Arbitration CAS 2004/A/780 Christian Maicon Henning v. Prudentópolis SC & Prudentópolis SC v. Christian Maicon Henning & Eintracht Frankfurt Fußball AG, award of 18 July 2005

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Goetz Eilers (Germany); Mr José Juan Pintó (Spain)

Football
Unilateral termination of the employment contract by a player
Counterclaim
Interpretation of the contract
Just cause
Sporting just cause
Reduction of the penalty clause
Claim for disciplinary sanctions

1. **Article R55 of the Code allows the filing by the Respondent of challenges against the decision appealed from by the Appellant, even though the Respondent had title to directly challenge the same decision within the deadline for appeals, but decided not to use this possibility. The Code allows this Respondent to attack the decision – after the expiration of the deadline for direct appeals – in the event another subject files an appeal.**

2. **"Hidden" intentions cannot be invoked to overrule the objectively clear wording of a contract. If the meaning of the words of a contract is clear, it is not permissible for the parties to adduce evidence of their intentions. It would contradict some basic principles of a system – such as that administered by FIFA – where stability, consistency and good faith play a fundamental role.**

3. **The failure by the national federation to issue the International Registration Transfer Certificate, or even the wish of the player to find a more convenient and better remunerative team to play with are no just causes that justify a breach of contract.**

4. **The occurrence of "sporting reasons" to terminate a contract has to be determined at the end of the football season, in the event the player can show that it was fielded in less than 10% of the official matches of his club, taking in mind several circumstances (age, injuries, field position, etc.). No sporting reasons appear to be available a few days after the signature of the contract, to take the possibility, within a "transfer window" soon to be closed, to sign for a second club. Likewise, concerns as to the future intentions of the club to actually field the player, or about the position in the league of the club the player has freely decided to join, cannot be invoked to terminate a contract for "sporting reasons".**

5. **The power of mitigation is given by Article 163 para. 3 of the Swiss Code of Obligations, under which *"the judge shall reduce penalties that he deems excessive"*. This provision has in fact mandatory nature, reflecting public policy principles in conflict-of-laws situations.**

6. **It is not for a party to claim, and a CAS panel to impose, *"sports sanctions and disciplinary measures provided by FIFA Regulations"*. The prerogative to impose, modify and/or increase such sanctions lies entirely with FIFA.**

Christian Maicon Henning (the "Appellant" or the "Player") is a Brazilian professional football player.

Prudentópolis Sport Club ("Prudentópolis") is a Brazilian football club existing under the laws of Brazil and has its headquarters in Prudentópolis, Brazil. It is affiliated to the *Confederacão Brasileira de Futebol* (the "Brazilian Football Federation").

Eintracht Frankfurt Fußball AG ("Eintracht") is a German football club existing under the laws of Germany and has its headquarters in Frankfurt am Main, Germany. It is affiliated to the German Ligaverband, which is a member of the *Deutsche Fussball-Bund* (the "German Football Federation"), which in turn is affiliated to FIFA.

The Player, Prudentópolis and Eintracht are subject to and bound by the applicable rules and regulations of the *Fédération Internationale de Football Association* (FIFA). 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. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).

On 29 August 2003 the Player and Eintracht signed an employment contract under which the Player was bound to render his professional services to Eintracht for the period from 1 September 2003 to 30 June 2004 (the "Contract of 2003").

Pursuant to Article 9 of the Contract of 2003, Eintracht had the option to extend the validity of the Contract of 2003 for two additional years, until 30 June 2006. Such option had to be exercised before 30 April 2004 by written notice given to the Player. In case of exercise of the option, Eintracht was obliged to pay the amount of EUR 250,000 to the "holder of the transfer rights" (the "Inhaber der Transferrechte" in the German original version of the Contract of 2003).

On 19 April 2004 Eintracht notified the Player of its exercise of the option pursuant to Article 9 of the Contract of 2003. The payment of the amount of EUR 250,000 was however not made.

On 12 July 2004 the Player contacted FIFA requesting it to state that he shall be free to sign a contract with a club of his choice, in the light of the failure of Eintracht to pay the amount of EUR 250,000. Such request was challenged by Eintracht and was referred to the Dispute Resolution Chamber (DRC) of FIFA.

On 6 August 2004 FIFA provisionally authorized the Player to sign a contract with a new club, pending adjudication of the dispute with Eintracht as to the exercise of the option pursuant to the Contract of 2003.

On 9 August 2004 the Player signed an employment contract with Prudentópolis, under which the Player was bond to render his professional services to Prudentópolis for a period of four years (the "Brazilian Contract"). Article 25 of the Brazilian Contract provided for a penalty clause in the amount of BRL 13,000,000 for breach of contract.

On the basis of the Brazilian Contract, the Brazilian Football Federation requested on 19 August 2004 the issuance by the German Football Federation of the International Registration Transfer Certificate for the Player. Such issuance was denied by the German Football Federation.

On 30 August 2004 the Player requested FIFA to be allowed to keep playing for Eintracht, with which he had signed a new contract valid from 1 July to 30 June 2006 (the "Contract of 2004"). As a result, the Player withdrew his claim against Eintracht, which was pending before the DRC.

On 22 September 2004 Prudentópolis turned to FIFA, requesting it to declare that the Player, by signing the Contract of 2004, had unilaterally breached the Brazilian Contract. It also requested that the Player be ordered to pay the contractual penalty of BRL 13,000,000 and be imposed the sporting sanctions provided by the FIFA Regulations for the Status and Transfer of Players (the "FIFA Players' Regulations").

On 26 November 2004 the DRC adopted a decision (hereinafter referred to as the "Decision") as follows:

"1. The claim of the Brazilian club, Prudentopolis SC, is partially accepted.

2. The player, Christian Maicon Henning, is instructed to pay the amount of USD 300,000 to the Brazilian club, Prudentopolis SC, within 30 days as from the date of notification of the present decision.

3. In the case that the player, Christian Maicon Henning, does not respect the above-mentioned deadline, on the relevant compensation amount a default interest payment of 5% p.a. shall be applied, as from the day following the expiry of the fixed deadline.

4. The player, Christian Maicon Henning, is suspended for the period of four months from participating in any official football match as from the date of notification of the present decision.

5. The suspension will be automatically lifted on the day the player, Christian Maicon Henning, pays the compensation mentioned under point 2 and in any event, after four months following the notification of the present decision.

