Arbitration CAS 2009/A/1773 Borussia Vfl 1900 Mönchengladbach v. Club de Fútbol América S.A. de C.V. (Asociación Atlética Argentinos Juniors/Argentina) & CAS 2009/A/1774 Borussia Vfl 1900 Mönchengladbach v. Club de Fútbol América S.A. de C.V. (Club Atlético Independiente/Argentina), award of 3 November 2009

Panel: Mr Lars Hilliger (Denmark), President; Mr Goetz Eilers (Germany); Mr Fernando Cabrera (Mexico)

Football
Solidarity contribution
Validity of "internal arrangements" between the clubs involved in a transfer
Financial burden of the solidarity contribution
Interpretation of the transfer agreement

1. **There are no provisions in the FIFA Regulations or in the Swiss legislation suggesting that an "internal arrangement" between the clubs involved in a transfer is prohibited, as long as the new club remains responsible *vis a vis* the clubs that trained the player.**

2. **The FIFA Regulations do not leave the issue of internal relationship between new and former club entirely in the hands of the clubs involved in a transfer. The new club "retains and distributes" an amount which is "deducted" from the transfer sum owed to the former club. Thus, the FIFA Regulations clearly indicate that, although payment of solidarity contribution is effected by the new club, the financial burden in fact lies with the former club, which is in principle deprived from the 5% of its right on the agreed transfer amount.**

3. **According to the principle *"in dubio contra stipulatorem"*, the party who drafted the transfer agreement is responsible for the choice of its wording and shall, therefore, bear the consequences of any unresolved ambiguity.**

Borussia Vfl 1900 Mönchengladbach GmbH ("Borussia" or "the Appellant") is a football club with its registered office in Mönchengladbach, Germany and is a member of the German Football League (Die Liga-Fußballverband e.V.). The latter is affiliated to the German Football Federation (Deutscher Fußball-Bund) which in turn is a member of FIFA. FIFA is the world governing body for the sport of football and is registered in Zurich, Switzerland.

Club de Fútbol América S.A. de C.V. ("América" or "the Respondent") is a football club with its registered office in Mexico City, Mexico. It is affiliated to the Mexican Football Federation, which in turn is a member of FIFA.

F. ("the Player") is an Argentinean football player born in 1980. Between the ages of 11 and 23 the Player was registered as follows:

a) from 14 March 1991 to 6 February 2002 with the Argentinean club Asociación Atlética Argentinos Juniors ("Argentinos");

b) from 7 February 2002 to 12 August 2003 with the Argentinean club Club Atlético Independiente ("Independiente").

Following negotiations which took place in the Appellant's offices in June 2007, the Appellant and the Respondent signed a Contract of Transfer regarding the Player's transfer from Borussia to América ("the Transfer Agreement"). The Appellant was represented in the negotiations and the signing of the Transfer Agreement by its CEO, Mr. Stephan Schippers ("Mr. Schippers") and by its – then – technical director, Mr. Christian Ziege ("Mr. Ziege"). The Respondent was represented by its vice-president, Mr. Yon de Luisa Plazas ("Mr. de Luisa") and by Mr. José Antonio Lara del Olmo.

The relevant parts of the Transfer Agreement read as follows:

"§1

2. Borussia undertakes to consent to the transfer of the player F. to the club CF America, starting on June 21st, 2007 and to issue all declarations that are necessary in this connection.[…]

§3

CF America will pay for the transfer of the football professional F. to Borussia the amount of

US-$ 4.600.000,00
(US-Dollar: four million six hundred thousand)

The complete amount is payable immediately by wire transfer after receipt of invoice to the account […]

After reception of the complete amount of US-$ Mio. 4,6 Borussia will release the player in favour of CF America. […]

§5

2. In order to be valid, any changes or supplements to this contract must be made in writing. This shall also apply for the revocation of this written form requirement.

