Arbitration CAS 2010/A/2187 Roberto Calenda v. Sport Lisboa e Benfica Futebol, SAD, award of 12 April 2011

Panel: Prof. Ulrich Haas (Germany), President; Mr José Juan Pintó (Spain); Mr Michele Bernasconi (Switzerland)

Football
Contract between a player's agent and a football club
Difference between a contract and the expression of a party's will
Conclusion of a contract according to Swiss law
Elements used for the legal qualification of a declaration

1. **It is questionable whether a "declaration" qualifies as a contract. In the course of negotiations parties – in practice – quite often exchange a number of documents, letters or declarations. Not every one of these expressions of a party's will, however, can be qualified as a legally binding act or a contract. Instead, there are a number of acts prior to the conclusion of a contract which are different in nature and consequences. Those acts may qualify as pre-contracts, letters of intent, offers to enter into a contract, etc. The legal qualification of the expressions of will depends on the applicable law.**

2. **According to the Swiss Code of Obligations (CO), the conclusion of a contract requires a mutual expression of intent by the parties. Such an expression of intent requires, *inter alia*, that the expressing party is willing to create a binding legal consequence (*"Geschäftswille"*). However, if one party does not intend to bind itself, the corresponding expression of intent does not lead to a contract in the sense of Art. 1(1) CO but only to a non-binding promise.**

3. **A declaration expressly reserving the finalization of a contract to a later stage speaks in favour of construing such declaration as an intention to conclude a contract at a later stage. Additional elements for the legal qualification of a declaration are the heading of the document (e.g. the use of the words "contract" or "declaration") as well as the fact that conditions are not fixed in final terms, but are subject to final negotiations to be concluded later.**

Mr Roberto Calenda ("the Appellant") is a players' agent licensed by the Italian Football Federation (Federazione Italiana Giuoco Calcio, FIGC).

Sport Lisboa e Benfica-Futebol, SAD ("the Respondent") is a professional football club with its registered office in Lisbon, Portugal. It is affiliated to the Portuguese Football Federation (Federação

Portuguesa de Futebol, FPF) which in turn is a member of the Fédération Internationale de Football Association (FIFA).

In July 2004 the Respondent entered into an employment contract with Mr José Veiga. The contract reads according to an uncontested translation – *inter alia* – as follows:

> *"1-The First Party [Respondent][1] hires the Second Party [Mr José Veiga][2] to exercise the duties of Managing Director, committing him the management of his main team of senior football;*
>
> *2-Attentive the profile of the Second Party and to the duties to be perform by this one, both parties recognize that such performance is based in a special trust relationship with the Administration Board of the First Party and his holders.*
>
> …
>
> *In the scope of his activity and always reporting to the main football team of the First Party, the Second Party has the duty of:*
>
> - *Ensure the functional interface with the Technical Team and with other structures of services, directly or indirectly connected with the team;*
> - *Determine and propose the criteria of management for sports resources*
> - *Equate and propose the Policy for hiring Players with the adequate profile to integrate the main football team of the First Party;*
> - *Equate and propose the exemption, transfer and release of players*
> - *Proceed with the planning and scheduling of the activities related to the team;*
> - *Implement, coordinate and orientate every decision of the Administration Board related to the team*
>
> …".

Mr Veiga was at no time member of the board of directors of the Respondent. Currently, he is no longer employed with the Respondent.

Mr Veiga got in contact with the Appellant for the first time in July 2004 and inquired as to the possibility of obtaining the services of the Greek professional football player G. (hereinafter also referred to as "the Player") for the Respondent. The Appellant was and still is the Player's agent. However, no deal could be concluded at the time since the Player was under contract with FC Internazionale Milano.

After several further contacts between Mr Veiga and the Appellant both met once more on 18 August 2005 in Monte Carlo/Italy to talk about a possible transfer of the Player to the Respondent.

