Arbitration CAS 2007/A/1301 Ituano Sociedade de Futebol Ltda v. Silvino João de Carvalho, Buyuksehir Belediyesi Ankaraspor & Fédération Internationale de Football Association (FIFA), award of 10 March 2008

Panel: Prof. Luigi Fumagalli (Italy), President; Ms Margarita Echeverría Bermúdez (Costa Rica); Mr Michele Bernasconi (Switzerland)

Football
Contract of employment
Principle "electa una via non datur recursus ad alteram"
Jurisdiction of FIFA to hear the contractual dispute
Referral of the case back to the FIFA

1. **As an exception to the statutory principle that recourse to ordinary courts of law is prohibited, FIFA has acknowledged the possibility for a party to opt for State court adjudication, but has established the principle that once such option is exercised, the possibility to refer the same case to sport adjudication bodies is precluded. The adoption of such principle does not seem to run against peremptory provisions or fundamental principles of Swiss law. Well to the contrary, the rationale underlying it must be approved, since it avoids "forum shopping" and conflicting decisions.**

2. **When a party only request an interim measure of protection from a State court, but does not request that the same court issues a judgement on the merits, it cannot be deemed to have opted for State court adjudication and be precluded from referring its case to sport adjudication. It is a principle, widely recognized, that a request for interim measures addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.**

3. **When, due to the circumstances of the case, no evaluation on the merits of the dispute has taken place before the competent sport adjudication body, the objectives of not depriving the parties of one level of adjudication and of allowing a unitary assessment of all the relevant aspects of the dispute, including the position of third parties or the potential imposition of disciplinary measures, must prevail over the advantages with respect to time and costs that a direct adjudication on the merits of the case by a CAS panel would imply. Therefore, the case must be referred back to the competent sport adjudication body.**

Ituano Sociedade de Futebol Ltda. ("Ituano" or the "Appellant") is a football club existing under the laws of Brazil and has its headquarters in Itú, São Paulo, Brazil. It is affiliated to the *Confederação Brasileira de Futebol* (CBF or the "Brazilian Football Association").

Silvino João de Carvalho ("Silvino" or the "Player") is a professional football player of Brazilian nationality, born on 20 May 1981.

Buyuksehir Belediyesi Ankaraspor ("Ankaraspor") is a football club existing under the laws of Turkey and has its headquarters in Ankara, Turkey. It is affiliated to the *Türkiye Futbol Federasyonu* (TFF or the "Turkish Football Federation").

The Fédération Internationale de Football Association (FIFA) is an association under Swiss law and has its headquarters in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide. As a result, Ituano, Silvino, Ankaraspor and FIFA itself are subject to and bound by the applicable rules and regulations of FIFA.

The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings.

On 18 January 2004 Ituano and Silvino signed an employment contract (the "Contract") under which the Player was to render his professional services to Ituano until 31 December 2004 for a monthly salary amounting to BRL 350.

An attachment to the Contract contained the following provision (translation provided by the Appellant):

> *"PENAL CLAUSE: The party who does not comply with, breaches or unilaterally terminates this agreement, will bear the fine of R$ 450,000.00 (four hundred fifty thousand reais), according to the terms of 3rd paragraph of article 28, Law 9,615/98. (2) If the non compliance is motivated by an international transfer, the fine will be freely negotiated. (3) In case of assignment of the rights of this agreement by Ituano to any team in Brazil or abroad, the player hereon waives any fine set forth in article (01) and (02) above, as well as the remaining of the contract pro rata. (4) As jointly agreed, upon the liberation of the comply of the employment agreement balance, the rescission can be observed with the waive of the agreed penal clauses, as well the waive of the indemnifications foreseen in sections 479, 480 of the Consolidations of the Labor Laws (CLT). (5) It is herein between the parties that, in case of sale of the Federative Rights (pass) of the athlete for any team abroad, Ituano pledges to liberate the same by means of payment of 30% (thirty per cent) of the liquid value of the negotiations. (6) The player hereon grants preference to Ituano Soc. Futebol Ltda. for the extension/renewal of this agreement".*

On 30 January 2004 the Contract, together with its attachment, was registered by the CBF.

On 15 June 2004 Ankaraspor sent letter to Ituano with an offer for the acquisition of 30% of the *"federal right"* on the Player, for a consideration of USD 100,000.

