CAS 2024/A/10477 Al-Ahli Saudi Football Club v Jeonbuk Hyundai Motors Football Club and Fédération Internationale de Football Association

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Anthony **Lo Surdo** SC, Barrister, Arbitrator, Mediator in Sydney, Australia

in the arbitration between

Al-Ahli Saudi Football Club, Kingdom of Saudi Arabia

Represented by Mr Ron Gourlay, CEO, Al-Ahli Saudi Football Club, Jeddah, Kingdom of Saudi Arabia

Appellant

and

Jeonbuk Hyundai Motors Football Club, Republic of Korea

Represented by Mr Emanuel Cortada, Attorney-at-law and/or Ms Corina Quirighetti, Bar & Karrer AG, Brandschenkestrasse 90, 8027 Zurich, Switzerland

First Respondent

and

Federation Internationale de Football Association, Switzerland

Represented by Messrs Miguel Lietard Fernandez-Palacios and Roberto Nájera Reyes, FIFA Litigation Department, Coral Gables, United States of America

Second Respondent

I. THE PARTIES

1. Al-Ahli Saudi Football Club ("Appellant" or "Club") is a professional football club affiliated to the Saudi Arabia Football Federation ("SAFF") which is in turn a member association of Fédération Internationale de Football Association ("FIFA").

2. Jeonbuk Hyundai Motors Football Club (the "First Respondent" or "Jeonbuk") is a South Korean professional football club affiliated to the Korea Football Federation which is in turn a member association of FIFA.

3. FIFA (or the "Second Respondent") is the international governing body of football. It is an association under the Swiss Civil Code with its headquarters in Zurich, Switzerland.

4. Jeonbuk and FIFA are jointly referred to as the "Respondents".

5. The Club and the Respondents are jointly referred to as the "Parties".

II. INTRODUCTION

6. The Club appeals the decision of the FIFA Football Tribunal Players' Status Chamber ("FIFA PSC") passed on 5 March 2024 and notified on 18 March 2024 ("Appealed Decision").

7. In the Appealed Decision, the FIFA PSC ordered the Club to pay Jeonbuk the sum of USD 49,172.20 as a contractual penalty and to pay FIFA USD 100,000 as a fine and rejected the balance of the Jeonbuk's claims.

III. FACTUAL BACKGROUND

A. Background Facts

8. Below is a summary of the relevant facts and allegations based on the factual part of the Appealed Decision, the parties' written submissions and the exhibits filed. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows.

9. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Award only refers to the submissions and evidence the Sole Arbitrator considers necessary to explain his reasoning.

10. On 10 January 2023, Jeonbuk and the Club signed an agreement for the permanent transfer of the player Mr Modou Barrow ("Player") to the Club ("Agreement').

11. The Agreement was concluded following negotiations between the parties which commenced on or about 19 December 2022.

12. The negotiations which culminated in the Agreement were conducted on behalf of the Club by the Player's Agent, Mr Erkan Saglik ("Agent"), pursuant to a written authority contained in a letter dated 19 December 2022 which also expressed the Club's "proposal" for a permanent transfer of the Player from 1 January 2023.

13. As of 23 December 2022, the FIFA TMS disclosed that the Club was subject to one or more transfer bans.

14. Accordingly, on 25 December 2022, Jeonbuk requested the Club to confirm that it was not subject to any transfer ban.

15. On 28 December 2022, Jeonbuk informed the Club in writing that it agreed to the proposed financial terms but would only execute a formal transfer agreement after the Club confirmed the lifting of the transfer ban.

16. On 31 December 2022, Jeonbuk prepared and submitted a first draft of the Agreement which it forwarded to the Club ("First Draft Agreement").

17. Clause 4.3 of the First Draft Agreement contained a proposal by Jeonbuk that, in case of default by the Club, all amounts would become immediately due and the Club would pay 65% of such outstanding amounts as a penalty and 18% per annum as default interest. The Club did not agree with that proposal.

18. On 2 January 2023, the Club proposed an amendment to Clause 4.3 of the First Draft Agreement, the effect of which was that in the event of default by the Club, it would only be required to pay 5% per annum as default interest ("Second Draft Agreement"). Jeonbuk did not agree with that proposal.

19. On 4 January 2023, Jeonbuk proposed a further amendment to Clause 4.3 of the Second Draft Agreement, the effect of which was to require the Club to pay a USD 400,000 penalty in the event of default by the Club and a default interest rate of 5% per annum ("Third Draft Agreement"). The Club did not agree with that proposal.

20. In a response provided on the same date, the Club proposed an amendment to Clause 4.3. Whilst other amendments were effected to subsequent drafts of the agreement, the wording of Clause 4.3 as proposed by the Club on 4 January 2023 was ultimately reflected in the Agreement as signed on 10 January 2023.

21. Clause 3.1 of the Agreement required the Club to pay Jeonbuk a fixed transfer fee of USD 800,000 in two instalments, the first, by no later than three (3) calendar days from the date of the Agreement, and the second, payable by no later than 15 March 2023 ("Transfer Fee").

22. Clause 3.1 of the Agreement also provided that a conditional transfer fee of USD 200,000 was payable if the Club was promoted to the Saudi Pro League (or the highest division in the Saudi Arabian football league system) ("Conditional Transfer Fee"). The Conditional Transfer Fee was payable by no later than the last day of the

season date (as set by the SAFF and indicated on the FIFA TMS) during which the Club played in the Saudi First Division League and such promotion is confirmed.

23. Clause 4.1 of the Agreement provided that any amounts payable to Jeonbuk were to be paid in full and without any set-off, deduction or withholding whatsoever.

24. Clause 4.2 of the Agreement provided that notwithstanding Clause 4.1, it was explicitly agreed that the Transfer Fee would include "*…whatever amount(s) due to Jeonbuk, as well as claims of third clubs for solidarity contribution mechanism as set out in FIFA's Regulations on the Status and Transfer of Players. In this regard, Al-Ahli shall deduct such solidarity contribution amount (5%) and pay these amounts to all entitled clubs in accordance with relevant regulations set forth by FIFA.*"

25. Clause 4.3 of the Agreement provided that if the Club "*fails to make any payment due to Jeonbuk, Al-Ahli shall be obliged to pay 5% per month to Jeonbuk on any amount outstanding, of which any amount exceeding 18% per annum shall be deemed as a penalty from the date when it was due until the default is fully cured. Al-Ahli acknowledges the importance of this transaction, and the economic significance of it for Jeonbuk and therefore acknowledges that this default interest rate and penalty payment are appropriate and balanced*."

26. The FIFA TMS recorded the relevant football seasons in Saudi Arabia as follows:

- Season 2022/2023: from 25 August 2022 until 30 May 2023; and

- Season 2023/2024: from 11 August 2023 until 30 June 2024.

27. On 16 January 2023, Jeonbuk wrote to the Club confirming receipt of USD 399,970, representing the first instalment of the Transfer Fee (less USD 30 in remittal charges). Jeonbuk also informed the Club that the payment exceeded the amount that was due because the Club should have deducted the solidarity contribution of USD 20,000 and that the surplus amount of USD 19,970 (after deducting the USD 30 remittal charge) would be credited towards the second instalment of the Transfer Fee. There was no response by the Club to this communication.

28. The second instalment of the Transfer Fee in the amount of USD 360,030 was not paid by its due date of 15 March 2023.

29. On 20 March 2023, Jeonbuk sent a default letter to the Club for its failure to pay the second instalment of the Transfer Fee in the amount of USD 360,030 by its due date ("First Default Notice").

30. There being no response to the First Default Notice, another default notice was issued by Jeonbuk to the Club on 17 April 2023, by which Jeonbuk was afforded 10 calendar days to make the second instalment of the Transfer Fee in the amount of USD 360,030 ("Second Default Notice"). The Club did not respond to the Second Default Notice nor did it pay the amount demanded in the notice by the stipulated date.

31. On or about 4 May 2023, that is, by the end of season 2022/2023, the Club was promoted to the Saudi Pro League, being the highest division in Saudi Arabia football thus triggering the payment of the Conditional Transfer Fee which, pursuant to Clause 3.1(b) of the Agreement was due no later than 30 May 2023, that is, the last day of the 2022-2023 season.

32. The Club did not pay the Conditional Transfer Fee by 30 May 2023.

33. Accordingly, on 3 August 2023, Jeonbuk sent a default notice to the Club requesting payment of the Conditional Transfer Fee in the amount of USD 190,000 (being USD 200,000 as provided in the Agreement less the solidarity contribution) by 14 August 2023 ("Third Default Notice"). The Third Default Notice also noted that the Club was in arrears of payment of the second instalment of the Transfer Fee together with interest that had accrued on that payment.

34. On 8 August 2023, the Club paid the amount of USD 399,970 to the Club (being an amount of USD 400,000 less bank charges of USD 30). At this time, the amount of USD 550,030 was outstanding comprising the second instalment of the Transfer Fee and the Conditional Transfer Fee but not including any interest or penalty.

35. As the Club did not provide any specific instructions regarding the manner in which its payment was to be attributed against the outstanding amounts, on 18 August 2023, Jeonbuk sent a letter to the Club informing it that the payment had been appropriated as follows: USD 86,407.20 towards interest and penalties accrued in respect of the outstanding second instalment of the Transfer Fee; and USD 313,562.80 in part payment of the second instalment of the Transfer Fee.

36. In the 18 August 2023 letter, Jeonbuk also demanded that the Club pay the following amounts by 25 August 2023: USD 48,374.10, being the residual amount of the second instalment of the Transfer Fee, including interest and penalties; and USD 217,484.93, being the Conditional Transfer Fee, including interest and penalties ("Fourth Default Notice").

37. A final default notice was issued by Jeonbuk to the Club on 2 November 2023 by which it demanded the payment of the following amounts by 12 November 2023: USD 53,800.11, being the residual amount of the second instalment of the Transfer Fee, including interest and penalties; and USD 241,846.58, being the Conditional Transfer Fee, including interest and penalties ("Fifth Default Notice").