A couple of days after this meeting, on 21 August 2005, Mr Veiga sent a fax to the Appellant entitled "Declaração" ("the Declaration"). This declaration was signed by Mr Veiga and written on the

[1] Inserted for better understanding.
[2] Inserted for better understanding.

Respondent's letterhead. The Declaration reads – in an uncontested English translation provided by the Respondent – as follows:

> *"Benfica SAD*
>
> *Declaration*
>
> *The Sport Lisboa e Benfica-futebol, SAD, engages itself to pay to the player's agent of G., Mr Roberto Calenda the amount of EUR 700.000,00 (seven hundred thousand euros).*
>
> *The payment form will be discussed when the player will arrive in Lisbon, Tuesday 22.08.2005 in the afternoon.*
>
> *Lisbon 21 August 2005*
>
> *Signature illegible*
>
> *Stamp of the club [i.e. the Respondent[3]]".*

Together with this Declaration Mr Veiga sent a further letter per fax which is also entitled "Declaração" ("Player Declaration") and which reads in an uncontested translation provided by the Appellant as follows:

> *"Benfica SAD*
>
> *Declaration*
>
> *The Sport Lisboa e Benfica-futebol, SAD, engages itself to pay to the professional football player G., for a contract period of three years, seasons 2005/07, 2006/07 and 2007/08, the amount of EUR 4.500.000,00 (four millions five hundred thousand euros) NET included all kind of taxes.*
>
> *The player will have right to the bonus game equally to all the team.*
>
> *The payment form will be discussed when the player will arrive in Lisbon, Tuesday 22.08.2005 in the afternoon.*
>
> *Lisbon 21 August 2005*
>
> *Signature illegible*
>
> *Stamp of the club [i.e. the Respondent[4]]".*

The parties did not exchange any correspondence between 21 August 2005 and 30 August 2005. On 30 August 2005, the Appellant and the Player flew to Lisbon. On this occasion a contract ("Employment Contract") was signed between the Player and the Respondent in the presence of the Appellant. The Respondent was represented by the two members of the board of directors, Mr Rui Cunha and Mrs Teresa Claudino. The duration of the Employment Contract was for three sporting seasons, i.e. 2005/2006, 2006/2007 and 2007/2008. The remuneration agreed upon in this Employment Contract was EUR 4,749,372.00 net.

On the same day, i.e. on 30 August 2005, the Respondent and Jetcrown Consultants Ltd., the latter represented by the Appellant, entered into an agreement ("the Agreement"). This Agreement reads – *inter alia* – as follows:

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[3] Inserted for better understanding.
[4] Inserted for better understanding.

"Considering That:

1. *Jetcrown, is represented by Roberto Calenda, FIFA player's Agent licensed by F.I.G.C. with the number 79;*
2. *Benfica SAD and the player G., signed today a labour contract for the seasons 2005/2006, 2006/2007 and 2007/2008;*
3. *For the accomplishment of this purpose it was necessary to obtain the resolution of the contract with the previous club, F.C. Internazionale;*
4. *Jetcrown intermediated in such resolution as well as in new conditions concerned with the new contract with Benfica SAD;*
5. *For this services Benfica SAD will pay to Jetcrown, € 1.800.000,00 (one million and eight hundred thousand euros), paid as follows:*

[…]

7. *For all that is not foreseen in this agreement it will be applied the FIFA law regarding the player's transfers, with appeal to T.A.S.*

[…]".

The Agreement bears the signature of the Appellant. On the part of the Respondent the Agreement was signed by two members of the board of directors, i.e. Mr Domingo Soares Oliveira and Mrs Teresa Claudino.

It is uncontested between the parties that the amount mentioned in section 5 of the Agreement (EUR 1,800,000.00) was duly paid by the Respondent to Jetcrown Consultants Ltd.

On 2 August 2007, the Appellant lodged a claim before the FIFA Players' Status Committee claiming from the Respondent the payment of EUR 700,000.00 based upon the Declaration.