On 18 June 2004 Ankaraspor sent to Ituano a second letter concerning the Player, with the offer to

pay USD 180,000 *"for the federal rights for 2 years"*. The same letter contained an offer to the Player, which would receive a salary of USD 175,000 for the first year of contract, and of USD 225,000 for the second year of contract.

On 20 June 2004 Ankaraspor sent to Ituano a third letter concerning the Player, as follows:

> *"For the federal rights for 2 years the club will pay 300,000$.*
> *40% for Clube ITUANO*
> *60% for the Clube ANKARA.B.BELEDIYESPOR*
>
> *SILVINO JOÃO CARVALHO*
> *For the first years of contract 200,000$*
> *For the second year of contract 225,000$".*

On 23 June 2004 the Player left Brazil to visit Ankaraspor.

On 28 June 2004 the Player returned to Brazil.

According to Ituano, at or about the end of June 2004, it received a phone call, during which representatives of Ankaraspor communicated that their club was no longer interested in the services of the Player.

On 1 July 2004 an amendment to the Contract (the "Amendment") was allegedly signed by the Player and Ituano: the signature of the Amendment, invoked by Ituano, is in fact denied by the Player. Such Amendment, not registered by the CBF, extended the term of the employment relation under the Contract to 18 January 2009, increased the monthly salary to BRL 2,500 and modified the attachment to the Contract as follows (translation provided by the Appellant):

> *"PENAL CLAUSE: The party that does not comply with, breaches or unilaterally terminates this agreement, will bear the fine of R$ 3,000,000.00 (three million reais), according to the terms of 3rd paragraph of article 28, Law 9,615/98. (2) If the non compliance is motivated by an international transfer, the fine will be of US$ 1,500,000.00 (one million five hundred thousand American Dollars) in the terms of 5th § of section 28 of the Law 9,615/98. (3) It is hereby agreed that Ituano will pay R$ 20,000 (twenty thousand reais) for the transfer at the end of the agreement. (4) In case the rights of this instrument are assigned by Ituano to any team in Brazil or abroad, the player hereon WAIVES his right on fines established in clauses (01) and (2) and also the remaining amounts of the agreement. (5) It is herein mutually agreed that upon the release concerning the compliance with the balance of the labour agreement, the termination can be observed with the waive to the agreed penal clauses, a waive to sections 479 and 480 of the Consolidations of the Labor Laws- CLT. (6) The player irrevocably and permanently grants the preference to Ituano for this agreement renewal. (7) The parties agree that Ituano, on July 26, 2004 will make available to the player the amount of R$ 150,000.00 (one hundred and fifty thousand reais) as payment for 100% (hundred per cent) of his federative rights. (8) Section 05 of the agreement in force will be effective where it is read 30% of the federative rights, read 100% of the federative rights, being the former agreement revoked".*

Ituano submits that on 16 July 2004 it made an offer to the Player according to § 7 of the attachment to the Amendment, but that it received no answer from the Player.

On 24 July 2004 the Player left Brazil to join Ankaraspor.

On 27 July 2004 the Player signed with Ankaraspor an employment contract valid until 31 May 2008.

On 29 July 2004 the CBF received a request from the TFF for the issuance of the relevant ITC concerning the Player.

On 30 July 2004 the Labour Court of Itu registered under case number 1461/04 the filing by Ituano of a petition, dated 28 July 2004, containing the following request for relief (translation provided by the Appellant):

> *"a) to be authorized … the deposit of the amount owed to the Consignee athlete [Silvino], issuing the appropriate slip for the deposit in the amount of R$ 150,000.00 (one hundred and fifty thousand reais), which will be immediately formalized at the financial institution as soon as this subscriber is authorized to do so.*
>
> *b) […]*
>
> *c) finally, for the present claim to be received due to the deposit in the files, being declared extinct the contractual obligation of the Consigning Club […]".*

In such petition Ituano declared

i. that it had agreed with the Player in the Amendment to *"make available to the athlete"* before 26 July 2004 *"the sum of R$ 150,000.00 (one hundred and fifty thousand reais) as payment for the 100% (one hundred per cent) of the federative rights"*;

ii. that the Player on 24 July 2004 had, *"with no reason to justify, … abandoned the concentration"* of Ituano an *"not fulfilled his duties nor … has given any satisfaction to the club, simply having disappeared"*;

iii. that the objective of the claim was *"to release"* Ituano *"of its contractual obligation towards the athlete, and to safeguard its rights acquired by the agreement as if it had satisfied the amount directly to the creditor athlete"*.