3. Verbal collateral agreements shall not exist".

By e-mail dated 10 July 2007 Mr. de Luisa wrote to Messrs. Schippers and Ziege:

> *"Dear Christian and Stephan,*
>
> *A couple days ago I receive[d] this fax from Argentina, in which Argentinos Juniors Club is asking for their share of FIFA's solidarity mechanism f[ro]m F., total[l]ing US$207,000. […]*
>
> *Please let me know if you want:*
>
> *a) Club America sends the complete US$4,600,000 to Borussia, and Borussia pays Argentinos Juniors*
>
> *b) Club America discounts the US$207,000 from the transfer to Borussia.*
>
> *I look forward to receive your response […]".*

By e-mail dated 11 July 2007 Ms. Annette Wolter, secretary at the Appellant's office ("Ms. Wolter"), replied to the above correspondence as follows:

> *"Dear Mr. de Luisa,*
>
> *Please pay the complete amount.*
>
> *Thanks and best regards*
>
> *Annette Wolter".*

On 17 July 2007 the Respondent paid the amount of USD 4,600,000 to the Appellant.

On 25 July 2007 Argentinos and Independiente filed two separate claims against América before the FIFA Dispute Resolution Chamber ("the FIFA DRC") requesting payment of the solidarity contribution for the periods the Player was registered with them.

On 6 February 2008 FIFA informed all clubs concerned, including Borussia who had now joined the cases, about the jurisprudence of the FIFA DRC in similar cases, in accordance with which

> *"… the player's new club, in casu América, is ordered to remit the relevant proportion(s) of the 5% solidarity contribution to the club(s) involved in the player's training, in casu Argentinos and Independiente, in strict application of the relevant provisions of the Regulations for the Status and Transfer of Players. At the same time, the player's former club, in casu Borussia, is ordered to reimburse the same proportions(s) of the 5% of the compensation that it received from the player's new club. FIFA informed the parties that the said jurisprudence is based on the 2001 edition of the said Regulations but that the 2005 edition of the Regulations did not change as to the substance of the relevant aspect".*

On 3 July 2008 the FIFA DRC passed two decisions ("the Decisions") which were notified to the parties.

The operative part of the Decisions reads as follows:

(in the matter Argentinos v. América)

"1. The claim of Asociación Atlética Argentinos Juniors is partially accepted.

2. Club América has to pay the amount of USD 197,417, as well as 5 % interest per year on the said amount as from 30 August 2007 until the date of the effective payment, to Asociación Atlética Argentinos Juniors within 30 days as from the date of notification of this decision.

[…]

6. Borussia VfL 1900 Mönchengladbach has to reimburse the amount of USD 197,417 to Club América within 30 days as from the date of notification of the present decision".

(in the matter Independiente v. América)

"1. The claim of Club Atlético Independiente is partially accepted.

2. Club América has to pay the amount of USD 32,583 to Club Atlético Independiente within 30 days as from the date of notification of this decision.

[…]

6. Borussia VfL 1900 Mönchengladbach has to reimburse the amount of USD 32,583 to Club América within 30 days as from the date of notification of the present decision".

On 5 December 2008 the Respondent paid the amounts stipulated in the Decisions to Independiente and Argentinos respectively.

By facsimile dated 8 January 2009 FIFA served the Decisions with almost identical reasons on the parties.

In the Decisions, the FIFA DRC considered *inter alia* the following:

"7. After examining § 3 of the transfer agreement signed between América and Borussia, the Chamber considered that the said provision of the contract does, notwithstanding the argumentation put forward by Borussia, not lead to the conclusion that the parties agreed that América should pay the full transfer amount and, in addition, also the relevant proportion(s) of the 5 % solidarity contribution to the club(s) which trained the player. Rather, the Chamber deemed it appropriate to point out that the content of the said clause is in contradiction to art. 21 and Annex 5 of the Regulations, this is, the relevant article of the Regulations cannot be set aside by means of a contract concluded between the clubs involved in a player's transfer. In other words, the said article of the Regulations is mandatory and its implementation shall not be affected by clubs involved in a player's transfer agreeing upon other terms.

8. On account of the above, the Chamber then referred to its well-established jurisprudence applied in similar cases, in accordance with which the player's new club is ordered to remit the relevant proportions(s) of the 5 % solidarity contribution to the club(s) involved in the player's training in strict application of art. 21 and Annex 5 of the Regulations. At the same time, the player's former club is ordered to reimburse the same proportions(s) of the 5 % of the compensation that it received from the player's new club".