6. All other claims of the Brazilian club, Prudentopolis SC, are rejected".

More specifically, the Decision, in its reasoning, reads as follows:

> *"The members present at the meeting … deemed it appropriate to verify at first the validity of the employment contract, which, incontestably, had been concluded between the player, Christian Maicon Henning, and the Brazilian club, Prudentopolis SC, on 9 August 2004 (hereinafter:* the second employment contract*). In this respect, the DRC examined whether, on the basis of the general legal principles, there were any reasons which would have imposed to doubt about the validity of the relevant contract. In particular, the deciding body acknowledged that the player, Christian Maicon Henning, and the club, Prudentopolis SC, are not contesting having exchanged a common manifestation of intent and that the relevant mutual aim covered all* essentialia negotii *of an employment contract. Equally, none of the parties claims having signed the contract in mistake as to the motivation, the subject or the nature of the transaction nor based on a factual error. Consequently, the DRC established that, as a general rule, the employment contract concluded between the player, Christian Maicon Henning and the club, Prudentopolis SC, was valid and legally binding for both parties.*
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> *In continuation, the deciding body duly considered the player's reasoning, according to which the second employment contract had never become valid since the DFB did not issue the relevant IRTC at any time. The members of the DRC present at the meeting were of the unanimous opinion that the player's argumentation cannot be supported. The validity of an employment contract is not subject to the issuing of an IRTC. The conclusion of an employment contract constitutes an act of the private law, and it develops its effects inter partes only. Consequently, it is not admissible to make the validity of an employment contract dependent on an action, which lies within the power of disposition of a third party – in the case of the issuing of the IRTC, in the first place, the association and moreover, the player's former club.*
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> *In the light of the above, the DRC established that the objections raised by the player, Christian Major Henning, which are based on the sportive regulations, did not have any effect on the validity of the second employment contract neither.*
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> *Having come to the conclusion that the employment contract concluded between the player, Christian Major Henning, and the club, Prudentopolis SC, was valid and therefore, both parties had to fulfill their respective obligations, the deciding body evaluated whether their were valid reasons, which would have justified the player's premature departure from the Brazilian club.*
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> *In this respect, the DRC acknowledged that the player does not evoke any such reasons. His argumentation is merely focused on contesting the validity of the second employment contract. Furthermore, the deciding body stated that it could not see any just cause neither. In particular, the club, Prudentopolis SC, does not appear to have violated its contractual obligations. In view of the very short duration of the contractual relation at the time of the player's departure – only 21 days after the conclusion of the relevant employment contract – this fact cannot really surprise.*
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> *… [T]he deciding body continued by stating that, at the time when the second employment contract was signed, the legal status of the contractual relation between the player, Christian Major Henning, and the club, Eintracht Frankfurt, remained unclear. In the fact, a dispute regarding the validity of the unilateral extension of the employment contract binding the player to the German club (hereinafter:* the first employment contract*) was pending at FIFA waiting for a formal decision. Therefore, the members present at the meeting deemed that the player and the club, Prudentopolis SC, had to be aware of the incertitude pending over their contractual relation. The authorization given to the player by FIFA to sign for a new club of his choice was expressly a provisional one, pending the decision of the DRC on the validity of the unilateral extension of the*

first employment contract by the German club, Eintracht Frankfurt. Consequently, should the DRC have come to the conclusion that the German club had validly extended the duration of the first employment contract, the player, Christian Maicon Henning, would possibly have had the obligation to return to Eintracht Frankfurt in order to fulfill his contractual duties during the remaining time of the relevant agreement. The deciding body stressed that under these hypothetic circumstances the player, Christian Major Henning, would have had, not only the right, but the obligation to prematurely terminate his engagement with the Brazilian club. In casu*, this was, however, not the case. The player freely changed his mind, withdrew his claim against Eintracht Frankfurt and returned to Germany".*

As a result of the above, the DRC concluded that the Player *"had breached the employment contract he had signed with the club, Prudentopolis Sc, without just cause"*. The DRC therefore applied the relevant rules set forth in the FIFA Players' Regulations and held as follows:

"Art. 21 par. 1 (a) of the Regulations provides that if there is unilateral breach of an employment contract without just cause during the first 3 years, compensation shall be payable and sports sanctions applied.

With regard to the compensation, the deciding body duly considered the penalty clause contained in the second employment contract. In particular, it compared the stipulated amount – BRL 13,000,000 – with the player's monthly salary – BRL 10,000 – and noted that the relevant compensation corresponds to more than 108 (!) yearly salaries of the player.

The DRC was of the opinion that, under such circumstances, the penalty clause appears to be completely disproportionate and that therefore, the deciding body had a legitimate competence to reduce the relevant amount, taking into account the particularities of the specific case.

In this respect, the members present at the meeting particularly emphasized the fact that the DFB did not issue the relevant IRTC in favor of the CBF. This documents was, however, absolutely necessary for the player, Christian Major Henning, in order to play for his new Brazilian club (cf. art. 6 par. 7 of the Regulations). The DRC explained that, from its point of view, it was somehow understandable that the player feared about his career and that under these circumstances he preferred to renounce to his engagement with Prudentopolis SC and return to his former German club, Eintracht Frankfurt, instead of risking to remain without playing for a considerable period of time waiting for the outcome of his dispute with the German club. A further mitigation cause, which was brought forward by the deciding body, was the fact that the player did not leave Prudentopolis SC for a third club, but returned to his former club in Germany. According to the DRC, that stance corroborates its opinion that, when deciding to leave Brazil, the player, Christian Major Henning, was primary led by the wish to be able to continue playing football without having to remain out of the fields for an unknown period of time for legal reasons. Finally, the members present at the meeting recalled that the player had actually never been registered for the Brazilian club.

In view of the above, the DRC decided that an amount of compensation fixed ex aequo et bono *at USD 300,000 appears to be reasonable and justified.*

With regard to the sports sanctions, the deciding body referred to art. 23 par. 1 (a) of the Regulations and stated that, as a general rule and in strict application of the relevant provision, the player, Christian Maicon Henning, should be suspended for a period of four months from participating in any official football match. However, the DRC stated that, fundamentally, it was authorized to go below the minimum sanction provided for in the Regulations, because such a more lenient attitude operates exclusively in favor of the party to be sanctioned.

Taking into account that a certain understanding for the player's stance had been shown already when establishing the amount of compensation, the members present at the meeting deemed it inappropriate to use the same mitigation causes in order to reduce the sports sanctions. Yet, bearing in mind that, in all probability, the player, Christian Maicon Henning, had decided to leave Prudentopolis SC in order to not be forced to stop from playing football for a certain period of time, the DRC was of the opinion that it could nevertheless somewhat soften the effect of the sports sanctions by giving the player the opportunity to personally influence the length of the suspension. Based on these considerations, it was decided to suspend the player, Christian Maicon Henning, for the period of four months from participating in any official match. The suspension shall, however, be automatically lifted on the day the player pays the due compensation to Prudentopolis SC.

Finally, the DRC referred to the position of the German club, Eintracht Frankfurt, and in particular, it evaluated whether it can somehow be made co-responsible for the breach of contract committed by the player, Christian Maicon Henning.

In this respect. the deciding body stressed that, at the time when the player changed his mind and decided to return to Eintracht Frankfurt, i.e. on 30 August 2004, the German club was of the firm opinion to have validly exercised its option to unilaterally extend the duration of the employment contract with the player, Christian Maicon Henning, and that, consequently, the latter was still contractually bound to it until 30 June 2006. The German club was convinced of its position. This is corroborated by the fact that it did not authorize its association, the DFB, to issue the IRTC for the player in question on behalf of the CBF.

The DRC deemed that, under these circumstances, it appears to be very improbable that the German club, Eintracht Frankfurt, should have induced the player, Christian Maicon Henning, to breach the employment contract he had concluded with Prudentopolis SC. As a consequence, it was decided that Eintracht Frankfurt is not anyhow to blame for the breach of contract committed by the player, Christian Maicon Henning, and therefore, the German club cannot be made jointly liable for the payment of the compensation due by the player to the Brazilian club. For the same reasons, no sports sanctions may be imposed".

The Decision was notified to the parties on 7 December 2004.