On 4 August 2004 the Player moved to the Labour Court of Itu seeking an injunction to be released from any and all contractual obligations owed to Ituano, by paying the *"fine"* stipulated in the attachment to the Contract, and to be allowed to sign a new contract with a foreign club (Ankaraspor). Such petition was registered by the Court under case number 1491/04.

On the same 4 August 2004 Ituano filed with the Labour Court of Itu a new petition, registered by the Court under case number 1492/04. In such petition Ituano declares to have requested *"legal recognition of the fact that the Player could not be transferred without paying the amount established in the penalty clause"*, as attached to the Amendment.

On 5 August 2004 the Labour Court of Itu *"for the moment"* dismissed the application for an injunction filed by the Player in case number 1491/04.

On 10 August 2004 the Labour Court of Itu issued the protective measure requested by the Player in case number 1491/04, authorizing him to transfer to a foreign club.

On 12 August 2004 the CBF recorded the order issued by the Labour Court of Itu authorizing the Player to transfer to a foreign club.

On 18 August 2004 the Player did not attend the hearing before the Labour Court of Itu in case number 1491/04. As a result, the Labour Court of Itu decided to *"file"* the petition of the Player (in the Brazilian original: *"Não tenendo comparecido o reclamante, arquivo a reclamacão"*).

On 13 September 2004 the Labour Court of Itu issued a decision in the joined cases 1461/04 and 1492/04 started by Ituano

i. declaring *"extinct without the appreciation of its merit"* the petition in case 1492/04, because Ituano had not *"proposed the main lawsuit … in the deadline established"* in Brazilian law; and

ii. judging in favour of Ituano with respect to the *"payment consignation lawsuit … to declare extinct the obligation represented by the deposit"* in case 1461/04.

By submission dated 14 June 2005, received by FIFA through the CBF on 11 July 2005, Ituano started proceedings against the Player before FIFA.

In its submission, Ituano claimed that the Player had breached the Contract, as supplemented by the Amendment, and sought compensation for damages, in the amount of USD 1,500,000. According to Ituano, in fact, the Player had left Brazil to join Ankaraspor and had remained with Ankaraspor even after the Brazilian labour court had (i) revoked the *interim* order allowing his transfer to Turkey and (ii) accepted Ituano's request to deposit the amount of money required to secure the extension of the term of the Contract pursuant to its Amendment.

On its side, Ankaraspor denied any breach, stating that it had signed a contract with the Player only after being informed that Silvino had properly terminated the Contract on the basis of a Brazilian court decision, and that it had fully respected the applicable FIFA regulations.

The claim of Ituano was challenged also by the Player, who emphasised that his signature on the Amendment was fake, and that the Contract had been terminated as a result of the decision rendered by the Brazilian labour court.

On 21 November 2006 the FIFA Dispute Resolution Chamber (the "DRC") issued a decision (the "Decision") holding that:

"1. The claim of the club Ituano Sociedade de Futebol is not admissible".

In its Decision, the DRC preliminarily noted that it had jurisdiction, pursuant to Articles 22 to 24 of the FIFA Regulations for the Status and Transfer of Players (edition 2005) (the "RSTP 2005"), to examine the dispute between the parties, because such dispute involved a Brazilian club, a Brazilian player and a Turkish club with respect to the maintenance of contractual stability in connection with

an international transfer. At the same time, the DRC indicated that said dispute had to be determined on the basis of the same RSTP 2005, since the claim had been filed by Ituano on 11 July 2005.

In support of its Decision, then, the DRC considered the judgment rendered by the Labour Court of ITU on 13 September 2004 and emphasized that the translation provided was rather difficult to understand. Yet, the DRC underlined that, in any case, said judgment appeared *"not to be a decision as to the substance of the matter, i.e. the labour dispute arisen between the Player and the Claimant"* [i.e., Ituano]. *"Based on the statements of the Claimant, which are confirmed by the official documentation of the relevant labour court"*, the DRC also stated *"that the player was not present at the pertinent meeting of the decision-making body. In fact, this appears to be the main reason for the conclusions reached by the relevant labour court"*.