By letters dated 22 January 2009 and received by CAS on 26 January 2009 the Appellant filed its Statements of Appeal with CAS against the Decisions.

By letters dated 29 January 2009 the Appellant filed its Appeal Briefs and required from CAS the following:

(in the matter CAS 2009/A/1773 – Asociación Atlética Argentinos Juniors)

I. The before-mentioned decision is lifted insofar as it ordered the Appellant to reimburse an amount of USD 197.417.- to the Respondent (No. III.6 of the DRC Decision).

II. The Respondent shall bear all costs before the CAS as well as the fees of the Appellant's counsel in the CAS procedure.

III. The pending procedure is connected to one procedure together with the appeal procedure (filed today as well) between the parties related to reimbursement of solidarity contribution to the original Claimant Club Atletico Independiente/Argentina amounting to USD 32.583,-.

(in the matter CAS 2009/A/1774 – Club Atlético Independiente)

I. The before-mentioned decision is lifted insofar as it ordered the Appellant to reimburse an amount of USD 32.583 to the Respondent (No. III.6 of the DRC Decision).

II. The Respondent shall bear all costs before the CAS as well as the fees of the Appellant's counsel in the CAS procedure.

III. The pending procedure is connected to one procedure together with the appeal procedure (filed today as well) between the parties related to reimbursement of solidarity contribution to the original Claimant Associacion Atletica Argentinos Juniors/Argentina amounting to USD 197.417,-.

The Appellant's submissions in essence, are summarized as follows:

- Clause 3 of the Transfer Agreement provides (twice) that the *complete* amount is payable and only after reception of the complete amount the Appellant shall be obliged to issue the International Transfer Certificate ("ITC") in favour of the Respondent. The Respondent agreed twice to pay the complete amount, which is nothing else than the agreed amount without any deductions, expressed in different words. Whereas "complete" means "full" in a positive wording, "without any deductions" means just the same from a negative perspective. It makes no difference, if one has to pay the complete (i.e. full) amount or is prevented from any deductions. In both cases it is obvious for the party that is liable to pay, that 100% of the agreed amount has to be paid to the recipient.
- The Appellant and the Respondent in this case exercised their right to include in the Transfer Agreement terms which are different than the provisions of Article 21 and Annex 5 of the FIFA Regulations for the Status and Transfer of Players. Such terms are proper, as long as the rights of the clubs which trained the player are not affected. This opinion has been accepted in the past by CAS in a case where the parties had agreed on the payment of a transfer fee "without any deduction", including solidarity contribution (CAS 2006/A/1018).
- Further, during the negotiations the Appellant always stressed out that the transfer amount must be paid net, i.e. without any deductions or – as finally laid down in writing – "complete". For

that reason, the issuance of the ITC was also explicitly subject to the payment of the complete transfer sum.

- If one accepts that the parties could not insert a clause by which Respondent waived its right to deduct solidarity contribution, the logical consequence would be that Appellant would have to insist on a transfer fee that amounts to the sum they wanted to receive net (i.e. USD 4,6 million) *plus* a surcharge of 5% for solidarity contribution. In such case, the transfer sum should have been raised to about USD 4,83 million. In other words, the economical result of provisions in the transfer contract which require *complete* payment could have been achieved by such a construction as well.
- The Appellant had good reasons to be released from any deductions or reimbursements for solidarity contribution: when the Appellant acquired the federative rights of the Player only one year earlier, in June 2006, the transfer sum paid to his former club (Boca Juniors, Argentina) was explicitly declared to be net, i.e. without any deductions. Consequently, the Appellant satisfied the claims of former clubs of the player without withholding a portion of the transfer sum or claiming reimbursement from Boca Juniors. Therefore, the Appellant was not – and could not – be ready to pay solidarity contribution for the same player twice within just one year.

By letter dated 4 February 2009 the CAS Court Office confirmed that, in view of the parties' agreement, the arbitration procedures 2009/A/1773 and 2009/A/1774 were consolidated.

By letters dated 19 February 2009 América filed its Answers and submitted the following requests to the CAS:

(in the matter CAS 2009/A/1773 – Asociación Atlética Argentinos Juniors)

"The Respondent considers that this Court should confirm the decision of the Chamber, and order the Appellant to reimburse the amount of US$ 197,417.00, to the Respondent, and interest at a rate of 5 % per year will apply as of expiry of the time fixed by the Chamber, as well as all the expenses and legal fees related to this Appeal".

