Arbitration CAS 2017/A/5103 Valletta FC v. Apollon Limassol, award of 12 June 2018

Panel: Prof. Jacopo Tognon (Italy), Sole Arbitrator

Football
Training compensation
Discretion to exclude evidence under Art. R57 para. 3 of the CAS Code
Objective of the training compensation system
Conditions for an offer to be deemed having been made "in writing"
"Bona fide and genuine interest" in retaining the player for the future
Determination of the completion of the training period

1. **The inherent discretion of a CAS panel to exclude certain evidence under Art. R57, para. 3 of the CAS Code should be construed in accordance with the fundamental principle of the *de novo* power of review, which is, in essence, the foundation of CAS appeals system. Therefore, the discretion to exclude evidence should be exercised with caution, for example in situations where a party may have engaged in abusive procedural behaviour or in any other facts or circumstances where the CAS panel might, in its discretion, consider either unfair or inappropriate to admit new evidence.**

2. **The FIFA training compensation system ensures that training clubs are adequately rewarded for the efforts they have invested in training their young players. Indeed, the objective of training compensation is to ensure that training clubs are sufficiently compensated for the cost incurred in training their young players. This concept is aimed at maintaining a competitive balance between clubs and allows them to continue training and improve the development of players' abilities in the knowledge that they will be adequately compensated for their efforts. Training compensation therefore plays an important role in the development of young players and in maintaining the stability and integrity of sport.**

3. **For transfers occurring within the EU/EEA, Art. 6 para. 3 of Annexe 4 to the FIFA Regulations on the Status and Transfer of Players (RSTP) is *lex specialis*. In order for the training club to retain a right to compensation if a player moves to another club, the provision requires that a contract or an offer be made *"in writing"* to the player. As there is no definition in the FIFA regulations of the meaning of *"in writing"*, such meaning must be considered under Swiss law applicable subsidiarily. According to Arts. 13, 14 and 16 of the Swiss Code of Obligations (SCO), which apply not only to contracts but also to offers, a contract or an offer is deemed to be made *"in writing"* when it is signed with the original signature of the party or the parties that are contractually bound by the document. The use of a "registered letter" is not a condition of validity of the written offer; it has only been foreseen by FIFA as a way to provide evidence and not as a condition of validity.**

4. Art. 6 para. 3 of Annexe 4 to the RSTP provides an "exception to the exception" when it states that the training club is not entitled to training compensation if it does not offer the Player a contract *"(…) unless the Former Club can justify that it is entitled to such compensation"*. Therefore, if the training club can *"justify"* that it is entitled to training compensation the new club which hired the trained player would be obliged to pay the training compensation to the former club. In this respect, the training club can *"justify"* its entitlement by taking a proactive attitude vis-à-vis the player so as to clearly show that the club still counts on him for the future season(s). Accordingly, the training club must either offer the concerned player a professional contract or, short of that, it must show a bona fide and genuine interest in retaining him for the future. This applies for players with and without a contract, i.e. for both professionals and amateurs.

5. If a player moving from a club competing in a local championship in no way comparable to a fourth category championship in Europe was particularly successful in his second year with his new fourth category club, going from 20 appearances and 2 goals to 28 appearances and 12 goals, it is an unequivocal sign that while playing in his new club, his training was still ongoing and that thanks to the new training methods, his value rose, drawing the interest of a higher category club. Therefore it cannot be considered that the training period of the player ended before he was transferred to the fourth category club in Europe.

I. PARTIES

1. Valletta FC (the "Appellant" or "Valletta") is a football club with its registered office in La Valletta, Malta. Valletta FC is affiliated with the Malta Football Federation, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Apollon Limassol (the "Respondent" or "Apollon") is a football club with its registered office in Limassol, Cyprus. Apollon Limassol is affiliated with the Cyprus Football Federation, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Background Facts

4. The player H. (hereinafter "the Player"), born in 1994, was at the beginning of his training period registered with the first division Gambian club, Gambia Ports Authority FC, as it results from his player passport.

5. Immediately after, he made his first international transfer and he was transferred to Valletta on 2 July 2013, *id est* at the age of 18. This club is well known in Malta for having won many titles until today; as, for example, 23 times the Maltese Championship and 13 times the Maltese Cup.

6. The Player was registered with the Appellant for almost two seasons, *i.e.* from 2 July 2013 until 3 June 2015.

7. On 25 September 2014, through Mr. Gerard Ellul – team manager of Valletta FC –, negotiations allegedly occurred between the Appellant and the Player's Agent – J. – to extend the relationship between the Appellant and the Player. As stated in an email dated 9 January 2015 (see Annex E of Appellant's Statement of Appeal/Appeal Brief), it appears that the Appellant made a first offer which was rejected by the Agent on 15 January 2015. The Agent then made a counter offer to the Appellant via an e-mail of 27 February 2015. In reply to the counter-offer, the Appellant asked for clarifications on the same day, but appears not to have received any reply.