In continuation, the DRC underlined that, in principle, it was *"competent to deal with disputes between players and clubs that have an international dimension"* and emphasised that *"players and clubs have the right to seek redress before a civil court for employment-related disputes"*, since, for such issues, *"the choice of judge is a fundamental right that cannot be denied"*. At the same time, the DRC recalled that the *"parties may however decide to divert from the choice of judge and instead refer the matter to sports arbitration. Yet, according to the principle of* 'litispendency'*, a case pending in front of civil courts cannot be dealt with by the decision-making bodies of sports arbitration"*. In addition, the DRC deemed it important to underline that *"the practice of parties to have their legal cases heard by several decision-making bodies with the aim to get the most favourable judgement, known as* 'forum shopping'*, cannot not be upheld at all"* by the DRC.

In view of such principles, the DRC stated that Ituano had made use of the right to *"seek redress before a civil court for employment-related disputes"*, by lodging its claim before the Labour Court of Itu, *"although it could have lodged its claim related to the contractual relationship with the player directly with FIFA"*. In this respect, the DRC underlined that at the latest on 29 July 2004, when the relevant ITC was issued by the CBF in favour of the TFF, the dispute acquired an international dimension, and that Ituano could have withdrawn its claim lodged before the Brazilian court and referred the matter to FIFA. The DRC stressed that Ituano only in July 2005, almost a year after having lodged its claim before the Labour Court of Itu and 10 months after the Player's transfer to Turkey, decided to seek redress before FIFA after the proceedings before the Brazilian civil courts were suspended or (temporarily) dismissed.

On the basis of all these considerations the DRC concluded that *"if a player or a club, by using their right according to the regulations seek redress before an ordinary court in connection with employment-related disputes, and the competence of the ordinary court is not contested by the other party, as a general rule, the addressed civil court, which was first contacted by a party, shall deal with the matter in its entirety"*; and that *"if an ordinary court expresses itself on the liability of a party in connection with a possible contractual breach, it should also decide as to the relevant consequences implied by such a potential breach of the contract"*.

The DRC thus concluded that Ituano *"would have to seek for the protection of its alleged rights towards the player in front of the ordinary court, as it had originally chosen to do"*.

The Decision was notified to Ituano, the CBF, Silvino, Ankaraspor and the TFF on 27 April 2007.

By submission dated 18 May 2007, Ituano filed a statement of appeal with the Court of Arbitration

for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision, naming Silvino, Ankaraspor and FIFA as respondents (the "Respondents"), and specifying the following request for relief:

> *"**(a)** to reform the challenged decision, recognizing that the FIFA Dispute Resolution Chamber is the competent body to deal with the matter at hand; **(b)** should CAS accept the request "a" above, the Appellant requests that the matter be judged entirely by the CAS Panel itself, i.e., the ground of action of the question, having in mind the competence of the latter and the procedural economy, according to article R57 of the Code of Sports-related Arbitration; **(c)** to recognize that the Player unilaterally breached the contract signed with the Appellant without just cause and that Ankaraspor induced the Player to commit such a breach of contract; **(d)** accordingly, to hold both Respondents jointly and severally liable for compensation an amount of at least US$ 1,500,000 (one million and five hundred thousand North American dollars), as a result of the breach of contract by the Player induced by the Turkish club; **(e)** in addition, to order the Respondents to pay interest on the amount of compensation at a rate of 5% (five per cent) per annum, as from the date of the breach of the contract until the actual payment; **(f)** to consider imposing on both Respondents the appropriate sanction deriving from their attitude in connection with the breach of contract and in accordance with the FIFA Regulations; **(g)** to order the Respondents to bear all costs of this arbitration and to contribute to the costs incurred by the Appellant in an amount of at least US$ 60,000 (sixty thousand North American Dollars), in that respect, at the end of this procedure, the Appellant will supply with the invoice of its counsellors".*

On 28 May 2007, the Appellant filed its appeal brief, with the supporting documents, confirming the request for relief submitted in the statement of appeal.

On 6 July 2007 the Player and Ankaraspor filed, by separate but corresponding submissions, their respective answers pursuant to Article R55 of the Code, requesting, in substance, that the appeal filed by Ituano be dismissed, and the Appellant be ordered to bear *"all legal expenses and cost of procedure before CAS".*

On 25 June 2007 FIFA submitted its answer to the appeal filed by Ituano, asking the CAS:

> *"1. To reject the present appeal as to the substance and to confirm, in its entirety, the decision passed by the Dispute Resolution Chamber on 21 November 2006.*
>
> *2. To order the Appellant to bear all costs incurred with the present procedure.*
>
> *3. To order the Appellant to cover all legal expenses of the third Respondent* [FIFA] *related to the present procedure".*

After a full exchange of written pleadings and evidence, the hearing was held in Lausanne on 9 January 2008.