(in the matter CAS 2009/A/1774 – Club Atlético Independiente)

"The Respondent hereby request[s] this Court [to] confirm the decision of the Chamber, and order the Appellant to reimburse the amount of US$ 32,583.00, to the Respondent, and interest at a rate of 5 % per year will apply as of expiry of the time fixed by the Chamber, as well as all the expenses and legal fees related to this procedure".

The Respondent's submissions in essence, are summarized as follows:

- The intention of the parties to the Transfer Agreement was not to agree in terms which are contrary to Article 21 and Annex 5 of the FIFA Regulations for the Status and Transfer of Players. As pointed out by the FIFA DRC, said provisions are mandatory and their implementation shall not be affected by clubs involved in a player's transfer agreeing upon other

terms. Therefore, the parties were not entitled to set aside Article 21 by means of the Transfer Agreement.

- Clause 3 of the Transfer Agreement states that: *"The complete amount is payable immediately by wire transfer after receipt of the invoice to the account …"*; this clause was meant to establish Respondent's obligation to pay the amount in only *one* complete payment and not in instalments, as the parties had agreed during the negotiations.
- The issue of solidarity contribution was neither mentioned during the negotiations nor in the Transfer Agreement. The Respondent had understood that solidarity contribution was an obligation of the Appellant and this is the reason why Mr. de Luisa consulted via e-mail with Mr. Schippers and Mr. Ziege about the payment of the solidarity contribution to Argentinos. Mr. de Luisa offered two options to the Appellant and the latter opted for the first: América should pay the entire transfer sum to Borussia and Borussia would pay the solidarity contribution directly to Argentinos.
- It is obvious from the Appellant's reply to the e-mail of 10 July 2007 that no agreement on solidarity contribution had been reached between the parties. If the Appellant was expecting Respondent to pay the solidarity contribution, it would have pointed out in its reply that Borussia has no obligation to pay the solidarity contribution based on their negotiations and Transfer Agreement.

A hearing was held in Lausanne on 3 September 2009 (the "Hearing"). At the outset of the Hearing the parties agreed that the *amounts* of the solidarity contribution as calculated by the FIFA DRC in the Decisions were not in dispute. At the end of the Hearing, the parties, after making submissions in support of their respective requests for relief, confirmed that they had no objections to raise regarding their right to be heard and have been treated equally and fairly in the arbitration proceedings.

LAW

Jurisdiction

1. Article R47 of the Code of Sports-related Arbitration (the "CAS Code") states:

   "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".

2. Article 61 para.1 of the FIFA Statutes provides the following:

"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. The jurisdiction of CAS is not disputed in the present case. For the sake of completeness, though, the Panel notes that the very last provision of the Transfer Agreement reads as follows:

"The exclusive place of jurisdiction and place of performance for both contracting parties shall be Mönchengladbach/Germany".

4. The Panel takes note of the fact that the parties did not in any way challenge the jurisdiction of the FIFA DRC or of the CAS at any stage of the proceedings before said bodies. On the contrary, the jurisdiction of the CAS has been explicitly recognised by the parties in their briefs and in the Order of Procedure they have signed.

5. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable law

6. Article R58 of the CAS Code provides the following:

"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. In the latter case, the Panel shall give reasons for its decision".

7. Article 60 para.2 of the FIFA Statutes provides 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".

8. It remained undisputed between the parties that the 2005 edition of FIFA's Regulations for the Status and Transfer of Players (the "FIFA Regulations") shall govern this dispute.

9. Further, the Panel does not find any evidence that the parties have agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the parties refer exclusively to the FIFA Regulations. As a result, subject to the primacy of applicable FIFA Regulations, Swiss Law shall apply complementarily.

Admissibility

10. The Appeals were filed on 26 January 2009, in accordance with the 21-day time limit stipulated in Art. 61 para.1 of the FIFA Statutes and stated in the Decisions of the FIFA DRC. Both appeals complied with all other requirements of article R48 of the CAS Code.