On 17 December 2004, the Player 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. The statement of appeal cited Prudentópolis and FIFA as Respondents, contained an *"Application for Urgent Interim Relief"*, the appointment of Mr Goetz Eilers as arbitrator and the following request to the CAS:

"1. reversal of the decision of the Dispute Resolution Chamber of FIFA, passed in Zurich, Switzerland, on 26 November 2004;

2. dismissal of the claims of the Respondent;

3. a declaration that there is no valid labour contract between the Appellant and the Respondent, or at least a declaration that there is no valid labour contract within the meaning of Article 23 of the FIFA Regulations.

Alternatively […]

4. *reversal of the order for payment of a fine (order no. 2 of the decision) or at least a reduction of that fine; and/or*

5. *permanent removal of the suspension (order no. 4 of the decision)".*

On 23 December 2004, the Player filed his appeal brief, confirming his request for relief.

In support of his requests for relief, the Player first describes the relationship between the parties since 2001, with specific regard to his transfer to Germany, the Contract of 2003 and its content, the dispute with Eintracht and its settlement, then submits his legal argument to conclude that:

> *"the Appellant has not breached a contract with the Respondent as the arrangement between the Appellant and the Respondent is null and void (sham contract). If valid, the arrangement would have to be treated as a player agent arrangement and therefore would not fall within the scope of Article 23 Player Statute. If treated as a valid employment contract, a breach by the player would be justified based on just cause as well as sporting cause".*

More specifically, in fact, under a first perspective, the Appellant maintains that the Brazilian Contract *"is null and void for two reasons: it is a sham contract and it infringes FIFA Rules".*

In the Appellant's opinion the Brazilian Contract is a sham contract, and *"is therefore invalid under Brazilian as well as under German law".* The Appellant submits that, although the parties named their arrangement as an "employment contract", they had no intention that under the Brazilian Contract the Player had to play for Prudentópolis, while their "true purpose" was to create a mechanism under which Prudentópolis could claim a payment for the transfer of the Player.

As a result, the Appellant maintains, the Brazilian Contract infringes the FIFA rules, because it circumvents regulations governing player transfer agents, which are intended to prohibit and prevent *"unprofessional services".* An employment contract was signed, in order to allow Prudentópolis to obtain a payment for the transfer of the Player, because Prudentópolis and its president did not hold a player agent license, and as such would not have been entitled to compensation for the services rendered in connection with the transfer of the Player.

Under a second perspective, the Appellant submits that the Brazilian Contract is not an employment contract, and should be considered a player's agent contract, in accordance with the true intentions of the parties. As a result, Article 23 of the FIFA Players' Regulations does not apply, because it does not cover agency agreements. In addition, the Appellant maintains, the application of Article 23 of the FIFA Players' Regulations to protect economic interests would be contrary to Article 39 of the EC Treaty or in any case contradict its purpose (intended to implement Article 39 of the EC Treaty).

Further, the Appellant explains that, even assuming that the Brazilian Contract falls within the meaning of "employment contract" for the purposes of Article 23 of the FIFA Players' Regulations,

no sanction should be applied because *"the actions of the Appellant constituting the alleged breach were done with just cause and for sporting reasons"*.

The "just cause" is offered, in the Appellant's opinion,

i. by the fact that the Brazilian contract was signed on the basis of the provisional authorization of FIFA, pending the adjudication on the dispute between the Appellant and Eintracht, at a time when everybody was aware of the fact that, as a result of such dispute, the Player could have to return to Eintracht: and *"not to fulfill a contract which was from a FIFA point of view provisional can not result in a severe punishment"*;

ii. by the fact that *"from the very beginning a transfer could not have been achieved under the existing transfer rules"*: as result of the fact that the German Football Federation had not issued the International Transfer Certificate, *"the Appellant was never able to move to Brazil"*.

With respect to the *"sporting reasons"*, the Appellant stresses that *"the FIFA Regulations ... do not prevent a player from leaving a club ... if the club does not actually employ and engage him as a football player"*, and concludes that, since *"it was never the intention and as the Respondent would never be capable of offering the Appellant an appropriate position in an appropriate team, the Appellant was entitled to terminate"* the Brazilian Contract; and chiefly so, because otherwise *"he would have missed the transfer window"*.

Under a third perspective, the Appellant alleges that Article 23 of the FIFA Players' Regulations applies only in cases where a player breaches a contract by signing for a new club. As a result he could not be sanctioned because he did not join a new club, but *"simply fulfilled his obligations under the Eintracht contract"*.

Under a fourth perspective, the Appellant submits that Article 23 of the FIFA Players' Regulations cannot be applied to enforce payments due by a player to an agent.

Under a fifth, and final, perspective the Appellant submits that no payment obligation binds him to Prudentópolis: the penalty stipulated in the Brazilian Contract is invalid *"under both Brazilian and German law"*; no payment is due to Prudentópolis acting as an agent, because Prudentópolis did not render any professional services to the Player in connection with the renewal of the contract with Eintracht.

By letter of 23 December 2004, Prudentópolis appointed Mr José Juan Pintó as arbitrator.

On 31 January 2005, Prudentópolis filed its answer to the appeal brief. The answer contains a statement of defence and a counterclaim brought by Prudentópolis against the Appellant and Eintracht pursuant to Article R55 of the Code, and the following requests for relief:

A. As to the appeal brought by the Player

"1. to upheld the decision of the Dispute Resolution Chamber of FIFA, passed in Zurich, Switzerland, on 26 November 2004;

2. *a declaration that there is a valid and binding labour contract between the Appellant and the Respondent within the scope of Article 23 of the FIFA Regulations;*

3. *the payment by the Appellant of legal and procedural costs and fees incurred to the Respondent.*

4. *dismissal of the claims of the Appellant, including*

   a. *the stay of the execution of the decision appealed against;*

   b. *the reversal of the order for payment of a fine nor a reduction of that fine;*

   [c.] the removal of the suspension of the Appellant".

B. As to the counterclaim brought by Prudentópolis

"5. to declare Eintracht Frankfurt jointly liable to pay the compensation to be awarded to the Respondent, under penalty to suffer sports sanctions and disciplinary measures provided by FIFA Regulations;

6. to recognize the validity, applicability and consequently payment, by the Player or by Eintracht, of the penalty clause at the amount of R$ 13.000.000,00 (thirteen million in Brazilian currency) or, at least, to adjust the amount of compensation to be paid, by means of equity, to an amount higher than that one awarded by the aforementioned decision, which corresponds only to 6.45% of the penalty clause foresaw in the contract;

7. the reimbursement of the amount paid by Prudentopolis to the Player as an advanced wage, as provided by the attachment 2.

8. order the Appellant to bear with all the arbitration costs".