LAW

Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS, which is not disputed by either party, is based *in casu* on Article R47 of the Code and on Articles 60 ff. of the FIFA Statutes, in their version as of 1 August 2006, in force when the Decision was issued and the appeal was filed (the "FIFA Statutes").

2. More specifically, the provisions of the FIFA Statutes that are relevant to that effect in these proceedings are the following:

   Article 60 [*"Court of Arbitration for Sport (CAS)"*]:

   "1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

   2. 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".

   Article 61 [*"Jurisdiction of CAS"*]:

   "1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

   2. Recourse may only be made to CAS after all other internal channels have been exhausted.

   3. CAS, however, does not deal with appeals arising from:

   (a) violations of the Laws of the Game;

   (b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

   (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

   4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.

   5. The World Anti-Doping Agency (WADA) is entitled to appeal against doping-related decisions which are deemed to be final under the terms of par. 1 above".

Admissibility

3. Ituano's statement of appeal was filed within the deadline set down in the FIFA Statutes and the Decision. It complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

Applicable Law

4. According to Article R58 of the Code, the Panel is required to decide the dispute

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

5. Pursuant to Article 60.2 of the FIFA Statutes:

"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".

6. In this case, therefore, FIFA rules and regulations have to be applied primarily, with Swiss law applying subsidiarily. More exactly, the Panel agrees with the DRC that the dispute between the parties has to be decided on the basis of the RSTP 2005, as the petition to FIFA was filed on 11 July 2005, i.e. after the entry into force of the RSTP 2005 (1 July 2005) and the dispute concerns a contract signed after 1 September 2001 (Article 26 of the RSTP 2005).

7. The rules of the RSTP 2005 that are relevant in these proceedings are the following:

Article 17 [*Consequences of Terminating a Contract Without Just Cause*]:

"The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specific city of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.

[…]

3. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club. […]

4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless established to the contrary, that any club signing a Professional who has terminated

his contract without just cause has induced that Professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two Registration Periods".

The expression *"Protected Period"* used in such provision is defined in the RSTP 2005 as follows:

"a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, is such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, is such contract was concluded after the 28th birthday of the Professional".

Article 22 [FIFA Competence]:

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

a) Disputes between clubs and players in relation to the maintenance of contractual stability (Art. 13 – 18) if there has been an ITC Request and if there is a claim from an interested party in relation to such ITC Request, in particular regarding its issuance, regarding sporting sanctions or regarding compensation for breach of contract;

b) Employment-related disputes between a club and a player that have an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the Association and/or collective bargaining agreement; […]".

Scope of Panel's Review

8. Pursuant to Article R57 of the Code,

"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. […]".

The Merits of the Dispute

9. The dispute between the parties, as submitted to this Panel, concerns basically two points: (i) whether the DRC had jurisdiction to hear the claim filed before it by Ituano; and (ii) whether the claim filed by Ituano against Silvino and Ankaraspor is well founded, i.e. whether Silvino breached the Contract and is responsible for damages, together with Ankaraspor, towards Ituano.

10. In respect of the above, the Panel underlines that the possibility for it to evaluate the existence of a breach of contract, and to determine the consequences thereof, is subject to the finding that the DRC erred in holding itself not competent to adjudicate on Ituano's claim. In this regard, the Panel agrees with the Player's and Ankaraspor's submissions: in the event FIFA's jurisdiction is denied, and the Decision is confirmed, in fact, the Panel, failing an express

arbitration agreement between the parties, would not have jurisdiction to hear the contractual dispute between the parties. However, the Panel remarks that, even in the event its jurisdiction is confirmed, it would have the option, contemplated by Article R57 of the Code, to issue an award on the contractual dispute between the parties or to refer the case back to FIFA for a decision on said dispute.

11. The question whether the DRC had jurisdiction to hear the claim filed before it by Ituano is to be determined on the basis of Article 22(a) of RSTP 2005. According to this provision, FIFA (through its DRC: Article 24.1 of RSTP 2005) has the *"competence"* to adjudicate on *"disputes between clubs and players in relation to the maintenance of contractual stability"* in the event

    i. the dispute has an international character; and

    ii. the player or the club, with respect to the dispute at hand, has not sought *"redress before a civil court for employment related disputes"*.