11. It follows that the appeals are admissible.

Merits

12. The main issues to be decided by the Panel are:

    a) Whether and to what extent clubs involved in a transfer of a professional football player may agree on who will bear the final financial obligation for the payment of solidarity contribution (paras. 13 – 17 below);

    b) Whether the parties *in casu* reached an agreement with respect to solidarity contribution and, if yes, what was the content of such agreement (paras. 18 – 28 below).

13. Article 21 of the FIFA Regulations provides:

    "If a Professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club (solidarity contribution). The provisions concerning solidarity contributions are set out in annex 5 of these Regulations".

    Article 1 of Annex 5 to the FIFA Regulations reads:

    "If a Professional moves during the course of a contract, 5% of any compensation, with the exception of Training Compensation, paid to his Former Club shall be deducted from the total amount of this compensation and distributed by the New Club as a solidarity contribution to the club(s) involved in his training and education over the years" [emphasis added by the Panel].

    The Commentary on the FIFA Regulations for the Status and Transfer of Players ("Commentary"), when dealing with the interpretation of Article 1 of Annex 5 of the FIFA Regulations, states on p. 128:

    "If a professional player transfers during the validity of his employment contract [i.e. the player and the club mutually agree to terminate the employment contract before its expiry date] and the new club pays the former club compensation for allowing the player to transfer to the new club, the new club shall retain and distribute 5% of this transfer compensation to all clubs where this player played between the ages of 12 and 23" [emphasis added by the Panel].

14. The Panel notes that, as stated in the Decisions, FIFA DRC's consistent jurisprudence on the issue of solidarity contribution *"is based on the 2001 edition of the said Regulations but the 2005 edition of the Regulations did not change as to the substance of the relevant aspect"*. In that respect, the Panel refers

to the award issued in the matter CAS 2006/A/1018 and especially to the following consideration:

"Although it appears logical and common ground that the acquiring club should in general withhold such 5% from the amount paid to the previous club, the FIFA Regulations do not prevent the clubs to agree otherwise, such as in the present circumstances, and to provide that the transfer fee shall be paid without any deduction. […] The Panel considers that by so doing, the parties did not commit any unlawful circumvention of FIFA Regulations".

15. Further, upon interpreting the 2005 FIFA Regulations in a matter very similar to the present case (CAS 2008/A/1544), the CAS Panel noted the following three underlying principles:

    (a) It is the new club that has the obligation to pay the solidarity contribution to the club(s) entitled to it;

    (b) Towards third parties, i.e. the clubs entitled to the solidarity contribution, the obligation to pay the contribution remains with the new club, even if there are internal arrangements between the new club and the transferring club;

    (c) The transferring club and the new club are free to agree on a shift of the final, financial burden of the solidarity contribution and, in particular, to agree on a rule regarding any reimbursement due or not due.

16. The Panel sees no reason to depart from the above-mentioned CAS jurisprudence. Indeed, there are no provisions in the FIFA Regulations or in the Swiss legislation, nor have any been pointed out by the parties, suggesting that an "internal arrangement" between the clubs involved in a transfer is prohibited, as long as the new club remains responsible *vis a vis* the clubs that trained the player. In addition, the parties in the present case do not disagree with respect to points (a) and (b) above. It remained undisputed both before the FIFA DRC and before CAS that América was, towards Argentinos and Independiente, the club carrying the obligation to pay the solidarity contribution, and it did so promptly after receiving notification of the Decisions. Instead, what lies at the core of the present dispute is whether the Appellant and the Respondent reached a certain "internal arrangement" and, if so, what is the content of such agreement.

17. In that respect, the Panel wishes to clarify that the FIFA Regulations do not leave the issue of internal relationship between new and former club entirely in the hands of the clubs involved in a transfer. It is clear from the wording of Article 21 that the new club "retains and distributes" an amount which is "deducted" from the transfer sum owed to the former club. Thus, the FIFA Regulations clearly indicate that, although payment of solidarity contribution is effected by the new club, the financial burden in fact lies with the former club, which is in principle deprived from the 5% of its right on the agreed transfer amount. The legal relationship between new and former club created by Article 21 of the FIFA Regulations becomes even more evident through the "reimbursement mechanism" which has evolved in the FIFA DRC jurisprudence and been accepted by CAS: in case the new club pays the entire (i.e. without deducting 5%) transfer sum to the former club and is ordered by FIFA to pay the solidarity contribution to the clubs that trained the player, it is entitled to claim back the 5% of the transfer fee from the former club.