On 10 February 2010, the FIFA Players' Status Committee passed a decision rejecting the Appellant's claim ("the Decision"). The Decision justifies its conclusions – *inter alia* – as follows:

"11. …the Committee arrived to the following conclusions: first of all, that on the acknowledgement dated 21 August 2005 [i.e. the Declaration] was clearly expressed that the Agent [i.e. the Appellant] was representing the Player and secondly, on the agreement dated 30 August 2005 [i.e. the Agreement] and based on the art. 12 par. 3 of the Regulations which expressly states that "…only the client engaging the services of the players' agent, and no other party, may remunerate him …", it seems that the Agent was representing the Club.

12. In addition, the Committee deemed appropriate to emphasize the content of art. 14 d) of the Regulations, which states that a licensed player's agent is required to represent only one party when negotiating a transfer.

13. In continuation, the Committee focussed its attention again on the acknowledgement and stated that in accordance with the aforementioned art. 12 par. 3 of the Regulations and the well established jurisprudence of the Players' Status Committee, although the Agent would be representing only the interest of the Player it would not be possible for the Agent to receive any commission from the Club unless the Player after the

conclusion of the relevant transaction would give his written consent for the Club to pay directly to the Agent in his behalf".

By letter dated 3 August 2010, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Decision rendered by the FIFA Players' Status Committee. By letter dated 6 August 2010, the Appellant filed his Appeal Brief with the CAS.

By letter addressed to the CAS Court Office and dated 17 August 2010, FIFA renounced to its right to intervene in these proceedings.

On 4 October 2010, the Respondent filed its Answer.

By fax-letter dated 7 October 2010, the CAS Court Office informed the parties that:

"…in accordance with Article R56 of the Code of Sports-related arbitration (the "Code"), unless the parties agree otherwise 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 requests of 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".*

By letter dated 19 October 2010, the CAS advised the parties of its decision to request a second round of submissions. Furthermore, the parties were invited to address the following specific issues in their submissions:

"i) Whether or not Mr Veiga had authority to enter into a contractual agreement for the Respondent;

ii) The law applicable to the merits of the case, in particular:
- *To the conclusion and the legal prerequisites of the (alleged) promissory note/acknowledgement of dept;*
- *The (alleged) authority of Mr Veiga;*
- *The legal prerequisites for an apparent authority of Mr Veiga;*

iii) The relation between the applicable law and the FIFA regulations".

In light of the above the Appellant filed his second submission on 15 November 2010 ("the Second Brief"). In response to the question raised by the Panel the Appellant also submitted a legal opinion rendered by Professor Antonio Menezes Cordeiro ("the Menezes opinion").

On 30 December 2010, the Respondent filed its second answer ("the Second Answer"). Together with its Second Answer the Respondent provided the CAS with two legal opinions, one from Professor João Calvão da Silva ("the Calvão da Silva opinion") and the other from Professor Carolina Cunha ("the Cunha opinion").

By letter dated 19 January 2011, the CAS Court Office informed the parties that the Panel had decided to hold a hearing on 11 March 2011 in Lausanne/Switzerland. Furthermore, the parties were provided with the information that the Panel had decided to request the parties to produce witness statements of any witnesses, specified in their written submissions, which they intended to rely on.

By letter dated 8 February 2011, the Panel invited the Appellant to provide the CAS Court Office with more detailed information on the company Jetcrown Consultants Ltd.

By letter dated 9 February 2011, the Respondent provided the CAS Court Office and the Panel with the witness statements of its witnesses.

On 18 February 2011, the Appellant filed a certified copy of the certificate of incorporation for the company Jetcrown Consultants Ltd.

On 11 March 2011, the hearing was held in Lausanne/Switzerland ("the Hearing").

In the Hearing, the Appellant submitted a document to the Panel according to which Jetcrown Consultants Ltd. was dissolved on 27 July 2010. With the agreement of the Respondent this document was accepted to the file.