8. The Player and the Appellant ended up never agreeing to extend their contract or sign a new contract.

9. At the end of the contract, the Player decided to leave Malta and opted to sign a new contract with Apollon. At the time of the registration on 18 August 2015, the Player was 20 years old.

10. By a letter of 11 September 2015, the Appellant made a formal request to the Respondent, claiming to be entitled to receive training compensation for the Player in a total amount of € 38.410,00.

11. In its reply of 16 September 2015, the Respondent declared that no valid contract offer was ever made to the Player and that, in any case, he had already completed his training, so that in any event no training compensation was due.

B. Proceedings before the FIFA Dispute Resolution Chamber

12. On 3 August 2016, the Appellant lodged a complaint before the FIFA Dispute Resolution Chamber (hereinafter "FIFA DRC") against the Respondent and requested the payment of training compensation in the amount of € 38.333,33 plus interest.

13. The Respondent filed its statement of defence before FIFA DRC after the time limit set by the Chamber had elapsed. In particular, the Answer was submitted on 18 October 2016 while it was expected to be filed by 28 September 2016.

14. By a letter of 19 October 2016, the FIFA DRC asked to the Appellant to submit comments on whether it had offered a contract to the Player, pursuant to Art. 6 para. 3 of Annexe 4 of the FIFA Regulations on Status and Transfer of Players (hereinafter "FIFA RSTP"), before 31 October 2016.

15. Valletta filed its comments belatedly with correspondence remitted to FIFA DRC on 8 November 2016.

16. With a decision passed on 30 January 2017, notified to the Parties on 29 March 2017, the Single Judge of the Sub-Committee of the DRC rejected the claim (the "FIFA Decision").

17. The FIFA Single Judge stated *inter alia* as follows:

- The Respondent failed to present its response to the claim of the Claimant within the relevant time limit set by FIFA. As a result, in application of the Art. 9.3 of the FIFA Procedural Rules, the Single Judge decided not to take into account the reply of the Respondent.

- The same reasoning justified the decision to not take into account the Claimant's position submitted belatedly via the Transfer Match System on 8 November 2016, while it was expected before 31 October 2016.

- The Appellant had not been able to establish that it had complied with the requirements set out in Art. 6 para. 3 of Annexe 4 of the FIFA RSTP and therefore was not entitled to receive any training compensation since it had not complied with the prerequisites stated in this rule.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 19 April 2017, Valletta lodged a Statement of Appeal, designating it as also constituting its Appeal Brief, pursuant to Articles R48 and R51of the CAS Code of Sports-related Arbitration (edition 2017) (the "Code"). In these submissions, the Appellant asked that the case be referred to a sole arbitrator and proposed Mr. Jacopo Tognon, Attorney-at-law in Padova, to be appointed as sole arbitrator to adjudicate the case.

19. On 2 May 2017, the Respondent informed the CAS that it accepted the proposal to refer the case to a sole arbitrator and the appointment of Mr. Jacopo Tognon in these proceedings.

20. Considering the agreement of the Parties, the CAS Court Office confirmed on 19 May 2017 that the Sole Arbitrator appointed to decide the present matter was Mr Jacopo Tognon, Attorney-at-law in Padova, Italy.

21. On 4 July 2017, Apollon filed its Answer, pursuant to Art. R55 of the Code.

22. On 13 July 2017, both the Appellant and the Respondent informed the CAS Court Office that they preferred that a decision be issued solely based on the Parties written submissions.

23. On 20 July 2017, the Parties were informed that the Sole Arbitrator had decided not to hold a hearing in these proceedings. On the same date, the Parties were informed that the Sole Arbitrator had decided to request a copy of the FIFA file in the current matter from FIFA.

24. By returning signed Orders of Procedure on 24 August 2017, the Parties confirmed their agreement that this matter be decided based on the Parties' written submissions and confirmed CAS' jurisdiction to hear the appeal.

25. On 29 September 2017, the complete FIFA file in the above-mentioned procedure was transmitted to the Parties and the Sole Arbitrator.

IV. SUBMISSIONS OF THE PARTIES

26. Valletta FC's submissions may be summarised, in essence, as follows:

- The FIFA Decision is counter to the spirt and purpose of the FIFA RSTP. Indeed, the DRC preferred to give precedence to minor procedural issues while the aims of sporting justice shall not be overridden by an overly formalistic interpretation of the Regulations, as confirmed by certain CAS jurisprudence.

- The Appellant provided sufficient evidence that Art. 20 and Art. 6, para. 3 Annexe 4 of the FIFA RSTP has been fully adhered. In this framework, it was proved that: a) the 60-day obligation to offer a contract to the Player was respected; b) the contract was of an equivalent value (three times the contract value); c) the Player was validly notified via e-mail through is Agent.