38. On 24 November 2023, the Club offered to settle all claims made by Jeonbuk upon the payment of USD 150,060 corresponding to the principal then outstanding. That offer was rejected on 27 November 2023.

39. On 28 November 2023, the Club made a further offer to settle all claims made by Jeonbuk upon the payment of USD 162,023.61 corresponding to the principal then outstanding plus interest at 5% per annum. That offer was rejected on

30 November 2023 and the Club was also informed that a claim would be filed with the FIFA Football Tribunal.

40. On 30 November 2023, Jeonbuk lodged a claim with the FIFA Football Tribunal.

41. On 10 December 2023, the Club paid Jeonbuk the sum of SAR 609,504.99 (equivalent to USD 162,231.83). Accompanying that payment was an email from the Club's then attorneys noting that their client's "…*goal is to settle this situation amicably. While we trust that this payment is sufficient to reach that goal, we remain open to further conversations on (sic) that regard. In this sense, we propose the use of FIFA Mediation.*"

42. On 15 January 2024, the Club paid to Jeonbuk the sum of USD 32,494.26, corresponding to an applicable interest rate of 18% per annum on the outstanding amounts but leaving as unpaid penalty payments claimed by Jeonbuk under Clause 4.3 of the Agreement.

43. On 24 January 2024, Jeonbuk acknowledged receipt of the payments of USD 162,231.83 and USD 32,494.26, disputed the Club's allegations, in particular, in relation to Clause 4.3 of the Agreement and otherwise referred to the arguments set out by it in the FIFA PSC proceedings.

B. Proceedings before the FIFA PSC

44. In the proceedings before the PSC, Jeonbuk claimed overdue payables under the Agreement, as follows: USD 46,467.20, being the residual amount of the second instalment of the Transfer Fee plus 1.5% per month (18% p.a.) as default interest and 3.5% per month as contractual penalty from 9 August 2023 until payment; and USD 190,000, being the Conditional Transfer Fee, plus 1.5% per month (18% p.a.) as default interest and 3.5% per month as contractual penalty from 31 May 2023 until payment. Jeonbuk also sought that a sanction be imposed on the Club in accordance with Article 12bis para. 4 of the FIFA Regulations on the Status and Transfer of Players ("RSTP") and costs.

45. Jeonbuk submitted to the FIFA PSC, in summary, that the penalty provision in the Agreement was concluded after negotiations between commercially experienced parties following a proposal made by the Club, it was necessary to act as a deterrent especially having regard to the Club's history of non-compliance with financial obligations and that the imposition of the penalty was justified because of the Club's failure to make timely payments and to otherwise act in good faith.

46. In reply, the Club argued, in summary, that Jeonbuk drafted Clause 4.3 of the Agreement with the intention of establishing an abusive interest rate and/or penalty fee, it was responsive to demands for payment by consistently engaging in settlement discussions with Jeonbuk and that Article 12bis para. 4 of the RSTP should not apply given the attempts made by it towards settlement and the four payments that it had made representing all outstanding principal plus interest at 18% per annum.

47. The first issue for determination by the FIFA PSC was whether Clause 4.3 of the Agreement complied with the principles of proportionality and "reasonability" so as to not place the party who is subject to the burden of that clause in a situation of unjust enrichment.

48. The FIFA PSC determined that, upon its proper construction, Clause 4.3 of the Agreement, would permit "…*hidden interests that far exceed the amount applicable of 18% per annum…*" and in the order of 60% per annum. Having so found, the FIFA PSC determined that Clause 4.3 "…*should be reduced…*" in its operation and that it "…*could subsist if the time-element in what exceeds the rate of 18% per annum was removed*."

49. The FIFA PSC however, opined that the percentage in excess of 18% per annum, if considered a maximum of 60%, could be enforced as a penalty (thus resulting in an annual interest of 18% per annum plus a contractual penalty of up to 42%). Applying this rationale, the FIFA PSC determined that a penalty would apply over the second instalment of the Transfer Fee from 15 March 2023 to 8 August 2023 and on the Conditional Transfer Fee from 31 May 2023 to 10 December 2023.

50. Having recalculated penalty and interest payments in accordance with this rationale, the FIFA PSC determined that the applicable penalty in respect of the second instalment of the Transfer Fee and the Conditional Transfer Fee totalled USD 48,879.45 and that the applicable interest on the second instalment of the Transfer Fee and the Conditional Transfer Fee totalled US 45,443.84. These amounts were added to the principal payments required under the Agreement making the total due by the Club to Jeonbuk as USD 1,044,323.29. Deducting the payments made by the Club to Jeonbuk in the sum of USD 995,151.09, the FIFA PSC accordingly concluded that the balance due by the Club to Jeonbuk as a contractual penalty was USD 49,172.20.

51. The second issue for determination by the FIFA PSC was whether the circumstances warranted the imposition of a sanction pursuant to Article 12bis of the FIFA RSTP, which provides that any club found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis may be sanctioned.

52. The FIFA PSC confirmed that Jeonbuk had twice put the Club in default of payment; first, on 17 April 2023 regarding the payment of USD 360,030 relating to the unpaid portion of the second instalment of the Transfer Fee which had fallen due for payment more than 30 days prior and that, notwithstanding a 10 day extension to cure such default, the amount was not paid until 8 August 2023; and the second, on 2 November 2023 regarding the Conditional Transfer Fee of USD 190,000 which had fallen due for payment more than 30 days prior and that, notwithstanding a 10-day extension to cure such default, the amount was not paid until January 2024. The FIFA PSC found that the Club had twice delayed a due payment without a *prima facie* contractual basis to do so and that it was therefore entitled by virtue of Art. 12bis par. 4 of the RSTP to impose sanctions on the Club.

53. The FIFA PSC noted that the Club had been sanctioned on eight different occasions by both the FIFA Dispute Resolution Chamber and the FIFA PSC in the period from

24 February 2022 to 20 April 2023 for having overdue payables. Those sanctions varied between a warning and a fine of USD 7,500 and fines of up to USD 105,000 totalling USD 460,000. The FIFA PSC found that the Club "…*is considered a repeat offender…*" and that a repeated offence is considered an aggravating circumstance leading to a more severe penalty. The FIFA PSC recalled that the Club was made aware that repeated offences would be considered as an aggravating circumstance. Yet, and notwithstanding that the Club had received USD 460,000 in fines for having overdue payables, the Club had twice defaulted in its obligations to Jeonbuk without contractual cause.

54. In the circumstances, the FIFA PSC determined that a fine of USD 100,000 was warranted ("Fine").

55. The Appealed Decision determined, relevantly, the following:

"*IV. Decision of the Players' Status Chamber:*

1. The claim of the Claimant, Jeonbuk Hyundai Motors FC, is partially accepted.
2. The Respondent, Al Ahli, must pay to the Claimant USD 49,172.20 as contractual penalty.
3. Any further claims of the Claimant are rejected.
(…)
7. The final costs of the proceedings in the amount of USD25,000 are split between the parties and shall be paid to FIFA in the following manner:
(…) b) USD 12,500 by the Respondent.
8. A fine in the amount of USD 100,000 is imposed on the Respondent, which must be paid to FIFA within 30 days of notification of this decision…"

IV. SUMMARY OF THE PROCEEDINGS BEFORE THE CAS

56. On 7 April 2024, the Club filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (2023 Edition) (the "Code") against the Respondents with respect to the Appealed Decision. In its Statement of Appeal, the Club requested the appointment of a sole arbitrator.

57. On 18 and 19 April 2024 respectively, FIFA and Jeonbuk agreed to the appointment of a sole arbitrator in the present matter.

58. On 28 April 2024, the Club filed its Appeal Brief in accordance with Article R51 of the Code.

59. On 22 July 2024, Jeonbuk filed its Answer in accordance with Article R55 of the Code.

60. On 21 August 2024, FIFA filed its Answer in accordance with Article R55 of the Code.

61. On 22 August 2024, the CAS Court Office invited the Parties to inform it as to whether they preferred a hearing or case management conference to be held or for the Sole Arbitrator to issue an award based on the parties' written submissions.

62. In response, the Parties indicated that neither a hearing nor a case management conference was necessary and requested that the Sole Arbitrator issue an award based solely on the written submissions.

63. On 29 August 2024, the parties were informed by the CAS Court Office that, pursuant to Article R54 of the Code and on behalf of the Deputy President of the Appeals Arbitration Division, the Arbitral Tribunal had been constituted as follows:

    Sole Arbitrator: Mr Anthony Lo Surdo SC, Barrister, Arbitrator, Mediator in Sydney, Australia.

64. On 4 November 2024, the CAS Court Office informed the Parties that, pursuant to Article R57 para. 2 of the Code, the Sole Arbitrator deemed himself sufficiently well-informed to decide the case based solely on the Parties' written submissions, without the need to hold a hearing.

65. On 5 November 2024, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order for Procedure, which was duly signed by the Parties on 17 November 2024, 7 November 2024 and 5 November 2024, respectively. In that Order for Procedure the Parties, *inter alia*, confirmed their agreement that the Sole Arbitrator decide this matter based upon their respective written submissions and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES

66. What follows is a summary of the parties' written submissions. It does not necessarily encompass every contention put forward by the Parties. To the extent that it omits any contentions, the Sole Arbitrator notes that he has carefully considered all the evidence and arguments submitted by the parties, even if there is no specific reference to those submissions in the summary.

A. The Club's Submissions and Request for Relief

67. Set out below is a summary of the Club's submissions on the appeal and its request for relief:

    The Appealed Decision's Obvious Mistake

    - The FIFA PSC used the wrong base amount of USD 380,000 to calculate interest and penalty in relation to the second instalment of the Transfer Fee and should have used USD 360,030.

- Despite USD 380,000 being the original value of the second instalment of the Transfer Fee, the actual amount due was USD 360,030 when regard is had to the amount paid in relation to the first instalment of the Transfer Fee which was more than was due and that amount is credited towards the payment of the second instalment of the Transfer Fee.

- USD 360,030 is the amount that Jeonbuk itself used for the calculation of interest and penalty in its demand letter to the Club, dated 20 March 2023.

