CAS 2009/A/1765 – Sport Lisboa E Benfica v/ Club Atlético de Madrid SAD & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Hendrik Willem Kesler, Attorney-at-law, Zeist, The Netherlands
Arbitrators: Mr Efraim Barak, Attorney-at-law, Tel Aviv, Israel
Mr José Juan Pintó Sala, Attorney-at-law, Barcelona, Spain

Ad hoc Clerk: Mr Albert von Braun, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Sport Lisboa E Benfica - Futebol SAD, Lisboa, Portugal

Represented by Mr Ettore Mazzilli, Attorney-at-law, Bari, Italy

- Appellant -

and

1/ Club Atlético de Madrid SAD, Madrid, Spain

Represented by Mr Juan de Dios Crespo Perez, Attorney-at-law, Valencia, Spain

2 / Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

- Respondents -

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I. PARTIES

1. Sport Lisboa E Benfica SAD is a football club with its registered office in Lisboa, Portugal (hereinafter also referred to as "Benfica" or the "Appellant"). It is a member of the Potuguese Football Federation (Federaçao Potuguesa de Futebol) (hereinafter referred to as "FPF"), itself affiliated to the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

2. Club Atlético de Madrid SAD is a football club with its registered office in Madrid, Spain (hereinafter also referred to as "Atlético" or "First Respondent"). It is a member of the Spanish Football Federation (Real Federaciòn Española de Fùtebol) (hereinafter referred to as "RFEF"), itself affiliated to FIFA.

3. The Fédération Internationale de Football Association (hereinafter referred to as the "FIFA") is the governing body of Football on a worldwide level and has its registered office in Zurich, Switzerland.

II. BACKGROUND FACTS

2.1 THE CONTRACT OF 13 SEPTEMBER 2000 SIGNED BY D. AND BENFICA

4. At the beginning of September 2000, Benfica acquired from the Dutch club AFC Ajax NV, the "federative rights" of the Portuguese player D. (hereinafter referred to as the "Player" or "D."). Benfica paid to the Player's former club a transfer fee for a total amount of EUR 1'806'562.50.

5. On 13 September 2000, Benfica and D. signed an employment contract called in Portugese "*Contrato de Trabalho Desportivo*", or in its English translation "Sporting Labour Contract" (hereinafter referred to as the "Contract" or the "Employment Contract").

6. In the Contract was a fix-term agreement valid for four sporting seasons. According to the text of the Contract, as stated by its clause no. 5, the effect of the Contract was to expire at the end of football season 2003/2004.

7. The Contract notably set out, under its clause no 2, the payments which Benfica undertook to make to the Player within the above-mentioned timeframe. The Appellant made a calculation of the amount arising from the addition of the payments which were to be made if this employment contract had been fulfilled until its foreseen expiration. According to the exchange rate applied by the Appellant, the total amount of the payments which should have been made by Benfica to the Player, notably as salary, images rights and appearance bonuses during the foreseen four seasons employment period, would have reached an amount of EUR 3'195'928.93. This calculation has never been disputed.

8. On 17 November 2000, *i.e.* two months after the signature of the Contract, Benfica decided to take disciplinary actions against the Player, because it was unsatisfied with his behaviour towards his club, which, in Benfica's view, was also harmful to both the Player's reputation and the sportive performance of his team.

9. On 6 December 2000, the Player notified to the Appellant that he unilateral terminates their contractual relationship for just cause.

2.2 THE CONTRACT OF 19 DECEMBER 2000 SIGNED BY D. AND ATLÉTICO

10. On 19 December 2000, the Player signed a new employment contract with the First Respondent.

11. On the same day, the Player sent an undated letter to the General Secretary of FIFA by means of which he confirmed the unilateral termination of his contract with Benfica for just cause which occurred on 6 December 2000, and requested that a provisional registration as a professional player of Atlético be granted by FIFA.

12. On 11 January 2001, the RFEF requested from the FPF to issue an International Transfer Certificate (ITC) for D. The FPF refused, arguing that a dispute related to the unilateral termination of the contract between the Player and Benfica was still pending before the competent Portuguese jurisdictions. Hence, since Benfica had not accepted the unilateral termination of contract for just cause alleged by the Player, the ITC could not be issued before a decision from the competent Portuguese arbitral commission.

13. On 26 January 2001, following an additional request made by the RFEF to FIFA, the provisional registration of D. as a player of Atlético was allowed by FIFA, "*in order not to jeopardize the player's future career"*.

14. On the same date, FIFA pointed out and notified the concerned parties that: "*Finally, we would like to inform the parties involved that this decision does not jeopardize any further decision, which could be taken in this case at a later stage by our competent bodies"*.

2.3 THE PROCEEDINGS BEFORE THE "*COMISSÃO ARBITRAL PARITARIA*"

15. As a consequence of the Player's premature termination of his contract with Benfica which occurred on 6 December 2000, the Appellant immediately filed a claim against the Player before the "*Comissão Arbitral Paritaria*".

16. The "*Comissão Arbitral Paritaria*" is the competent body in Portugal to settle disputes between football clubs and players. The jurisdiction and competence of this institutionalized domestic arbitral body is expressly provided for in the employment contract of 13 September 2000 signed by Benfica and the Player.

17. On 23 February 2001, the "*Comissão Arbitral Paritaria*" issued its final decision regarding the dispute between Benfica and D. with respect to the contract which they had signed. Firstly, the "*Comissão Arbitral Paritaria*" observed that Benfica was entitled to exercise its disciplinary power over D. and that such prerogative was rightly

exercised in the matter at hand. Moreover, in substance, the "*Comissão Arbitral Paritaria*" considered, for three different reasons, that the facts invoked by the Player in his termination letter could not be considered as a just cause for termination.

18. It should be pointed out that the decision of the "*Comissão Arbitral Paritaria*" only addresses the issue as to whether there was or not a just cause for unilateral and premature termination. However, despite its conclusion emphasizing that D. was not entitled to unilaterally terminate his contractual relationship with Benfica, the "*Comissão Arbitral Paritaria*" neither took any decision regarding the consequences of this inadequate termination, nor provided for any compensation amount which Benfica was entitled to receive from the Player.

2.4 THE PROCEEDINGS BEFORE THE LABOUR COURT OF LISBOA

19. Both the Player and Benfica lodged proceedings against one another before the competent Labour courts in Lisboa.

20. The first proceeding, lodged by D. – as plaintiff -, against Benfica – as defendant -, was registered under case no. 356/2001 by the 1st Section of the 5th Division of the Labour Court of Lisboa.

21. The second proceeding, lodged by Benfica – as plaintiff - against D. – as defendant - was registered under case no. 370/2001-C by the 3rd Division of the labour Court of Lisboa.

22. On 9 January 2003, both proceedings were settled by means of a settlement agreement reached by the parties. The settlement agreement provided (in its English translation provided to the Panel by the Appellant):

"*ONE*

The Plaintiff, D., hereby reduces his claim to 164'078.25 Euros.

TWO

The said sum shall be paid by way of recourse to the damages, which Sport Lisboa e Benfica, SAD is entitled to receive form Atletico de Madrid, the amount of which has already been fixed by the FIFA.