- The Appellant argues that the FIFA Decision runs counter to interests of sporting justice. By stating this principle, Valletta quoted CAS 2009/A/1757, where it was stated as follows: *"The panel considered that given the potential importance of those documents … in the interest of sporting justice it was in the Panel's discretion to consider this new material"*. It follows, that even if the Appellant did not respect the time limit to submit its comments, these documents are relevant and admissible in the present proceedings.

- Moreover, the Appellant considered that the FIFA Decision favoured the breach of the FIFA RSTP by Apollon. Therefore, *"given that a) the transfer of the Player in question*

took place as per art. 2 para. 1(ii) of Annex 4 RSTP; and b) a contract of improved value was offered in writing (vide Annex E) to the Player more than sixty (60) days before the expiry of his contract with the CC (*id est*: the Appellant) *as per art. 6 para. 3 of Annex 4 RSTP; it should have been clear to the RC* (*id est*: the Respondent) *ab initio that training compensation was justly due to the Claimant"* (pag. 8 of the Appeal Brief).

27. The Appellant requested CAS to:

a) Revoke the FIFA DRC decision dated 30Th January 2017 (vide Annex j);

b) Consider all the facts of the present case together with all the annexed documentation, which is being respectfully submitted by the CC for your attention and consideration;

c) Resolve that in line with the provisions of the RSTP, training compensation is due by the RC to the CC;

d) Order the RC to pay training compensation due to the CC in the amounts claimed before the DRC by the CC (i.e. € 38.333,33, plus 5% interest p.a. as of the 17Th of September 2015 until the date of effective eventual payment by the RC), the detailed calculation of which can be found in Annex I (specifically in point 6 entitled "The Amount Claimed") and/or any other amount which this Arbitration panel deems fit and opportune;

e) Order the RC to also pay the amount of CHF 5,000 (4,000 CHF in fees borne by the CC before the FIFA DRC and CHF 1,000 borne in fees during the present appeal before the CAS) as costs of the proceedings involved;

f) Order the RC to pay any and all other costs related to this Appeal and other costs relating to the first instance;

g) Take any other decision, interim or final, which this Arbitration panel deems fit.

28. Apollon's submissions may be summarised, in essence, as follows:

- The Appellant has abused of CAS proceedings. Indeed, art. R57 para. 3 of the Code applies to the following type of evidence: a) evidence that was available to the parties before the FIFA Decision was rendered or b) evidence that could reasonably have been discovered by the parties before the FIFA Decision was rendered.

- Valletta tried to submit documentation in these proceedings that was available to it long before. This documentation dates back to the year 2014 and was therefore long ago in the possession of Valletta. The Appellant had ample opportunity to fully present its case before FIFA, but did not act diligently. The alleged contract "offer", notwithstanding its irrelevance, was filed belatedly before FIFA DRC. The Appellant is now attempting to abuse of CAS proceedings to remedy its own deficiencies and

lack of diligence. Exhibit E to the Appellant's Statement of Appeal/Appeal Brief shall not be admitted to the file.

- The Appellant in any case is not entitled to any training compensation since:
    - Valletta failed to offer a contract to the Player;
    - The Appellant failed to demonstrate a *bona fide* and genuine interest;
    - The Player already completed his training while he was under contract with the Appellant.
- After reminding the legal framework and the general principles of the FIFA RSTP rules, the Respondent argued that:
    - no offer was made "in writing" as this principle has been interpreted by CAS and Swiss jurisprudence. The supposed "offer" consists of mere emails sent from a generic gmail account. There is no signed document, no signed letter, no fax and no formal offer on the club's letterhead. In addition, no information was provided on whether the person sending the emails, Mr Ellul, was legally entitled to make a binding offer on behalf of the Appellant.
    - Furthermore, according to the Respondent, it should be considered that no offer was made to the Player at all, as such an offer was never actually received by the Player. The Appellant carried the burden of proving that the offer reached the Player or that he was aware of it and did not discharge it. In addition, there is no evidence that J. had been authorised by the Player to receive any type of communication on his behalf.
- According to Apollon, the Appellant did not demonstrate any *bona fide* and genuine interest for the purposes of Art. 6 para. 3 of Annexe 4 of the FIFA RSTP, which provides that the training club is not allowed to training compensation if it does not offer the player a contract, unless it can justify that it is entitled to such compensation (the *"exception to the exception"*), since the information provided by Valletta (namely, the exchange of correspondence as annexed to the Statement of Appeal/Appeal Brief) does not establish any *bona fide* and genuine interest of the Maltese Club. The Respondent notes, in particular, that, as of 27 February 2015 when the Appellant merely asks a question about a proposal made by J., all communications from the Appellant simply stopped.
- To sum up, as written in para. 140 of the Answer, the Appellant:
    - *"does not offer a contract in writing in sense of Swiss law,*

