



**Arbitration CAS 2006/A/1018 C.A. River Plate v. Hamburger S.V., award of 10 November 2006**

Panel: Mr Jean-Philippe Rochat (Switzerland), President; Mr José Juan Pintó (Spain); Mr Ulrich Haas (Germany)

*Football*

*Solidarity contribution*

*FIFA circulars*

*Obligation to bear the 5% contribution*

1. Although the FIFA circulars are not to be considered as regulations in a strict legal sense, they reflect the understanding of the FIFA and the general practice of the federations and associations belonging thereto. Thus, they are relevant for the interpretation of the FIFA Regulations.
2. The circulars relating to Chapter IX of the FIFA Regulations 2001 do not contain any interpretation of the provisions on the solidarity mechanism. No conclusion may be drawn from the content of such circulars that the 5% solidarity contribution should in any case be technically borne by the old club and that the duty of the new club would only be to collect this amount and to apportion it amongst the previous clubs.
3. According to the CAS jurisprudence, the obligation to apportion the solidarity contribution amongst the former training clubs is on the new club. The FIFA Regulations provide that it is for the new club to calculate and to pay a solidarity contribution to the former clubs. The *ratio legis* of this system is that it is easier for the receiving club to determine the former clubs of the Player. The player being at the disposal of the receiving club, he can assist his new employer in this task. As it is for the receiving club to calculate and to distribute the solidarity contribution, the system provides that an amount of 5 % which in most cases corresponds to the amount of the solidarity contributions distributed, can be retained by the receiving club.
4. When it has not retained part of the transfer sum in order to pay the solidarity contribution, the receiving club has a claim against the transferring club for repayment of the amounts paid in application of the solidarity mechanism.
5. A transfer agreement that insists on the fact that the party receiving the transfer fee shall get an amount "without any deduction" complies with the FIFA Regulations; art. 25 of the FIFA Regulations only provides that a proportion of 5% of any transfer compensation is to be distributed. 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

**and to provide that the transfer fee shall be paid without any deduction. The correct construction of such agreement is that the party paying the transfer fee committed itself to bear and to pay all possible deductions, including the 5% solidarity compensation, which is to be calculated on the transfer fee.**

L. (“the Player”) is a football player born in 1978. He was registered for the Argentinean club Defensores de Belgrano for two sporting seasons from 1990 to 1992 and then for the Argentinean club Argentinos Juniors for seven seasons from 1992 to 1999. The Player joined the Argentinean club C.A. River Plate (“the Appellant”) on 9 August 1999 and played for the Appellant’s 1<sup>st</sup> team until the age of 23.

On 8 July 2002, the Appellant and the German club Hamburger S.V. (“the Respondent”) signed a transfer agreement drafted in German by the Respondent’s representatives. This agreement was then translated into Spanish by the Appellant, and the second version was signed by the parties on 9 July 2002 for the purpose of the registration of the Player’s transfer at the Argentinean Football Association.

According to article 3 of the transfer agreement, the parties agreed on a transfer fee for the Player of 3.5 million USD without any deduction (“*ohne jeglichen Abzug*”, “*sin deducción de importe alguno*”). The article 10 of the transfer agreement provided that the agreement was to be governed by German law, any litigation being subject to FIFA’s procedural rules. Moreover the article 11 expressly provided that the German version of the agreement would prevail. The clauses related to the applicable law and the applicable language of the agreement were not translated or replaced in the Spanish version of the agreement.

On 25 July 2002, the Spanish version of the transfer agreement was registered at the Argentinean Football Federation and the Player was then transferred to the Respondent which officially registered the player for the season 2002/03.

The football clubs Defensores de Belgrano and Argentinos juniors – both former training clubs of the player – were only informed later of the transfer and of the existence of a fee ascending to 3.5 million USD paid by the Respondent to the Appellant. They consequently claimed their respective proportions of the amount of 5% of the transfer sum corresponding to the solidarity contribution provided under Art. 25 of the FIFA Regulations for the Status and Transfer of Players (edition September 2001; the “FIFA Regulations 2001”). A claim was lodged before the Dispute Resolution Chamber of FIFA. It requested that the Respondent be ordered a total amount of USD 140,000 to the claimants. On 29 March 2004, the Dispute Resolution Chamber rendered a decision ordering to pay USD 140’000 to the Claimants. The decision was then duly executed by the Respondent and the amount was paid to the Argentinean training clubs.

During the procedure before the Dispute Resolution Chamber, the Respondent had warned the Appellant that he would claim back any amount the Dispute Resolution Chamber might order him to pay to the training clubs. By letter dated 21 April 2004 and 9 June 2004, the Respondent claimed against the Appellant the reimbursement of the amounts paid to the two Argentinean clubs.