THREE

Sport Lisboa e Benfica, SAD shall inform the Plaintiff when the said sum is received and shall effect the said payment within 30 days thereof.

FOUR

The said payment shall be made within one year of the date thereof, independently of the receipt of the said payment, if Atletico de Madrid does not make the said payment.

FIVE

The court fees shall be borne equally by the Plaintiff and the Defendant, who waive their entitlement to party costs and legal costs, to the extent that is possible."

23. It is officially certified and was undisputed that this agreement and the judgement ratifying it became final on 28 January 2003.

24. On 10 March 2003, the Appellant sent a letter to FIFA stating, *inter alia*, that: "*In what concerns the terms of the agreements to put an end to the labour case, I must tell you that the moneys we accepted to pay D. (€ 164'078.25) are due to salaries in debit."*

2.5 THE PROCEEDINGS BEFORE THE FIFA SPECIAL COMMITTEE AND THE COMMERCIAL COURT OF ZURICH

25. On 1 June 2001, Benfica lodged a claim before FIFA against Atlético requesting the payment of a financial compensation for training and/or development, in accordance with Art. 14.1 of the Regulations for the Status and Transfer of Players, in their edition of October 1997, which was the applicable edition at the time of the claim.

26. On 26 April 2002, the FIFA Special Committee issued its final decision regarding the dispute between Benfica and Atlético relating to the amount of the compensation for the training and/or development of D. According to this decision, Atlético had to pay to Benfica an amount of USD 2'500'000 as compensation for the training and/or development of the Player. This sum was presented as calculated on the basis of the remunerations and premiums received by the Player, his career as a football player as well as his international ability.

27. On June 2002, Atlético lodged an appeal before the Commercial Court of Zurich against the decision rendered on 26 April 2002 by the FIFA Special Committee.

28. In its decision of 21 June 2004, the Commercial Court of Zurich declared the challenged decision of 26 April 2002 as null and void, notably because the Honorable Court decided that this decision was in breach of both European and Swiss competition laws.

29. The Honorable Commercial Court emphasised that the amount of compensation for training and/or development granted to Benfica by the FIFA Special Committee bore no relation to the actual training and educational costs incurred by the Appellant. Thus, the court ruled that the decision issued by the Special Committee had been reached arbitrarily.

30. FIFA did not challenge this decision in front of the Zurich Cantonal Court. Neither did Benfica nor Atlético. It must however be observed that Atlético had no reasons to appeal this decision, since its claim was granted, cancelling its duty it to pay any amount to Benfica based on the reasoning of the FIFA Special Committee. As for Benfica, it was not a party in the proceedings.

31. On 25 August 2004, following the aforementioned decision of the Commercial Court of Zurich,Atlético and FIFA entered into an agreement. In this agreemnt, FIFA undertook, towards Atlético,that in the event where Benfica would lodge a new claim with FIFA in the same matter, FIFA would then take into account the findings of the judgment of the Commercial Court of Zurich of 21 June 2004 when conducting the proceedings, provided that the claim's formal requirements were satisfied.

32. It has to be noted at this stage that Benfica claims that it has never been informed of these Swiss domestic proceedings. According to the Appellant, the decision issued by the Commercial Court of Zurich has never been notified to it, which, according to Benfica, explains why it never challenged such decision. Finally, Benfica has never been informed of the above mentioned agreement of 25 August 2004 between Atlético and FIFA, before the present proceeding at the Court of Arbitration for Sport (hereinafter also referred to as the "CAS").

2.6 THE ADDITIONAL PROCEEDINGS BEFORE THE FIFA SPECIAL COMMITTEE

33. On 21 October 2004, Benfica sought a new decision from FIFA on the compensation payable for the training and/or development of the Player and requested that Atlético be condemned to pay an amount of EUR 3'165'928 in that respect.

34. The FIFA Special Committee mainly took the following considerations into account to make its opinion on the Appellant's claim:

- *"It could not be excluded that Benfica might also have to bear part of the responsibility for premature termination of the employment contract signed with the player*" (par. 14). This circumstance and the fact that, according to the FIFA Special Committee, Benfica might not have properly fulfilled its contractual obligations, has an impact on the calculation of the compensation.

- The player only rendered his services to Benfica during a period of three months, *i.e.* from 13 September until 19 December 2000.

- Although not in force at the time of the disputed facts, the 2001 edition of the Regulations for the Status and the transfer of Players is applicable to this litigation in order to determine the amount of the compensation due (par. 17).

- Under these new regulations, a player aged of more than 23 has already terminated his training period. Moreover, according to these new regulations, the compensation for training and/or development shall be payable until the age of 23.

- Therefore, considering that the Player was already in the year of his 24th birthday when he moved to Atlético, he had already terminated his training period. In addition, "*no compensation for training and/or development shall be payable when a player over the age of 23 changes clubs* (par. 20)".

35. These elements led the FIFA Special Committee to the conclusion that, according to the new 2001 regulations and as a general rule, a compensation would be due. However, it considered, in its exclusive competence to establish the relevant amount, that it should in this case be fixed at the amount of zero (par. 21 and 22 of the appealed decision).

36. As a result, the FIFA Special Committee decided the following:

"*The claim of the Claimant, Sport Lisboa e Benfica Futebol SAD, for compensation is rejected*".

37. The decision of the FIFA Special Committee, although already passed on 14 February 2008, was only notified to the parties on 23 December 2008.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 APPEAL PROCEDURE CAS 2009/A/1765

3.1.1 The Appeal of Benfica

38. On 13 January 2009, Benfica filed a statement of appeal with the CAS. It challenged the decision of FIFA of 14 February 2008 (hereinafter also referred to as the "Decision" or the "Challenged Decision") submitting the following request for relief:

> "*The Appellant requests the CAS:*
>
> *I. To fully accept the present Appeal and, consequently, to cancel in full the Decision of the FIFA Special Committee passed on 14 February 2008 regarding the amount of compensation for training and/or development of the player D., condemning the Respondents, individually or jointly, to pay to the Appellant the amount of Euro 3,165,928.93 plus legal interests or the highest amount that should be considered as due by the CAS Panel.*
>
> *II. For the effect of the above, to state that the Respondents shall be also condemned to pay, individually or jointly, any and all costs of the present proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts."*

39. On 22 January 2009, Benfica filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents. In this brief, the Appellant took additional and alternative submissions which were not mentioned in its statement of appeal of 13 January 2009:

"*Alternatively, should the aforesaid requests be not accepted,*

III. To annul the Decision of the FIFA Special Committee passed on 14 February 2008 regarding the amount of compensation for training and/or development of the player D. and refer the case back to the competent FIFA judicial body.

IV. For the effect, of the above, to state that the Respondents shall be also condemned to pay, individually or jointly, any and all costs of the present proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts."