- Any interest and/or penalty due in relation to the second instalment of the Transfer Fee should be calculated on the correct base amount of USD 360,030.

The Contractual Penalty

- Jeonbuk drafted the Agreement and, in particular, Clause 4.3.

- Jeonbuk's intention in drafting Clause 4.3 of the Agreement was to establish an abusive consequence against the Club, either as to interest rate or as a penalty.

- The Club never had the intention of agreeing to an unlawful and immoral rate of 5% per month but rather one equal to the default interest rate provided by Swiss law of 5% per annum. In support, the Club refers to an early draft of Clause 4.3 of the Agreement in which it has made a proposed amendment to that effect.

- In establishing the meaning of a contract, under Swiss law, a court will seek to determine the actual common intention of the parties (Article 18 para. 1 of the Swiss Code of Obligations ("SCO")) and when the actual common intention cannot be established, the contract must be interpreted according to the requirements of good faith. The requirements of good faith give preference to an objective approach, that is, how a reasonable person would have understood the contractual provisions in issue (CAS 2005/O/985). Further, unclear declarations or words in a contract will be interpreted against the party that drafted it, in accordance with the legal principle of *in dubio contra stipulatorem* (CAS 2018/A/6023).

- In particular, the intention of Clause 4.3 of the Agreement was for Jeonbuk to use a "hidden interest rate" of 5% per month to validate an unlawful and immoral interest rate of 60% per annum which is expressly prohibited by Article 163 para. 2 of the SCO.

- Further, Article 104 para. 1 of the SCO contemplates a default interest rate of 5% per annum. However, Article 104 para. 2 of the SCO provides that where a contract envisages a rate of interest higher than 5%, such higher rate may also be applied while the debtor remains in default. Whilst the parties are free to negotiate a higher rate of interest, such contractual freedom is not unlimited as the outcome must remain compatible with Swiss law. Interest at a rate of 18% per annum is the maximum permissible under Swiss law (CAS 2015/A/3909; CAS 2010/A/2128; CAS 2020/A/6809 & 6843; CAS 2021/A/7727 and CAS 2021/A/7673 & 7699).

- Cognisant of these principles, Jeonbuk drafted Clause 4.3 of the Agreement containing an actual interest rate of 60% per annum, however, adding that "*any amount exceeding 18% per annum shall be deemed as penalty*." Even so, the penalty fee would amount to a rate of 3.5% per month (or 42% per annum), which is blatantly excessive and disproportionate.

- Swiss law does not provide an exact definition of when a penalty is considered abusive or excessive. A court must take "…*into account the merits of the case and all the relevant circumstances in determining whether a penalty is excessive or not and, if so, the extent to which it should be reduced* (ATF 82 II 42 par. 3). Further, "*a penalty is considered abusive when its amount is unreasonable and clearly exceeds the admissible amount in consideration of the principles of justice and equity*." (ATF 82 II 43 par. 3 and ATF 133 II 43 par. 3.3.1 and CAS 2020/A/6809 & 6843).

- The principle of contractual freedom enshrined in Article 19 of the SCO is to be respected but only within the limits of excessive self-commitment (CAS 2021/A/8306 & CAS 2015/A/1042) and the contract must not otherwise be "unlawful", that is, "…*against the law, moral standards or customary practice.*" (CAS 2021/A/8306 at par. 76). In establishing a rate of 60% per annum, Clause 4.3 of the Agreement is blatantly abusive and disproportionate, thus against the law, moral standards and customary practice.

- The FIFA PSC correctly identified Clause 4.3 of the Agreement as containing hidden interest of 60% per annum. However, it erred when deciding the consequences of such conclusion and deviated from the consistent practice of the FIFA Football Tribunal when dealing with the issue of hidden interest.

- The constant practice of the FIFA Football Tribunal is: to consider a penalty fee as "hidden interest" whenever the fee is not limited in time, or whenever it is triggered in connection with a default of payment that persists in time; and when concluding that a contract provides for a penalty fee that is in fact "hidden interest", to reduce the overall interest rate applicable to the maximum allowed by Swiss law of 18% per annum.

- The Club had the legitimate expectation that the FIFA Football Tribunal would apply its constant practice in the case at hand. It accordingly submits that the principle of estoppel or *venire contra factum proprium* applies (CAS OG 02/006; CAS 2007/A/1320-1321; CAS 2014/A/3765; CAS 2017/O/5265, 5265 & 5266).

- "Hidden interest" occurs when a penalty fee is unlimited in time, thus serving the same purpose as an interest rate (DRC decision of 4 October 2018). Reference is made by the Club to sixteen decisions in which the FIFA Football Tribunal, when addressing a contract with hidden interest, reduced the overall interest applicable to the maximum interest rate accepted by its jurisprudence (and permitted by Swiss law) to 18% per annum.

- In FIFA DRC decision FPSD-6515, the Chamber emphasised FIFA's constant jurisprudence on penalty fees as hidden interest as follows: "…*whenever the payment of a penalty is triggered in connection with the default of payment that persist in time (i.e. it is not only paid once but increases along with the non-payment over time), the DRC jurisprudence tends to consider those obligations as hidden interest rates rather than penalties. Thus, if so considered, the said penalty would amount to a rate higher than the maximum interest rate permitted under Swiss law and under the DRC jurisprudence, i.e. a default interest of 18% per annum*." (see also FIFA DRC FPSD-4387).

- In FIFA DRC decision 20-01749, the FIFA DRC, when identifying a clause establishing hidden interest of 60% per annum, as is the case presently, decided it in line with Swiss law and the jurisprudence of FIFA and CAS.

- The Appealed Decision unjustifiably deviated from such constant practice as, despite correctly identifying Clause 4.3 of the Agreement as hidden interest of 60% per annum, it still applied a penalty fee on top of an interest rate of 18% per annum.

- Further, in finding that the penalty fee is to be capped at 42% (that is, 60% per annum less interest at a maximum of 18% per annum), in the calculations that followed, the FIFA PSC used a "rule of three" in determining that the applicable penalty in excess of default interest of 18% for the second instalment of the Transfer Fee was 6% and the applicable penalty in excess of default interest of 18% for the Conditional Transfer Fee was 13.72%.

- In doing so, the FIFA DRC has inadvertently maintained the time-element which constitutes the very nature of hidden interest so that the longer the delay, the more the penalty increases. This method of calculation directly contradicts the constant practice adopted by the FIFA Football Tribunal as the trigger for the penalty fee is a default of payment that persists in time.

- In other words, as the penalty fee increases along with the non-payment over time, it is actually hidden interest. In reality, the penalty fee of 6% for the second instalment of the Transfer Fee comprised a hidden interest rate of 15% per annum and the penalty fee of 13.72% for the Conditional Transfer Fee comprised a hidden interest rate of 25.96% per annum.

- The Club has paid all amounts due to Jeonbuk under the Agreement assuming the application of an interest rate of 18% per annum consistent with the jurisprudence of the FIFA Football Tribunal.

- In the event that the Sole Arbitrator determines, as confirmed by CAS jurisprudence, that a penalty fee may be applied cumulatively to an interest rate, the burden of proof of which lies with Jeonbuk as creditor (CAS 2015/A/4057; CAS 2020/A/6809-6843; & CAS 2021/A/7673-7699), the method of calculation of the penalty should be such as to remove the time element from the calculation thus avoiding the application of

a penalty fee that amounts to hidden interest. It is submitted that this can be achieved by the removal of the time-element from the wording of Clause 4.3 of the Agreement so that it reads as follows:

"*If Al-Ahli fails to make any payment due to Jeonbuk, Al-Ahli shall be obliged to pay 5% ~~per month~~ to Jeonbuk on any amounts outstanding of which any amount exceeding 18% per annum shall be deemed as penalty, ~~from the date when it was due until the default is fully cured.~~*"

- This would result in the application of a penalty fee at a set rate of 5% on the amount overdue, plus an interest of 18% per annum and, in doing so, remove the time-element from the penalty fee, while maintaining the percentage contained in the clause.

- In this case, Clause 4.3 of the Transfer Agreement would be entirely reduced to an interest rate of 18% per annum and the application of a set penalty fee of 5%.

The Fine imposed by the Appealed Decision

- A sanction under Article 12bis para. 2 of the RSTP is not warranted and should be set aside in its entirety because:

  - The imposition of sanctions by FIFA is not mandatory.

  - Clubs may only be sanctioned if "*found to have delayed a due payment for more than 30 days without a prima facie contractual basis*."

  - In previous cases of the FIFA Football Tribunal, exceptional circumstances may constitute a *prima facie* reason justifying the lack of payment, even if the obligation to pay still exists (DRC decision FPSD-2366; PSC decision FPSD-6734 and PSC decision FPSD-9425).

  - The conditions under which clubs could justify non-performance or partial performance of a contractual obligation within the scope of Article 12bis of the RSTP must be assessed according to Swiss law (TAS 2018/A/5896).

  - The Club cannot reasonably be expected to pay outstanding amounts with the application of an abusive 5% monthly rate which is both illegal and egregiously unfair in Swiss law. This is an exceptional circumstance that constitutes a *prima facie* reason justifying the lack of payment.

  - If the Sole Arbitrator determines that the Club does not owe any outstanding amounts to Jeonbuk as a contractual penalty, the Fine should be automatically removed or reduced to zero because the base amount for calculating the fine would be zero and if FIFA and/or Jeonbuk had understood that all payments due were executed with the final payment, the case would not have proceeded before the FIFA PSC.

- In the alternative, if the Sole Arbitrator determines that the Club should be fined on the basis of Article 12bis of the RSTP, the Fine should be significantly reduced in circumstances where the Club submits that the Appealed Decision erred in its applicability of the principle of recidivism, imposed a manifestly and grossly disproportionate fine (CAS 2021/A/8014) and erred by not considering several mitigating factors.

- Neither Article 12bis of the RSTP nor the Procedural Rules Governing the Football Tribunal specify a period of relevant recidivism. A study carried out by the Club comprising every "overdue payables" decision issued by FIFA since 2020 demonstrates that the FIFA Football Tribunal has consistently utilised a period of recidivism of two years. Using any other time limit in the present case would be barred by the principle of estoppel and the concept of common practice.