As no amicable solution could be reached, the Respondent filed a claim with the Dispute Resolution Chamber and requested that the Appellant be ordered to reimburse the amount of USD 175,000, corresponding to a percentage of 5% of the transfer fee paid by the Respondent to the Appellant.

On 21 November 2005, the Single Judge of the Players' Status Committee (the "Single Judge") passed a decision (the "Decision") which was notified to the parties.

In this Decision, the Single Judge first considered that, as the dispute was submitted to FIFA before 1 July 2005, then, pursuant to Art. 26 para. 1 of the revised Regulations for the Status and Transfer of Players (edition 2005; "the FIFA Regulations 2005"), the former Regulations, the FIFA Regulations 2001, were applicable. He further considered that he had jurisdiction to rule on this matter in accordance with Art. 42 para. 1 lit. b of the FIFA Regulations 2001.

The Single Judge then stated the following, in the relevant parts of his Decision:

*"7. [...] The Single Judge analysed the Argentinean club River Plate's statement, whereby (...) the transfer amount agreed upon, USD 3,500,000, is to be considered net, and the extra 5% has to be fully borne by Hamburger Sport Verein.*

*8. In this regard, the Single judge was eager to point out that such an interpretation is not in accordance with the ratio itself of the rules governing the solidarity mechanism, whereby the solidarity payment should be actually distributed by the new club, but borne by the old club, by way of deduction.*

*9. The Single Judge further refuted the Argentinean club's position by referring to the well-established jurisprudence of the Dispute Resolution Chamber, according to which, the player's new club is ordered to remit the 5% solidarity contribution to the club(s) involved in the player's training in strict application of art. 11 of the Regulations governing the Application of the Regulations for the Status and Transfer of Players (edition 2001). Moreover, and in applying the said jurisprudence, the Respondent, in turn, will have the right to claim the reimbursement of the 5% from the player's former club".*

For the above-mentioned reasons, the Single Judge decided the following:

*"1. The claim of the German club Hamburger Sport Verein is partially accepted.*

*2. The Respondent, River Plate, must pay to Hamburger Sport Verein the amount of USD 140,000.*

*[...]*

*7. According to art. 60 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 10 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, [...]"*

FIFA served the Decision on the Appellant on 10 January 2006.

On 18 January 2006, the Appellant filed a statement of appeal with the Court of Arbitration for Sport ("CAS") to challenge the Decision.

## LAW

### CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Art. 59 ff. of the FIFA Statutes 2004 and Art. R47 of the Code of Sport-related arbitration (the “Code”). It is further confirmed by the order of procedure duly signed by the parties.
2. Consequently, CAS has jurisdiction to decide the present dispute.
3. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial de novo, evaluating all facts, including new facts, which had not been mentioned by the parties before the Dispute Resolution Chamber of the FIFA, and all legal issues involved in the dispute.

### Applicable law

4. Art. R58 of the Code provides that *“the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate”*.
5. Art. 59 para. 2 of the FIFA Statutes, in their version in force as of 1 December 2005, further provides that CAS shall primarily apply the various Regulations of FIFA, and, additionally, Swiss law.
6. In the present matter, the parties have agreed that the FIFA Regulations 2001 and the FIFA Application Regulations 2001 are applicable. Those regulations shall thus apply primarily together with the other applicable rules and regulations of FIFA.
7. As for issues related to the transfer agreement, the Panel has considered that the German version of the transfer agreement prevails, according to the clear wording of its article 11. The Panel considers that the purpose of the Spanish version of the transfer agreement was only to provide the Appellant with a translation of the transfer agreement, in particular for the registration with the Argentinean Football Association of the Player’s transfer. According to the same article 11, German law thus applies to issues relating to the transfer agreement which are not covered by FIFA Regulations.

### Admissibility

8. The appeal was filed within the deadline provided by Art. 60 of the FIFA Statutes and indicated in the Decision, namely within 21 days after notification of the decision. It complies with the requirements of Art. R48 of the Code.
9. It follows that the appeal is admissible, which is also undisputed.