At the end of the Hearing the parties acknowledged that their right to be heard had been duly respected throughout the proceedings. Furthermore, the Panel invited the parties to file their statements on costs with the CAS Court Office until 21 March 2011. By letter dated 23 March 2011, the CAS Court Office provided the parties with copies of both received statements on costs and invited them to file their comments on these documents within 5 days upon receipt. Such comments were filed on 25 March 2011 by the Appellant and on 27 March 2011 by the Respondent. With respect to the Respondent's statement on costs, the Appellant put forth that there was a miscalculation because some of the relevant invoices were considered twice (as original and copy). The Panel takes due note of this submission.

In his Appeal Brief dated 6 August 2010 the Appellant requests the CAS – *inter alia* – to

(1) "set aside the challenged decision of the Players' Status Committee;

(2) order Sport Lisboa e Benfica Futebol, SAD to pay to the Appellant the amount of Euro 700.000,00".

In its Answer dated 4 October 2010 as well as in its Second Answer dated 30 December 2010, the Respondent requests to *"fully reject the present Appeal".*

Further reference is made to the Respondent's Answer, his Second Answer, his submissions in the Hearing as well as to the Calvão da Silva opinion and the Cunha opinion contained in the file.

LAW

CAS Jurisdiction

1. The competence of CAS results from Article R47 of the CAS Code, which stipulates the following:

"An appeal against the decision of a federation, association or other 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 and regulations of the said sports-related body".

2. Article 63(1) of the FIFA Statutes reads:

"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".

3. Decisions of the Players' Status Committee cannot be appealed before any other legal body of FIFA (cf. Art 23(3) of the Regulations on the Status and Transfer of Players – RSTP). Consequently, as all internal legal remedies have been exhausted, this condition laid down in Article R47 of the CAS Code is met. In addition, the Panel notes that the parties have not challenged the competence of CAS at any time and, hence, have accepted the jurisdiction of CAS to deal with the present matter.

Mission of the Panel

4. The mission of the Panel follows, in principle, from Art R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Timeliness of the Appeal

5. The Appellant filed its appeal in time. According to Art R49 of the Code the time limit for filing an appeal with CAS is 21 days, unless the regulations of the sports federation or association concerned provides for another time limit. Art 63(1) of the FIFA Statutes stipulates that the time limit for filing an appeal with CAS is also 21 days. The period begins to run upon receipt of the decision in question. In the present case the decision was served on the Appellant on 20 July 2010. Consequently, the time limit starts to run – applying Art. 32(1) of the Code by analogy – on 21 July 2010 and expires on 10 August 2010. Thus, by filing his Statement of Appeal on 3 August 2010, the Appellant submitted his appeal in time.

Applicable Law

6. Art 187 of the PIL provides - *inter alia* - that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PIL. In particular, the provisions enable the parties to mandate the arbitrators to settle the dispute in application of provisions of law that do not originate in any particular national law, such as sports regulations or the rules of an international federation (cf. KAUFMANN-

KOHLER/RIGOZZI, *Arbitrage international*, 2nd ed. 2010, marg. no. 597, 636 et seq.; POUDRET/BESSON, *Comparative Law of International Arbitration*, 2007, marg. no. 679; RIGOZZI A., *L'arbitrage international en matière de sport*, 2005, marg. no. 1177 seq.).

7. According to the legal doctrine, the choice of law made by the parties can be tacit (*Zürcher Kommentar zum IPRG*/HEINI, 2nd ed. 2004, Art 187 marg. no. 11; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2010, marg. no. 1269; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2nd ed. 2010, marg. no. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI A., *L'arbitrage international en matière de sport*, 2005, marg. no. 1172; KAUFMANN-KOHLER/STUCKI, *International Arbitration in Switzerland*, 2004, p. 118 et seq.). In agreeing to arbitrate the present dispute according to the Code the parties have submitted to the conflict-of-law rules contained therein, in particular to Art R58 of the Code (CAS 2006/A/1061, marg. no. 28 et seq.; CAS 2006/A/1141, marg. no. 61; CAS 2007/A/1267, marg. no. 41).