3.1.2 The answer of Atlético

40. On 16 February 2009, Atlético filed its answer, with the following request for relief:

"The Respondent requests the Panel:

1. *To accept this answer against the appeal submitted by the Appellant.*

2. *To reject in full the appeal submitted by the Appellant against the decision of the FIFA Special Committee dated 14 February 2008.*

3. *To fix a sum of 40'000 CHF to be paid by the Appellant to the Respondent Club Atletico de Madrid SAD, to help the payment of its defence fees and costs.*

4. *To condemn the Appellant to the payment of the whole CAS administration costs and the Arbitrators fees."*

3.1.3 The answer of FIFA

41. On 16 February 2009, FIFA filed its answer, with the following request for relief:

1. *"In conclusion, we request that the present appeal be rejected, particularly with regard to the Appellant's incomprehensible request for FIFA to be jointly responsible for any payment related to the substance of the dispute between the Appellant and the fist Respondent, and that the decision taken by the FIFA Special Committee on 14 February 2008 be confirmed in its entirety.*

2. *Furthermore, we request, for the above outlined reasons, that the Appellant's demand for FIFA to cover the costs related to the present procedure shall be rejected.*

3. *Finally, we request that the procedural costs as well as all legal expenses of the second Respondent shall be borne by the Appellant."*

3.2 THE PARTIES' SUBMISSIONS

3.2.1 Benfica's position

Benfica's submissions, in essence, may be summarized as follows:

42. With respect to the facts, the Appellant first criticizes factual elements which have, in its opinion, inadequately been taken into account by the authority of first instance. Benfica notably contests the understanding by the FIFA Special Committee of the proceedings held before the Commercial Court of Zurich. On the one hand, the decision issued by the aforementioned court cannot be considered as a decision of appeal, since it only focused on Atlético's request that, in accordance with Art. 75 of the Swiss Civil Code, the decision of 26 April 2002 rendered by the FIFA Special Committee be deemed null and void. It is therefore an independent and first instance proceeding against a decision taken by a Swiss association. On the other hand, since Benfica has never been informed of these proceedings before the Commercial Court of Zurich and has never been notified of its final decision and has therefore never been

treated as a party, these proceedings cannot be considered as an appeal. Finally, the fact that Benfica sought for a new decision to be rendered by FIFA cannot be considered as a new claim. The judgment issued by the Commercial Court of Zurich only has a cassatory effect which naturally leads FIFA to render a new decision.

43. Benfica has never been informed of the agreement between FIFA and Atlético following the decision of the Commercial Court of Zurich. In this regard, FIFA has not respected any of the basic compulsory procedural formalities. It is therefore unfair that the FIFA Special Committee refers to the decision rendered by the Commercial Court of Zurich, as well as to the findings which may arise from this decision that the Appellant never obtained and never had the chance to comment before the Honorable Court which issued this decision.

44. Moreover, it is totally unfair to consider that Benfica might have been partly responsible for the premature termination of the employment contract signed by D. and Benfica. According to the competent Portuguese decision making body, Benfica was entitled to exercise its disciplinary power regarding D. and such prerogative was rightly exercised.

45. With respect to the law, the Appellant first considers that the present dispute shall be resolved according to the FIFA Regulations and, additionally, according to Swiss Law. Moreover, the present case shall be judged under the FIFA Regulations for the Status and Transfer of Players in their edition which came into force on 1 October 1997, as the requested compensation is based on a contract which was signed before September 2001, thus prior to the entry into force of the 2001 edition.

46. Under Art. 14 par. 1 of the FIFA Regulations for the Status and Transfer of Players in their 1997 edition, if a non-amateur player concludes a contract with a new club, his former club shall be entitled to compensation for his training and/or development. The amount of the compensation shall be determined in the light of different criteria,

notably the player's age, the amount of the transfer fee paid to the former club, the player's career and eventual damages suffered by the former club.

47. The FIFA Special Committee should have applied Art. 14 of the FIFA Regulations for the Status and Transfer of Players in their 1997 edition, which, in Benfica's opinion, implied that a compensation was due whenever a player was transferred to another club and there was no agreement between the two clubs involved regarding the amount of compensation due to the former club, even in a situation of a premature termination of contract by the Player who is then, shortly afterwards, registered by a new club. In other words, the FIFA Special Committee wrongly denied Benfica's right to obtain a training and/or development compensation from Atlético by applying the 2001 FIFA Regulations for the Status and Transfer of Players to the present case rather than the 1997 edition.

3.2.2 Atlético's position

The submissions of Atlético may be summarised as follows:

48. D. was offered to Atlético by his legal representatives and agents, Impera SA, as a player free of any employment contract relationship. Atlético therefore thought in good faith that it could hire the Player.

49. Atlético considered that D. should be called as a party in this case. In fact, he could be responsible for the payment of a compensation to Benfica since he breached his contract with the Appellant and could therefore be liable to the payment of a compensation. This would also let him clarify his position towards Atlético when he signed a new employment contract in December 2000. For Atlético, Impera SA should also be called as a party in the proceedings before the CAS since it signed a contract with Atlético in which it declared to be liable for any compensation to be paid to any club or third party in the context of D.'s employment contract signed with Atlético.

50. The FIFA Special Committee decision of 26 April 2002 has been declared null and void by the Commercial Court of Zurich. In Atlético's opinion, both the proceedings and the decision were notified to the Appellant and to FIFA, which did not appeal this decision, which therefore became definitive. Benfica cannot pretend not having been informed of the proceedings before the Commercial Court of Zurich concerning the validity of a decision granting the Appellant an amount of USD 2'500'000. This consideration raises a "*res judicata*" issue. The decision of the aforementioned authority is definitive and the CAS should refuse to re-open the case.

51. The agreements signed by Benfica and D. before the competent Labour Courts in Lisboa show that Benfica accepted it has a salary debt towards the Player. It is therefore demonstrated that Benfica was at least partially responsible for the premature contract termination. Moreover, it is established that the employment law issue has been definitely resolved by these agreements. Hence, the Appellant's claim can only be understood as related to a training and/or development compensation which, in Atlético's opinion, cannot be requested.

52. The FIFA Regulations for the Status and Transfer of Players in their 1997 edition are indeed applicable to the present case. But, contrary to the Appellant's explanations, these regulations do not contain any provision regarding training and/or development compensation. The principle of this compensation does not exist under Art. 14 of the applicable 1997 Regulations. There is a legal vacuum which can only be resolved by comparison with the FIFA Regulations for the Status and Transfer of Players in their 2001 edition, which provide that no compensation is due for a player who is transfered to another club during the season after his 23rd birthday. No compensation can therefore be granted to Benfica.

3.2.3 FIFA's position

The submissions of FIFA may be summarised as follows:

53. The Appellant's requests in its statement of appeal dated 13 January 2009 do not correspond to the ones in its appeal brief dated 22 January 2009. The new subsidiary requests shall be disregarded.

54. The dispute only concerns the two clubs involved and not FIFA. Moreover, since the dispute at stake is not related to a disciplinary decision, FIFA should not have been called as a party.

55. There is no legal basis for the Appellant's claim for FIFA to be responsible for anything in the matter at stake. Other than in a disciplinary matter, FIFA cannot be deemed to be directly involved. Therefore, the costs shall be shared between the two clubs involved.

56. The involvement of FIFA in the procedure could have been avoided by the Appellant. He shall therefore be condemned to reimburse to FIFA all legal costs incurred through the present procedure.

3.3 THE HEARING

57. A hearing was held on 2 June 2009 in Lausanne, Switzerland. All the members of the Panel were present. At the outset of the hearing, the Parties declared that they had no objection with respect to the composition of the Panel.