18. It follows that, as regards the internal relationship between new and former club and in the absence of any agreement to the contrary, Article 21 of the FIFA Regulations imposes the financial burden of solidarity contribution on the former club. Therefore, Borussia being the former club of the Player, it bears the procedural *onus* of proving that an agreement shifting the said burden to América was concluded in the present case. It is only under this construction that the Appellant could validly argue that the amount of USD 4,600,000 was agreed to be paid net of any charges related to solidarity contribution and that the Appellant is not to reimburse the Respondent for the solidarity contribution paid by the latter.

19. The Panel moves now to the evaluation of the evidence presented before it with respect to the Transfer Agreement and the negotiations of the parties on the issue of solidarity contribution.

20. As stated above, the parties are in dispute about the meaning of the word "complete":

"The complete amount is payable immediately by wire transfer after receipt of invoice to the account […]

After reception of the complete amount of US-$ Mio. 4,6 Borussia will release the player in favour of CF America. […]"

[emphasis added by the Panel].

On their face, the above terms appear to have no connection whatsoever with the issue of solidarity contribution. Also, the context does not provide any indications that the amount agreed could be *in concreto* understood as "without any deductions", as the Appellant suggests. On the other hand, the argument brought forward by the Respondent also fails, in that the word "complete" cannot be interpreted as "in one instalment" in the absence of any supporting context in the Transfer Agreement. As a result, the Panel is unable to reach a conclusion by merely examining the wording of the Transfer Agreement.

21. Furthermore, the Panel underlines that it is necessary to construe the Transfer Agreement not only on the basis of its wording but also in view of the *real intention* of the parties. Article 18 of the Swiss Code of Obligations reads in its relevant part:

"When interpreting the form and the contents of a contract, the mutually agreed real intention of the parties must be considered and not incorrect terms or expressions used by the parties by mistake or in order to conceal the true nature of the contract […]".

22. It is undisputed that all negotiations took place in the Appellant's offices during two days in June 2007; no correspondence between the parties *before* the signing of the Transfer Agreement has been produced or even indirectly invoked. Moreover, at the Hearing the Panel heard evidence from three of the four persons that negotiated and signed the Transfer Agreement:

(a) Mr. Schippers testified that the issue of solidarity contribution was discussed and, in particular, it was agreed that the Respondent would settle the matter with the Argentinean clubs that trained the Player. His perception of the word "complete" was that there would be no deductions to this amount and that Borussia should receive and keep for itself USD

4,6 million. Otherwise, he would have included in the Transfer Agreement, which Borussia drafted, a clause providing for "4,6 million plus 5%". Mr. Schippers also argued that he was on vacation when Mr. de Luisa's e-mail was received by the Appellant.

(b) Mr. Ziege had limited recollection of the negotiations and was not sure whether the issue of solidarity contribution was ever raised. However, he was able to name the exact amount of the transfer compensation and that the Appellant's intention was to receive a "full" amount, so that it would not have anything "to look after" once the transfer was completed.

(c) Mr. de Luisa was confident in his testimony that the Respondent never negotiated the solidarity contribution with the Appellant; this explains why he asked Borussia to clarify matters on 10 July 2007, only a few weeks after signing the Transfer Agreement. The addition of the word "complete" should be attributed to discussions on the payment schedule. When asked by the Panel why the Respondent did not deduct 5% of the transfer sum before transferring it to the Appellant, Mr. de Luisa responded that he followed the instructions of Borussia in their e-mail of 11 July 2007 and that he was convinced the Appellant would pay the solidarity contribution directly to the Argentinean clubs.

23. The Panel found all the witnesses to be straightforward and honest in their replies. Under the circumstances of this case and without questioning the integrity of the witnesses, it has been almost an impossible task for the Panel to determine through the above testimonies whether and to what extent solidarity contribution was discussed during negotiations which took place more than two years ago and were not in any fashion documented.