In support of its statement of defence and counterclaim, Prudentópolis summarizes *"the entire dispute"* with the Player and Eintracht as follows (emphasis in the original):

"I) Prudentopolis Esporte Club was the club which held the Player's first professional contract, since June 2001, launching the player to the Brazilian's first division football scene, including the opportunity given the Player to play for two of the most traditional and competitive teams in Brazil's first division;

II) In a labor judicial litigation against his former club, on November 2001, the Player was condemned for misconduct and bad faith litigation, fact that already identified the Player's disrespect before his duties and contractual obligations;

III) By claim n° vde 04-00593 (Christian Maicon Henning x Eintracht Frankufurt), after the unquestionable not fulfillment of the conditions established in that contract, and also based on the understanding from FIFA that 'the relation between the player and the club concerned is seriously disrupted', the employment relationship existing between the parties was fully terminated and the Player was authorized to sign a contract with the club of his choice;

IV) On August 9th 2004, the Player signed his labor contract with Prudentopolis, at his free will, with the clear intention of continuing his career and believing on the opportunities that the Brazilian club could arrange for him, as it had done years before;

V) On August 26, 2004 DFB refused to send the International Transfer Certificate for the Player, demonstrating total disrespect before FIFA's decision, as well as a illegal protection in favor of one of its

affiliate; this situation unable the Player from being hired from other interested clubs, because of the sensation of lack of security illegally created from Eintracht and DFB;

VI) On August 30, 2004, the Player induced by the German Club and supported by DFB intentions, withdrew the claim before Eintracht Frankfurt, and arranged an 'agreement' so that his previous relation with the Brazilian Club could be finally settled;

VII) The agreement settled before FIFA totally misled the comprehension about the facts in order to solve the dispute, because the most important information was ignored by the player, by Eintracht and also by the DFB – THE FACT THAT THE PLAYER HAD SIGNED A CONTRACT WITH ANOTHER CLUB, UNDER FIFA'S AUTHORIZATION;

VIII) Therefore, the decision provided by FIFA's DRC must be upheld in the merit;

IX) Nevertheless the compensation to be paid by the player must be awarded at a higher amount, especially due to the lawfully contractual penalty clause, which foresees the payment of R$ 13.000.000,00 (thirteen million in Brazilian currency);

X) Moreover, the German club Eintracht must be deemed jointly liable with the player in order to pay the relevant compensation for the breach of contract, especially before all the aforementioned misconduct and inducement committed by the club and above, before the fragility of its body of evidence and testimonials.

XI) Finally, the obligation to pay the amount due to Prudentopolis by the player and/or by Einthracht must not excludes the application of sports sanctions and/or disciplinary measures as a consequence of all the misconduct committed".

More specifically, Prudentópolis submits a description of the relevant facts and advances legal arguments in support of its requests for relief.

As to the facts, Prudentópolis describes *"the real qualification and identification of the Respondent"*, the contract between the parties in 2001, the transfer of the Player to Germany, the employment contract with Eintracht and its termination, the failure of Eintracht to exercise the option to extend the Contract of 2003, the ensuing dispute the Brazilian Contract and its content, and the *"situation of the Appellant a the end of August"* 2004.

As to the law, Prudentópolis first answers to the criticisms of the Decision put forward by the Appellant, then, by way of counterclaim, attacks the Decision on opposite grounds and asks the Panel to modify it in its favour.

The submissions of the Appellant are challenged by Prudentópolis under several perspectives.

Under a first perspective, Prudentópolis maintains that *"the contract concluded between the Appellant and the Respondent has fulfilled the Brazilian law requirements, which regulate the referring relation concerning a contract"* and it was *"no sham contract"*. In this respect Prudentópolis submits that *"there is no legal evidences related to German, Brazilian or even Swiss Law brought by the Appellant to maintain his argument in order to consider the contract as a sham contract before them"*. On the contrary, in Prudentópolis' opinion, *"there was a valid and binding contractual relationship concluded in 2004 between the player and the club, stipulated by a written standard contract duly registered before Brazilian Football Confederation ..., which foresaw reciprocity*

and balanced obligations to each party. Also, the player has received the relevant salaries corresponding to that period"; "... such contract was concluded under all legal requirements under Brazilian law and, even more, under FIFA Regulations related to the issue...".

Under a second perspective, Prudentópolis adds that the Brazilian Contract *"is to be deemed as an employment contract, not as an agency or representation one for the purposes of the FIFA regulation"*, and that EC law *"seems to be inapplicable ... in this present case"*. According to Prudentópolis, *"the Respondent's President has never acted as a player's agent"*; and the transfers of the Player (in Brazil and to Germany) have been *"arranged by the Respondent's President, legitimately representing the club's interest"*.

Under a third perspective, Prudentópolis submits that the Brazilian Contract was breached by the Appellant *"without just cause"*, because he was *"acting in bad faith"* and the failure of the German Football Federation to issue the International Transfer Certificate *"has no legal grounds and cannot be used as a just cause to the breach of contract committed by the player"*.

Under a fourth perspective, Prudentópolis confirms that *"there is no possibility to the Appellant to invoke the existence of a sports just cause in order to breach the contract concluded with the Appellant"*.

Under a fifth perspective, Prudentópolis submits that Article 23 of the FIFA Players' Regulations *"must be applied to enforce payments"*, and that the penalty clause set forth in the Brazilian Contract is valid and enforceable under Brazilian law.

Finally, Prudentópolis challenges *"the Appellant's evidentiary body of documents and witnesses statements"*. Prudentópolis submits that *"the Appellant shows absolutely no clear evidence nor any written proof or document of the alleged facts, being its assertions therefore groundless and of no value"*; and the written declarations *"are submitted by people bound to Eintracht, which is an interested person on the solution of the present matter"*.

In the counterclaim brought against the Appellant and Eintracht, Prudentópolis challenges the Decision to the extent it denied any responsibility of Eintracht, fixed the compensation for Prudentópolis in the amount of USD 300,000 and determined that the suspension of the Player *"will be automatically lifted on the day the player … pays the compensation"*.

In this respect Prudentópolis submits that Eintracht should be deemed as jointly liable to pay the compensation to Prudentópolis is accordance with Article 14 par. 3 of the FIFA Players' Regulations, in the case the Player fails to make the payment indicated in the Decision. Such obligation, in addition, would be, in Prudentópolis' opinion, a consequence of the fact that Eintracht *"induced the Appellant to the breach of the employment contract he had concluded with the Respondent"*.
At the same time, Prudentópolis criticizes the Decision because the compensation it awarded *ex aequo et bono "appears to be too distant of a reasonable and justified criteria"*. Such compensation should be calculated, in Prudentópolis' opinion, on the basis of the penalty clause contained in the Brazilian Contract and awarded taking in mind *"the losses deriving from the unilateral breach of the employment contract without just cause"*. And Prudentópolis stresses that, according to Article 22 of the FIFA Players' Regulations, *"compensation for breach of contract ... shall be calculated with due respect to the national law applicable"* (indicated as being Article 28 of the Brazilian Law No. 9615/1998).

The Decision is finally criticized under a different perspective: in Prudentópolis' view, in fact, the *"disciplinary sanctions provided by FIFA Regulations must be applied concurrently, not alternatively, to the compensation to be paid"*. Prudentópolis submits that the Player *"must be deemed not eligible to participate in any official football matches within the relevant period and concurrently, not alternatively, must pay the compensation awarded"*. In addition, Eintracht should also be sanctioned for having induced the Player to breach the Brazilian Contract, pursuant to Article 23 of the FIFA Players' Regulations.

The answer to the counterclaim by Eintracht was filed with CAS on 7 March 2005, following the letter by CAS dated 14 February 2005. In fact, the submissions made by Prudentópolis against Eintracht by way of counterclaim were considered as an application of joinder in accordance with Article R41.2 of the Code.

