Arbitration CAS 2013/A/3417 FC Metz v. NK Nafta Lendava, award of 13 August 2014

Panel: Mr Hans Nater (Switzerland), President; Mr João Nogueira Da Rocha (Portugal); Mr Stuart McInnes (United Kingdom)

Football
Training compensation
Distinction between legal capacity and standing to sue/to be sued
Distinction between a buy-out-clause and a mutual agreement to terminate a contract
Training compensation not due in case of signature of an employment contract with a free agent

1. **According to the jurisprudence of the Swiss Federal Tribunal, the standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim; it relates to the (active or passive) entitlement to the right claimed and its absence does not entail the inadmissibility of the appeal but rather its dismissal. By contrast, the capacity to be a party consists in the ability to participate in proceedings as a party. It is a condition of admissibility of the claim and its absence constitutes a bar to hearing of the case. It also determines the jurisdiction of the arbitral tribunal. The legal capacity of a football club shall be governed by the law of the place of incorporation of that club.**

2. **According to CAS jurisprudence, a buy-out-clause included in an employment agreement of a professional football player is a clause that determines in advance the amount to be paid by a party in case of breach and/or unilateral premature termination of the employment relationship. If the wording of the clause included in an agreement entered into between a player and a club is not addressing a situation of unilateral termination, but rather the certain departure of the player at the end of the season, subject to the payment, at an undetermined time, of a certain amount by the player, the clause at stake is not a buy-out-clause but a mutual agreement to terminate the employment relationship.**

3. **If the player is a free agent when he signs his employment contract with the new club, there is no transfer in the meaning of Article 2 of Annex 4 RSTP and therefore, no training compensation is payable.**

I. INTRODUCTION

1. This appeal is brought by FC Metz (hereinafter referred to as "the Appellant" or "Metz"), against a decision of the Dispute Resolution Chamber (hereinafter also referred to as "the DRC") of the Fédération Internationale de Football Association (hereinafter referred to as

"FIFA") dated 25 April 2013 (hereinafter also referred to as "the Appealed Decision") mainly imposing on FC Metz the payment of EUR 400,000, plus interest, to NK Nafta Lendava (hereinafter referred to as "the Respondent" or "Nafta") as training compensation in the context of the alleged transfer of the player V. (hereinafter referred to as "the Player") from Nafta to Metz.

II. THE PARTIES

2. The Appellant is a French football club, affiliated with the French Football Federation ("FFF"), which in turn is affiliated with FIFA.

3. Nafta is a Slovenian football club, affiliated with the Slovenian Football Association ("SFA"), which in turn is affiliated with FIFA.

III. FACTUAL BACKGROUND

4. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the Parties, the exhibits filed as well as the oral presentations at the hearing. Additional facts may be set out, where relevant, in the legal considerations of the present award.

5. The Player, born on 22 February 1990, was registered with the Respondent from 8 September 1998 until 30 June 2009 as an amateur, and from 1 July 2009 until 5 October 2011 as a professional.

6. On 25 July 2009, the Respondent and the Player concluded an employment agreement valid until 30 June 2013 (hereinafter referred to as the "First Employment Agreement"). In accordance with Clause 4 of this contract, the Player was entitled to a monthly salary of EUR 589.19, plus the reimbursement of expenses in a maximum total amount of EUR 350.00 per month.

7. On 1 February 2011, the Respondent and the Player signed a new employment agreement valid until 30 June 2014 (hereinafter referred to as the "Second Employment Agreement"). In accordance with Clause 4 of this contract, the Player was entitled to a monthly salary of EUR 1,500.00, plus the reimbursement of expenses in a maximum total amount of EUR 350.00 per month.

8. In the season 2010/2011, the Respondent faced financial difficulties.

9. On 31 March 2011, the Respondent and the Player signed an agreement in order to amicably settle their contractual relationships, in particular with regard to the remaining outstanding salaries and the future of the Player with the Respondent (hereinafter referred to as the "Settlement Agreement").