58. At the hearing, Benfica was represented by its counsel, Mr Ettore Mazzilli, Attorney-at-law in Bari, Italy. Atlético was represented by its counsel, Mr Juan de Dios Crespo Pérez, Attorney-at-law in Valencia, Spain. FIFA was neither present nor represented at the hearing as it considered it should not have been called as a party in the CAS proceedings.

59. At the beginning of the hearing, the Panel brought the Parties' attention to the fact that the CAS is entitled to consider the case "*de novo*" and consider new factual and legal elements to judge the case.

60. The Panel also expressed its initial thoughts (based on the reading of all the written submissions) and suggested that both Parties should seriously consider the possibility of reaching a compromise under the hospices of the Panel who suggested its assistance, if needed, in this regard. The Parties were therefore advised to consider this recommendation, and the hearing was suspended to let them reach an amicable settlement. However, the Parties informed the Panel that no agreement could be reached between them to solve the dispute.

61. During the hearing, the Parties made full oral submissions. Mr Gianpaolo Montineri was called at the hearing as a witness by the Appellant and was examined and cross-examined by both Parties and also answered the Panel's questions about the circumstances of D.'s transfer from Benfica to Atlético and the circumstances that led to the agreement made between FIFA and Atlético. However, the Panel refused that Mr Gianpaolo Montineri be questioned as an expert about the application and the interpretation of the 1997 FIFA Regulations for the Status and Transfer of Players, since he had been called as a witness by the Appellant, and not as an expert. According to Art. R51 of the Code of Sports-related Arbitration (hereinafter also referred to the "Code"), should the Appellant's intention was to call him as an expert, Mr Giannpaolo Montineri should have been called as such as the Code prescribes. Mr. Monteneri's testimonymay be summarized as follows:

> The witness confirms that he was the head of the Player Status legal department of FIFA at the time of D.'s transfer. He worked for FIFA from March 1997 to January 2005. At the time of his testimony, the witness remembered the case, but not all the details. He knows that a problem related to the Player's ITC arose, followed by a dispute concerning a compensation for training and/or development. He explained the practice on such cases at the time of the dispute and the way he (as an officer of FIFA) applied the Regulations and that, Art. 12 to 14 of the 1997 FIFA Regulations for the Status and Transfer of Players were notably applicable to this case. He explained that these Regulations were the former practice, applied by FIFA, based on the idea which is close or similar to the principal of contract stability under the present Regulations for the Status and

Transfer of Players. However, he explained that the consequences of the 1997 Regulations were different from the 2001 ones. Under the 1997 Regulations, the new club has to stand for any consequences of the transfer, and the consequences were only financial. Therefore, despite of the fact that the 1997 edition of the Regulations did not deal precisely with the situations of breach of contract at the time when this dispute arose, FIFA had already adopted the principle that in case of a dispute, FIFA will allow the transfer in order not to jeopardize the future carrier of the Player, without however also jeopardizing any future decision of a competent body of FIFA regarding the dispute. The witness testified he was still with FIFA when the decision of the Commercial Court of Zurich was issued, but he never saw this decision because he was neither involved in that specific case, nor in the agreement reached between FIFA and Atlético following such decision. He considers the decision to deliver the ITC, despite the existing dispute between Benfica and Atlético, to be appropriate in order not to jeopardize the Player's career and because it was likely that a solution to this conflict was possible. Answering a direct question to this effect, he added that he would personally have ordered to issue the ITC even if he had known that Atlético refused to pay any amount to Benfica. Refusing to deliver the ITC would have been counter productive.

62. After the Parties' final arguments, the Panel closed the hearing and announced that its award would be rendered in due course.

63. Upon closure, the Parties expressly stated that they were satisfied with respect to their right to be heard and to be treated equally in these arbitration proceedings.

IV. DISCUSSION

4.1 JURISDICTION OF THE PANEL AND ADMISSIBILITY OF THE APPEAL

64. The jurisdiction of the CAS, which is not disputed, derives from Art. 62 and 63 of the FIFA Statutes and Art. R47 of the Code. It is further confirmed by the Order of Procedure duly signed by the Parties. Consequently, the CAS has jurisdiction to decide

the present dispute.

65. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel, therefore, in the exercise of its jurisdiction, does not examine only the formal aspects of the appealed decision, but holds a trial *de novo*, evaluating all facts, including new facts which had not previously been mentioned by the Parties, and all legal issues involved in the dispute.

66. The appeal was filed within the deadline provided by Art. 63 of the FIFA Statutes and indicated in the Decision, namely within 21 days after notification of the Decision. It complies with the requirements of Art. R48 of the Code. It follows that the appeal filed by Benfica is admissible, which is undisputed.

4.2 APPLICABLE LAW

67. Art. R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

68. Art. 62 par. 2 of the FIFA Statutes further provides that CAS shall primarily apply the various Regulations of FIFA, and, additionally, Swiss law.

69. The Panel is of the opinion that the Parties have not formally agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the Parties refer exclusively to the Regulations of FIFA. Thus, subject to the primacy of the applicable Regulations of FIFA, Swiss Law shall apply complementarily.

4.3 APPLICABLE REGULATIONS OF FIFA

70. First of all, the Panel has to determine which edition of the FIFA Regulations for the Status and Transfer of Players is applicable to the case at hand. Both Parties agree on

this question and consider that the 1997 FIFA Regulations for the Status and Transfer of Players are applicable. Art. 45 of the 1997 Regulations reads as follows:

"*These regulations were initially adopted in April 1991 and subsequently amended in December 1991, December 1993, December 1996, May 1997 and in September 1997 by the FIFA Executive Committee. They shall come into force in their present form on October 1997".*

Art. 46 par. 3 of the 2001 Regulations reads as follows:

"*Contracts between players and clubs concluded before 1 September 2001 will continue to be governed by the previous version of these regulations, which come into force on 1 October 1997 [..]".*

71. The case at hand is mainly related to an amount of compensation, whose nature will be discussed hereafter, requested by the Appellant from the First Respondent, on the basis of a contract that has been signed by Benfica and D. in September 2000 (as well as a contract signed between the Player and the First Respondent on December 2000). It is therefore undisputed that the FIFA Regulations for the Status and Transfer of Players, in their 1997 edition, are applicable to the matter at stake.

72. At this stage, the Panel wishes to emphasize that, contrary to the First Respondent's contentions, the principle or the idea of the training and/or development compensation did exist in the 1997 FIFA Regulations for the Status and Transfer of Players, under Art. 14. This article provided for a general principle of payment to be made by the new club to the previous club, which could be applied for various reasons including compensation for training or development as well as for compensation in cases of breach of contracts. However, no specific mechanism or method of calculation of the compensation existed in the regulations, and it was left to the Special Committee to decide. The annexes providing these calculation criteria and mechanism have only been added to the Regulations with the 2001 FIFA Regulations for the Status and Transfer of Players.

73. In other words, as correctly claimed by the First Respondent, the 1997 FIFA Regulations for the Status and Transfer of Players present a legal written vacuum with respect to the criteria and mechanism of the compensation's calculation, which amount was at that time to be determined by FIFA at its entire discretion.