- *does not provide any documentation that could be considered as genuine and legally binding,*
- *does not provide evidence that the Player actually received the exchange of communications considered – incorrectly – as a contract offer,*
- *does not copy the player in any of the exchanges,*
- *makes a proposal that would be in breach of the regulatory framework, namely art. 18ter FIFA RSTP,*
- *sends communications to J. with a three-months' time interval, which cannot be considered as serious and reasonable in the context of contract negotiations and*
- *finally, never follows-up on this informal exchange of e mails".*

- Last but not least, the Respondent argued that the Player had already completed his training before joining Valletta. In order to corroborate its assumptions, the Respondent specified that:
  - The Player was already an established professional before joining Appellant, since he was a crucial member of the club Gambia Ports Authority, a successful champion first division club of his country and before turning 18 years old had already signed a professional employment contract.
  - The Player played with U17 and U20 representative teams of Gambia and became part of the A representative team in 2013 already, at the age of only 18. He quickly became a key element of the A Gambian team and participated in the preliminary competition for the 2014 FIFA World Cup Brazil.
  - Without any waiting period, the Appellant fielded the Player at continental level, namely in the UEFA Europa League preliminary rounds. The Player took part in all matches played by the Appellant at UEFA level. The Player appeared in most of the matches played by the Appellant in his first season.
  - At the very latest, the Player completed his training at the end of the first season in which he played for the Appellant.

29. The Respondent's requests for relief are as follows:

- *Prayer 1: The Appeal shall be rejected, insofar as it is admissible.*

Subsidiary to Prayer 1

- *Prayer 1A: The amount of training compensation due to Valletta FC shall be reduced.*

- *Prayer 2: In any case, Appellant, Valletta FC shall be ordered to bear the costs of the arbitration and it shall be ordered to contribute to the legal fees incurred by Appellant at an amount of at least CHF 10,000.*

V. JURISDICTION

30. Art. R47 of the Code provides, *inter alia*, as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

31. The jurisdiction of the CAS derives from Art. 58 para. 1 of the FIFA Statutes (2016 edition) that provides as follows:

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

32. The jurisdiction of the CAS was not contested by either Party and is further confirmed by the Order of Procedure, which was duly signed by both Parties. Moreover, according to the "Note relating to the motivated decision (legal remedy)" on the last page of the FIFA Decision, *"this decision may be appealed against before the Court of Arbitration for Sport (CAS)".*

VI. ADMISSIBILITY

33. Art. R49 of the Code provides, *inter alia*, as follows:

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

34. The appeal was filed within the deadline of 21 days set by Art. 58 of the FIFA Statutes. The appeal complied with all other requirements of Art. R48 of the CAS Code.

VII. APPLICABLE LAW

35. Art. R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law

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

36. Art. 57.2 of the FIFA Statutes stipulates the following:

The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

37. Pursuant to Art. 58 of the Code and Art. 57 .2 of the FIFA Statutes, the Sole Arbitrator shall, as to the substance of the appeal, apply primarily the 2016 edition of the FIFA RSTP and, subsidiarily, Swiss law, should arise the need to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

A. The Main Issues

38. The main issues to be resolved by the Sole Arbitrator are the following:

i. Is exhibit E) to the Statement of Appeal/Appeal Brief admissible in light of Art. R57 para 3 of the Code?

ii. Which is the correct interpretation of the FIFA Regulations in this case?

iii. Does Valletta comply with the requirements stipulated in art. 6 para. 3 Annexe 4 of the FIFA RSTP regarding the "offer in writing"?

iv. Did Valletta establish a "bona fide and genuine interest" for the purposes of art. 6 para. 3 Annexe 4 of the FIFA RSTP?

v. Had the Player already completed his training prior to joining the Appellant, for the purposes of Art. 6 para. 2, Annexe 4 of the FIFA RSTP?

vi. Should the training compensation to which Valletta is entitled be reduced?

39. After having carefully analysed all the factual elements provided by the Parties and the substantive law and regulations applicable to the merits, this Sole Arbitrator considers that the appeal is grounded for the following reasons.

i. Is exhibit E) to the Statement of Appeal/Appeal Brief admissible in light of Art. R57 para 3 of the Code?

40. According to the Respondent' Answer, Valletta has abused of the CAS proceedings since it has tried to annex as evidences documents that were at the Appellant's disposal since long

time and, in particular, before the FIFA Decision was rendered.

41. It follows, in the Respondent's view, that the Sole Arbitrator should exclude these documents under Art. R57 para. 3 of the Code.

42. Art. R57 of the Code provides as follows:

"The Panel has full power to review the facts and the law (…). The Panel has the discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered (…)".

43. Under Art. R57 para. 1 of the Code, and in line with the consistent jurisprudence of the CAS, the Sole Arbitrator has full power to review the facts and the law. The Sole Arbitrator therefore deals with the case *de novo*, evaluating all facts and legal issues involved in the dispute. However, this *de novo*-mandate only applies to the matter in dispute that has been brought before this Sole Arbitrator. The matter in dispute is defined by the requests of the Parties and the live circumstances underlying the latter.