### Main Issues

10. The main questions the CAS has to decide are the following :
  - a) Whether Art. 25 of the FIFA Regulations 2001 and Art. 11 of the FIFA Application Regulations 2001 provide for a deduction from the transfer fee or not.
  - b) Depending on the answer to question a), what are the consequences thereof and in particular determine whether the Appellant have eventually to bear the 5% solidarity contribution.
11. As mentioned above, this case is governed primarily by the FIFA regulations. For the implementation of the FIFA regulations, the FIFA has issued a number of circular letters. Although these circular letters are not to be considered as regulations in a strict legal sense, they reflect the understanding of the FIFA and the general practice of the federations and associations belonging thereto. Thus, the Panel considers these circular letters are relevant also for the interpretation of the FIFA Regulations.
  - A. *Do Art. 25 of the FIFA Regulations 2001 and Art. 11 of the FIFA Application Regulations 2001 provide for a deduction from the transfer fee or not ?*
12. Art. 25 of the FIFA Regulations 2001 provides as follows:

*“If a non-amateur player moves during the course of a contract, a proportion (5%) of any compensation paid to the previous club will be distributed to the club(s) involved in the training and education of the player. This distribution will be made in proportion to the number of years the player has been registered with the relevant clubs between the ages of 12 and 23”.*
13. Art. 11 of the FIFA Application Regulations 2001 further provides as follows:
  - “ 1. The new club shall pay the amount due as a solidarity contribution to the training clubs pursuant to the above provisions at the latest within 30 days of the player’s registration.*
  - 2. It is the responsibility of the new club to calculate the amount of the solidarity contribution and the way in which it shall be distributed in accordance with the player’s career history. The player shall, if necessary, assist the new club in discharging this obligation”.*

14. After having carefully studied those articles both in the English version and in the French version, the Panel is of the opinion that the literal interpretation of those articles could not lead to any final conclusion regarding the question of the deductibility of the 5% contribution.
15. The Panel then examined the Circular 826 issued by FIFA on 21 October 2002, which Counsel for the Appellant has relied upon. The Panel did not find any hint on the way to interpret Art. 25 of the FIFA Regulations 2001 as this circular expressly refers to the training compensation covered by Chapter VII of the FIFA Regulations 2001 and not to the solidarity mechanism covered by Chapter IX of the FIFA Regulations 2001. The Panel then looked at Circular 801 dated 28 March 2002 which provides as follows regarding the interpretation of the solidarity mechanism:

*“If the payment of an additional compensation for the transfer of a player, to be paid to his former club, is made subject to certain conditions, e.g. the player being fielded by his club for a minimum amount of matches during a season, the 5% solidarity contribution will also be applied to any such amount. Any amount due as value added tax may, however, be deducted from the amount that is the basis for the calculation of the solidarity contribution”.*
16. Eventually, the Panel considered Circular 769 dated 24 August 2001 which provides as follows in the relevant parts:

*“If a non-amateur engages in an international transfer during the term of his contract, his previous club may receive financial compensation, either because the player’s departure constitutes a breach of contract or in the context of an agreement between the left club, the new club and the player concerned. In those circumstances, and regardless of the age of the (non-amateur) player, the new club concerned is to distribute 5% of this compensatory amount to all the clubs where this player has played between the age of 12 and 23. This distribution of monies is meant as a solidarity contribution to the clubs involved in the training and education of the player.(..). Payment of the solidarity contribution must be effected within 30 days from registration of the player by the new club. It is the responsibility of the new club to calculate the amount of the contribution and to effect the necessary payments”.*
17. Based on the foregoing the Panel has considered that the circulars relating to Chapter IX of the FIFA Regulations 2001 do not contain any interpretation of the provisions on the solidarity mechanism. No conclusion may be drawn from the content of such circulars that the 5% solidarity contribution should in any case be technically borne by the old club – the Appellant – and that the duty of the new club – the Respondent – would only be to collect this amount and to apportion it amongst the previous clubs.
18. According to the CAS jurisprudence (CAS 2006/A/1026 & 1030), the obligation to apportion the solidarity contribution amongst the former training clubs is on the new club. The latter benefits from the increase of the value of the Player, deriving from the training and education provided by all former training clubs, including possibly the transferring club. The solidarity mechanism is meant to redistribute the value of the training given to the player. Such system may be compared, to some extent, to the levy of a tax. The FIFA Regulations provide that it is for the new club to calculate and to pay a solidarity contribution to the former clubs. The ratio legis of this system is that it is easier for the receiving club to determine the former clubs of the Player. The player being at the disposal of the receiving club, he can assist his new

employer in this task (see Art. 11 par. 2 of the FIFA Application Regulations). As it is for the receiving club to calculate and to distribute the solidarity contribution, the system provides that an amount of 5 % which in most cases corresponds to the amount of the solidarity contributions distributed, can be retained by the receiving club.

19. This interpretation of the FIFA solidarity mechanism appears to be consistent with the wording both of the FIFA Regulations 2001 and of the new FIFA Regulations 2005. As a result, in the Panel's opinion the solidarity mechanism, as mentioned by the Single Judge in the Decision, was based from the beginning on the principle that the 5% contribution was to be deducted from the transfer fee to be paid to the former club by the new club. The Panel sees no reason to challenge the Decision or not to apply the CAS jurisprudence on this specific question.