- The Appealed Decision considered two offences committed by the Club which pre-dated the two-year period. As such, the Appealed Decision erred in considering the Club a 9th time offender when in fact, it is a 7th time offender in the present case justifying, without more, a reduction in the Fine.

- The FIFA PSC erroneously used a double jeopardy standard or the principle *of ne bis in idem* in the Appealed Decision when it referred to the Club having twice delayed a due payment without a *prima facie* contractual basis. Whilst the principle derives from the criminal law, it can be applied in disciplinary proceedings before the CAS. There are three specific requirements to be fulfilled for the application of the principle, an identity of the object, of the parties and of the facts (CAS 2007/A/1396 & 1402). Recidivism should be counted on a case-by-case basis and not over individual instalments of a particular financial obligation.

- Therefore, the fact that the Agreement was divided into instalments bears no relevance for counting recidivism, since the case still relates to the same object, parties and facts.

- A comprehensive study undertaken by the Club of decisions issued by the FIFA Football Tribunal discloses a consistent practice of not imposing a fine higher than the amount ordered by the relevant decision.

- CAS jurisprudence demonstrates that the first reasonable nexus between the severity of the violation and the sanctions to be imposed is the outstanding amount of debt and that fines shall be proportional to the amount owed (CAS 2018/A/6239).

- The Fine corresponds to 203% of the outstanding amount ordered to be paid by the Club. Therefore, the Fine is evidently and grossly disproportionate.

- Further, the Appealed Decision failed to consider several extenuating factors in favour of the Club which also justify a reduction to the Fine. Firstly, the Club's proactivity and willingness to settle the present dispute even before the filing of the claim. Such collaborative behaviour has been considered in CAS jurisprudence as a mitigating factor in favour of debtors (CAS 2018/A/6263 & CAS 2019/A/6263). Secondly, the Club has executed payments during the proceedings, which firmly represents a *bona fide* behaviour towards resolving the dispute. Decisions of both the FIFA Football Tribunal (FIFA PSC decision 3 June 2025) and the CAS (CAS 2018/A/5900) have recognised that partial payments are key factors in determining the proportionality of fines. The Club made four payments to Jeonbuk representing all principal amounts owed pursuant to the Agreement, plus an application of an interest rate of 18% per annum.

- The Fine is counter-productive because it does not appear to provide any incentive for the Club or any other debtor in the football community to execute payments to creditors during the course of the proceedings.

- The Fine disregards the Club's recent history and developments concerning its repeated offender status. Since the restructure of football in Saudi Arabia in 2023, the Club has been engaged in proactive efforts to resolve its disputes before the FIFA Tribunal. The cases referred to in the Appealed Decision in support of the Club's "repeated offender" status are related to its old administration. The specific circumstances surrounding the Club's behaviour have changed for the better just as has the Club's behaviour towards creditors. The Club's previous record must therefore be put in perspective.

- The Fine should be reduced to no more than 15% of the amount ordered to be paid by the Club to Jeonbuk.

68. The Club accordingly submitted the following requests for relief:

" *a. Admit the present appeal;*

b. Uphold the present appeal and set aside the Appealed Decision, replacing it by an Arbitral Award which:

i. Determines that Al Ahli does not owe any outstanding amount as contractual penalty to Jeonbuk in relation to the Transfer Agreement.

ii. Determines that no fine is applicable on Al Ahli.

Subsidiarily,

In the event the Panel understands that an amount is still due to Jeonbuk as contractual penalty:

iii. Determines that the amount ordered by the Appealed Decision must be reduced.

In the event the Panel understands that a fine is applicable on Al Ahli:

iv. Determines that the amount of the fine must be reduced.

In any event

i. Orders the Respondents to bear all costs and/or expenses of the present arbitration and of the first instance proceedings before FIFA (if any); and

ii. Orders the Respondents to pay the Appellant a contribution towards legal fees and other expenses incurred in connection with the proceedings, pursuant to art. 64.5 of the CAS Code, in an amount to be fixed at its discretion."

B. Jeonbuk's Submissions and Request for Relief

69. Jeonbuk's submissions are summarised as follows:

- Clause 4.3 of the Agreement makes plain that the Club not only expressly agreed to the penalty but also acknowledged that both the default interest rate and penalty are "*appropriate and balanced*."

- Clause 4.3 of the Agreement was the subject of negotiation between the parties and the form of that clause as ultimately agreed was proposed by the Player's agent, Mr Saglik, who was authorised by the Club to conduct the negotiations on its behalf.

- In raising concerns in respect of Clause 4.3 of the Agreement for the first time only in proceedings before the FIFA PSC, the Club is in violation of the principle of *venire contra factum proprium.*

- Clause 4.3 of the Agreement does not comprise "hidden interest" because first, it was the subject of extensive negotiation between the parties and, secondly, its wording is clear and unambiguous. It clearly stipulates what the parties considered to comprise interest and what part is a penalty. It is further entirely clear how these amounts are to be calculated and when they become due.

- It is constant CAS jurisprudence, that "*[b]y seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must - according to the jurisprudence of the Swiss Federal Court - be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith.*" (CAS 2018/A/5950, para. 76; see also SFT 124 III 165, 168, consid. 3a; SFT 119 II 449, 451, consid. 3a).

- Under Swiss law, when a contractual clause is clear, there is no room for interpretation (SFT 5A_378/2015, 15 March 2016, consid. 4.7; SFT 111 II 284,

consid. 2; SFT 99 II 282, consid. 1.1). Further, and having regard to the clarity of the language employed by Clause 4.3 of the Agreement, the principle of *in dubio contra stipulatorem* is of no application. The present case should be distinguished from other cases such as CAS 2009/A/1773 & 1774 and CAS 2019/A/6023 where the contractual provisions in issue were capable of two or more meanings. Further, and having regard to the clarity of the language in Clause 4.3 of the Agreement the principle of *in dubio mitius* does not apply.

- The only interpretation of Clause 4.3 of the Agreement according to good faith and Swiss law is the qualification of 18% per annum as interest and everything above as penalty. The wording of Clause 4.3 of the Agreement is very clear and the Club would have had ample opportunity to change the wording if it was not satisfied with it. Therefore, there is no indication that it was the Club's intention that Clause 4.3 of the Agreement meant otherwise and the penalty qualified differently.

- The penalty awarded by the FIFA PSC in the Appealed Decision, which, at USD 49,172.20 is less than 5% of the debt that it was intended to secure, is manifestly not abusive, perfectly lawful and proportionate because:

    - The burden of proving that the conditions for reduction of a penalty have been met lies on the Club (SFT 114 II 264, consid. 1b); SFT 103 II 109);

    - Contractual penalties are commonly implemented and acknowledged under Swiss law including for the failure to comply with obligations within agreed time limits. Article 160 par. 2 of the SCO provides that where the penalty is promised for a failure to comply with the stipulated time or place of performance, a creditor may claim the penalty in addition to the performance, provided the creditor has not expressly waived such right or accepted performance without reservation. It is evident from the different default notices issued and the claim submitted to the FIFA PSC, that Jeonbuk did not express any waiver or acceptance and is thus entitled to claim the penalties in addition to the transfer fee;

    - Further, Article 163 para.1 of the SCO permits parties to freely determine the amount of the penalty;

    - The Panel in CAS 2020/A/6809-6843, held that "*Swiss law does not provide an exact definition of when a penalty should be considered abusive or excessive. The judge must therefore establish, taking into account the merits of the case in all the circumstances, whether the penalty is excessive or not, and if so, the extent to which it should be reduced (ATF 82 II 142 par.3).*"

    - The FIFA Football Tribunal is not bound by its previous jurisprudence and, to the extent that the Club relies on prior decisions of that Tribunal, they are, in any event, factually distinguishable from the present case;

- In accordance with CAS (CAS 2018/A/5738, para. 38; CAS 2015/A/4139, para. 51) and SFT jurisprudence (SFT 113 III 43, consider. 3.3.1; SFT 114 II 264, consid. 1a); SFT 4A_107/2011, consid. 3.1; SFT 4A_233/2009, consid. 4), the reduction of a penalty is reserved for exceptional cases where the penalty flagrantly exceeds an amount that is acceptable having regard to notions of justice and equity. This is typically the case when there is a gross disproportion between the amount of the agreed penalty and the creditor's interest in adhering to it;

- In assessing the proportionality of a penalty clause, all relevant circumstances of the case must be considered including: the creditor's interest in the other party's compliance the undertaking; the severity of the default for breach; the intentional failure to breach the main allegation; the business experience of the parties; and the financial situation of the debtor (CAS 2015/A/4139, para. 53; SFT 133 III 43, consid. 3.3.2);

- The sole purpose of the penalty was to encourage the Club to comply with its payment obligations which is a legitimate interest of Jeonbuk as a creditor and generally a standard ground accepted in business practices when negotiating penalty and liquidated damages clauses in contracts. During the negotiations of the transfer, Jeonbuk became aware of the transfer ban imposed by FIFA on the Club because of its repeated failure to meet payment obligations, a matter that was later confirmed by the Club itself. The Club had failed not only to meet its financial obligations in previous transactions but had also failed to comply with decisions of the FIFA Tribunal and/or CAS;

- The Club failed to fulfil its obligations to pay the second instalment of the Transfer Fee on 15 March 2023 and again to pay the Conditional Transfer Fee on 31 May 2023. Despite the service of numerous default notices from Jeonbuk in the period commencing from March 2023, the Club remained unresponsive until receipt of a belated remittance in the amount of USD 399,970 in August 2023, almost 5 months after the stipulated due date and the payment of the Conditional Transfer Fee on 10 December 2023, almost 6 months after its due date. Further, interest at 18% per annum on the outstanding amounts was only paid on 15 January 2024, that is, after the commencement of the proceedings before the FIFA PSC and 10 months after the stipulated due date. The severity of the breach and the Club's fault is undeniable;

- The Club is one of the most successful professional football clubs in Saudi Arabia, being one of the four founding members of the Saudi Pro League and having participated in the AFC Champions League on numerous occasions. It is extremely active in the international transfer market and thus has great experience in negotiating transfer agreements. The penalty was agreed between two commercially experienced parties who are well versed in international transfer and transfer agreements. Clause 4.3 of the Agreement was not implemented unilaterally but was the subject of intense negotiation by the

parties. The parties made an informed decision to agree on the terms of Clause 4.3 of the Agreement; and

- The CAS Panel in CAS 2015/A/4139 (at para. 54) further held that higher amounts are appropriate for penalties to prevent the debtor from breaching its contractual obligations in the first place, that is, when the penalty clause has a punitive function, an approach also confirmed by SFT jurisprudence (SFT 4A_656/2012, consid. 2.3 & SFT 4A_107/2011, consid. 3.4).