44. In this regard, the Sole Arbitrator considers that his inherent discretion to exclude certain evidence under Art. R57, para. 3 should be construed in accordance with the fundamental principle of the *de novo* power of review, as specified above, which is well established in a long line CAS Jurisprudence and is, in essence, the foundation of CAS appeals system.

45. Therefore, the standard of review should not be undermined by an overly restrictive interpretation of this rule. As such, the discretion to exclude evidence should be exercised with caution, for example in situations where a party may have engaged in abusive procedural behaviour or in any other facts or circumstances where the Sole Arbitrator might, in his discretion, consider either unfair or inappropriate to admit new evidence.

46. It is the Sole Arbitrator's understanding that the Appellant, as also confirmed by the Respondent, attempted to collect these evidences during the FIFA proceedings, even though they were filed with delay. Notwithstanding the above, Annex E is completely in line with the arguments presented in the FIFA DRC file so that the allegation in the appeal proceedings does not seem to engage in abusive procedural behaviour. In other words, the Sole Arbitrator does not consider unfair or inappropriate to admit the "new" evidences at this stage since they were known to Apollon before the first instance proceedings were terminated.

47. Moreover, the Respondent has the full opportunity to discuss these evidences and to comment on them so that no violation of the right to be heard occurred in the case at stake. Furthermore, recalling the reasoning set out in *CAS 2014/A/3486*, this Sole Arbitrator finds that – by admitting this proof in appeal – he does not go beyond the claims submitted to him within the meaning of Art. 190 (2) (c) of Swiss Private International Law Act or beyond the scope of the previous litigation (see also DE LA ROCHEFOUCAULD E., "The taking of evidence before the CAS", pag. 37 and seq., in CAS Bulletin, 2015/1).

48. Therefore, Annex E of the Statement of Appeal is admissible.

ii. Which is the correct interpretation of the FIFA Regulations in this case?

49. As preliminary remarks, the Sole Arbitrator notes that the importance of enhancing and supporting the improvement of the abilities of young players, is reflected in the RSTP and, in particular, in the regulations concerning the payment of training compensation. Art. 20 and Annexe 4 of the RSTP set out the system whereby a player's training club shall be compensated by the player's new club for the entire period the training club effectively trained the player between the ages of 12 and 21 subject to the factual question of whether the player's training has in fact been completed earlier.

50. The FIFA training compensation system ensures that training clubs are adequately rewarded for the efforts they have invested in training their young players. Indeed, the objective of training compensation is to ensure that training clubs are sufficiently compensated for the cost incurred in training their young players. This concept is aimed at maintaining a competitive balance between clubs and allows them to continue training and improve the development of players' abilities in the knowledge that they will be adequately compensated for their efforts. Training compensation therefore plays an important role in the development of young players and in maintaining the stability and integrity of sport.

51. The Sole Arbitrator carefully reviewed all the arguments raised by the Parties and used the usual sources including the FIFA regulations and CAS jurisprudence in order to correctly determine the scope of application of the FIFA rules on training compensation.

52. In this respect, the Sole Arbitrator argues that his role is not to revise the content of the applicable rules, but only to interpret and apply them (CAS 2005/A/955 & 956, para. 7.3.10). With regard to the interpretation of the rules, Swiss law provides, under Art. 1 of the Swiss Civil Code, that a rule must be interpreted according to its wording and its purpose. The historical background of the rule matters only when such rule is not clear or incomplete (Decisions of the Swiss Federal Court, notably, ATF 122 I 253 and ATF 112 II 1).

53. The Sole Arbitrator considers the following FIFA regulations to be relevant in the present case:

(1) Art. 20 of the FIFA RSTP reads as follows:

"Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations".

(2) Art. 1.1 of Annexe 4 to the FIFA RSTP reads as follows:

"A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In the latter

case, training compensation shall be payable until the end of the season in which the player reaches the age of 23, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training".

(3) Art. 2 of Annexe 4 to the FIFA RSTP reads as follows:

"1. Training compensation is due when:

i. a player is registered for the first time as a professional; or

ii. a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday.

2. Training compensation is not due if:

i. the former club terminates the player's contract without just cause (without prejudice to the rights of the previous clubs); or

ii. the player is transferred to a category 4 club; or

iii. a professional reacquires amateur status on being transferred".

(4) Art. 6 of Annexe 4 to the FIFA RSTP reads as follows:

"1. For players moving from one association to another inside the territory of the EU/EEA, the amount of training compensation payable shall be established based on the following:

a) If the player moves from a lower to a higher category club, the calculation shall be based on the average training costs of the two clubs.

b) If the player moves from a higher to a lower category, the calculation shall be based on the training costs of the lower-category club.

2. Inside the EU/EEA, the final season of training may occur before the season of the player's 21st birthday if it is established that the player completed his training before that time.