10. On 12 August 2011, the Player played his last game with the Respondent.

11. On 17 August 2011, the Appellant and the Player signed an employment agreement.

12. On 26 September 2011, the Respondent sent a letter to the Appellant, in particular stating that it was entitled to receive training compensation following the Player's transfer to the Appellant.

13. On 5 October 2011, the Player was registered with the Appellant, as a professional.

14. On 14 October 2011, the Respondent addressed another letter to the Appellant, reiterating that it was entitled to training compensation for the Player, and that the amount due was to be calculated by the Appellant, in accordance with the applicable FIFA regulations.

15. On 17 January 2012, the Respondent filed a claim before FIFA, requesting the payment of training compensation from the Appellant, on the ground that the Player, on 5 October 2011, was transferred as a professional from the Respondent to the Appellant before the end of the season of his 23rd birthday. In particular, the Respondent was claiming the payment of the amount of EUR 400,000.

16. On 25 April 2013, the Appealed Decision was rendered, under which the Appellant was ordered to pay to the Respondent the amount of EUR 400,000 plus interest at 5% as training compensation following the transfer of the Player.

17. On 21 November 2013, the Parties were provided by FIFA with the grounds of the Appealed Decision.

IV. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

18. On 6 December 2013, following the notification of the Appealed Decision, the Appellant filed a Statement of Appeal and an Appeal Brief, in French, with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code"). Together with its Statement of Appeal and Appeal Brief, the Appellant filed a request for the stay of the Appealed Decision.

19. On 12 December 2012, the CAS Court Office sent a letter to the Parties, informing them about various aspects of the proceedings and in particular granting to the Respondent a deadline of twenty days to file its answer. The CAS Court Office also mentioned that according to CAS jurisprudence, *"une decision de nature financière rendue par une association privée suisse n'est pas exécutoire"*, and therefore informed the Appellant that its request for the stay of the Appealed Decision would be in principle dismissed.

20. On 13 December 2013, the Appellant withdrew its request for a stay of execution of the Appealed Decision.

21. On 18 December 2012, the Respondent acknowledged receipt of the CAS Court Office's letter dated 12 December 2013, and proposed in particular that the language of the proceedings be English, in particular, as there was no agreement between the Parties on the language to be used, that all the documentation had already been translated from Slovenian to English and that English is a neutral language, which would ensure equity to both Parties.

22. On 14 January 2014, the Appellant filed its Answer, in English.

23. On the same day, the CAS Court Office informed the Parties that in accordance with Article R56 of the CAS Code, unless the parties agree or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their request or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the Appeal Brief and of the Answer.

24. On 15 January 2014, the Respondent informed the CAS Court Office that it considered that a hearing was not necessary in the case at hand. The Respondent stated in particular the following:

"Given the fact that the legal question – the interpretation of written contracts is the only questionable part of said subject matter, a hearing would not contribute to any further clarification of the subject matter but would only incur additional, very high costs".

25. On 16 January 2014, the Appellant informed the CAS Court Office that it considered that a hearing should be held in the case at hand.

26. On the same day, the Parties were informed that the Deputy President of CAS had decided that English would be the language of the present proceedings.

27. On 18 February 2014, the Parties were informed that the following persons had been appointed as Arbitrators: Dr Hans Nater, Attorney-at-law in Zürich, Switzerland, as President of the Panel, sitting with Mr João Nogueira Da Rocha, Attorney-at-law in Lisbon, Portugal, and Mr Stuart C. McInnes, Solicitor in London, United Kingdom, as arbitrators.

28. On 18 March 2014, FIFA informed the CAS Court Office that it renounced its right to take part in the present proceedings.

29. On 19 March 2014, the Respondent requested that the Appellant file a translation of its written submissions and enclosures from French to English.