12. With respect to the first point, the Panel remarks that the international character of the dispute relevant under Article 22(a) of RSTP 2005 is therein defined: FIFA has jurisdiction to hear a contractual dispute when *"there has been an ITC Request and … there is a claim from an interested party in relation to such ITC Request, in particular regarding its issuance, regarding sporting sanctions or regarding compensation for breach of contract"*.

13. With respect to the second point, the Panel notes that FIFA, in the exercise of its freedom of association, decided to set, in its Statutes, the principle that *"recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations"* (Article 62.2 as currently in force; the provision was however contemplated with the same wording also in the preceding versions of the FIFA Statutes): contractual disputes are ordinarily to be settled by the sport adjudication bodies, i.e. by a body constituted within the framework of the football association. At the same time, however, FIFA acknowledged that the legislation of many countries provides for the compulsory, or even exclusive, jurisdiction of ordinary State courts for employment-related disputes. As a result, in its regulations, FIFA contemplated the possibility, as an exception to the statutory prohibition and to the duty to refer the case to sport adjudication bodies, for clubs and players to seek redress before a domestic court, competent to decide on labour disputes.

14. Taking into account the possibility for clubs and players to refer disputes to State courts instead of submitting them to sport adjudication bodies, FIFA has developed, in the exercise of its freedom of association, a principle of coordination between the State and the sporting adjudication systems: if a party decides to start proceedings before a State court, such case cannot be submitted (at the same time or thereafter) to a FIFA adjudication body. This rule of "alternativity" has been described by FIFA as based on the principle of "litispendency". Its effects, however, appear to be more properly the consequence, established within the FIFA system, of the choice by the relevant party of the remedy for contractual disputes, so that *electa una via non datur recursus ad alteram*. In other words, FIFA acknowledges the possibility for a party to opt for State court adjudication, but establishes the principle that once such option is exercised, the possibility to refer the same case to sport adjudication bodies is precluded.

15. The Panel underlines that the adoption of such principle, established by FIFA in the exercise of its statutory freedom, cannot be reviewed in these arbitration proceedings: the principle per se has not been challenged and does not seem to run against peremptory provisions or fundamental principles of Swiss law. It is a FIFA rule that this Panel is bound to apply. Well to the contrary, the rationale underlying it must be approved, since it avoids "forum shopping" and conflicting decisions.

16. The question to be examined by this Panel is therefore whether this principle was properly applied: more exactly, whether Ituano, having sought redress in the way it did before the Labour Court of Itu, was precluded from bringing its case against the Player and Ankaraspor before the DRC.

17. In this evaluation, the Panel finds the following facts to be relevant:

    i. in year 2004 Ituano and the Player were bound by the Contract: in such respect the question whether the Contract's term, originally expiring on 31 December 2004, had been extended to 18 January 2009 by the Amendment is not relevant;

    ii. on 27 July 2004 the Player signed a contract with Ankaraspor;

    iii. on 29 July 2004 the CBF received a request for the issuance of the ITC concerning the transfer of the Player to Turkey;

    iv. on 30 July 2004 the Labour Court of Itu recorded the petition dated 28 July 2004, whereby Ituano requested the authorization to deposit an amount claimed to be due to the Player in order to avoid, in Ituano's opinion, a breach of the Contract as modified by the Amendment;

    v. on 4 August 2004 the Player filed a petition with the Labour Court of Itu to obtain his release from the Contract by depositing the amount of money stipulated for such purposes in the Contract;

    vi. on the same 4 August 2004 Ituano filed a new petition with the Labour Court of Itu, seeking to enforce the provisions of the Amendment with respect to the amount of money to be deposited by the Player for his release from the Contract;

    vii. on 13 September 2004 the Labour Court of Itu granted the request filed by Ituano on 30 July 2004 and dismissed Ituano's application of 4 August 2004.