B. *Does the Appellant have eventually to bear the 5% contribution?*

20. As mentioned above, the procedure set out by FIFA in its Application Regulations 2001 provides that it is the new club's duty to calculate and distribute the amount due to the training club(s) on the basis of the solidarity mechanism.
21. When the transfer agreement was signed on 8 July 2002, the FIFA Regulations 2001 and the FIFA Application Regulations 2001 were already in force. Circular 769 had also been issued by FIFA. The solidarity mechanism had thus to be taken into consideration by the parties in general and by the Respondent in particular, which was in charge, according to Art. 11 of the FIFA Application Regulations 2001 to calculate and distribute the amount due to the training club(s).
22. However, in the abovementioned CAS precedent (CAS 2006/A/1026 & 1030), the Panel eventually considered that, when it has not retained part of the transfer sum in order to pay the solidarity contribution, the receiving club has a claim against the transferring club for repayment of the amounts paid in application of the solidarity mechanism.
23. Nevertheless, in the present case, the prevailing version of the transfer agreement drafted in German and signed on 8 July 2002 expressly provides, under its article 3, for a transfer fee for the Player of 3.5 million USD without any deduction ("*ohne jeglichen (réd.) Abzug*"). This article, drafted in the Respondent's working language, expresses clearly that the Appellant intended to receive a net amount of 3.5 million USD without any deduction.
24. The Respondent contended at the hearing that such wording contemplated usual deductions like taxes, banking costs, etc. The Respondent added that the solidarity mechanism does not provide for a "deduction" but for a "distribution" and that therefore, the amount was due by the Appellant and could be claimed back by the Respondent on the basis of the principle of "unjustified enrichment".

25. As mentioned above, the Panel first considers that FIFA Regulations 2001 and the FIFA Application Regulations 2001 provide for a mechanism which clearly required from the Respondent to deduct from the transfer fee the amount due to the training club(s). The Panel has also given due consideration to the CAS jurisprudence, according to which, if the new club fails to retain the 5% solidarity contribution from the transfer amount, it is still entitled to claim it back.
26. In the present circumstances, the Panel is of the view that the Respondent had to know that it was its duty to retain and to pay the amount of 5% corresponding to the amount of solidarity. In order to avoid the risk of being obliged to pay an additional amount above the 3.5 million USD, it was clearly its responsibility to make sure that this issue be discussed, negotiated and ruled by the transfer agreement.
27. Instead of clarifying this point, the Respondent has clearly agreed on the wording of article 3 which excludes any deduction from the amount of 3.5 million USD. In that context, the Panel accepts the Appellant's submission that this article was drafted as a "*clause of defence*" in order to ensure the payment of 3.5 million USD net on its bank account. As a result, the burden of any deduction applicable to such amount, including the compensation of solidarity, was shifted from the Appellant to the Respondent.
28. The Panel adds that the scope of this clause cannot be limited to tax and bank costs as the German word "*jeglichen*" literally covers all possible deductions. According to the principle "*pacta sunt servanda*", the Panel thus considers that the interpretation of article 3 of the transfer agreement leads to the conclusion that the parties agreed on a net amount of 3.5 million USD to be paid to the Appellant. The Respondent had thus to bear all the costs, including those deriving from the solidarity mechanism.
29. Finally, the Respondent raised a further issue regarding an alleged unlawful circumvention of FIFA Regulations. In that respect, the Panel considers that the way the Appellant required article 3 of the transfer agreement to be drafted and the way the payment eventually occurred indeed comply with Art. 25 of the FIFA Regulations and Art. 11 of the FIFA Application Regulations 2001. The contract does not prevent the Respondent from paying the 5% contribution but only insists on the fact that the Appellant shall get an amount of 3.5 million USD "*without any deduction*". Art. 25 of the FIFA Regulations provides only that a proportion of 5% of any transfer compensation is to be distributed. 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. In the view of the Panel, the correct construction of such agreement is that the Respondent committed itself to bear and to pay all possible deductions, including the 5% solidarity compensation, which is to be calculated on the amount of 3.5 million USD. The Panel considers that, by so doing, the parties did not commit any unlawful circumvention of FIFA Regulations.



30. To sum up, in view of the foregoing, the Panel considers that the Respondent has in this case to bear the amount of 5% on 3.5 million USD corresponding to the solidarity contribution.
31. It follows that the appeal is upheld and the Decision of the Single Judge is annulled.

**The Court of Arbitration for Sport rules that:**

1. The appeal filed on 18 January 2006 by C.A. River Plate against the decision issued on 21 November 2005 by the FIFA Single Judge of the FIFA Players' Status Committee is upheld.
  2. The challenged decision is annulled.
- (...)