- Regarding the time element in the calculation of the penalty, it was Jeonbuk's initial suggestion to have a contractual penalty without a time limit. The time limit was introduced by the Club and explicitly agreed by the parties.

- The conduct of the Club in failing to meet its obligations in a timely fashion justifies the Fine.

70. Jeonbuk accordingly submitted the following requests for relief:

" (*i*) *To dismiss the Appeal of Al Ahli in the proceedings CAS 2024/A/10477 Al Ahli Saudi FC v. Jeonbuk Hyundai Motors FC & Fédération Internationale de Football Association (FIFA) in its entirety and confirm the Appealed Decision of FIFA of 5 March 2024;*

(*ii*) *In any event, to order Al Ahli to pay all costs of the arbitration, including the costs of CAS, and to pay a contribution to the legal costs and expenses of Jeonbuk of at least CHF 20'000*."

C. FIFA's Submissions and Request for Relief

71. FIFA's submissions are summarised as follows:

- The application of Article 12bis of the RSTP and the consequent imposition of disciplinary sanctions required the following elements to be met: a delay of 30 days in the payment of an amount without there being a contractual basis or exception for such delay; and the creditor club must have placed the debtor club in default in writing and given the latter a period of at least ten days to comply with its financial obligations;

- Jeonbuk first put the Club in default of payment of USD 360,030 on 17 April 2023. The claimed amount corresponded to the unpaid portion of the second instalment of the Transfer Fee which had fallen due more than 30 days before, namely on 15 March 2023. Moreover, Jeonbuk granted the Club a period of 10 days to cure such default but to no avail. Even when the amount was finally paid on 8 August 2023, both elements to consider a breach of Article 12bis of the RSTP were met.

- Jeonbuk next put the Club in default of payment of USD 190,000 on 2 November 2023. The claimed amount corresponded to the Conditional Transfer Fee which had fallen due more than 30 days before, namely on 1 July 2023. Jeonbuk granted the Club a period of 10 days to cure such default but to no avail. Even when most of the amount was finally paid in January 2024, both elements to consider a breach of Article 12bis of the RSTP were met.

- Consequently, on two occasions, the Club had delayed a due payment without a *prima facie* contractual basis and, therefore, the criteria in Article 12bis of the RSTP were met on each occasion.

- The FIFA PSC justified the Fine because the Club had been sanctioned on eight prior occasions within the previous two years for overdue payables with sanctions ranging from a warning and fine of USD 7,500 and a fine of USD105,000.

- FIFA Commentary on the RSTP (at page 211) establishes the following:

  "*With respect to the imposition of sporting sanctions on clubs, the concept of "**repeat offenders"** has gained particular importance. Over time, the DRC began to observe that purely financial sanctions were not proving a sufficient deterrent for certain clubs. This meant urgent action had to be taken with a view to applying stricter sporting sanctions against these clubs. As a result, the DRC has established jurisprudence according to which **sporting sanctions are regularly applied against clubs found, at least four times in the two years preceding the DRC decision, to have terminated a contract without just cause or to have seriously breached contractual obligations*** […]".

- In short, if a club has breached its contractual obligations on four or more occasions within the last two years it will be considered a repeat offender. It is irrelevant as to whether, as the Club contends, it had breached its contractual obligations on seven or nine occasions in the last two years, it will still be considered a repeat offender.

- Decisions FPSD-4576 and FPSD-4147 should be counted as part of the Club's record. These decisions were issued within two years of the present breaches, that is, on 24 February 2022 and 4 March 2022, respectively, whereas the Club's breach of Article 12bis of the RSTP occurred on 27 April 2023 (when it failed to pay Jeonbuk within 10 days after the default notice related to the second instalment of the Transfer Fee) and on 12 November 2023 (when it failed to pay the Club the Conditional Transfer Fee).

- Further, the TMS records show that during the last three years, FIFA imposed on the Club forty-nine registration bans due to its constant disrespect of contracts (e.g., employment contracts and transfer agreements), FIFA decisions and CAS awards.

- The Club is therefore considered a repeat offender and, in accordance with Article 12bis para. 6 of the RSTP, is an aggravating circumstance that leads to a harsher penalty.

- FIFA Commentary of the RSTP (at para. 118) clearly explains that a "*repeated offence will be considered an aggravating circumstance and will generally result in a more severe sanction. In principle, the debtor will be given a warning if it commits a first offence within a timeframe of two years. A more severe sanction – ultimately, a ban from registering new players – will be imposed each time a club is a repeat offender. The DRC or the PSC can impose sanctions cumulatively in a decision (e.g. a warning and a fine) if the debtor club is a repeat offender.*"

- The Fine is not disproportionate. It was not calculated, as the Club contends, solely on the current outstanding amount, or that it represents 203% of the overdue payables. In fact, the Fine only represents 14% of the total financial obligations that the Club did not respect and which was owing as at the date of the breaches, being USD 713,494.65. The Fine is in line with FIFA jurisprudence. The Club's submissions in this regard are misleading and of no avail.

- The Club's reliance on the fact that it made four payments to Jeonbuk, paid the interest, and proactively attempted to settle the dispute are not mitigating factors. In fact, the first two were the Club's contractual obligations, which were not complied with on time (and still have not been fully met).

- CAS case law has repeatedly confirmed that an arbitral tribunal will not readily interfere with the discretion granted to an international federation in sanctioning its members (direct and indirect):

  "*71. Before the Sole Arbitrator takes this discussion any further though, he needs to establish the standard of review, adopted in CAS jurisprudence, when facing claims to the effect that a FIFA body has not observed proportionality when sanctioning a club. In CAS/2017/A/5031, the Panel, having visited prior case law on this score, concluded that it would find for the appellant:*

  'only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence'

  This means, that a mere disagreement of the Sole Arbitrator (or any CAS adjudicator to this effect) with the level of sanction imposed does not suffice, in and of itself, to undo the decision by the FIFA Disciplinary Committee…"

  (CAS 2019/A/6345)

- Given that the Fine is not evidently and grossly disproportionate to the offence, the amount owed at the time of the Club's breaches and its record, the Appealed Decision must be confirmed in full.

72. FIFA accordingly submitted the following requests for relief:

" *(a) reject the requests for relief sought by the Appellant;*

(b) confirm the Appealed Decision in its entirety;

(c) order the Appellant to bear the full costs of these arbitration proceedings."

VI. JURISDICTION

73. The jurisdiction of the CAS in this procedure derives from Article R47 of the Code and, Article 57 of the FIFA Statutes (May 2022 Edition) ("FIFA Statutes").

74. According to Article R47 para. 1 of the Code, "*[a]n 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 it prior to the appeal, in accordance with the statutes or regulations of that body.*"

75. Article 57 para. 1 of the FIFA Statutes, relevantly provides:

"*1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.*"

76. There is no internal channel of appeal from a decision of the FIFA PSC and Article 57 para. 1 of the FIFA Statutes provides that appeals against final decisions of FIFA's legal bodies, which includes decisions rendered by the FIFA PSC, lie to the CAS.

77. Further, each of the Parties relied on Article 57 of the FIFA Statutes as conferring jurisdiction on the CAS and its jurisdiction is further confirmed by the Parties' signatures on the Order of Procedure.

78. Accordingly, the Sole Arbitrator is satisfied that the CAS has jurisdiction.

VII. ADMISSIBILITY

79. Article R49 of the Code relevantly provides:

"*In the absence of a time limit set in the statutes or regulations of the Federation, association or sports -related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against*."

80. The Appealed Decision was passed on 5 March 2024 and notified on 18 March 2024.

81. The Statement of Appeal was filed on 7 April 2024, that is, within the 21-day time limit prescribed by Article R49 of the Code and Article 57 para. 1 of the FIFA Statutes.

82. The Appeal is accordingly admissible.

VIII. APPLICABLE LAW

83. Article R58 of the Code provides:

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

84. Article 56 para. 2 of the FIFA Statutes provides that:

> "*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.*"

85. The Parties each rely on Article R58 of the Code and Article 56 para. 2 of the FIFA Statutes.

86. The Sole Arbitrator notes that since the merits of the dispute touch on the RSTP, the Sole Arbitrator considers that these regulations are also relevant and that the applicable version is the February 2024 edition of the FIFA RSTP.

87. Accordingly, the Sole Arbitrator determined that the FIFA RSTP (February 2024 Edition) and any other relevant FIFA regulations constitute the applicable law and that Swiss law also applies subsidiarily.

IX. MERITS

A. Overview – Issues for Determination

88. Having regard to the *de novo* nature of the appeal (cf. Article R57 para. 1 of the Code), the arguments advanced by the Parties and the evidence upon which each relies, these proceedings give rise to the following issues:

- the proper construction of Clause 4.3 of the Agreement;
- whether the penalty in Clause 4.3 of the Agreement is proportionate;
- whether there is an obvious error in the calculation of the penalty; and
- the validity and proportionality of the Fine.

89. The Parties' written submissions, in part, address prior decisions of the FIFA Football Tribunal and what is claimed to be the usual or constant practice of that Tribunal in what is said to be similar or analogous matters. The Sole Arbitrator notes that he is not bound

by those decisions and that, in any event, this procedure is a *de novo* hearing in which the Sole Arbitrator will consider the facts, law, submissions and issues on their merits.

90. Before embarking upon a consideration of the merits of the appeal, it is necessary to address, briefly, the burden of proof.