30. On 3 April 2014, the CAS Court Office provided the Respondent with the translation into English of the Statement of Appeal and Appeal Brief.

31. On 25 April 2014, the Appellant addressed a letter to the CAS Court Office. In this letter, the Appellant was, in substance, explaining that it had received information from the Slovenian Football Association (hereafter also referred to as the "SFA") that the Respondent, although it was *"still registered in sport association records"*, was not competing in any competition of the SFA since the season 2011/2012, as it did not receive its license for the 2012/2013 season. The Appellant therefore considered that the Respondent was not more than an *"empty shell"* and that it had no more legitimacy to *"claim any rights/compensation related to organized football"*.

32. On the same day, the Respondent answered the above Appellant's letter, stating in particular that it was still registered *"in the sport association records"* and that in any circumstances, the payment of the training compensation in question was due at a time when it was still competing in the First Division of the SFA.

33. On 30 April and 1 May 2014, the Respondent, and the Appellant respectively, signed and returned the Order of Procedure.

34. On 6 May 2014, a hearing was held in Lausanne, Switzerland.

35. On 8 May 2014, the CAS Court Office sent a letter to the SFA requesting information on the legal status of the Respondent.

36. Under cover of a letter of 20 May 2014, the Respondent's lawyer confirmed the existence of the Respondent as a legal entity and filed two documents, one from the Slovenian Business Register dated 20 May 2014 showing that Nafta is still registered and the second from the State Administration Unit Lendava dated 9 May 2014 certifying that Nafta is entered in the Register of Societies.

37. On 23 May 2014, the SFA answered the following:

"ND Lendava was competing in the season 2011/2012 with first team called NK Nafta Lendava in Slovenian first division. ND Lendava didn't obtain the license for the season 2012/2013 and is not competing in any official competitions run by FA of Slovenia since then.

According to our records ND Lendava is not registered within any football associations who that constitute FA of Slovenia.

However, ND Lendava still exists as legal entity according to Slovenian Association's Act and is still registered within state records of associations".

38. On 26 May 2014, the CAS Court Office sent a copy of SFA's letter dated 23 May and granted the Appellant a deadline of fifteen (15) days to comment on the latter.

39. On 27 May 2014, the Appellant answered, confirming, in substance, that the Respondent was an *"empty shell"* and that therefore, it has no legitimacy/capacity to be a party to the present proceedings, in view of Article 22.d of the FIFA Regulations on the Status and Transfer of Players ("RSTP"). The Appellant further considered that the Respondent acted in bad faith by hiding its status within the SFA, and requested that the Respondent be condemned to pay all the arbitration costs and a *"symbolic indemnity"* of EUR 1.000 to the Appellant as a contribution to its defence costs.

40. On 27 May 2014, the Respondent sent an unsolicited letter to the CAS Court Office.

41. On 12 June 2014, the Parties were informed that the Panel did not find any exceptional circumstances to accept the unsolicited Respondent's letter dated 27 May 2014, and therefore disregarded it.

V. THE HEARING

42. As stated above, a hearing was held on 6 May 2014 at the CAS Headquarters in Lausanne, Switzerland.

43. In addition to the Panel, Mr Fabien Cagneux, Counsel to the CAS, and Mr Serge Vittoz, *ad hoc clerk*, the following persons attended the hearing:

a) For the Appellant:

1. Mr Bernard Serin, President;
2. Mr Jean-Louis Dupont, Counsel.

b) For the Respondent:

1. Mr Janko Fticar Counsel;
2. Mr Louro Pratnekar, Counsel.

44. The Parties were afforded the opportunity to present their case, to submit their arguments, and to answer the questions asked by the Panel.

45. The Parties explicitly agreed at the end of the hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

VI. POSITION OF THE PARTIES

46. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows.