In its answer, Eintracht submitted the following request for relief:

> *"1. In response to the appellant's appeal, the Dispute Resolution Chamber's decision of 26.11.2004 is to be set aside.*
>
> *2. The obligation upon the appellant to pay USD 300,000 as well as the ban imposed on him is to be lifted.*
>
> *3. All counterclaims of the respondent, and particularly those against Eintracht Frankfurt Fußball AG, are to be dismissed.*
>
> *4. All costs of the case including the costs of legal representation of the appellant and Eintracht Frankfurt Fußball AG, are to be borne by the respondent".*

In support of its request for relief, Eintracht under a first perspective challenges the counterclaim brought by Prudentópolis, and, under a second perspective, criticizes the Decision by endorsing the reasons put forward by the Player in support of his appeal.

With respect to the counterclaim brought by Prudentópolis, Eintracht submits that it has to be *"rejected of necessity, on procedural grounds"*. Eintracht, in this respect, emphasizes that by filing the counterclaim Prudentópolis is challenging the Decision to the extent it denied Prudentópolis' requests before the DRC. As a result, if Prudentópolis wanted to have the decision set aside, it had to file an *"independent appeal"* within 10 days of the delivery of the Decision. Since Prudentópolis failed to timely bring such appeal, the Decision in the points rejecting the claims of Prudentópolis *"stands with final legal effect"* and can no longer be challenged, even by way of counterclaim.

In any case, Eintracht confirms as *"wholly appropriate … the DRC's reasons for declining to make Eintracht ... jointly responsible"*, because Eintracht *"did nothing throughout the process other than pursue its ... position"* that the Contract of 2003 had been extended following the exercise of the option. In addition, Eintracht submits, the termination of the Brazilian Contract by the Player was the result of a letter sent by FIFA on 8 September 2004 and was not induced by Eintracht , that did not tell *"the appellant [that] he should terminate any contract with the respondent"*. In this respect Eintracht underlines what it sees as a contradiction of FIFA: in the letter dated 8 September 2004 it recommended that the Appellant

should end the Brazilian Contract; then it *"punish[ed] the appellant … for following precisely this recommendation"*.

On the other hand, with respect to the Appeal filed by the Player, Eintracht maintains *"that the decision of the DRC, insofar as it went against the appellant, is incorrect and should be set aside, and that the respondent has no rightful claims of any kind against either the appellant or Eintracht"*.

In support of such position, Eintracht argues that *"the appellant and the respondent never seriously intended or could have intended for the appellant to play football for the respondent"*, while the Brazilian Contract was not an employment contract but *"a mere sham contract"* (*"or, at best, covert agency contract"*), *"no more than a means to an end"*, planned to achieve the objective of a profitable sale: *"the sole and overriding objective of the contract of 09.08.2004 was to transfer the appellant, before he had ever played for the respondent, in order to make a profit"*. And, in further support of such conclusion, Eintracht invokes Article 5.2 of the FIFA Players' Regulations, restricting the number of transfers of registration of a player in the same sports season, which would have made it *"legally impossible"* to achieve the objective sought after by Prudentópolis if the Brazilian Contract had been a genuine employment contract.

Eintracht challenges the submissions of Prudentópolis also with respect to the penalty set forth in the Brazilian Contract, as being a *"transfer fee"*, *"wholly disproportionate"* and *"by any legal standard ... invalid and void"*; and such penalty could not be reduced, because of the *"prohibition on validity-maintaining reductions"*, but should be completely disregarded.

Eintracht, in addition, and inter alia, submits that in any case the Appellant had a sporting just cause to terminate the Brazilian Contract, also in the light of the pending dispute with Eintracht as to the extension of the Contract of 2003 and the provisional nature of the FIFA's authorization for the Player to sign a contract with a club of his choice.

By letter dated 30 December 2004 FIFA notified the CAS of its acceptance of the appointment of Mr José Juan Pintó as arbitrator made by Prudentópolis.

On 18 January 2005 FIFA filed a letter with CAS informing that *"FIFA renounces to actively participate to the present arbitration proceedings and assumes a passive role only"*. FIFA, in fact, confirmed that its *"involvement in this affair is limited to having passed a decision in a contractual dispute between a club and a player"*, and that it *"had no personal interest in the matter"*.

At the same time, however, FIFA made some remarks with respect to the Appellant's allegation that the Brazilian Contract was *"a sham contract aimed to disguise the real intention of the parties"*. According to FIFA *"to that regard it is worth emphasising that, throughout the procedure leading to the decision of the Dispute Resolution Chamber, the Appellant never raised any doubts about the nature of the contract. On the contrary he insisted on receiving an authorisation to be registered for the Respondent"*. In addition, FIFA stressed that, *"in the event that the Panel comes to the conclusion that … the employment contract … is a sham contract, the stance shown by the Appellant has to be considered as reproachable"*.

By letter dated 23 December 2004 Prudentópolis answered to the application for urgent interim relief submitted by the Appellant together with the statement of appeal, asking it to be rejected.

On 30 December 2004 FIFA filed with CAS a letter in answer to the Appellant's application for the stay of execution of the Decision, requesting that it be dismissed.

On 3 January 2005, the Appellant wrote a letter to CAS, insisting in its application for a stay.

On 6 January 2005 the Deputy President of the Appeals Arbitration Division of CAS, ruling in camera, issued an order on provisional measures as follows:

> *"1. The application by Mr Christian Maicon Henning for granting the stay of the decision issued on 26 November 2004 by the FIFA Dispute Resolution Chamber is upheld with respect to the suspension of four months imposed on Mr Christian Maicon Henning and dismissed with respect to the rest of such decision.*
>
> *2. The application by Prudentopolis Esporte Clube for making the stay of the decision conditional to the provision of security by Mr Christian Maicon Henning is dismissed.*
>
> *3. The costs of the present order, to be determined in the final award, shall be borne in a proportion of 50% by Mr Christian Maicon Henning and 50% jointly and severally by Prudentopolis Esporte Clube and by FIFA".*

By letter dated 25 January 2005, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division that Prof. Luigi Fumagalli had been appointed as President of the Panel.

On 9 May 2005 the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the "Order of Procedure"), detailing the procedure for the arbitration. The Order of Procedure was accepted and countersigned by both parties.

A hearing was held in Lausanne on 2 June 2005. At the conclusion of the hearing, the parties, after making submissions in support of their respective claims, confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

LAW

Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS *in casu* is based on Article 59 ff. of the FIFA Statutes and has been confirmed by the signature by all the parties of the Order of Procedure issued by the CAS Court Office on behalf of the President of the Panel.

Appeal Proceedings

2. As these proceedings involve an appeal against a decision issued, in a dispute relating to a contract, by a federation (FIFA), whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in a non disciplinary case, in the meaning and for the purpose of the Code.

Admissibility

3. The Player'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.

4. On the other hand, dispute has arisen with respect to the admissibility of the counterclaim filed by Prudentópolis. Eintracht, in fact, denies it and submits that by filing the counterclaim Prudentópolis is challenging the Decision – to the extent it denied Prudentópolis' requests before the DRC – after the expiration of the deadline set down for appeals. In Eintracht's opinion, Prudentópolis had to file a timely appeal against the Decision; and the expiration of the deadline implies that the Decision can no longer be challenged by Prudentópolis, even by way of counterclaim.