18. In their respect it is to be noted that:

    i. there is no evidence that on 30 July 2004, when the petition dated 28 July 2004 was recorded by the Labour Court of Itu, Ituano had been informed of the receipt by CBF, the day before, of the request for the issuance of the ITC concerning the transfer of the Player to Turkey; on the other hand, Ituano was fully aware of the request for the issuance of the mentioned ITC when it filed its petition dated 4 August 2004;

    ii. the decision of the Labour Court of Itu issued on 13 September 2004, granting the request filed by Ituano on 30 July 2004, and allowing it to deposit a given amount of money to

discharge an obligation allegedly due to the Player, did not consider the validity and enforceability of said obligation, or the compliance by the parties of the Contract setting it: no request was filed by Ituano to have a judgment rendered by the Brazilian court against the Player for breach of the Contract;

iii. the decision of the Labour Court of Itu issued on 13 September 2004, dismissing Ituano's application of 4 August 2004, was expressly rendered *"without the appreciation of its merit"*, because Ituano had *"not … proposed the main lawsuit"*.

19. In the petition of 4 August 2004 the Appellant, indeed, seems to have requested only an *interim* measure of protection, as a "defence" or "counterclaim" to the petition filed on the same day by the Player: in fact, no request was filed by Ituano to have a judgment on the merits rendered by the Brazilian court against the Player for breach of the Contract.

20. In light of this conclusion, the Appellant does not seem to have opted for the State court adjudication of its contractual dispute with the Player: in both applications to the Labour Court of Itu, in fact, Ituano did not file any of the requests for relief thereafter filed with FIFA.

21. In addition, it is to be noted that it is a principle, widely recognized, that a request for *interim* measures addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court (see Geneva Convention on International Commercial Arbitration of 21 April 1961, Article VI.4; ICC Rules of Arbitration, Article 23.2; UNCITRAL Arbitration Rules, Article 26.3; FOUCHARD/GAILLARD/GOLDMAN, *International Commercial Arbitration*, Paris, 1999, p. 711 ff., § 1306 ff.).

22. As a result, Ituano could not be deemed to be precluded from reverting to FIFA on 11 July 2005: the dispute had an international character, and the Appellant, with respect to the dispute at hand, had not sought *"redress before a civil court for employment related disputes"*. The DRC, therefore, could not declare Ituano's claim inadmissible. Consequently, the Decision, so holding, has to be set aside.

23. Notwithstanding the foregoing, triggering the jurisdiction of this Panel to adjudicate on the dispute between the parties, the Panel deems it to be appropriate to refer the case back to FIFA for a decision on said dispute.

24. The Panel, indeed, fully appreciates the advantages, with respect time and costs, that a direct adjudication on the merits of the case would imply. The Panel, however, notes before the DRC no evaluation of the merits of the dispute had taken place, and that the Decision finally adopted by the DRC was severely influenced by the bad quality translations of the documents submitted by the parties. As a result, this Panel would deprive the parties of one level of adjudication, if it was to render an award on the merits of a dispute never examined by the FIFA competent body. In addition, the new examination of the dispute by the DRC would allow a unitary assessment of all the relevant aspects, including the position of Ankaraspor, not a party to the proceedings before the Labour Court of Itu, in respect of which, therefore, Ituano's claims are in any case not precluded. At the same time, the DRC would be in a position to adopt

disciplinary sanctions, if the case. In other words, the Panel intends to respect the freedom of FIFA in the prior evaluation of the factors which are relevant for the settlement of contractual disputes in accordance with Article 17 of RSTP 2005.

25. The Decision, therefore, has, in the Panel's view, to be vacated, and the case, pursuant to Article R57 of the Code, referred back to FIFA, whose intervention could be requested for a second time by the party interested in obtaining a decision on the dispute concerning whether Silvino breached the Contract and is responsible for damages towards Ituano. In re-hearing the case, then, FIFA could freely decide, in addition to the above, also about the role, if any, of Ankaraspor with respect to the contractual dispute between Ituano and the Player, as well on the imposition of any disciplinary measures on the parties involved, as the case may be.

26. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the Appellant to the Panel. Furthermore, all other prayers for relief are rejected.

Conclusion

27. In the light of the foregoing, the Panel holds that the Decision has to be annulled and the case referred back to FIFA, which shall be called to resolve on the dispute upon application of the interested party.

The Court of Arbitration for Sport rules:

1. The appeal filed by Ituano Sociedade de Futebol Ltda against the decision issued on 21 November 2006 by the FIFA Dispute Resolution Chamber is partially upheld.

2. The decision adopted by the FIFA Dispute Resolution Chamber on 21 November 2006 is annulled and the case is referred back to FIFA, that shall hear it upon the application of the interested party.

3. All other prayers for relief are dismissed.

(…).