74. Since the Challenged Decision clearly establish that, in principle, a compensation to the Appellant is due, and considering this legal written vacuum on the question of the criteria and the mechanism of calculation, should the Panel upheld the basic principle of the compensation, then it is requested to consider the question of the calculation of a compensation in the context of a contract signed under the application of the 1997 FIFA Transfer Regulations and/or case law which will be developed further on.

4.4 PROCEDURAL MOTIONS

75. The First Respondent, requested that the Player and the company Impera SA, his legal representatives when he signed the new employment contract with Atlético in December 2000, be called as third parties in the procedure at stake.

76. The Panel, applying Art. 41 and 64 par. 2 of the Code, firstly decided that this request could not be assimilated to a counterclaim submitted to the payment of a second advance of costs. Secondly, the Panel pointed out that Atlético was free to call D. and the company Impera SA as witnesses during the hearing, should the Respondent was of the idea that their testimonies maycontribute to the case's resolution.

77. After having requested from the three Parties involved at that stage to make their observations on the request submitted by Atlético, as well as the observations from the Player and the company Impera SA, the Panel considered that neither D. nor Impera SA took part in the previous proceedings before FIFA. In addition, no claims have been raised against them in the appeal brief. Furthermore, the object of the dispute is to determine whether Atlético is liable to pay to Benfica a compensation in accordance with the applicable FIFA Regulations. For all these reasons, the Panel dismissed Appellantthe First Respondent's request.

V. MERITS

78. The main issues to be resolved by the Panel in deciding this dispute are the following:

A. Is Benfica entitled to compensation?

B. If so, on which basis?

C. If so, which is the correct calculation of the compensation?

5.1 THE DECISION OF THE COMMERCIAL COURT OF ZURICH

79. As a starting point for the consideration of this case, the Panel. deems itself respectfully bound to carefully analyze the decision of 21 June 2004 rendered by the Honorable Commercial Court of Zurich since it is essential to understand the reasons which led the aforementioned authority to declare the FIFA Special Committee's decision of 26 April 2002 null and void.

5.1.1 Nature of the proceedings before the Commercial Court of Zurich

80. First of all, it has to be noted that the procedure before the Commercial Court of Zurich is definitely not an appeal against a decision rendered by FIFA, such as an appeal before the CAS would be. The "Zurich procedure" consisted in a claim lodged by Atlético in its quality of a club affiliated to a member of FIFA, against a decision taken by this Swiss association, which legal seat is in Zurich. According to Art. 75 of the Swiss Civil Code, any member of an association that has not voted may challenge an agreement of a management body before a judge, if it is in breach either of the law or of the Articles of Association, within the time period of one month from the date on which they became aware of the agreement.

81. Atlético's claim before the Commercial Court of Zurich is therefore not of arbitral nature, but initiates an independent Swiss domestic procedure aiming to contest a

decision rendered by a Swiss law association, in accordance with Art. 75 of the Swiss Civil Code.

82. It is therefore important to stress that, for the aforementioned reasons, and of course with all due respesct, the decision rendered by the Zurich Commercial court cannot be considered as a definitive decision that would prevent the Panel to consider the case "*de novo*".

83. Furthermore, FIFA and Atlético forsaw, in the agreement that they concluded further to the decision of the Commercial Court of Zurich, on 25 August 2004, that a new claim on the same matter would be brought to FIFA, *i.e*. that they did not even consider the decision of the court as a barrier from submitting a new claim in the same matter to FIFA.

The argument raised by the First Repondent in connection with a "*res judicata*" issue must therefore be rejected.

5.1.2 Interpretation of the 1997 FIFA's Regulations for the Status and Transfer of Players

84. The Commercial Court of Zurich considered that Art. 14 par. 1 of the 1997 Regulations provides grounds for the right of the previous club for whom the player worked to be compensated for training and/or development. In other words, under these specific regulations, if a non-amateur player entered into contract with a new club, the previous club would be entitled to compensation for training and/or development. The affected clubs must determine the amount of that compensation and, if they do not reach any agreement in this respect, the case would be heard by a special FIFA Committee (Art. 15 onwards of the 1997 Regulations for the Status and Transfer of Players).

85. However, the Commercial Court of Zurich also noted that the 1997 Regulations do not contain any provision with respect to the manner in which the compensation for training and/or development was to be calculated. Under these regulations, it was therefore up to the FIFA Special Committee to unilaterally determine any compensation amount.

5.1.3 Breach of both European and Swiss Competition Laws

86. The Commercial Court of Zurich was of the opinion that, with regard to the amount of compensation (cf. GA LENZ, Case Bosman, case C-415/93, ruling dated 15.12.1995, Sammlung der EU – Rechtsprechung I-4921 N, No. 57) and also the fact that no objective grounds of any type to justify such a wide area of discretion was put forward, one had to assume that the provision in question exposed the concerned clubs to unfairness on the part of the Special Committee. The corresponding decisions had an extremely problematic effect on the economic freedom of the affected clubs affiliated to the members of the association. By virtue of this regulatory provision, the same clubs could find themselves under the obligation to pay out considerable sums, difficult to estimate in advance, and which might be well beyond their financial resources. Consequently, such a practice was incompatible with a normal and free undertaking business world.

87. With the 1997 Regulations, clubs were under the obligation, when contracting a new player, not only to proceed in accordance with supply and demand, but also to bear in mind the matter of the compensation payable to the previous club. Said obligation to compensate affects how often a player changes clubs and can also serve to force player's salaries below the level of the competition. Moreover, in such a context, FIFA, and the most famous and rich clubs, have a dominant position in the international football events market.

88. For all these reasons, the Commercial Court of Zurich concluded that compensation payments under the 1997 Regulations for the Status and Transfer of Players did distort competitiveness, and were therefore in breach of both European and Swiss Competition Law.

89. Finally, the Commercial Court of Zurich also considered, in the specific situation of D.'s transfer from Benfica to Atlético, that the USD 2.5 millions granted to Benfica by the FIFA Special Committee by means of its decision of 26 April 2002 was not in any way governed by true training or development costs. The Honorable Court was of the

opinion that it was highly unlikely that D. could have given rise to training costs in the amount of USD 2.5.million in only two months.

5.1.4 Elements from the Commercial Court of Zurich's decision to consider in the case at hand

90. The Panel first observes that the decision rendered by the Commercial Court of Zurich is the result of an exhaustive legal analysis by an experienced and respected Swiss court in the light of both European and Swiss laws. It should be clearly stated that this Panel pays full respect to that decision and its reasoning which led the Zurich Commercial Court to consider the appealed decision as null and void. It should therefore be clear that this Panel is dealing and deciding on **an Appeal of a different decision of FIFA**, *i.e.* the one that was rendered in the new claim submitted by Benfica.

91. The Panel wishes to emphasize that the world of football has its own merits, and is ruled by regulations applied by its own authorities which, on a practical level, may sometimes be slightly different from the legal considerations that would satisfy a traditional judiciary authority. These rules should be respected and honored in as much as they do not contradict basic principles of law or any specific legislature.

92. In the case at hand, the Commercial Court of Zurich judged the first decision of FIFA as null and void, mainly because it did not comply with European and Swiss competition laws, and because it "*is highly unlikely that D. could have given rise to training costs in the amount of 2.5 million US dollars in two months*".