8. 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 issued the challenged decision is domiciled or according to the rules of law the application of which the Panel deems appropriate.

9. In the present case, the "applicable regulations" are the FIFA regulations, in particular the Players' Agents Regulations and the FIFA Statutes. However, the FIFA regulations can only be relevant within their scope of application. For those aspects of the dispute at hand that do not fall under the scope of application of the FIFA regulations therefore, the rules of law chosen by the parties need to be applied. Only in the absence of such a choice, i.e. subsidiarily, Swiss law (as the law of the country in which the federation, association or sports-related body which issued the challenged decision is domiciled) applies to the present dispute. This follows from the wording of the above mentioned Art R58 of the Code.

On the Merits

10. The Appellant's request would be well founded if the challenged Decision was wrong. This would be the case if on the basis of the Declaration the Appellant was legally entitled to receive the claimed amount of EUR 700,000. Such a claim requires – *inter alia* – that:

    1. *there is a contract providing for the payment EUR 700,000;*
    2. *this contract binds the parties, in particular that Mr Veiga had authority to act on behalf of the Respondent, and*
    3. *that the contract is valid, i.e. that the parties have neither amended nor terminated the contract and that the contract does not violate mandatory rules.*

11. Whether the Declaration qualifies as a contract is questionable. In the course of negotiations parties – in practice – quite often exchange a number of documents, letters or declarations. Not every one of these expressions of a party's will, however, can be qualified as a legally binding

act or a contract. Instead, there are a number of acts prior to the conclusion of a contract which are different in nature and consequences. Those acts may qualify as pre-contracts, letters of intent, offers to enter into a contract, etc.

12. The answer to the question how to legally qualify the expressions of will by Mr Veiga and the Appellant in the case at hand depends – in the first instance – upon the applicable law. The Panel is of the view that this question does not fall within the scope of application of the FIFA regulations and that the parties have not chosen a particular law applicable to this question. Therefore, in principle, Swiss law applies to thereto. Whether in the case at hand there are any other rules of law the application of which are more appropriate then Swiss law, can be left unanswered here, since all the laws that are connected with the present case (e.g. Italian or Portuguese law) apply the same criteria when qualifying the legal acts by the parties.

13. Art 1(1) of the Swiss Code of Obligations (CO) reads:

"The conclusion of a contract requires a mutual expression of intent by the parties".

14. Such an expression of intent requires, *inter alia*, that the expressing party is willing to create a binding legal consequence ("Geschäftswille", see KRAMER E., *Berner Kommentar,* Art 1 marg. no. 4; GAUCH/SCHLUEP/SCHMID, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, no. 171 et seq.). However, if one party does not intend to bind itself, the corresponding expression of intent does not lead to a contract in the sense of Art 1(1) CO but only to a non-binding promise (see BGE 116 II 695, cons. 2.a).

15. In the present case, the Appellant bases his claim on the Declaration. Taking into consideration the factual circumstances of the origin of this document, the Panel is not convinced that Mr Veiga intended to enter into a contract with the Appellant. According to the Appellant's own statements in the Hearing he asked Mr Veiga at the meeting on 18 August 2005 in Monte Carlo/Italy to send him in the days to come a "proposal/offer" concerning the transfer of the Player. This "proposal/offer" was – according to the Appellant's statement – needed to convince the Player to make the transfer and make him come to Lisbon to finalize the contract. Since the Player was not present during the negotiations the Appellant wanted "something in writing" he could show the Player and rely upon. The purpose of the Declaration was, hence, to evidence the seriousness of the negotiations being conducted between Mr Veiga and the Appellant concerning the transfer. It follows from this that the parties were aware that the faxes which Mr Veiga sent to the Appellant were not the final documents. Instead, it was the will of all parties concerned to have the contracts and the negotiations finalized in Lisbon. All of this speaks rather in favour of construing the Declaration as an act aimed at the future conclusion of the contract than as a final and binding contract itself. This interpretation by the Panel is also evidenced by the Appellant's behaviour following the reception of the faxes. Neither he nor the Player "accepted" the letters nor signed them or contacted the Respondent or Mr Veiga.