A. FC Metz

47. The Appellant's position is in substance the following:

a. At the heart of the dispute lays the interpretation of the Settlement Agreement. In particular, the matter is to decide whether the terms *"indemnification for the departure of the player"* could, in good faith, be considered by the Player (and therefore by the Appellant) as the total flat fee, inclusive of training compensation, in case of departure of the Player before the end of his employment contract with the Appellant.

b. The common will of the Parties in the Settlement Agreement is easily discerned, the latter being to establish a bilateral contract, according to which, in consideration of salary concessions and the recurrent non-fulfilment of its contractual obligations by the Respondent, the Player was granted the right to leave the club by payment of a flat fee, which included training compensation.

c. The repeated contractual breaches by the Respondent would have allowed the Player to terminate the Second Employment Contract with just cause, thus eliminating the payment of any transfer and any training compensation. However, the Player decided to remain with the Respondent, preferring instead to conclude the Settlement Agreement, which

ensured, through the litigious clause, that he could increase his opportunities of finding a new club. However, the Player's objective would not be achievable if one considers that the indemnity for "departure" concerned only the transfer compensation and not the training compensation.

d. If one considers that the common will of the parties of the Settlement Agreement cannot be determined, one should consider that by concluding the Settlement Agreement, the Player had the legitimate right to consider that the amount of EUR 50,000 comprised not only the transfer compensation, but also the training compensation, in accordance with the principle of trust.

e. It shall be considered that the Respondent has not offered an employment contract of at least an equivalent amount of the previous contract and that therefore, the Respondent is not entitled to any training compensation, in application of Article 6.3 of Annex 4 RSTP.

f. The jurisprudence of the DRC and CAS provides for *"the bilateral principle to the rights of clubs and the rights of players"*. This principle was violated in the case at hand, as *"according to the jurisprudence of the [DRC], when two clubs agree a transfer indemnity, this must include the training indemnity, UNLESS if the contract implicitly excludes it, whereas, regarding the decision disputed, if a club and a player agree on a "departure" (which – in the case in point – we understand occurred – in teleological manner – to replace a transfer contract), this is not required to include the training indemnity, UNLESS the contract indicates it specifically"*. Such a disparity creates a disadvantageous situation for a player compared to the club and discriminates against the player, which is contrary to the objectives of the RSTP.

g. Moreover, the Respondent has lost its right to any compensation as it has not paid, at the time when the Statement of Appeal/Appeal Brief was filed, the amounts agreed in the Settlement Agreement.

h. The Respondent is an *"empty shell"* with regard to organized football and has therefore no more legitimacy to claim training compensation.

B. NK Nafta Lendava

48. The Respondent's position is, in substance, the following:

a. The Settlement Agreement was concluded between a club and a player; it can therefore not address issues with regard to training compensation, in accordance with the RSTP and the DRC practice.

b. The interpretation of the litigious clause of the Settlement Agreement to be made in connection with Clause 13 par. 2 of the Employment Contract, which states the following:

"In case of early termination of the contract based on the 1st paragraph of Article 12 of this contract the compensation amount is mutually agreed upon".

c. The litigious clause of the Settlement Agreement should be considered as a "buy-out-clause" in case of early termination of the Employment Contract, as foreseen in Clause 12 par. 3 of the latter contract.

d. The Respondent contacted the Appellant regarding training compensation, before that the Player was even registered with the Appellant.

e. The Appellant, as a category I club, must have known that training compensation is subject to contracts between clubs, and not between clubs and players.

f. The Appellant failed to make contact with the Respondent in order to organize the transfer of the Player, but dealt directly with the latter, in violation of Article 18.3 RSTP. Furthermore, the Appellant did not answer the various communications sent by the Respondent, with regard to training compensation following the transfer of the Player.

g. The Player was not a free agent when he was hired by the Appellant, which is, in particular, demonstrated by the fact that the Appellant paid the amount of EUR 50,000, as foreseen in the litigious clause of the Settlement Agreement.

h. The Second Employment Agreement was never terminated, and there was never any request for an early termination submitted to the Respondent by the Player. Thus the Appellant's contention that the Respondent lost its rights to Training Compensation due to contract termination as stated in Article 2.2.i of Annex 4 RSTP is unfounded.

i. With regard to the fact that the RSTP creates unjustified discrimination between players and clubs, it is not for CAS to decide on this matter, in accordance with CAS jurisprudence (CAS 2006/A/1072 and CAS2010/A/2069).

j. The Respondent is still registered *"in the sport association records"* and the payment of the training compensation was due at a time when it was still competing in the First Division of the SFA.