B. The Burden of Proof

91. The Sole Arbitrator recalls that:

> "*[I]n CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence*" (CAS 2009/A/1810 & 1811, para 18; CAS 2020/A/6796, para 98 & CAS 2022/A/8763, para. 114).

92. Consistent with this general principle, CAS jurisprudence has established that the burden of proving that a penalty fee may be applied cumulatively to an interest rate lies with the creditor (CAS 2015/A/4057; CAS 2020/A/6809-6843 & CAS 2021/A/7673-7699).

C. Consideration

The Proper Construction of Clause 4.3 of the Agreement

93. Clause 4.3 of the Agreement is in the following terms:

> *"If Al-Ahli fails to make any payment due to Jeonbuk, Al-Ahli shall be obliged to pay 5% per month to Jeonbuk on any amounts outstanding of which any amount exceeding 18% per annum shall be deemed as penalty, from the date when it was due until the default is fully cured. Al-Ahli acknowledges the importance of this transaction, and the economic significance of it for Jeonbuk and therefore acknowledges that this default interest rate and penalty payment are appropriate and balanced.*"

<u>Principles concerning the interpretation of contracts</u>

94. The principles relating to the construction or interpretation of contractual provisions in Swiss law are well-settled, outlined in Article 18 of the SCO and may be summarised as follows:

> "*When the interpretation of a contractual clause is in dispute, the judge should seek to discover the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article 18 para. 1 CO). When the mutually*

agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664 consid 3.1; ATF 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 133 III 61, consid. 2.2.1; ATF 131 III 606, consid. 4.1; ATF 129 III 118 consid. 2.5 p. 122; ATF 128 III 419 consid. 2.2 p. 422). The requirements of good faith tend to give the preference to a more objective approach (ATF 129 III 118 consid. 2.5 p. 122; ATF 128 III 419 consid. 2.2 p. 422)." (CAS 2015/A/4057 at para. 68; see also CAS 2021/A/7699 at para.115).

95. Therefore, in interpreting a contract, Swiss law requires that a judge determine the "…*true and mutually agreed upon common intention of the parties*" in a subjective sense and, if that intent cannot be determined, to consider that intent objectively, that is, by what a party "…*could have been reasonably understood depending on the individual circumstances of the case*."

96. Under Swiss law, when a contractual clause is clear, there is no room for interpretation (SFT 5A_378/2015, 15 March 2016, consid. 4.7; SFT 111 II 284, consid. 2; SFT 99 II 282, consid. 1.1).

97. Further, it is constant CAS jurisprudence that "*[b]y seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must - according to the jurisprudence of the Swiss Federal Court - be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith."* (CAS 2018/A/5950, para. 76; see also SFT 124 III 165, 168, consid. 3a; SFT 119 II 449, 451, consid. 3a).

Was Clause 4.3 of the Agreement drafted by Jeonbuk?

98. A preliminary issue is whether as the Club contends, Clause 4.3 of the Agreement was introduced by Jeonbuk so that it can be considered the author of the draft.

99. Clause 4.3 of the Agreement was the subject of negotiation between the Parties which commenced on or about 19 December 2022 and concluded with the execution of the Agreement.

100. The First Draft Agreement was prepared by Jeonbuk and submitted to the Club on 31 December 2022. Clause 4.3 of this draft was to the effect that in case of default by the Club, all amounts would become immediately due and the Club would pay 65% of such outstanding amount as a penalty and 18% per annum as default interest. The Club did not accept that term.

101. The Second Draft Agreement was prepared by the Club and submitted to Jeonbuk on 2 January 2023. Clause 4.3 of this draft was to the effect that in the event of default by the Club, it would only be required to pay 5% per annum as default interest. Jeonbuk did not accept that term.

102. The Third Draft Agreement was prepared by Jeonbuk and submitted to the Club on 4 January 2023. Clause 4.3 of this draft was to the effect that the Club was to pay a USD 400,000 penalty in the event of default by the Club and a default interest rate of 5% per annum. The Club did not accept that term.

103. In a response provided on 4 January 2023, the Club proposed an amendment to Clause 4.3 of the Agreement. Whilst other amendments were affected in two subsequent drafts of the agreement, the wording of Clause 4.3, as proposed by the Club on 4 January 2023, was ultimately reflected in the Agreement signed on 10 January 2023.

104. The Sole Arbitrator accordingly finds that the Club was the author of Clause 4.3 of the Agreement.

The meaning of Clause 4.3 of the Agreement?

105. Neither party has adduced evidence of what each considered to be the purport or effect of Clause 4.3 of the Agreement. The Club contended in submissions only that it never had the intention of agreeing to an unlawful and immoral rate of 5% per month but rather one equal to the default interest rate provided by Swiss law of 5% per annum. In support, the Club referred to an early draft of Clause 4.3 of the Agreement in which it made a proposed amendment to that effect. However, that proposal was not accepted by Jeonbuk and the negotiations progressed with the Club ultimately proposing the iteration of Clause 4.3 which was accepted by Jeonbuk and concluded in the Agreement. That proposal by the Club is inconsistent with the interpretation of Clause 4.3 for which it contends.

106. The evidence does not permit a determination under Swiss law, subjectively, of the true and mutually agreed upon intention of the parties. The words that the parties employed in Clause 4.3 of the Agreement are, in the opinion of the Sole Arbitrator, quite clear and unambiguous. They are not capable of conflicting interpretations. Considered objectively, the intention of the parties as manifested in the words of Clause 4.3 is that if the Club failed to make any payment due to Jeonbuk it was to pay default interest at 5% per month from the date when the payment was due until the default was cured but in an amount which, cumulatively, was not to exceed 18% per annum and that any amount in excess of 18% per annum was "deemed" a penalty.

107. Clause 4.3 does not contain any "hidden interest" as submitted by the Club. Interest was to be assessed at 5% per month on outstanding payments to a maximum of 18% per annum.

108. For these reasons, the Sole Arbitrator is of the opinion that there is no scope of the application of either the principle of *in dubio contra stipulatorum* or *in dubio mitius.*

Whether the penalty in clause 4.3 is valid and, if so, it should be reduced for being disproportionate

The principles of relating to the validity of penalty clauses

109. The principles of Swiss law that apply to the validity and proportionality of penalty clauses appears well-settled, has been extensively addressed by the Parties and were, in part, eloquently summarised by the Sole Arbitrator in CAS 2021/A/8356, drawing on CAS jurisprudence, as follows:

> "*68. Articles 160 et seq. of SCO state as follows:*
>
> *'Article 160: Relation between penalty and contractual performance*
>
> *1. Where a penalty is promised for non-performance or defective performance of a contract, unless otherwise agreed, the creditor may only compel performance or claim the penalty.*
>
> *2. Where the penalty is promised for failure to comply with the stipulated time or place of performance, the creditor may claim the penalty in addition to performance provided he has not expressly waived such right or accepted performance without reservation.*
>
> *3. The foregoing does not apply if the debtor can prove that he has the right to withdraw from the contract by paying the penalty.*
>
> *Article 161: Relation between penalty and damage*
>
> *1. The penalty is payable even if the creditor has not suffered any damage.*
>
> *2. Where the damage suffered exceeds the penalty amount, the creditor may claim further compensation only if he can prove that the debtor was at fault.*
>
> *Article 163: Amount, nullity and reduction of the penalty*
>
> *1. The parties are free to determine the amount of the contractual penalty.*
>
> *2. The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.*
>
> *3. At its discretion, the court may reduce penalties that it considers excessive".*
>
> ….
>
> *71. Pursuant to the principle of contractual freedom, the parties can freely determinate the amount of the contractual penalty. However, the Swiss legislator has enacted a limitation to this freedom in Article 163 of the SCO in*

order to warrant public order and the principle of proportionality as a standard in Swiss law.

72. The issue of whether a penalty clause should be reduced for being disproportionate under Article 163 of the SCO has been dealt with in several occasion (sic) by CAS jurisprudence, which stated the following principles:

- *the provision set out in Article 163 of the SCO 'is mandatory and the parties cannot contractually depart from it. Therefore the judge (or the Sole Arbitrator in this matter) shall examine this amount' (CAS 2018/A/5738);*

- *'the reduction of a penalty clause shall only be reserved for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction affects the contractual freedom of the parties' (CAS 2020/A/6809 & 6843; CAS 2018/A/5857);*

- *'a reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the entire claim, measured concretely at the moment the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances at hand' (CAS 2017/A/5304; CAS 2019/A/6626);*

- *'the factors to consider when deciding whether a reduction of a penalty clause is applicable, are as follows: (i) the creditor's interest in the other party's compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor*" *(CAS 2018/A/5857).*

110. Further:

- Article 73 of the SCO provides:

  "*1. Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.*

  2. Public law provisions governing abusive interest charges are not affected."

- Article 104 of the SCO provides:

> "*1. A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract.*
>
> *2. Where the contract envisages a rate of interest higher than 5%, whether directly or by agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default.*"

111. To be valid and enforceable under Swiss Law, a penalty clause must contain all the necessary elements required for such purpose: a) the parties bound thereby are mentioned; b) the kind of penalty has been determined, as it can be qualified as a liquidated damages clause; c) the conditions triggering the obligation to pay are met; and d) its measure is specified (CAS 2020/A/6809 & 6843).

112. Lastly, the Swiss Federal Tribunal has held that an interest rate as high as 18% per annum was acceptable (ATF 93 II 189). It ruled that above this limit, the interest rate was usurious and, therefore, contrary to public morals (ATF 93 II 189; GRANGES M., Les intérêts moratoires en arbitrage international, Zurich 2014, p. 236) (see also CAS 2010/A/2128; CAS 2015/A/3909; CAS 2020/A/6809 & 6843; CAS 2021/A/7673 & 7699; and CAS 2021/A/7727).

The validity of the penalty prescribed by Clause 4.3 of the Agreement

113. No Party submitted that the interest provision assessed at a maximum of 18% per annum was excessive, usurious or against public morals nor could such a submission have been reasonably maintained having regard to decisions of the Swiss Federal Tribunal.