3. If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player's previous club(s)".

54. It follows that, as a general principle, training compensation must be paid to a player's training club(s) when a player signs his first professional contract and on each further transfer until the end of the football season of his 23rd birthday (Article 20 of the FIFA RSTP).

55. As mentioned in previous CAS awards (2006/A/1152, 2011/A/2682, 2016/A/4720) the rationale of the above general principle is explained in the FIFA Principles for the amendment of the FIFA rules regarding international transfers, agreed in 2001 by FIFA, UEFA and the European Commission:

> *"In order to promote player talent and stimulate competition in football it is recognized that clubs should have the necessary financial and sportive incentives to invest in training and education of young players".*

56. In the present case, the Player was registered as a professional in 2013 with his training club and played with the Appellant for two seasons. It is undisputed that the Player was under a professional contract with the Appellant before joining the Respondent. At the moment of the transfer, he was under the age of 23. In principle, in accordance with Art. 20 of the FIFA RSTP, the Respondent would be entitled to the payment of training compensation. However, the FIFA RSTP set out certain exceptions to such general principle.

iii. Does Valletta FC comply with the requirements stipulated in art. 6 para. 3 Annex 4 of the FIFA RSTP regarding the "offer in writing"?

57. As explained above, Art. 6 para. 3 of Annexe 4 of the FIFA RSTP sets out an exception which applies specifically to players moving from one football association to another inside the territory of the EU/EEA.

58. For transfers occurring within the EU/EEA – such as that of the Player in question, who moved from Malta to Cyprus – Art. 6 para. 3 is *lex specialis*, to be read as qualifying any general principle present in the regulations dealing with the obligation to pay training compensation (CAS 2006/A/1152).

59. It is acknowledged that the Player was a professional when he left the Appellant and signed a contract with the Respondent. The Sole Arbitrator accepts that Art. 6 para. 3 is applicable and no further investigation is required in this respect, which is undisputed by the Parties.

60. The second and third sentences of Art. 6 para. 3 of Annexe 4 to the FIFA RSTP apply to situations where a professional contract is already in existence, setting out certain requirements which the training club must meet in order to retain a right to compensation if a player moves to another club: (i) an offer in writing for a new contract 60 days before the expiry of the current contract; (ii) a notice of the offer sent by registered mail; (iii) financial terms of the offer at least as favourable as those in the current contract.

61. Art. 6 para. 3 of Annexe 4 of the FIFA RSTP requires that the contract or the offer to be made *"in writing"* by the training club to the player. In the CAS case 2008/A/1521, the Panel mentioned that there is no definition in the FIFA regulations of the meaning of *"in writing"*. As mentioned in paragraph 37 above, Swiss law applies complementarily to the FIFA RSTP. The Sole Arbitrator must therefore consider the meaning of *"in writing"* under Swiss law.

62. The Sole Arbitrator agrees with the Respondent's point of view and notes that, according to Arts. 13, 14 and 16 of the Swiss Code of Obligations ("SCO"), which apply not only to contracts but also to offers (ATF 101 III 65), a contract or an offer is deemed to be made *"in writing"* when it is signed with the original signature of the party or the parties that are contractually bound by the document.

63. In the instant case, it is undisputed between the Parties that there has been an extensive exchange of emails between the Appellant and the Player's Agent regarding a potential extension of the Player's contract with Valletta. However, while the Appellant alleges that it actually offered a new contract to the Player, the Respondent alleges that there was at no point any real offer made containing all the elements of an employment contract with the Player.

64. The Sole Arbitrator will revert later in this award to the consequences to be drawn from this situation. At this stage, the Sole Arbitrator notes, however, that no offer in writing was made by the Appellant, as there is no document in the file signed by Valletta. The first of the cumulative conditions of Art. 6 para. 3 of Annexe 4 of the FIFA RSTP is therefore not met.

65. As one of the cumulative formal requirements of Art. 6 para. 3 of Annexe 4 is not met, there is no need to determine whether or not the other formal requirements of this provision were met.

66. However, in order to clarify this issue, this Sole Arbitrator agrees with the findings of CAS 2010/A/2316 which underlines that the use of a "registered letter" is not a condition of validity of the written offer to be made by the "Former Club". Furthermore the better financial term of the offer is *in re ipsa* when comparing the first contract signed in July 2013 to the e-mail of 9 January 2015 sent by Mr. Jerry Ellul, team manager of the Appellant.

67. To summarize, having failed to comply with at least one of the formal requirements of Art. 6 para. 3 of Annex 4 of the FIFA RSTP, the Appellant should in principle not be entitled to training compensation.

iv. Did Valletta establish a "bona fide and genuine interest" for the purposes of art. 6 para. 3 Annexe 4 of the FIFA RSTP?

68. However, with reference to CAS 2011/A/2682, the Panel notes that the last part of the first sentence of Art. 6 para. 3 of Annexe 4 of the FIFA RSTP provides an "exception to the exception" when it states that the training club is not entitled to training compensation if it does not offer the Player a contract *"(…) unless the Former Club can justify that it is entitled to such compensation"*.