VII. THE PARTIES' REQUESTS FOR RELIEF

49. The Appellant's requests for relief are the following:

"For these reasons, FC Metz requests that the arbitration panel review the disputed decision and judge that – in light of all circumstances of the case in point – FC Metz is not liable for any training indemnity to NKNL, with regard to V".

50. The Respondent's requests for relief are the following:

- *"To accept this answer against the appeal submitted by the Appellant;*

- *To reject in entirety the Appeal submitted by the Appellant against the Decision of the FIFA Dispute Resolution Chamber, passed in Zurich, Switzerland, on 25 April 2013;*
- *To fix a sum of 115.000,000 CHF to be paid by the Appellant to the Respondent NK Nafta Lendava, to help the payment of its defence fees and costs;*
- *To condemn the Appellant to the payment of all the CAS administration costs and arbitrators fees".*

VIII. CAS JURISDICTION AND ADMISSIBILITY OF THE APPEAL

51. The jurisdiction of an appeal before CAS shall be examined in light of Article R47 of the Code, which reads as follows:

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

52. The same general principle is gathered in Article 67 of the FIFA Statutes, which states that:

"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".

53. In the case at hand, the jurisdiction of the CAS to hear this dispute derives from these provisions, *i.e.* Article R47 of the CAS Code and Article 67 of the FIFA Statutes.

54. The Appealed Decision, with grounds, was notified to the Appellant on 21 November 2013. Hence, the Appellant, with its letter dated 6 December 2013, timely filed its appeal.

55. The Appellant submitted that the Respondent was *"not anymore a registered football club"*, that it shall be considered as an *"empty shell"*, and that it had therefore *"no legitimacy to claim any rights/compensation related to organized football and in particular to the FIFA relevant regulations".*

56. The Panel considers that two separate legal issues regarding the status of the Respondent are in point, *i.e.* (i) its legal capacity, *i.e.* the capacity to be a party, and (ii) its standing to sue or to be sued.

57. According to the Swiss Federal Tribunal (ATF 128 III 50), the following distinction shall be made between the above legal concept:

"As a matter of principle, it is necessary to make a clear distinction between the concept of standing to sue or be sued (also known as qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), on the one hand, and the notion of capacity to be a party (Parteifähigkeit), on the other. The standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim; it relates to the (active or passive) entitlement to the right claimed and its absence does not entail the inadmissibility of the appeal but rather its dismissal (…). By contrast, the capacity to be a party, understood here in its widest sense, consists in the ability to participate in proceedings as a party (…); it is a condition of admissibility of the claim and its absence constitutes a bar to

hearing of the case. To know whether the claimant or the respondent is a party to the arbitration agreement, in other words, whether it has the capacity to be a party, is thus a question of admissibility which determines the jurisdiction of the arbitral tribunal and which must not, in theory, be confused with the substantive defence derived from the lack of standing to sue or to be sued (…)".

58. The Panel examines first whether the Respondent has the legal capacity to be a party to the present arbitration proceedings before CAS.