24. Apparently, the only written communication between the parties at the time of the transfer was an e-mail exchange between Mr. de Luisa and Ms. Wolter on 10/11 July 2007. Ms. Wolter testified that she replied to Mr. de Luisa's queries on behalf of Borussia because both Mr. Schippers and Mr. Ziege were out of office and that she knew the text of the Transfer Agreement because she had typed it earlier that summer, following the instructions of Mr. Schippers. She testified that in her laconic reply *"Please pay the complete amount",* she used the term "complete amount" as a quote from the Transfer Agreement and had no intention to accept neither Mr. de Luisa's (a) or (b) suggestions. Mr. de Luisa on the other hand testified that he understood Ms. Wolter's reply to be an acceptance of option (a), i.e. that *"Club America [would] send the complete US$4,600,000 to Borussia, and Borussia [would] pay Argentinos Juniors"*. Without entering into the issue of whether Ms. Wotler was authorised to bind the Appellant with her reply or if her reply was dictated or approved by Mr. Schippers, the Panel finds that Ms. Wolter did not accept any of Mr. de Luisa's options but only asked for payment of the amount in accordance with the terms of the Transfer Agreement. Therefore, the use of the word "complete" once more in the communication of the parties does not provide any guidance as to their real intention while it falls far from being understood as a modification to the Transfer Agreement. In addition, the mere fact that this correspondence took place *after* the signing of the Transfer Agreement and still left the parties with opposite views on the issue of solidarity contribution is a strong indication that the wills of the parties never met on this particular matter during the negotiations.

25. In light of the foregoing analysis, the inconclusive evidence brought forward by the parties and considering that both sides acted *bona fide* in the conclusion and execution of the Transfer Agreement, the Panel finds that there has been no agreement between the parties with respect to solidarity contribution.

26. In reaching such conclusion, the Panel also sought recourse to the well developed –in Swiss law and CAS jurisprudence (CAS 2001/A/317, CAS 2004/A/593, CAS 2004/A/776) – principle of *"contra stipulatorem"*. In the matter CAS 2005/A/871 the Panel stated:

"By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith ('Treu und Glauben': Wiegand, Obligationenrecht I, Basel 2003, n. 35 ad art. 18 CO), based on its wording, the context and the concrete circumstances in which it was expressed (ATF 124 III 165, 168, consid. 3a; 119 II 449, 451, consid. 3a). Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract (ATF 124III 155, 158, consid. 1b): It is of the responsibility of the author of the contract to choose its formulation with adequate precision (In dubio contra stipulatorem – Winiger, Commentaire Romand – CO I, Basel 2003, n. 50 ad 18 CO). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law (ATF 126 III 388, 391, consid. 9d), under which the accrued protection of the weakest party" [emphasis added by the Panel].

27. In the present case, the party who drafted the Transfer Agreement, i.e. the Appellant, is the same party who carries the burden of proving the existence of an agreement to shift the final internal financial obligation for the solidarity contribution from the Appellant to the Respondent. The Panel feels comforted to interpret such uncertainty in the wording against the Appellant having also in mind that Borussia had, admittedly, agreed only one year earlier to undertake the solidarity contribution obligation for the same Player when acquiring his rights from Boca Juniors and was therefore expected to deal with this issue more efficiently, in its dealings with América. While América should also be concerned on how to deduct and distribute the solidarity contribution, Borussia was solely responsible for the choice of words in the Transfer Agreement and shall, therefore, bear the consequences of the unresolved ambiguity surrounding the word "complete". The Panel is satisfied from Mr. Schippers' frank admission that, since the present dispute arose, Borussia is carefully drafting its transfer agreements in order to be "more clear" on this point.

28. Consequently, the Panel concludes that the parties did *not* agree to shift the final financial burden for solidarity contribution to the Respondent and thus the Appellant must reimburse the amounts decided by the FIFA DRC to the Respondent.

The Court of Arbitration for Sport rules:

1. The appeals filed on 26 January 2009 by Borussia Vfl 1900 Mönchengladbach GmbH against the decisions issued on 3 July 2008 by the Dispute Resolution Chamber of FIFA are dismissed.

2. The decisions issued on 3 July 2008 by the Dispute Resolution Chamber of FIFA are confirmed.

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

(…).