69. Therefore, if the training club can justify that it is entitled to training compensation – and the burden of proof lies with the training club – the exception to the exception is triggered and the new club which hired the trained player would be obliged to pay the training compensation to the former club.

70. The Sole Arbitrator has now to determine what can be considered as a justification for the entitlement to receive payment of training compensation, under the last part of the first sentence of Art. 6 para. 3 of Annexe 4 of the FIFA RSTP. In order to determine this, the Sole Arbitrator considers necessary to interpret the meaning of the term *"justify"* in light of the purpose of Art. 6 para. 3 itself, and the FIFA rules on transfers.

71. In this respect, in a previous and leading CAS case (2006/A/1152) involving an amateur player, the Panel stated that, *"if a club wants to retain the right to training compensation in respect of one of its amateur (red.) players, it must "justify" it under Article 6 para. 3 by taking a proactive attitude vis-à-vis that individual player so as to clearly show that the club still counts on him for the future season(s). Accordingly, the training club must either offer the concerned player a professional contract or, short of that, it must show a bona fide and genuine interest in retaining him for the future".*

72. In CAS 2010/A/2316 the Panel declared that *"the language itself of Article 6 para. 3 makes clear that the first sentence covers both players with and players without a contract (i.e. both professionals and amateurs)".*

73. The Sole Arbitrator is of the opinion that the conditions listed by the panel in the case CAS 2006/A/1152 are therefore also applicable to professional players, in accordance with the evaluations made by CAS 2011/A/2682 (para. 77-90).

74. Furthermore, the Sole Arbitrator recalls that *"the rationale for the provisions in the FIFA Regulations regarding training compensation is that clubs should be encouraged to train the players and those clubs that carry out the training process successfully should be rewarded for their training efforts. By the same token, those other clubs which enjoy the fruits of that training process should be obliged to pay something in compensation for the training efforts engaged in by others"* (CAS 2009/A/1757).

75. The Sole Arbitrator fully agrees with such contention and is eager to emphasize, together with the CAS panel in the latter case (CAS 2009/A/1757), that *"the aim of sporting justice shall not be defeated by an overly formalistic interpretation of the FIFA Regulations which would deviate from their original intended purpose"*, *i.e.* that a club which trained a player should be compensated for its training efforts.

76. Moreover, *"Selon la jurisprudence du TAS, le droit du club formateur au paiement d'une indemnité de formation par rapport à un jouer être fondé sur "l'attitude proactive" du club à l'égard du joueur se traduisant par une conduite de bonne foi et un intérêt authentique à retenir le joueur pour le futur. Cette attitude proactive peut se manifester par le fait d'avoir investi en termes de formation et d'éducation pour le joueur pendant plusieurs saisons; par l'envoi d'une lettre au joueur pour lui manifester son intention de le garder, comme amateur, pour la saison sportive suivante, également adressée à la fédération nationale à laquelle le club était affilié en conformité avec les règlements internes de ladite fédération; par la démonstration de l'existence de pourparlers avec le joueur en vue de signer un contrat professionnel"* (TAS 2014/A/3587).

77. In the case at hand, the Appellant was able to demonstrate that (i) it started to negotiate with the Player's Agent on 25 September 2014, almost one year prior to the end of his contract; (ii) an "offer" was made to the Player's Agent via email on 9 January 2015; (iii) this offer was substantially of a greater value than the Player's existing contract; (iv) this offer was not

accepted by the Player's Agent (see e- mail of 15 January 2015 in which the Agent stated *"thanks for the offer. After a deep analysis, I think that this offer is too far away from our expectations for the next three years")*; (v) after team Manager's request of 15 January 2015 a counter offer was made by the Agent by e-mail of 27 February 2015 *"Hello Jerry, after the last two seasons in which H. has shown his quality as player and value for the team, on Valletta FC proposal to renew the contract of H., this is my proposal: 2 years with bonuses + accommodation + flight, first season 120.000€ nets, second season 170.000€ nets. Please analize the offer and let me know your comments"*; (vi) after a request for a clarification made by the team manager by e-mail of 27 February 2015 no answer appears to have followed.

78. In the Sole Arbitrator's view this e-mail exchange can in all the aspects be assimilated to the expression of a genuine and concrete interest of the Appellant to want to extend the contract with the Player. As for the Team Manager's and his negotiating power, it should be pointed out that the Agent of the player (in spite of saying he never received any offer) has not only recognized the legitimacy of the Team Manager's club itself but has received the offer and rejected it in the name and on behalf of the Player (the Team Manager at that point had certainly informed the Player) and, at the express request of Mr. Gerard Ellul, made a counter proposal.