59. According to the Swiss Federal Tribunal, the capacity to be a party to an arbitration is not governed by the specific conflict of law rules of the Private International Law Act (PILA), Art. 178 par. 2, but it is determined by the law applicable by operation of the general conflict of laws rules of the PILA governing the legal capacity of individuals and legal entities (Art. 35-36 and 154-155 PILA) (Decision 4P.161/1992 of 22 December 1992 of the Swiss Federal Tribunal of 22, E. 4a, cited by BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2. ed. 2010, section 328). The latter doctrine is in line with the result the Swiss Federal Tribunal's reasoning, but considers that Article 187 PILA is actually applicable to this issue. The Panel considers that if one follows any of this reasoning, the legal capacity of a football club shall be governed by the law of the place of incorporation of that club. In the case at hand, Slovenian law shall be applicable to this issue.

60. The Respondent provided the Panel with convincing evidence that it was still in existence in accordance with the legal requirement of Slovenian law, in particular that it was registered in the Commercial Register. This was further confirmed by the SFA in its letter dated 23 May 2014.

61. The Panel therefore considers that the Respondent has the capacity to be a party to the present proceedings.

62. The question of the Respondent's standing to sue or to be sued will be addressed below, in the section regarding the merits of the case.

IX. APPLICABLE LAW

63. Article 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.

64. According to the evidence available in the present proceedings, the Parties have not chosen any particular regulations or rules of law.

65. The Panel therefore decided that the Regulations of FIFA shall primarily apply to the case at hand and, additionally, Swiss law.

66. The Panel notes that, as the Player was registered with the Appellant on 5 October 2012, the 2010 Edition of the RSTP is applicable to the matter at hand.

X. MERITS

67. The following refers to the substance of the Parties' allegations and arguments without listing them exhaustively. In its discussion of the case and its findings on the merits, the Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to in what immediately follows.

A. Standing to sue or to be sued

68. The standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim, it relates to the (active or passive) entitlement to the right claimed (ATF 128 III 50).

69. The Appellant asserts that, according to Article 22.d RSTP, FIFA has the competence to deal with disputes related to training compensation only between clubs belonging to different associations, and that the Respondent shall not be entitled to claim for training compensation, as it is not registered anymore as a member of the SFA.

70. According to the Respondent, it is still registered *"in the sports association records and, as such, is still the holder of all rights and liabilities"*. In the course of the hearing, the Respondent confirmed that it was still a member of the SFA, and consequently of FIFA, and that therefore it was entitled to claim for training compensation in the case at hand.

71. The Panel considers that the affiliation of the Respondent to the SFA, and therefore to FIFA, is questionable. Indeed, the Panel requested clarification on this matter from the SFA after the hearing. As seen above, the SFA explained, in its letter dated 23 May 2014, that the Respondent was not participating in any official competition organised by the SFA and that it was not registered with any association affiliated to the SFA, which would tend to confirm that it is not affiliated with the SFA and FIFA anymore.

72. However, the Panel considers that the question of the affiliation of the Respondent to the SFA and its standing to sue or to be sued in the present proceedings may remain open in view of the Panel's conclusion regarding the Respondent's claim for training compensation, as detailed below.

B. Is any training compensation owed by the Appellant to the Respondent?

1. Training compensation in the FIFA Regulations concerning the Status and Transfer of Players ("RSTP")

73. Article 2 of Annex 4 RSTP 2010:

> *"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".*

74. There is no dispute between the parties that the Player was registered with both the Appellant and the Respondent as a professional, that the Appellant and the Respondent belong to two different associations, *i.e.* the FFF, respectively the SFA, and that the Player was registered with the Appellant before his 23rd birthday.

75. Therefore, the Panel needs only, at this point, to determine whether there was, or not, a transfer of the Player between the Respondent and the Appellant.