5. The Panel notes that the counterclaim was filed by Prudentópolis pursuant to Article R55 of the Code, which, on the point, so provides:

   "Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS an answer containing:

   […]

   • *any counterclaim*

   […]".

6. The Panel does not agree with Eintracht's reading of Article R55 of the Code. Such provision, in fact, drafted in broad terms, gives Prudentópolis the possibility to file any counterclaim it

may have against the Appellant and does not limit the scope of admissible counterclaims. In other words, the provision, in its plain wording, allows the filing by Prudentópolis of challenges against the Decision appealed from by the Appellant, even though Prudentópolis had title to directly challenge the same Decision within the deadline for appeals, but decided not to use this possibility. Prudentópolis, indeed, may have chosen to accept the Decision – however unsatisfactory – and therefore not to challenge it, provided no one else challenges it. In accordance with CAS jurisprudence (CAS 2005/A/819), the Code allows this Respondent to attack the Decision – after the expiration of the deadline for direct appeals – in the event another subject files an appeal.

7. This conclusion, in the Panel's opinion, is fully consistent with the meaning of the CAS arbitration proceedings and with the scope of the panel's review (see para. 13 *infra*). The CAS arbitration gives the parties (the appellant and the respondent) the possibility to obtain a full review of the facts and the law: the Code, in the same way as it allows the appellant to obtain a *de novo* hearing on the dispute, allows the respondent to bring any counterclaim.

8. According to the Panel, therefore, the counterclaim brought by Prudentópolis – satisfying the requirements of Article R55 of the Code – is admissible.

Applicable Law

9. 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".

10. Pursuant to Article 59 para. 2 of the FIFA Statutes

"CAS applies the various regulations of FIFA or, if applicable, of the Confederations, Members, Leagues and clubs and, additionally, Swiss Law".

11. In this case, therefore, FIFA rules and regulations have to be applied primarily, with Swiss law applying subsidiarily.

12. The rules to be taken into account in this arbitration are the following:

A. <u>As to the FIFA rules</u>

i. Article 21 of the FIFA Players' Regulations:

"1 (a) In the case of all contracts signed up to the player's 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable.

[…]".

ii. Article 22 of the FIFA Players' Regulations:

"Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art. 13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

(1) Remuneration and other benefits under the existing contract and/or the new contract,

(2) Length of time remaining on the existing contract (up to a maximum of 5 years),

(3) Amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,

(4) Whether the breach occurs during the periods defined in Art. 21.1".

iii. Article 23 of the FIFA Players' Regulations:

"Other than in exceptional circumstances, sports sanctions for unilateral breach of contract without just cause or sporting just cause shall be applied:

1. In the case of the player:

(a) If the breach occurs at the end of the first or the second year of contract, the sanction shall be a restriction of four months on his eligibility to participate in any official football matches as from the beginning of the new season of the new club's national championship.

[…]

(c) In the case of aggravating circumstances, such as failure to give notice or recurrent breach of contract, sports sanctions may be imposed for up to a maximum of six months.

2. In the case of the club breaching a contract or inducing such a breach:

(a) If the breach occurs at the end of the first or the second year of contract, the sanction shall be a ban on registering any new player, either nationally or internationally, until the expiry of the second transfer period following the date on which the breach became effective. In all cases, no restriction for unilateral breach of contract shall exceed a period of 12 months following the breach or inducement of the breach

[…]

(c) A club seeking to register a player who has unilaterally breached a contract during the periods defined in Art. 21.1 will be presumed to have induced a breach of contract.

(d) Without prejudice to the foregoing rules, other sports sanctions may be imposed by the FIFA Disciplinary Committee on clubs, where appropriate, and may include, but shall not be limited to, the following:

- *fines,*
- *deduction of points,*
- *exclusion from competitions*

[…]".

iv. Article 24 of the FIFA Players' Regulations:

"In addition to termination for just cause, it will also be possible for a player to terminate his contract for a valid sporting reason ("sporting just cause").

Sporting just cause will be established on a case-by-case basis pursuant to the procedure set out in Art. 42. Each case will be evaluated on its individual merits, taking account of all relevant circumstances (injury, suspension, player's field position, player's age etc.). Furthermore, sporting just cause shall be examined at the end of the football season and before expiry of the relevant registration period in the former club's national association.

If sporting just cause has been established, it shall be determined whether compensation is payable and to what amount".

v. Article 42 of the FIFA Players' Regulations:

"1. Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established, which shall consist of the following elements:

[…]

(b) (i) The triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber of the Players' Status Committee … .

(ii) If the decision reached pursuant to (i) is that a contract has been breached without just cause or sporting just cause, the Dispute Resolution Chamber shall decide within 30 days whether the sports sanctions or disciplinary measures which it may impose pursuant to Art. 23 shall be imposed. This decision shall be reasoned, also with respect of the findings made pursuant to (b)(i) … .

(iii) Within the period specified in (ii), or in complex cases within 60 days, the Dispute Resolution Chamber shall decide any other issues related to a contractual breach (in particular, financial compensation). This decision shall be reasoned …".

vi. Article 12 of the "Regulations governing the Application of the Regulations for the Status and Transfer of Players" (hereinafter referred to as the "Application Regulations"):

"A player is entitled to terminate his contract with his club unilaterally for sporting just cause where he can show at the end of a season that he was fielded in less that 10% of the official matches played by his club. The existence of such sporting just cause shall be established on a case-by-case basis and shall depend on the particular circumstances (including but not limited to injury, suspension, player's field position, position in the team (e.g. reserve goal keeper), player's age, reasonable expectations on the basis of past career, etc.)".

vii. Article 14 of the Application Regulations:

"1. The party responsible for a breach of contract is obliged to pay the sum of compensation determined pursuant to Art. 42 of the FIFA Regulations for the Statues and Transfer of Players within one month of notification of the relevant decision of the Dispute Resolution Chamber.

2. If the party responsible for the breach has not paid the sum of compensation within one month, disciplinary measures may be imposed by the FIFA Players' Status Committee, pursuant to Art. 34 of the FIFA Statutes. …

3. If a player is registered for a new club and has not paid a sum of compensation within the one month time limit referred to above, the new club shall be deemed jointly responsible for payment of the amount of compensation.

4. If the new club has not paid the sum of compensation within one month of having become jointly responsible with the player pursuant to the previous paragraph, disciplinary sanctions may be imposed by the FIFA Players' Status Committee, pursuant to Art. 34 of the FIFA Statutes. …".

B. <u>As to the Swiss law</u>

viii. Article 163 of the *Code des Obligations*:

"1 Les parties fixent librement le montant de la peine.

2 La peine stipulée ne peut être exigée lorsqu'elle a pour but de sanctionner une obligation illicite ou immorale, ni, sauf convention contraire, lorsque l'exécution de l'obligation est devenue impossible par l'effet d'une circonstance dont le débiteur n'est pas responsable.

3 Le juge doit réduire les peines qu'il estime excessives".

["1 The parties freely fix the amount of the penalty.

2 The penalty fixed cannot be claimed either when its purpose is to sanction an illegal or immoral obligation, or, unless otherwise agreed, when the performance of the obligation has become impossible as a result of a circumstance for which the debtor is nor responsible.