79. Also, it must be highlighted that the Respondent has never explicitly disputed that J. was his Agent. He barely mentioned that J. had no power to receive communications. Nevertheless, the Appellant and J. had an intense email exchange over a long period of time, clearly demonstrating that J. was indeed duly representing the Player in his contacts with the club. Hence, it would appear very unlikely that the Player was not aware of these contacts. Consequently, posthumous statements (for example, the one of the Player who claims to have never received offers) appear unreliable and *ad hoc* created.

80. Among other things, it is interesting to note that in the first email of 25 September 2014 the team manager is the person who tells the Agent that he has received the player's consent to talk to him. Obviously, the player acknowledged J. as an agent and the club had begun negotiations.

81. On 27 February 2015, after a request for clarifications sent by the Team Manager, no further feedback appears to have been received from the Agent. If these are the facts, and the Sole Arbitrator by thoroughly analyzing the unquestioned circumstances believes there are no doubts, it follows that Valletta clearly showed its deep interest in keeping the player to the extent that it tried to negotiate his contract renewal without success.

82. Based on the foregoing, the Sole Arbitrator is of the opinion that the Appellant showed a *"bona fide and genuine interest"* to keep the Player and having taken account of all the circumstances, deems that the Appellant has been able to demonstrate that it is entitled to benefit from the "exception to the exception" set forth in the first sentence of Art. 6 para. 3 of Annexe 4 of the FIFA RSTP.

83. In view of the above, the Sole Arbitrator decides that the Appellant is entitled to training compensation in the case at hand.

v. Had the Player already completed his training prior to joining the Appellant, for the purposes of Art. 6 para. 2, Annexe 4 of the FIFA RSTP?

84. The Respondent considers that the Player had in fact ended his training period before moving from Gambia to Malta. And in support of this argument, it reports that the Player had played in a local A team, namely Gambia Ports Authority FC and participated in many football matches with National youth team and with the A National team.

85. The Sole Arbitrator cannot follow this reasoning.

86. Aside from the fact that the Gambia National team is now only 178 of the FIFA ranking, so it is one of the least powerful National teams in the world, it is clear that the local championship is in no way competitive according to European parameters (and African too) as well as appearances in the Youth nationals team do not appear to be in any way performing.

87. In other words, we are not discussing about a young player in a top club in Spain (where it is likely he has completed his training) who then moves to England. On the contrary, the matter is about a young player who moved from Gambia to the Maltese Championship (fourth category in Europe).

88. Furthermore, looking at the performances of the Player at Valletta, it emerges that he was particularly successful in the second year in Malta where he went from 20 appearances and 2 goals to 28 appearances and 12 goals. This is an unequivocal sign that while playing in an European Club, thanks to the new training methods, his value rose drawing the interest of a Cypriot club of third category, like Apollon.

89. Ultimately, the Sole Arbitrator considers that the Gambia training period of the player (bearing in mind that the registration as a professional is only for one day!) cannot in any case be considered as sufficient to consider that the Player's training period ended before his transfer to the Appellant.

90. It follows that the arguments carried out by the Respondent cannot be accepted.

vi. Should the training compensation to which Valletta is entitled be reduced?

91. The Respondent also requested that training compensation shall be reduced. By analyzing the Answer however, this Sole Arbitrator does not find any valid reason for Apollon to reduce the *quantum debeatur*. In fact, as also already explained above, the second year of training shows how the Player has significantly improved his abilities.

92. Given that the total amount of training compensation is not contested by the Respondent, the sum due is the one required by the Appellant amounting to € 38,333.33 as follows:

19th Birthday (2013/2104) = 12 months = € 20.000,00

20th Birthday (2014/2015) = 11 months = € 18.333,33

93. As per Art. 104 Swiss Code of Obligation, the Respondent has to pay the Appellant a 5% annual interest rate on the sum due. The interest shall run from 17 September 2015, i.e. 30 days following the registration of the Player with the new association, pursuant to Art. 3, para. 2, Annexe 4 of the FIFA RSTP.

B. Conclusion

94. Based on the foregoing, the Sole Arbitrator holds that:

i. The Appellant failed to comply with the formal requirement of Art. 6 par. 3 of Annexe 4 of the FIFA RSTP in order to be entitled to training compensation;

ii. The Appellant justified that it was entitled to such compensation in view of all the circumstances of the case;

iii. The Appellant is entitled to a training compensation in the amount of EUR 38.333,33. without any reduction being allowed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 19 April 2017 by Valletta FC against the decision issued on 30 January 2017 by the Single Judge of the sub-committee of the FIFA Dispute Resolution Chamber is upheld.

2. The decision issued on 30 January 2017 by the Single Judge of the sub-committee of the FIFA Dispute Resolution Chamber is set aside.

3. Apollon Limassol is ordered to pay to Valletta FC the amount of EUR 38.333,33 as training compensation with regard to the transfer of H., plus 5% interest *p.a.* from 17 September 2015 until the date of effective payment.

4. (…).

5. (…).

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