114. The relevant issues are first, whether in so far as Clause 4.3 of the Agreement requires the Club to pay amounts in addition to the second instalment of the Transfer Fee and the Conditional Transfer Fee that is more than 18% per annum is in the nature of "hidden interest" and should be reduced to 18% per annum, secondly, if it is not "hidden interest" whether it is nonetheless enforceable and, thirdly, if enforceable, whether it is excessive and should be reduced.

115. For reasons previously given, the Sole Arbitrator has determined that in so far as Clause 4.3 of the Agreement requires the Club to pay amounts in addition to the second instalment of the Transfer Fee and the Conditional Transfer Fee that is more than 18% per annum, it is not in the nature of "hidden interest" but is to be characterised as a penalty.

116. In determining the enforceability of the penalty prescribed by Clause 4.3 of the Agreement, it must first be recalled that the parties to a contract are at liberty to agree the amount of a penalty for non-performance or defective performance of a contract and that a creditor may claim the penalty in addition to performance provided they have not expressly waived such right or accepted performance without reservation (Articles 160; 163 of the SCO).

117. Clause 4.3 of the Agreement was the subject of intense scrutiny and discussion by the parties, both highly experienced commercial enterprises well-versed in the negotiation of international transfers and transfer agreements. It can be inferred that, in accordance with the rights recognised by Articles 160 and 163 of the SCO, each party made a free and informed decision in what they considered to be their respective best interests.

118. The Sole Arbitrator determines that the Penalty Clause is valid and enforceable under Swiss Law as it contains all the necessary elements required for such purpose, taking into account that: a) the parties bound thereby are identified; b) the kind of penalty that has been determined; c) the conditions triggering the obligation to pay are identified, being the failure to meet payment obligations as stipulated in the Agreement and d) its measure has been expressed in a manner that is capable of calculation, that is, any interest that cumulatively exceeds 18% per annum is deemed a penalty. Further, there is no evidence that and Jeonbuk has expressly waived its rights to the penalty.

Is the penalty proportionate?

119. In considering whether the penalty is proportionate, the guiding principles are that:

- a "*…reduction of a penalty clause shall only be reserved for exceptional cases that occur when the penalty is grossly and evidently unfair since the possibility of a reduction affects the contractual freedom of the parties*." (CAS 2020/A/6809 & 6843; CAS 2018/A/5857);

- "*a reduction of the penalty by the judge is justified when there is a significant disproportion between the agreed amount and the interest of the creditor to maintain the entire claim, measured concretely at the moment the contractual violation took place. To evaluate the excessive character of the contractual penalty, one must not decide in an abstract manner, but, on the contrary, take into consideration all the circumstances at hand*." (CAS 2017/A/5304; CAS 2019/A/6626); and

- "*the factors to consider when deciding whether a reduction of a penalty clause is applicable, are as follows: (i) the creditor's interest in the other party's compliance with the undertaking; (ii) the severity of the default or breach; (iii) the intentional failure to breach the main obligation; (iv) the business experience of the parties; and (v) the financial situation of the debtor*." (CAS 2018/A/5857)

120. During the negotiation of the transfer, Jeonbuk became aware of a transfer ban having been imposed by FIFA on the Club because of its repeated failure on some forty-nine occasions, to meet payment obligations, a matter that was later confirmed by the Club itself. The Club had failed not only to meet its financial obligations in previous transactions but had also failed to comply with decisions of the FIFA Tribunal and/or CAS. The evidence discloses that the Club had been sanctioned by FIFA on no less than eight occasions in the period from 24 February 2022 to 20 April 2023 for having overdue payables.

121. Understandably then, especially in the context of the Club's history of failing to meet its financial obligations as required, the sole purpose of the penalty was to encourage the Club to comply with its payment obligations which is a legitimate interest of Jeonbuk as a creditor and generally a standard ground accepted in business practices when negotiating penalty and liquidated damages clauses in contracts.

122. The Club failed to fulfil its obligations to pay the second instalment of the Transfer Fee on 15 March 2023 and again to pay the Conditional Transfer Fee on 31 May 2023. Despite the service of numerous default notices from Jeonbuk in the period commencing from March 2023, the Club remained unresponsive until receipt of a belated remittance in the amount of USD 399,970 in August 2023, almost 5 months after the stipulated due date and the payment of the Conditional Transfer Fee on 10 December 2023, almost 6 months after its due date. Further, interest at 18% per annum on the outstanding amounts was only paid on 15 January 2024, that is, after the commencement of the proceedings before the FIFA PSC and 10 months after the stipulated due date.

123. No explanation has at any time been proffered by the Club for its failure to meet its undisputed financial obligations in a timely manner which ultimately necessitated the commencement of the proceedings in the FIFA Football Tribunal. The Sole Arbitrator accordingly determines that the default and the breach were severe.

124. In the absence of any explanation by the Club to meet its primary obligations, that is, to make the payment of the second instalment of the Transfer Fee and the payment of the Conditional Transfer Fee as required by the Agreement even after having been served with the First, Second, Third, Fourth and Fifth Default Notices, the Sole Arbitrator concludes that the failure by the Club to meet those obligations must have been intentional.

125. The Club is one of the most successful professional football clubs in Saudi Arabia, being one of the four founding members of the Saudi Pro League and having participated in the AFC Champions League on numerous occasions. It is extremely active in the international transfer market and thus has great experience in negotiating transfer agreements. The penalty was agreed between two commercially experienced parties who are well versed in international transfers and transfer agreements. Clause 4.3 of the Agreement was not implemented unilaterally but was the subject of intense negotiation by the parties. The parties made an informed decision presumably in their respective best interests to agree on the terms of Clause 4.3 of the Agreement.

126. There is no evidence to suggest that the Club had any financial incapacity to meet its obligations to Jeonbuk when they fell due. In any event, financial difficulties or the lack of financial means of a club cannot be invoked as justification (CAS 2018/A/6239; CAS 2018/A/5779; CAS 2013/A/3358; CAS 2006/A/1008; CAS 2005/A/957; CAS 2004/A/1008).

127. The Sole Arbitrator also accepts that the amount of the penalty as initially assessed, being USD 49,172.20 is, as Jeonbuk contends, less than 5% of the debt that it was intended to secure.

128. For these reasons, the Sole Arbitrator concludes that the Club, which at all times bears the burden, has not established an exceptional case for the reduction of the penalty clause.

Is there an obvious error in the calculation of the penalty?

129. The FIFA PSC opined that the percentage in excess of 18%, if considered a maximum of 60%, could be enforced as a penalty (thus resulting in an annual interest of 18% per annum plus a contractual penalty of up to 42%). Applying this rationale, the FIFA PSC determined that the penalty would apply over the second instalment of the Transfer Fee from 15 March 2023 to 8 August 2023 and on the Conditional Transfer Fee from 31 May 2023 to 10 December 2023.

130. Having recalculated interest and penalty in accordance with this rationale, the FIFA PSC determined that the applicable penalty in respect of the second instalment of the Transfer Fee and the Conditional Transfer Fee totalled USD 48,879.45 and that the applicable interest on the second instalment of the Transfer Fee and the Conditional Transfer Fee totalled USD 45,443.84. These amounts were added to the principal payments required under the Agreement making the total due by the Club to Jeonbuk as USD 1,044,323.29. Deducting the payments made by the Club to Jeonbuk in the sum of USD995,151.09, the FIFA PSC accordingly concluded that the balance due by the Club to Jeonbuk as a contractual penalty was USD 49,172.20.

131. Having regard to the finding that any amount payable by the Club to Jeonbuk pursuant to Clause 4.3 of the Agreement over and above the second instalment of the Transfer Fee and the Conditional Transfer Fee that is more than 18% per annum is not in the nature of "hidden interest" but is to be characterised as a penalty, the method of calculation of the interest and penalty adopted by the FIFA PSC was appropriate.

132. However, the Sole Arbitrator is of the opinion that the calculations made by the FIFA PSC suffers from an error. The error is that the calculations are, in part, premised on the erroneous assumption that the amount owing by the Club to Jeonbuk under the second instalment of the Transfer Fee was USD 380,000. On 16 January 2023, the Club paid Jeonbuk the sum of USD 399,970 which included a solidarity payment of USD 19,970 (after deducting USD 30 in remittal charges). The Club should have deducted the solidarity payment. Therefore, the amount owing in respect of the second instalment of the Transfer Fee was USD 360,030. So much is apparent from the terms of the First Default Letter and the Second Default Letter.

133. Adopting the rationale outlined in paragraphs 34 – 37 of the Appealed Decision, the amount of the penalty should have been calculated as USD 26,566.16 being the difference between the total due by the Club to Jeonbuk of USD 1,021,717.25 less the amount paid of USD 995,151.09. Reproduced below is the table which appears at paragraph 36 of the Appealed Decision with the corrected calculations using USD 360,030 as the amount of the second instalment of the Transfer Fee.

Concept	Amount due (USD)
First Instalment	380,000
Second Instalment	360,030
Interest over Second Instalment	25,922.16
Penalty over Second Instalment	21,601.80
Conditional Fee	190,000
Interest over Conditional Fee	18,083.84
Penalty over Conditional Fee	26,079.45
Total Due	**1,021,717.25**

134. Therefore, the penalty is assessed at USD 26,566.16 instead of USD 49,172.20.

The validity and proportionality of the Fine

The validity of the Fine

135. Article 12bis para. 2 of the RSTP is in the following terms:

"***12bis Overdue payables***

1. Clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements.

2. Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with paragraph 4 below.

3. In order for a club to be considered to have overdue payables in the sense of the present article, the creditor (player or club) must have put the debtor club in default in writing and have granted a deadline of at least ten days for the debtor club to comply with its financial obligation(s).

4. Within the scope of its jurisdiction (cf. article 22 to 24), the Football Tribunal may impose the following sanctions: a) a warning; b) a reprimand; c) a fine; d) a ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods.

5. The sanctions provided for in paragraph 4 above may be applied cumulatively.

6. A repeated offence will be considered an aggravating circumstance and lead to a more severe penalty.

7. The terms of the present article are without prejudice to the application of further measures in accordance with article 17 in the event of unilateral termination of the contractual relationship."