3 The judge shall reduce penalties that he deems excessive"].

[English translation by the Panel]

Scope of Panel's Review

13. 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

A. The issues to be determined

14. The dispute – as defined in its scope by the claim and the counterclaim – between the parties focuses on the issue of the existence of a breach of the Brazilian Contract by the Appellant, and more exactly on whether the signature by the Player of the Contract of 2004 with Eintracht amounts to a breach of the contract he had signed with Prudentopólis. The Player and Eintracht deny this breach; the Decision and Prudentopólis affirm it.

15. In addition, dispute has arisen as to the consequences of such breach, if held to have occurred. Prudentopólis, in fact, assumes that the Decision, that found the breach, had to draw different, and harsher, conclusions, both with respect to the Player and Eintracht. On the other side, the Appellant and Eintracht submit that in any case no sanction can be applied.

B. The breach of contract by the Appellant

16. The Decision held that the Player, by entering into the Contract of 2004, breached the Brazilian Contract. This conclusion is challenged by the Player under several points of view (summarized above).

17. The first group of submissions of the Appellant concerns the true characterisation of the Brazilian Contract. In the Appellant's opinion, although an employment contract in its name, the Brazilian Contract is a sham contract intended to play the role of a covert player-agent contract, because the Player and Prudentópolis desired only to create a mechanism under which the latter could earn a fee upon the transfer of the former. The Appellant then draws from this assumption the consequences that the Brazilian Contract is null and void, that it infringes FIFA rules on player agents, and that it does not fall within the scope of application of Article 23 of the FIFA Players' Regulations, i.e. of the rule which the DRC applied in the Decision as a basis of the finding against the Appellant, that – in the Appellant's submission – could not be applied to enforce payments due by a player to an agent.

18. The Panel cannot accept the construction of the Brazilian Contract made by the Appellant and by Eintracht in his support.

19. The Panel notes, in fact, in agreement with the reasoning of the DRC and the submissions of Prudentópolis, that the Brazilian Contract – however succinct – has all elements of a valid employment contract under the rules governing it, and that by its signature the parties thereto appear to have expressed their consent to be bound by it. The parties, in addition, appear to have taken all usual steps that normally precede, concur with and follow the signature of an employment contract for football professionals:

i. the Player signed it after seeking and obtaining from FIFA the authorization to enter into a contract with a club of his choice, i.e. into a new employment contract;

ii. the parties signed it by using the standard form of the Brazilian Football Federation named *"Contrato de trabalho de atleta profissional de futbol"*;

iii. the Brazilian Contract was deposited with the Brazilian Football Federation;

iv. the Brazilian Football Federation sought the issuance by the German Football Federation of an international registration transfer certificate;

v. the Player obtained by Prudentópolis the payment of an advance on his salary.

20. In other words, the Panel notes that all the elements relating to the conclusion and the performance of the Brazilian Contract characterize it *prima facie* as an employment contract.

21. The Panel remarks that the attempts made by Prudentópolis' president to immediately transfer the Player to another club are under no circumstances inconsistent with such *prima facie* characterization. The possibility to negotiate a transfer and earning compensation for it is indeed part of the faculties arising out of the "ownership" of a player's rights deriving from the employment contract signed with a club. The existence of a valid labour contract is indeed a pre-requisite to agree on such transfer, because if no contract exists, no player can be transferred and no transfer fee can be claimed for.

22. At the same time, the Panel wishes to stress that going against the *prima facie* characterization of the Brazilian Contract and giving priority to the "hidden" – and *"reproachable"*, as FIFA correctly noted before this Panel – intentions of the parties over the actual expression of their will would run against an interpretation in good faith of the Brazilian Contract, taking in mind its wording. In the Panel's opinion, in fact, if the meaning of the words of a contract is clear, it is not permissible for the parties to adduce evidence of their intentions. In addition, it would contradict some basic principles of a system – such as that administered by FIFA – where stability, consistency and good faith play a fundamental role. In other words, reproachable intentions cannot be invoked to overrule the objectively clear wording of a contract.

23. As a result of the above, the Panel holds that the Brazilian Contract is a valid employment contract for the purposes of FIFA rules. As such, it does not infringe FIFA rules on players' agent contracts and falls within the scope of application of Article 23 of the FIFA Players' Regulations.

24. The second group of submissions concerns the Brazilian Contract as characterized as an employment contract. Even conceding that nature, in fact, in the Appellant's opinion the signature of the Contract of 2004 would not amount to its breach, because the actions of the Appellant were justified by a just cause and/or sporting reasons, and because Article 23 of the FIFA Players' Regulations sanctions only the breaches of a contract through the signature for a new club, and Eintracht could not be considered, in the circumstances, a new club.

25. The Panel does not agree with the Appellant's submissions and denies the existence of a "just cause" or of "sporting reasons" for the breach of the Brazilian Contract.

26. As to "just cause" the Panel notes that the fact that the Brazilian Contract was signed on the basis of the provisional authorization of FIFA, pending the adjudication on the dispute between the Appellant and Eintracht, is no justification for its breach. On the basis of such authorization the Player signed the Brazilian Contract binding on him; and the Player decided to sign another contract, the Contract of 2004, notwithstanding that nobody had forced him to do so, at a time when the authorization to enter into the Brazilian Contract was still in force. The failure by the German Football Federation to issue the International Registration Transfer Certificate, or even the wish of the Appellant to find a more convenient and better remunerative team to play with are no circumstances that justify a breach of contract: the stability of contractual relations would otherwise be seriously impaired.

27. As to the "sporting reasons", the Panel, in accordance with Article 24 of the FIFA Players' Regulation and of Article 12 of the Application Regulations, notes that, however to be examined on a case-by-case basis, their occurrence has to be determined at the end of the football season, in the event the player can show that it was fielded in less than 10% of the official matches of his club, taking in mind several circumstances (age, injuries, field position, etc.). In other words, no sporting reasons appear to be available a few days after the signature of the contract, to take the possibility, within a "transfer window" soon to be closed, to sign for a second club; and concerns as to the future intentions of the club to actually field the player, or about the position in the league of the club the player has freely decided to join, cannot be invoked to terminate a contract for "sporting reasons".

28. At the same time the Panel notes that Article 23 of the FIFA Players' Regulations refers to the "new club" in the meaning of the club joined by the player after the unilateral breach of contract, irrespective of the fact that the player had been or not employed with that club in the past. As a result, Eintracht has to be considered the "new club" for the purposes of Article 23 of the FIFA Players' Regulations.

29. In the light of the foregoing, therefore, the Panel concludes that the Player, by signing the Contract of 2004, breached the Brazilian Contract.

C. The consequences of the breach of contract by the Appellant

a) Financial consequences

30. The consequences of the finding of the breach by the Player of the Brazilian Contract are disputed by the parties, even though for opposite reasons. Prudentópolis, in fact, by way of counterclaim, is requesting this Panel to award it a larger compensation than that decided by the DRC, and for this purpose it invokes a "penalty" clause contained in the Brazilian

Contract. On their side, the Appellant and Eintracht submit that no payment obligation should be imposed on them, because the penalty stipulated in the Brazilian Contract is invalid.

31. The Panel notes that, in order to define the consequences of a breach of a contract, it has first to turn to the relevant provision set forth in FIFA rules.

32. Article 21.1(a) of the FIFA Players' Regulations provides that in case of breach of contracts signed up to the player's 28th birthday, as in the case of the Player, sports sanctions shall be applied and compensation shall be payable.