93. The Panel's understanding is that the Commercial Court of Zurich mainly came to its conclusion on the basis of the following assumptions:

- The compensation under the 1997 Regulations for training and/or development was contemplated in its litteral sense, *i.e.* as a compensation strictly limited to the investment made by the former club in the Player's training and/or development.

- The reasoning of the FIFA Special Committee to calculate the amount of compensation to be paid to the Player's former club was not explained nor understandable and was arbitrary.

94. These considerations lead the Panel to the conclusion that the present award should clarify the nature of the compensation "for training and/or development" as was agreed and understood by the stakeholders in the Football world, which might have been partly misunderstood. Moreover, should the Panel conclude that such a compensation be due to Benfica, its amount shall be determined as precisely as possible, in the light of the most adequate and objective criteria.

5.2 BENFICA'S ENTITLEMENT TO TRAINING AND/OR DEVELOPMENT COMPENSATION

95. Art. 14 of the 1997 Transfer Regulations provides the following:

" [1] *If a non-amateur player concludes a contract with a new club, his former club shall be entitled to compensation for his training and/or development.*

[..]

[8]*This article does not apply to the transfer of a player who is a proven national of a country that is a member of the European Union (EU) or the European Economic Area (EEA) if the transfer involves two national associations in member countries of the EU or the EEA and if the player's employment contract with his former club has validly expired from the point of view of both parties (that is, if the fixed period of the contract has terminated or if both parties have mutually agreed either to curtail or rescind the contract with immediate effect).*

[..]".

In the case at stake, the Player was under contract with the Appellant as of September 2000. He signed a new contract with the First Respondent in December 2000, four months after having signed with the Appellant. The conditions provided by Art. 14 of

the applicable 1997 FIFA Regulations for the Status and Transfer of Players are obviously met and entitle Benfica to compensation for D.'s training and/or development.

96. Par. 8 of the same article provides an exception to the principle of the training and/or development compensation when the transfer involves two national associations in member countries of Europe, which is the case for the transfer of D. from Benfica, in Portugal, to Atlético, in Spain.

97. However, for this exception to apply, a further condition needs to be met: that the player's employment contract with his former club has validly expired or that the player and his former club have reached a mutual agreement to terminate the employment contact with immediate effect. The Panel considers that the rationale of this provision is to deny compensation to a party who would request it after the end of a fair employment contract or after having reached a mutual agreement on its termination with the other party.

98. This is obviously not the case in the matter at hand, since both D. and Benfica lodged a procedure before the competent Labour Courts in Lisboa. Even though they ended both proceedings by concluding settlement agreements, it does not change anything to the fact that there has been an important dispute related to the termination of the employment contract between the Appellant and the Player. Moreover, the question of D.'s entitlement to prematurely terminate his employment contract for just cause has also been submitted to the competent Portuguese decision-making body. This overall situation of conflict is incompatible with the compromise context to which the application of the above-mentioned exception is submitted.

99. The exception and special provision in this par. 8 also implies, as already explained, that the compensation for "training and development" should not be considered and defined it its literary meaning, but as including any compensation including compensation in case of breach of agreement (par. 8 does not apply "*if the player's*

employment contract with his former club has validly expired from the point of view of both parties").

100. For all the aforementioned reasons, the Panel considers that, in accordance with Art. 14 of the 1997 FIFA Regulations for the Status and Transfer of Players, Benfica is entitled to training and/or development compensation in the wider sense and true meaning and idea of this phrase. In this respect, the part of the appealed decision stating that compensation is due can be confirmed, as far as it concerns the principle of an amount of compensation to be paid to Benfica which will meat reasonable and justificable criteria.

5.3 LEGAL VACUUM IN THE FIFA'S REGULATIONS AND ITS CONSEQUENCES

101. As discussed at par. 4.3, the 1997 FIFA Regulations governing the Status and Transfer of Players, applicable to the case at hand, only provides the principle of compensation for training and/or development, in accordance with its Art. 14. However, these regulations do not contain any provisions applicable to the determination of the amount to be paid.

102. Therefore, it is for the Panel to fill this legal vacuum and to decide on which basis the amount of compensation requested by Benfica is to be calculated or estimated. In the Panel's opinion, any legal question that cannot be answered on the basis of the applicable regulations shall be resolved in the light of Swiss law which applies complementarily, as discussed under par. 4.2.

103. As such issue is obviously not exhaustively covered by Swiss law, which does not provide any specific rules related neither to the meaning nor to the calculation of training and/or development compensation among the world of football, other sources shall inspire the Panel's decision. In this respect, the 2001 FIFA Regulations for the Status and Transfer of Players, although not formally applicable to the matter at stake, should be considered as a legitimate guidline and shall help the Panel to appreciate the way FIFA was intending to establish criteria for calculating the compensation amount only a couple of months following the employment contract between the Player and the

Appellant. It is important for the Panel to stress out that the 2001 Regulations, which came into force on September 2001, were adopted further to long and deep negotiations between FIFA and the EU, and clearly included inter alia the principle of compensation that should be paid in case of breach of contract in order to support contractual stability. Contractual stability is one of the pillars of the new regulations and is a response to the necessity and specificity of football.

104. Furthermore, the CAS awards rendered in application of the 2001 Regulations shall also be taken into account as interpretation means.

105. Finally, if a precise answer to the issue raised cannot be proposed, notably because the Panel is not in possession of all relevant elements, the final decision shall be taken according to the principles of good faith and equity.

5.4 NATURE OF THE COMPENSATION CLAIMED BY THE APPELLANT

106. The Appellant claims that an indemnity be paid by the First Respondent to repair the damage suffered in connection with the premature transfer of the Player from Benfica to Atlético. The Panel has to determine if damages exist and, if so, who is liable for it and on which legal basis. The relationships between the Appellant, the First Respondent and the Player have to be discussed in order to answer these questions.

5.4.1 Analysis of the legal relationship between Benfica and D.

107. It is undisputed that D. and Benfica have concluded an employment contract, which was terminated in the circumstances discussed above. This aspect of the Parties' relationships, although not essential to resolve the case at hand, needs to be analysed. The FIFA Special Committee, in its decision of 26 April 2002, declared null and void by the Commercial Court of Zurich on 21 June 24, notably considered that the Appellant might have been at least partially responsible for D.'s premature contract termination. The Panel has to make its own opinion on this question also when dealing with the appealed decision of FIFA (which, as one can recall, is not the one that was

before the Commercial Court of Zurich) as, on a practical level, D.'s departure from Benfica represents the origin of the present dispute.

108. It is established that the Player and Benfica have reached a comprehensive agreement between them with respect to their Labour contract relationship. They both signed agreements in front of the competent Portuguese Labour courts, which were ratified and confirmed in a definitive and undisputed judgement. The reasons which provoked this unexpected termination are however not explained. The letter sent by the Appellant to FIFA on 10 March 2003 however mentions: "*In what concerns the terms of the agreements to put an end to the labour case, I must tell you that the moneys we accepted to pay D. (€ 164'078.25) are due to salaries in debit."* In other words, one aspect of the Labour dispute between the Player and Benfica was related to salaries which had not been paid. It is necessary to determine if this circumstance was sufficient to justify D.'s unilateral contract termination for alleged just cause, as notably argued by the First Respondent in its answer.