136. Article 12bis para. 2 of the RSTP authorises the FIFA Football Tribunal to impose on a club any of the sanctions referred to its para. 4, which sanctions can be applied cumulatively, if the requirements of paras. 2 and 3 have been met. The use of the word "may" in para. 4 is permissive and not mandatory. Therefore, the Football Tribunal retains a discretion as to whether to impose a sanction(s) at all and, if so, a further discretion as to the nature of the sanction(s).

137. The Club failed to pay the second instalment of the Transfer Fee and the Conditional Transfer Fee on the dates that each were due. Jeonbuk put the Club as debtor in default in writing and granted a deadline of at least ten days for it to comply with its financial obligations. However, Article 12bis para. 2 of the RSTP requires a finding that a club has delayed a due payment for more than 30 days "…*without a prima facie contractual basis to do so.*"

138. The Club contends that it cannot reasonably have been expected to pay outstanding amounts with the application of an application of an abusive 5% monthly rate which it contended was illegal and egregiously unfair in Swiss law and that this is an exceptional circumstance constituting a *prima facie* reason justifying the lack of payment.

139. The Club's submission is partly premised upon a finding that the 5% monthly rate was both illegal and egregiously unfair in Swiss law. For the reasons outlined elsewhere in this Award, that submission is rejected. Further, the submission misconstrues or misapprehends the nature of the exemption or defence offered to defaulting clubs by sub-paragraph 2. A club may escape sanction only if it can identify a "contractual basis" for the delay in making a due payment.

140. The Club has identified no contractual basis that would justify its failure to pay the second instalment of the Transfer Fee and the Conditional Transfer Fee on the dates that each was due, even accepting that there may ultimately have been a dispute concerning interest and penalty payments. This latter dispute does not afford a contractual basis for the Club to refuse to meet its primary obligations to pay the second instalment of the Transfer Fee and the Conditional Transfer Fee.

141. The Sole Arbitrator accordingly concludes that the threshold requirements set out in Article 12bis paras. 2 and 3 of the RSTP for the imposition of a sanction(s) on the Club pursuant to Article 12bis para. 4 of the RSTP have been established. The next issue that arises for consideration is the proportionality of the Fine.

<u>The proportionality of the Fine</u>

142. The following general principles, derived from CAS jurisprudence, apply to the assessment of proportionality of a sanction:
    - in reviewing disciplinary sanctions, a certain level of deference shall be given to decisions of sport governing bodies. However, a Panel's powers to review the facts and the law of the case are neither excluded nor limited and the fact that it might not lightly interfere with the decision of a sports governing body does not mean that there is, in principle, any inhibition on its power to do so (cf. CAS 2010/A/2283

para. 14.36; CAS 2011/A/2518 para. 15; CAS 2011/A/2645 para. 44; CAS 2018/A/5808 para. 135);

- sanctions imposed by FIFA disciplinary bodies should be reviewed when they are "…*evidently and grossly disproportionate to the offence*" (CAS 2017/A/5117; CAS 2017/A/5031; CAS 2017/A/5496; CAS 2018/A/5864; CAS 2018/A/6239);

- the first reasonable nexus between the severity of a violation and the sanctions imposed is the outstanding amount of the debt and that fines be proportional to the amount owed (CAS 2017/A/5031; 2018/A/6239; CAS 2019/A/6345);

- each situation must be evaluated on a case-by-case basis, considering all the specific circumstances at issue, the behaviour and degree of responsibility of the defaulting party and any aggravating, extenuating or mitigating factors (CAS 2013/A/3358, also quoted in CAS 2016/A/4595; CAS 2017/A/5117; 2017/A/5496; CAS 2018/A/6239); and

- a club's failure to attempt to settle a debt, to negotiate any agreement with a creditor or to make a partial payment are relevant considerations (CAS 2018/A/6239; 2019/A/6263).

143. The Sole Arbitrator first considers that in general, the outstanding amount of debt provides a first reasonable nexus between the severity of the violation committed and the sanctions to be imposed.

144. The outstanding debts comprising the second instalment of the Transfer Fee and the Conditional Transfer Fee totalled USD 550,000 excluding interest and penalties. When interest and penalties were included, the outstanding debt amounted to USD 713,494.65. Jeonbuk had twice put the Club in default of payment; first, on 17 April 2023 regarding the payment of USD 360,030 relating to the unpaid portion of the second instalment of the Transfer Fee which had fallen due for payment more than 30 days prior and that, notwithstanding a 10-day extension to cure such default, the amount was not paid until 8 August 2023; and the second, on 2 November 2023 regarding the Conditional Transfer Fee of USD 190,000 which had fallen due for payment more than 30 days prior and that, notwithstanding a 10-day extension to cure such default, the amount was not paid until January 2024.

145. The Club submitted that the Fine corresponds to 203% of the outstanding amount ordered by the FIFA PSC to be paid by the Club and that it should not exceed 15%. However, comparing the Fine to the amount ordered to be paid by the FIFA PSC is misconceived. The purpose of a fine is, in part, to encourage clubs to honour their financial obligations and to deter them from repeating that or other relevant conduct. The proportionality of a fine is therefore to be assessed against the financial obligations which have been disrespected and in respect of which a club has been put in default and the need for deterrence. For the same reason, the submission by the Club that a fine provides no incentive for it or any other debtor in the football community to execute payments to creditors should be rejected. That said, other sanctions, such as transfer

bans and the like may provide even more incentive for clubs to meet their financial obligations.

146. The Fine comprises 14% of the total financial obligations which the Club failed to respect and in respect of which it was put in default. The Fine is consistent with amounts that the FIFA Football Tribunal has imposed in analogous cases with a similar level of recidivism (see, for example, FPSD-11361, FPSD-7859 and FPSD-6317).

147. No explanation has at any time been proffered by the Club for its failure to meet its undisputed financial obligations in a timely manner which ultimately necessitated the commencement of the proceedings in the FIFA Football Tribunal and, in the absence of any explanation, the failure by the Club to meet those obligations must have been intentional.

148. The Club attempted to settle outstanding claims as follows:

- On 24 November 2023, the Club offered to settle all claims made by Jeonbuk upon the payment of USD150,060,00 corresponding to the principal then outstanding. That offer was rejected on 27 November 2023;

- On 28 November 2023, the Club made a further offer to settle all claims made by Jeonbuk upon the payment of USD 162,023.61 corresponding to the principal then outstanding plus interest at 5% per annum. That offer was rejected on 30 November 2023 and the Club was also informed that a claim would be filed with the FIFA Football Tribunal;

- On 10 December 2023, the Club paid Jeonbuk the sum of SAR 609,504.99 (USD 162,231.83). Accompanying that payment was an email from the Club's then attorneys noting that their client's "*…goal is to settle this situation amicably. While we trust that this payment is sufficient to reach that goal, we remain open to further conversations on (sic) that regard. In this sense, we propose the use of FIFA Mediation.*"

- On 15 January 2024, the Club paid to Jeonbuk the sum of USD 32,494.26, corresponding to an applicable interest rate of 18% per annum on the outstanding amounts but leaving as unpaid penalty payments claimed by Jeonbuk under Clause 4.3 of the Agreement; and

- On 24 January 2024, Jeonbuk acknowledged receipt of the payments of USD 162,231.83 and USD 32,494.26, disputed the Club's allegations in relation to clause 4.3 of the Agreement and otherwise referred to the arguments set out in the FIFA PSC proceedings.

149. The Club's attempt to settle all claims stands in its favour and has been taken into consideration by the Sole Arbitrator in determining whether the Fine is proportionate.

150. The Club accepts that it has been sanctioned on at least seven occasions within the last two years. FIFA maintains that the Club has been sanctioned on no less than eight occasions within the last two years not including the sanctions in the present case. The evidence discloses that in the period from 24 February 2022 to 20 April 2023, the Club was sanctioned on no less than eight occasions for overdue payables. The sanctions ranged from a warning and fine of USD 7,500 to a fine of USD 105,000.

151. Further, TMS records show that during the last three years, FIFA had imposed on the Club forty-nine registration bans due to its constant disrespect of contracts (e.g., employment contracts and transfer agreements), FIFA decisions and CAS awards).

152. The Club seeks to explain its "repeated offender" status to its old administration and that, more recently, the Club's behaviour towards creditors has improved.

153. FIFA relies upon the Commentary on the RSTP (at page 211) which, in addressing the concept of "repeat offenders" states "…*sporting sanctions are regularly applied against clubs found, at least four times in the two years preceding the DRC decision, to have terminated a contract without just cause or to have seriously breached contractual obligations* […]"

154. FIFA Commentary of the RSTP (at para. 118) states that a "*repeated offence will be considered an aggravating circumstance and will generally result in a more severe sanction. In principle, the debtor will be given a warning if it commits a first offence within a timeframe of two years. A more severe sanction – ultimately, a ban from registering new players – will be imposed each time a club is a repeat offender. The DRC or the PSC can impose sanctions cumulatively in a decision (e.g. a warning and a fine) if the debtor club is a repeat offender."*

155. These facts lead to the inexorable conclusion that the Club is a repeat offender and, as established by Article 12bis para. 6 of the RSTP, this is an aggravating circumstance that leads to a harsher penalty.

156. The Sole Arbitrator accordingly determines that having regard to all the circumstances, the Fine is not evidently and grossly disproportionate to the offence and it is thus confirmed.

D. Determination

157. The Appeal as against Jeonbuk and FIFA is partially upheld.

X. COSTS

(…).

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Al-Ahli Saudi Football Club against the decision rendered on 5 March 2024 by the FIFA Players' Status Chamber is partially upheld.

2. The decision rendered on 5 March 2024 by the FIFA Players Status Chamber is amended as follows:

   "*2. The Respondent Al Ahli, must pay to the Claimant USD 26,566.16 as contractual penalty*."

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 28 February 2025

THE COURT OF ARBITRATION FOR SPORT

Anthony Lo Surdo SC
Sole Arbitrator