33. The criteria for the calculation of the compensation are indicated in Article 22 of the FIFA Players' Regulations, which *"unless specifically provided for in the contract"*, makes it relevant

i. the national law applicable,

ii. the specificity of sport,

iii. the amount of the remuneration and of the other benefits under the existing contract and/or the new contract,

iv. the length of time remaining on the existing contract,

v. the amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,

vi. the moment of the breach.

34. As a result, in the light of the clear wording of the provision, the Panel notes that the first element to be considered is the relevant contract, and the specific provisions therein contained.

35. The Brazilian Contract does contain a specific provision of the point. Section 25 of the standard form used by the parties provides, in fact, for the indication of a *"clausula penal – valor"* (penalty clause – value). That section has been filled in as follows: *"transf. nacional R$ 13,000,000.00 (transf. internacional R$ 13,000,000.00"* (national transfer: R$ 13,000,000.00; international transfer: R$ 13,000,000.00). In other words the parties indicated an amount corresponding roughly to USD 5,400,000 as penalty for a breach following a national or international transfer, determined on the basis of (one hundred times) the yearly salary for the Player.

36. The Panel notes that the provision set forth in the Brazilian Contract – failing any specific indication by the Appellant as to the inconsistency of such provision with Brazilian law, and taking in mind the submissions on the point by Prudentópolis – has therefore to take precedence over all other criteria set forth in the FIFA rules. In principle, therefore, the Player should be sentenced to pay the amount that he, by signing the Brazilian Contract, accepted as penalty.

37. The Panel, however, agrees with the DRC that, in the light of the extraordinary circumstances of the case mentioned in the Decision, the amount of the penalty has to be mitigated. The power of mitigation is given to the Panel, in the same way as it was given to FIFA, a Swiss entity, by Article 163 para. 3 of the Swiss Code of Obligations, under which *"the judge shall reduce penalties that he deems excessive"*. This provision has in fact mandatory nature, reflecting public policy principles in conflict-of-laws situations (see THÉVENOZ/WERRO (ed.), Commentaire Romand – Code des obligations I, Basel 2003, p. 870).

38. In this respect the Panel notes that under Swiss law a penalty can be mitigated in the exercise of the power of evaluation given to the adjudicating authority. And the Panel finds that the DRC, when it set the amount of the compensation to be paid to Prudentópolis in the amount of USD 300,000, did not improperly exercise its power of evaluation, with which, therefore, the Panel does not want to interfere. In any case, the Panel notes that the amount set in the Decision corresponds to the fee to be paid by Eintracht for the extension of Contract of 2003 (i.e., to the "value" of the services of the Player) and that its determination matches the criteria usually indicated for the application of Article 163 para. 3 of the Swiss Code of Obligations (see THÉVENOZ/WERRO (ed.), Commentaire Romand – Code des obligations I, Basel 2003, p. 871).

39. As a result, the Panel finds that the Decision, to the extent it awarded a compensation to Prudentópolis in the amount of USD 300,000, has to be confirmed.

40. Finally, in its counterclaim, Prudentópolis has also requested the Panel to order the Appellant to reimburse the amount he had received as an advance on the Brazilian Contract.

41. The Panel dismisses such requests for two reasons: because the Player has actually been employed with Prudentópolis for nearly a month, becoming entitled to salary, for that period; and because the Panel considers the advance paid by Prudentópolis as a part of the loss compensated as a result of the Decision.

b) The joint liability of Eintracht

42. Prudentópolis, indeed, by way of counterclaim, has also asked the Panel *"to declare Eintracht Frankfurt jointly liable to pay the compensation … to the Respondent, under penalty to suffer sports sanctions and disciplinary measures provided by FIFA Regulations"*.

43. The Panel notes, in this respect, the provision set forth in Article 14 para. 3 of the *Application* Rules, which provides for the joint responsibility of the new club for the payment of compensation awarded to the preceding club, in the event compensation is not paid timely, i.e., within one month of the decision. As a result, Eintracht is to be declared jointly responsible for the payment by the Player of the compensation awarded to Prudentópolis by DRC in the Decision, in the event the Player fails to pay the aforementioned compensation

within one month of the notification of the present award, that has confirmed the obligation of the Player to pay such compensation.

44. At the same time the Panel stresses it is not for Prudentópolis to claim, and the Panel to impose, *"sports sanctions and disciplinary measures provided by FIFA Regulations"* in the event of failure by Eintracht to make the payment for which it shall be jointly liable with the Player. The prerogative to impose such sanctions lies entirely with FIFA, with whose powers the Panel cannot, at this stage, interfere.

c) The Player's suspension

45. The DRC imposed on the Player a suspension of four months *"from participating in any official football match"*. By applying to the *"reversal of the decision of the Dispute Resolution Chamber"*, the Appellant also challenges this suspension.

46. The DRC Decision relies upon Article 23 para. 1 of the FIFA Players' Regulations, which provides for a suspension of four months if the breach of contract occurs at the end of the first or the second year of contract. Such is the case in the matter at hand. FIFA has thus applied validly this provision and the Panel sees no reason, should it actually be contended by the Appellant, which is unclear, to reverse the FIFA Decision in this regard.

47. For the same reasons mentioned above, it is not possible for Prudentópolis to ask any modification and/or increase in the disciplinary sanction (suspension) imposed on the Appellant or the imposition of sanctions on Eintracht pursuant to Art. 23.2 of the FIFA Players' Regulations, as the club inducing the breach by the Player. Any request in this respect has therefore to be rejected.

48. The FIFA Decision was sent to the parties on 7 December 2004. The Appellant applied with CAS for a stay of such decision, which was allowed by the Deputy President of the Appeals Arbitration Division in his order of 6 January 2005. It follows that the Player has already served one month of suspension, from 7 December 2004 until 6 January 2005. Such disciplinary sanction will thus end three months after the notification of the present award and the Player will remain suspended until 18 October 2005.

Conclusion

49. In the light of the foregoing, the Panel holds that the appeal brought by the Appellant has to be dismissed, while the counterclaim brought by Prudentopolis has to be upheld to the extent it requests that Eintracht is declared jointly responsible for the payment by the Player of the compensation awarded by the Decision, in the event the Player fails to timely pay the aforementioned compensation, and to be dismissed for the rest.

The Court of Arbitration for Sport rules:

1. The appeal filed by Christian Maicon Henning against decision issued on 26 November 2004 by the FIFA Dispute Resolution Chamber is dismissed.

2. Christian Maicon Henning is ordered to pay Prudentópolis Sport Club USD 300,000 (three hundred thousand US Dollars) within 30 days from the date of the present award, failing interest of 5% (five percent) per annum will apply to such amount from the due date.

3. Christian Maicon Henning is suspended from participating in any official football match until 18 October 2005.

4. The counterclaim filed by Prudentópolis Sport Club is partially allowed and Eintracht Frankfurt Fußball AG is declared jointly responsible for the payment by Mr Christian Maicon Henning of the compensation of USD 300,000 (three hundred thousand US Dollars) awarded to Prudentópolis Sport Club under item 2 above, in the event Mr Christian Maicon Henning fails to pay the aforementioned compensation within one month of the notification of the present award.

5. The decision adopted by the FIFA Dispute Resolution Chamber on 26 November 2004 is confirmed for its remaining portions.

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

(…).