109. In a recent case (CAS 2006/A/1180 Galatasaray v/ Ribéry & OM issued on 24 April 2007), the CAS ruled that the "*non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute « just cause » for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non-public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. (...) Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be « insubstantial » or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a*

warning. In other words, the employee must have drawn the employer's attention to the fact that his conduct is not in accordance with the contract (see also CAS 2005/A/893 Metsu v/ Al-Ain Sports Club; CAS 2006/A/1100 Tareq Eltaib v/ Club Gaziantepsport marg. no. 8.2.5 et seq.)".

110. The Panel observes that it has not been demonstrated that the Player made any complaints regarding any late payment of his salaries or how this may have affected his situation to a point where he could not be expected to remain in a contractual relationship with Benfica.

111. Moreover, the competent Portuguese decision-making body, the "*Comissão Arbitral Paritaria*", expressly judged that the Player was not entitled to premature contract termination for just cause. It even emphasized that Benfica was entitled to exercise its disciplinary power regarding D. and that it rightly do so. There is no indication of any misconduct of Benfica towards the Player.

112. From the evidence produced and considering the above, the Panel is of the opinion that D.'s premature contract termination was not justified.

5.4.2 Analysis of the legal relationship between Benfica and Atlético

113. It is not disputed that D. signed another employment contract with Atlético in December 2000. This relationship has not been discussed before the CAS and does not require any further analysis here, as it is not relevant to solve the case at hand.

114. Benfica claims for the payment by Atlético of a training and/or development compensation, as provided by the applicable Art. 14 of the 1997 FIFA Regulations, in the wider and customary sense of these Regulations. As developed under par. 4.3, the principle of a compensation to be paid by Atlético to Benfica is expressly provided by this latter article. The criteria and mechanism of calculation of this compensation are however not provided by any applicable provision, because of the legal vaccum observed and discussed under par. 5.3.

115. Benfica and Atlético are not bound by any contractual agreement in connection with the transfer of D. It has not been demonstrated that the two clubs had reached an agreement on the question of the Player's transfer from one club to the other, which partially explains why a dispute between these two clubs is still pending. Since Benfica and Atlético are not bound by any contract, the Appellant is not entitled to claim anything from the First Respondent on a contractual basis.

116. In the light of Swiss law, which applies complimentarily as discussed under par. 4.2, the legal relationship between Benfica and Atlético may only derive from Atlético's eventual civil liability, in accordance with Art. 41 ff of the Swiss Code of Obligations. These provisions read as follows:

"*Art. 41*

[1]*Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages (Art. 43 et seq.).*
[2]*Equally liable for damages is any person who wilfully causes damage to another in violation of bonos mores.*

Art. 42

[1]*Whoever claims damages must prove the damage.*
[2]*If the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party.*

Art. 43

[1]*The judge shall determine the nature and amount of compensation for the damage sustained, taking into account the circumstances as well as the degree of fault (Art. 41, para. 1).*
[2]*Where compensation is awarded by way of an annuity, the party liable shall be*

simultaneously required to give security.

Art. 44

[1]The judge may reduce or completely deny any liability for damages if the damaged party consented to the act causing the damage, or if circumstances for which he is responsible have caused or aggravated the damage, or have otherwise adversely affected the position of the person liable.
[2]If a liable person has caused the damage neither wilfully nor by gross negligence, and would be subject to distress as a result of his payment of damages, the judge may also, for this reason reduce the obligation to compensate."

5.4.3 Origins of the damage suffered by the Appellant

117. The Panel is convinced that Benfica suffered damage in the context of D.'s inadequate transfer to Atlético. However, it emphasizes that this situation is mainly due to the fact that the Player unilaterally and immediately terminated his contract with the Appellant, without any just cause. This conclusion is shared by the "*Comissão Arbitral Paritaria*" which exhaustively analysed this very specific question. Moreover, this conclusion follows the line of the CAS recent case law.

118. In other words, the damage suffered by Benfica has mainly been provoked by the inadequate behaviour of the Player, who put an immediate end to a contract that he had the commitment to respect during four seasons, without just cause, after only four months of existence. The Appellant however did not raise any claim before FIFA against the Player and even reached an agreement with D. before the Labour Courts of Lisboa with respect to the Labour contract aspect of their relationship.

119. Despite the fact that D. obviously had an active and determining attitude which almost fully provoked the premature and unjustified termination of his contract with the Appellant, Atlético's behaviour was not fair either.

120. Atlético pretends that D. has been presented by his legal representative, the company

Impera SA, as a free player. From the First Respondent's point of view, this seems to be a satisfying guarantee that D. was a player who could be acquired without any restriction.

121. The Panel cannot accept this argument as a serious one for releasing Atlético totally from its responsibility to the damage caused to Benfica. The Panel does not accept the assumption that a reputable club like Atlético could not have been aware of the fact that D. was under contract with Benfica when the negotiations related to the eventual employment of this Player were initiated. The fact that the Player was under contract with Benfica was notorious, because his transfer from Ajax Amsterdam to Benfica was known by "everyone" in the world of football.

122. As far as it was brought to the knowledge of the Panel, proceedings initiated by Atlético against the company Impera SA and the Player are currently pending in Madrid, Spain. The Panel has not been provided with further details about this procedure. Nevertheless, it demonstrates once more that Atlético was aware of the fact that D.'s transfer has not been performed in perfectly fair way. The same feeling arises from the rather curious procedural agreement which Atlético and FIFA reached following the decision rendered by the Commercial Court of Zurich, and which was never brought to the Appellant's attention, despite the obvious and determining impact that such a decision and such a "private" agreement had on its situation.

123. In any case, even if the Panel was in a position to give some credit to Atlético's explanations, according to which D. was presented as a free player, it has to point out that Atlético, in its position of international level club, is supposed, within the framework of good relations and "fair play", at least to fulfill the minimum commitment to investigate this question before proposing any contract to an international player who had played for other famous clubs before, notably Ajax Amsterdam.

124. Besides, one cannot believe that Atlético honestly thought to be legitimated to acquire such a famous player without paying any federative rights to a former club. It can therefore not be excluded that Atlético partly induced D. to breach his former contract

with Benfica, or at least was recless enough to "closed its eyes" in order not to see the possible damages of Benfica.

125. For all these reasons, even if the Player is to be considered as the main responsible for the premature termination of his contract with Benfica and for the damage caused to Benfica, the Panel considers that Atlético, by means of its careless and unprofessional attitude in the context of D.'s transfer, shares a contribution to the damage suffered by the Appellant.

5.5 CALCULATION OF THE DAMAGE SUFFERED BY THE APPELLANT

5.5.1 Appreciation of the total damage suffered by Benfica

126. In the Panel's opinion, and contrary to the Appellant's submissions, the damage suffered by Benfica cannot be appreciated in connection with the total value of the contract signed between Benfica and the Player, *i.e.* EUR 3'165'928.03, which represents the minimum amount of compensation claimed by the Appellant.

127. On the one hand, this amount is requested to be paid as training and/or development compensation and obviously does not correspond to the training and/or development costs incurred by D. during the three months he effectively played for the Appellant. This observation has significantly contributed to lead the Commercial Court of Zurich to the conclusion that the first FIFA Special Committee's decision, of 26 April 2002, was to be deemed null and void.

