4A_600/2016[1]

Judgment of June 29, 2017

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett
Federal Judge Hohl (Mrs.)
Federal Judge Niquille and
Federal Judge May Canellas
Clerk of the Court: Mr. Carruzzo

Michel Platini,
Represented by Mr. Vincent Solari
Appellant,

v.

Fédération Internationale de Football Associations (FIFA),
Represented by Messrs. Antonio Rigozzi, Sébastien Besson and Fabrice Robert-Tissot,
Respondent

Facts:

A.

A.a. Michel Platini is a former professional football player, captain and coach of the French National Football Team.

The Fédération Internationale de Football Associations (FIFA), an association under Swiss law, is the governing body of football at international level. With 209 national federations, it has a disciplinary power over these associations, over the players or the officials who disregard its rules, in particular through its Code of Ethics (hereafter: CEF).

Joseph S. Blatter, then Secretary General of FIFA, was elected president of the association on June 8, 1998. Re-elected several times, he served until 2015.

[1] Translator's Note: Quote as Michel Platini *v*. FIFA, 4A_600/2016.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

A.b. During the first half of 1998, Michel Platini, at the time co-chairman of the organizing committee for the World Cup in France that took place from June 10 to July 12, 1998, worked with the election campaign of Joseph S. Blatter. Since the second half of the same year, he worked for FIFA as an advisor to the newly elected president. This contractual relationship was formalized in a written agreement signed on August 25, 1999, by Michel Platini, then domiciled in Saint-Cloud (France), and Joseph S. Blatter, on behalf of FIFA. The confidential agreement, which entered into force retroactively on January 1, 1999, for a four-year term, set the amount of annual compensation of the FIFA advisor to the President at CHF 300'000, in return for his assistance and advice to the Association and its President on all matters relating to football at global level.

Michel Platini engaged in this activity and received the specified remuneration until June 2002. At that time, he stopped his activity after being elected to the Executive Committee of the European Football Association (UEFA) on April 25, 2002. He has represented this association on the FIFA Executive Committee since that date. In 2007, he was elected to the presidency of UEFA, then re-elected to this position in 2011, and again on March 24, 2015. He has also been Vice-President of FIFA.

A.c. A pension plan was put in place for members of the FIFA Executive Committee in 2005. Accordingly, when leaving the Executive Committee after having served for 8 years or more, members receive an amount calculated on the basis of their last remuneration (Remuneration x number of years in the Committee x 3%), which is paid to them only during the fiscal year following the date of their departure from the Executive Committee.

In 2007, Michel Platini requested an extension for the years during which he was an advisor to the President of FIFA (1998-2002) be taken into account in calculating his pension rights.

This extension was granted by Joseph S. Blatter. In an email dated April 15, 2009, and a letter dated October 30, 2009, Michel Platini was informed of the theoretical amount to which he was entitled at that time (USD 36'000) and his attention was drawn to the fact that his retirement allowance would only be paid to him upon leaving his role on the FIFA Executive Committee.

A.d. On January 17, 2011, Michel Platini sent Markus Kattner, Finance Director and Deputy Secretary-General of FIFA at the time, an invoice for CHF 2'000'000 for the "wages 1998/99, 1999/0, 2000/1, 2001/2". It read as follows:

> Mr. Kattner,
>
> Please pay me the salary for these four years, payment of which had been deferred by mutual agreement:
>
> 1998-1999 CHF 500'000
> 1999-2000 CHF 500'000

2000-2001 CHF 500'000
2001-2002 CHF 500'000

Which makes a total of CHF 2'000'000 net (out of which FIFA covers the payment of the AVS and all other social benefits, including those payable by the employee), as a final settlement.

The next day, Markus Kattner asked Joseph S. Blatter if this bill was correct and if it had to be paid. The President of FIFA replied in the affirmative and signed the invoice, noting the date of January 18, 2011, under his initials.

FIFA, through its financial department, paid the sum of CHF 2'000'000 to the bank account of Michel Platini on February 1, 2011. In his tax return for 2011, the latter indicated that he had received a salary of CHF 2'000'000.

This payment was included in the 2010 FIFA Accounts under the *Special Projects* category. The then-chairman of the FIFA Finance Committee, Julio Grondona, signed (but did not indicate the date) a spreadsheet containing the total remuneration received by the members of the FIFA Executive Committee in 2010. In the line concerning Michel Platini, this spreadsheet mentioned an amount of CHF 2'657'071 without specifying the nature of the payment. The difference between this amount and that of CHF 2'000'000 was probably due to the fact that FIFA had paid both the employer and employee shares of the Swiss social security taxes on this amount.

On March 2, 2011, Michel Platini attended a regular meeting of the FIFA Finance Committee in Zurich, replacing the usual representative, Marius Lefkaritis, the UEFA Treasurer, who could not participate for medical reasons. At that meeting, the Finance Committee also approved the accounts for 2010 without examining the details.

A.e. The 2011 FIFA presidential elections were scheduled for May 31 and June 1, 2011. In addition to Joseph S. Blatter, Mohamed Bin Hammam was running as a candidate.

On March 22, 2011, at a UEFA congress, Joseph S. Blatter addressed the delegates and asked for their support in these elections, explaining that this would be his last term.

In a letter dated May 6, 2011, the members of the UEFA Executive Committee, including Michel Platini, expressed their unanimous support to the FIFA President for the upcoming elections and recommended the national federations to do the same.

On May 29, 2011, Mohamed Bin Hammam withdrew his candidacy, leaving the field open to Joseph S. Blatter who was accordingly re-elected as President at the FIFA Congress on May 31 and June 1, 2011.