76. According to the DRC in the Appealed Decision:

> *"16. […] the DRC emphasized that the matter at stake does not concern a transfer agreement concluded between two clubs, but concerns an "agreement on settlement" concluded between a club and player which regulates relationship between the player and club. The DRC further emphasized that the relevant "agreement on settlement" contains a contractual clause which is similar to a "buy-out-clause". Thus, according to the player could "buy himself out of the contract" by paying a certain amount in exchange for which the club would renounce to his services for the remaining of the contract.*
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> *17. In this respect, the DRC held that the training costs are not affected by the aforementioned type of transaction. Therefore, the DRC concluded that training compensation was not included in the amount of EUR 50,000 that the Respondent paid to the Claimant in order to release the player and thus, in principle, training compensation is due".*

77. The Respondent agrees with this reasoning, whereas the Appellant contests it, arguing in substance that the Player was a "free agent" when he was hired and that therefore no training compensation is due.

78. According to CAS jurisprudence, *"free agents are players who are free from contractual engagements and for which no transfer fee is paid for their registration by a new club"* (CAS 2009/A/1919).

79. In order to determine whether the Player was a "free agent" at the time he signed his employment contract with the Appellant, one has to analyse the contractual relationship between the Player and the Respondent.

80. The Respondent and the Player concluded the First Employment Agreement valid until 30 June 2013. On 1 February 2011, they concluded the Second Employment Agreement, valid until 30 June 2014.

81. In the course of the 2010/2011 season, the Respondent was facing financial difficulties, which did not allow it to fullfil its financial obligations towards the Player. In order to amicably solve this situation, the Respondent and the Player concluded the Settlement Agreement, on 31 March 2011.

82. The content of the Settlement Agreement is essentially the following (translation from Slovenian to English provided by the Appellant):

I. the parties unanimously find:

- *That on a date in July 2009 they entered into a Contract no. 14-dm/2009, by which the Player committed himself to play football/soccer for NK Nafta Lendava.*
- *That NK Nafta Lendava found itself in such financial difficulties that it was not able to fulfil its commitments, in the amount and in the mode as was provided by the Contract no. 14-dm/2009.*
- *That between the parties a joint interest exists to arrange anew the volume and the mode of payment of the due obligations.*

II. NK Nafta Lendava and the Player hereby by this Agreement unanimously agree that NK Nafta Lendava, for the settlement of the due obligations, pay the Player in a single amount of EUR 2.059,00 and in particular immediately when its transaction account is set free, i.e. by the latest on 30 June, 2011.

Obligations pursuing from the spring part of the 2010/2011 season (Contract 10 dm/2011 for the period until June 2011) in the amount of 6.700,00 EUR NK Nafta shall pay at the latest by 32 Dec. 2011.

Indemnification for the departure of the Player after the end of the season 2010/2011 amounts to 50.000,00 EUR.

III. The parties consent that by signing this Agreement they have finally settled mutual legal relations and have no further claims towards each other.

83. First of all, there is no dispute between the Parties that under Clause II, para. 1 and 2, of the Settlement Agreement, the Respondent and the Player agreed on the payment schedule of the due salaries to the Player until 31 March 2014, as well as the remaining salaries until the end of the 2010/2011 season, *i.e.* until June 2011.

84. Second, the terms of the Settlement Agreement terminated the contract of employment as at the end of the 2011 season.

85. The interpretation of Clause 3 para. 3 of the Settlement Agreement is however disputed by the parties.

2. Is Clause 3 para. 3 of the Settlement Agreement a buy-out-clause?

86. According to CAS jurisprudence, a buy-out-clause included in an employment agreement of a professional football player is a clause *"that determines in advance the amount to be paid by a party in order to terminate prematurely the employment relationship"* (CAS 2007/A/1358). The jurisprudence of the CAS (CAS 2008/A/1519-1520) further states the following on this issue:

"Article 17 para. 1 of the FIFA Regulations sets the principles and the method of calculation of the compensation due by a party because of a breach or a unilateral and premature termination of a contract.