128. On the other hand, D. was already 23 years old when he signed his contract with Benfica. In accordance with the further FIFA Regulations which, although not formally applicable to the case at hand, can be taken into consideration as a source of interpretation, D.'s development would have been considered as achieved, since he had already reached the age limit of 23 years old when he joined Benfica. Pursuant to the first sentence of Art. 13 of the 2001 FIFA Regulations for the Status and Transfer of Players, a player's training and education takes place between the ages of 12 and 23. As a general rule, training compensation is due whenever a player, who is not yet 23,

transfers as a non-amateur from one club to another club which he joins in the same capacity (see Art. 13 and 15 of the 2001 FIFA Regulations and FIFA Circular Letter No 769, dated 24 August 2001, p. 3).

129. In this particular case, the fact that the Employment Contract signed by the Player and the Appellant ended up prematurely does not give rise to a damage corresponding to the salary that Benfica would have paid to the Player if the contract had been respected until its term.

130. In the Panel's opinion, the damage suffered by Benfica cannot exceed the price it had to pay to Ajax Amsterdam to buy D.'s federative rights. It is established that Benfica paid an amount of EUR 1'806'562.50 to Ajax Amsterdam in that respect. This amount was paid in the perspective of a contract between the Player and Benfica that should have lasted for at least four seasons, the agreed duration of the contract signed in September 2000. When D. was transferred to Atlético, three months only after having signed with Benfica, this latter club had only benefited from the Player's services during three months, instead of the foreseen 48 months.

131. Benfica accepted to pay EUR 1'806'562.50 to Ajax Amsterdam for a foreseen contractual period of 48 months. Since this contractual period only lasted for three month, from September to November 2000, and considering that the transfer of D. from Benfica to Atlético has not given rise to any federative rights payment, the loss on investment suffered by Benfica represents EUR 1'691'250, corresponding to the 45 months that D. did not perform with Benfica.

5.5.2 Atlético's liability for damages suffered by Benfica

132. The Panel observes that it does not have any other relevant elements in its possession to precisely calculate the damage suffered by Benfica in the context of D.'s transfer to Atlético in December 2000. Considering the legal vacuum existing among the FIFA 1997 Regulations for the Status and Transfer of Players, the modalities of the calculation of the amount of compensation due to Benfica are to be fixed in the light of Swiss law, applied complimentarily to the case at hand.

133. In the Panel's opinion, Benfica has not demonstrated that the amount of compensation claimed to be paid by Atlético was governed by the effectively suffered damages. Since the exact amount of damages suffered by Benfica and the part of which Atlético is liable to pay cannot be precisely calculated, the Panel considers, in accordance with Art. 42 par. 2 of the Swiss Code of Obligations, applied complimentarily, that the amount of compensation to be paid by Atlético has to be fixed at its entire discretion, with regard to the ordinary course of events.

134. As mentioned under par. 5.5.1, the Panel considers that the effective damage suffered by Benfica represents EUR 1'691'250. This damage is mainly due to the uniltateral and unjustified premature termination of his employment contract by the Player. Again, no formal claims have been raised against the Player before FIFA (and furthermore Benfica came to a settlement agreement with the Player in the Portugese Labour Court). Therefore, the part of the damages owed, if at all, by the Player is not an issue in the present case as it is "*ultra petita*".

135. Considering the obvious conduct of Atlético in contacting the Player without even doing the simplest investigations to ensure that D. was not under contract with another club, taking into account that Atlético probably contributed to induce, or at least helped, D. to prematurely terminate his contract with Benfica, the Panel considers that Atlético must be held liable for an amount of compensation approaching a quarter of the damage effectively suffered by Benfica.

136. In view of the above-mentioned circumstances, in application of Art. 42 par. 2 of the Swiss Code of Obligations, the Panel fixes at its discretion the amount of compensation due by Atlético to Benfica at EUR 400'000.

5.5.3 The Appellant's claims towards FIFA

137. The Panel rejects the Appellant's claims against FIFA based on the allegation that FIFA should be jointly liable to pay compensation.

138. It can be pointed out that the way the decisions were taken by FIFA in this very particular case was rather curious, and most of all the strange procedural agreement reached between FIFA and Atlético following the decision of the Commercial Court of Zurich. The reasons that led FIFA to conclude such an agreement are unknown to the Panel. FIFA chose not to participate in the appeal proceedings before CAS and not to attend the hearing and, therefore, did not explain its conduct. The agreement between FIFA and Atlético is to be clearly condemned. It is an unacceptable agreement between a deciding competent body and one of the potential parties to a dispute, made *a priori* only with one party and on the outcome of the future case, or at least on the terms of reference to be used by the deciding body. However, inasmuch as this is unacceptable, this conduct does not create by itself any real legal ground to find FIFA liable to Benfica's damages.

139. The Panel recalls that the question to solve in the case at hand is to determine whether Atlético, in its role of a club that acquired D. after Benfica, is liable to pay a training and/or development compensation to this latter club and, if so, on which basis and according to which law, regulations or case law this amount of compensation shall be calculated or estimated. FIFA was not at all involved in this matter as a party. Its role was to pass a decision in this dispute as an authority of first instance.

140. Moreover, the Panel observes that the Appellant has not demonstrated that a legal basis could justify his creative claims against FIFA to be individually or jointly responsible for the payment of any compensation amount due to the Appellant.

141. No further analysis is necessary. The Appellant's claims towards FIFA are to be disregarded.

VI. THE COSTS

142. Pursuant to Art. R64.4 of the Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrators computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of

the CAS, and the costs of witnesses, experts and interpreters. In accordance with Art. R64.4 of the Code and with the consistent practice of CAS, the award only states how these costs must be apportioned between the Parties. Such costs are later determined and notified to the Parties by separate communication from the Secretary General of CAS.

143. In the present case, Benfica's appeal is partially admitted. Having taken into account the outcome of the arbitration, in the light of all of the circumstances, the Panel is of the view that the Appellant and the First Respondent should bear, each one of them, all of its legal fees and other expenses incurred in connection with this arbitration. The costs of the arbitration as calculated by the CAS Court Office shall be shared equally between those two parties only.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of SPORT LISBOA E BENFICA against CLUB ATLÉTICO DE MADRID SAD with respect to the decision issued on 14 February 2008 and notified on 23 December 2008 by the FIFA Special Committee is partially admitted.

2. The decision issued on 14 February 2008 and notified on 23 December 2008 by the FIFA Special Committee is partially upheld.

3. CLUB ATLÉTICO DE MADRID SAD is ordered to pay to SPORT LISBOA E BENFICA the amount of EUR 400,000 (four hundred thousand Euros).

4. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne equally by SPORT LISBOA E BENFICA and CLUB ATLÉTICO DE MADRID SAD.

5. Each party shall bear its own legal costs and other expenses incurred in connection with the present arbitration.

6. All other or further claims are dismissed.

Done in Lausanne, on 29 September 2009

THE COURT OF ARBITRATION FOR SPORT

Henrik Willem Kesler

President

Efraim Barak

Arbitrator

José Juan Pintó Sala

Arbitrator

Albert von Braun

Ad hoc clerk