to place the Panel in a position to consider reviewing the said criteria.

119. The Panel notes that the Contracts were terminated at a time when the Player was owed some monies for services he had already rendered, these being:

- USD 400,000 signing-on fee due under the Image Rights Agreement;
- USD 120,000 as instalments due under the Image Rights Agreement (March, April and May); and
- USD 40,000 May salary due under the Employment Contract

  Total: USD 560,000

120. The Player has indeed stated that he is entitled to these amounts (cf section IV.1.3 above) and orally reiterated this request during the hearing.

121. Article 323b (2) of the Swiss Code of Obligations states as follows:

The employer may set off his counterclaims against wage claims only to the extent that the latter can be the subject of attachment in a debt enforcement proceeding. However, claims for wilful damages may be set off without limit.

122. Therefore, the Panel must offset these amounts and deduct them from the compensation otherwise due to Aerbin, meaning the Player must pay Aerbin USD 130,000 (i.e. USD 690,000 – USD 560,000).

VII. CONCLUSION

123. In view of the foregoing, the majority of the Panel finds that the Player had no just cause to terminate his contractual relationship with Aerbin. However, the Player's appeal is partially upheld to the effect that USD 560,000 is offset from the USD 690,000 ordered by the FIFA DRC, meaning the Player must compensate Aerbin with an amount of USD 130,000.

124. Interest at 5% p.a. shall attach on this amount. Given that i) the Respondent has requested interest in accordance with the orders issued in the Appealed Decision and ii) the Appeal Decision was notified to the Parties on 26 March 2015 with orders that interest be calculated

with effect from 30 days following its notification to the Parties, it follows that interest shall start running from 26 April 2015 until the date the compensation is fully paid.

125. The Panel emphasizes that it reached the above conclusions on the basis of very particular circumstances as evidenced, and without therefore intending to give any direction whatsoever for future cases.

126. This decision has been taken by the members of the Panel by majority.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Nashat Akram against the FIFA Dispute Resolution Chamber decision dated 27 November 2014 is partially upheld.

2. The FIFA Dispute Resolution Chamber decision dated 27 November 2014 is partially modified and Nashat Akram is ordered to pay Dalian Aerbin Football Club USD 130,000 (one hundred and thirty thousand US Dollars), together with interest at 5% p.a. with effect from 26 April 2015 until the date it is effectively paid.

3. (…).

4. (…).

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