16. Moreover, the wording of the Declaration supports the Panel's view. The Declaration expressly reserves the finalization of the contract to a later stage (*"the payment form will be discussed when the player will arrive in Lisbon …"*). This speaks in favour of construing the Declaration as an intention to conclude a contract at a later stage. This interpretation is further evidenced by the wording used in the heading of the document. The latter does not use the terms "contract", but uses the

word "declaration" instead. In doing so the document supports the view that the terms and conditions in the document are not fixed in final terms, but are subject to final negotiations to be concluded in Lisbon. Finally, it should be noted that the Declaration does not look like a typical contract. It neither shows a signature of the Appellant nor is the document designed to be signed by the Appellant.

17. To sum up, therefore, it is the Panel's view that, on the basis of all evidence submitted, the Declaration cannot be qualified and interpreted as a binding contract. Just for the sake of completeness the Panel notes that – even if the Declaration were to be qualified as a contract – the latter would be superseded by the Agreement entered into in Lisbon between the Respondent and Jetcrown Consultants Ltd. It is unclear whether and to what extent the Appellant and Jetcrown Consultants Ltd. are economically identical. Surprisingly enough, the Appellant – being questioned upon this by the Panel – was not able to identify the entities and persons that ultimately own Jetcrown Consultants Ltd. However, this question can be left unanswered here. It is undisputed that the Appellant was involved in the negotiations and finalization of both "contracts". In particular, the Appellant was one of the directors of Jetcrown Consultants Ltd. and conducted the negotiations in relation to the transfer of the Player on behalf of the company with the Respondent in Lisbon. He also signed the Agreement on behalf of Jetcrown Consultants Ltd. Furthermore, the subject of both "contracts" is identical. The Agreement provides that the remuneration is due to Jetcrown Consultants Ltd. because the latter "intermediated" in the resolution of the contract between the Player and FC Internazionale Milano and because it conducted the negotiations in relation to the terms and conditions of the (new) contract between the Player and the Respondent. Hence, in the Panel's view the services provided under the Declaration and under the Agreement were identical. However, not only the object of both "contracts" is identical. Instead, the services mentioned in both "contracts" (for which remuneration is sought) were – according to the Appellant's own statement in the Hearing – provided by the same person, i.e. by himself. Would the Agreement not supersede the Declaration, the Appellant would – according to his line of reasoning - be entitled to ask for a (considerable) remuneration for the same services twice (once on behalf of Jetcrown Consultants Ltd. and once on behalf of himself). This does not make a great deal of economic sense. Lastly, that the Agreement must supersede the Declaration is also evidenced when looking at the relationship between the Employment Contract and the Player Declaration. Interestingly enough, the terms and conditions of the Employment Contract differ from the Player Declaration. However, it is obvious that the parties never intended that the Player should be entitled to receive two remunerations (one according to the Player Declaration and one according to the Employment Contract) for the same kind of services provided to the same club for the identical sporting seasons (i.e. 2005/2006, 2006/2007 and 2007/2008). If, however, it is crystal clear that the Employment Contract replaced the Player Declaration (always under the condition that the latter is qualified as a binding contract), the same must apply also for the "contracts" related to the agent fees, since the latter, in principle, are ancillary to a player contract.

18. It follows from all of the above, that the Appellant has no right to claim EUR 700,000 and that, therefore, the Decision issued by the FIFA Players' Status Committee is correct and must be upheld. Thus, there is no further need to examine the other arguments, i.e. whether Mr Veiga

had authority to enter into a contract on behalf of the Respondent and whether or not the contents of the Declaration violates mandatory rules.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Roberto Calenda on 3 August 2010 against the decision issued by the FIFA Players' Status Committee on 10 February 2010 is dismissed.

2. (…).

3. (…).

4. All other further claims are dismissed.