> *66. First, the provision states the principle of the primacy of the contractual obligations concluded by a player and a club: "…unless otherwise provided for in the contract."... The same principle is reiterated in art. 17 para. 2 of the FIFA Regulations.*
>
> *67. This should not come to a surprise for those that are aware of the history of the provision itself and of the rules that are valid in some countries: Indeed, the rationale of allowing the parties to establish in advance in their contract the amount to be paid by either party in the event of unilateral, premature termination without just cause is to recognize that in some countries players and clubs have not only the right but even the obligation to do so (while, one shall note, in some other countries they may be prohibited to do so).*
>
> *68. Whether such clauses are called "buy out-clauses", "indemnity" or "penalty clauses" or otherwise, is irrelevant. To meet the requirements of art. 17 para. 1 FIFA Regulations the parties shall have "provided otherwise", i.e. the parties shall have provided in the contract how compensation for breach or unjustified termination shall be calculated. Legally, such clauses correspond therefore to liquidated damages provisions, at least so far as the real will of the parties to foresee in such clause the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract is established. Indeed, when FIFA and the relevant stakeholders were drafting the provision, it was recognized that such kind of penalties/liquidated damages may be validly agreed between the parties and, in such a case, it should not be up to the FIFA Regulations to deprive such a clause of its legal effect".*

87. In the present matter, it is disputed whether the Respondent and the Player agreed on the meaning and effect of the indemnity clause. The Respondent considers the indemnification clause contained in Clause II par. 3 of the Settlement Agreement to be a so-called buy-out-clause, whereas the Appellant considers it as a *"total flat fee"* to be paid by the Player for his departure at the end of the season 2010/2011.

88. The Panel, after a careful review of said clause and the evidence submitted, comes to the conclusion that this clause cannot be interpreted as a buy-out-clause in the meaning of Article 17 RSTP.

89. The Panel takes into consideration the wording of the clause itself: in no terms the clause is addressing a situation of unilateral termination, but rather the certain departure of the Player at the end of the 2010/2011 season, subject to the payment, at an undetermined time of EUR 50.000,00 by the Player.

90. The Respondent's reference to Clause 13 para. 2 of the Second Employment Contract is of no help to its position, but on the contrary confirms the Panel's interpretation of the Clause II para. 3 of the Settlement Agreement. According to Clause 13 para. 2 of the Second Employment Contract, *"[i]n case of early termination of the contract based on the 1st paragraph of Article 12 of this contract the compensation amount is mutually agreed upon"*. Furthermore, Clause 12 para. 1 of the Second Employment Contract reads as follows:

> *"The club and the player can at any moment come to a consensual agreement regarding the cessation of this contract".*

91. It therefore appears that the Respondent itself refers to two clauses of the Second Employment Contract which deal with consensual or mutual agreement to terminate this contract. Yet, as seen above, buy-out-clauses relate only to the *"breach and/or of a unilateral, premature termination of the employment contract"* (2008/A/1519-1520).

92. The Respondent's position in this regard therefore cannot be followed which is another indication that Clause II para. 3 of the Settlement Agreement is not a buy-out-clause but, on the contrary, a mutual agreement to terminate the Second Employment Contract.

93. This conclusion is further confirmed by the wording of Clause III of the Settlement Agreement, under which the Respondent and the Player agreed that by the conclusion of the latter agreement, they had finally settled all mutual, legal relations and had no further claims towards each other.

3. Conclusion

94. In view of the above, the Panel considers that the contractual relationship between the Respondent and the Player ended in June 2011 and that, therefore, the player was a free agent when he signed his employment contract with the Appellant. Consequently, there was no transfer in the meaning of Article 2 of Annex 4 RSTP 2010 and therefore, no training compensation is payable by the Appellant to the Respondent.

95. The Appeal shall therefore be upheld and the Appealed Decision annulled.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by FC Metz on 6 December 2013 against the decision passed by the FIFA Dispute Resolution Chamber on 25 April 2013 is upheld.

2. The decision issued by the FIFA Dispute Resolution Chamber on 25 April 2013 is set aside.

3. FC Metz is not liable to pay any training compensation to NK Nafta Lendava with regard to the football player V.

(…)

6. All other requests are dismissed.