A.f**.** On June 2, 2015, Joseph S. Blatter, freshly re-elected for a new term as President of FIFA, announced that he was resigning.

On October 7, 2015, the French Football Federation presented the candidacy of Michel Platini. However, FIFA indicated that it would not accept the application at that time, as the candidate had been provisionally suspended from all football-related activities in the context of the internal proceedings referred to below.

On January 8, 2016, Michel Platini, whose candidacy had not been accepted by the Election Committee due to the ongoing proceedings, announced that he had no choice but to withdraw his candidacy for the FIFA presidency.

A.g. On September 25, 2015, the Public Prosecutor of the Swiss Confederation (MPC) opened criminal proceedings against Joseph S. Blatter for suspicion of mismanagement and, in the alternative, breach of trust in connection with the payment of CHF 2'000'000 to Michel Platini in 2011. The latter was heard on the same day as a person called upon to give information. Since that hearing, Michel Platini has not been heard in criminal proceedings, which are currently pending.

B.
B.a. After a preliminary investigation, the Investigatory Chamber of the FIFA Ethics Committee opened disciplinary proceedings against Michel Platini on September 28, 2015, pursuant to Art. 63(1) CEF (unless otherwise indicated, reference is made to the 2012 version of this code). The same step was taken against Joseph S. Blatter.

By a decision without grounds issued on October 7, 2015, the FIFA Ethics Committee (hereinafter "the Adjudicatory Chamber") provisionally suspended Michel Platini from all activities related to football for a period of 90 days. As of December 11, 2015, the Court of Arbitration for Sport (hereinafter, "CAS") confirmed the interim suspension, but ordered FIFA not to extend it beyond the initial 90 days.

Upon termination of the investigation, the Adjudicatory Chamber issued its decision on December 18, 2015. Finding that Michel Platini had violated Articles 13, 15, 19, and 20 CEF, the Adjudicatory Chamber prohibited him from engaging in any activity related to football at a national and international level for a period of 8 years from October 8, 2015, and additionally imposed a fine of CHF 80'000.

B.b. By a decision of February 15, 2016, communicated to the parties with reasons on the 24th of the same month, the FIFA Appeals Committee (hereinafter "the Appeals Committee"), to which both parties brought their appeal, confirmed the decision of the Adjudicatory Chamber on the infringements of the CEF by Michel Platini. However, it reduced the duration of the imposed ban on football-related activities from 8 years to 6 years, while confirming the amount of the fine.

C.
C.a. On February 26, 2016, Michel Platini appealed to the CAS requesting the annulment of the aforementioned decision. The arbitration procedure was conducted in French by a panel of three arbitrators (hereinafter "the Panel") that held a hearing at the CAS headquarters in Lausanne on April 29, 2016, in the

presence of the Appellant, his counsel, as well as the FIFA counsel. At the outset of the hearing, the Panel resolved a number of preliminary issues. In particular, it admitted the handwritten amendment made by one of the Appellant's counsel, in which he had replaced the reference in the Procedural Order of April 26, 2016, to the Federal Act on Private International Law of December 18, 1987, (PILA, RS 291) by a reference to the Code of Civil Procedure of December 19, 2008, (CPC, RS 272). On May 9, 2016, the Panel notified the parties of the dispositive part of its award, which read as follows:

> The Court of Arbitration for Sport, ruling in the presence of both parties (*inter partes*)*:*
>
> 1. Partially admits the appeal filed on 26 February 2016 by Michel Platini against the decision of 15 February 2016 issued by the Appeal Committee of the International Federation of Football Associations.
> 2. Amends the decision of 15 February 2016 issued by the Appeal Committee of the International Federation of Football Association as follows:
>   i. Michel Platini is found guilty of violating Art. 19 and 20 of the Code of Ethics of the International Federation of Football Association,
>   ii. The prohibition on Michel Platini to take part in any activity (administrative, sporting or other) related to football at a national and international level for six (6) years is reduced to four (4) years, from 8 October 2015,
>   iii. The fine of CHF 80'000 imposed on Michel Platini is reduced to CHF 60'000.
> 3. This arbitration award is free of charge, subject to the CAS Court Office fee of CHF 1'000, paid by Michel Platini, which remains with the Court of Arbitration for Sport;
> 4. Holds that each party shall bear its own legal costs, along with all costs incurred for these proceedings;
> 5. Rejects all other or further motions.

C.b. The reasons for this final award were communicated to the parties on September 16, 2016. They can be summarized as follows:

C.b.a. It is undisputed that the CAS is competent on the basis of Article R47 of the Code of Sports-related Arbitration (hereinafter "the Code"), Articles 66(1) and 67(1) of the FIFA Statutes (version 2015) (hereinafter "the Statutes") and Article 81 CEF, as the appeal is directed against a final decision of the FIFA Appeals Committee against an official. The appeal is, moreover, formally admissible.

As the seat of the arbitration is in Switzerland and both parties are domiciled or have their seat in Switzerland, Chapter 12 of the PILA[2] is not applicable under Article 176(1) of that Act. The arbitral proceedings are thus governed by Articles 353 ff. of the [Swiss] CPC well as the provisions of the Code.[3]

With respect to the substantive law, the Panel, having regard to Article R58 of the Code and Article 66(2) of the Statutes, shall first and foremost apply the internal regulations of FIFA, in particular the CEF; on a subsidiary basis, it shall refer to Swiss law.

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[2] Translator's Note: PILA is the English abbreviation of the Federal Statute of December 18, 1987, on private international law, RS 291.

[3] Translator's Note: CPC is the French abbreviation of the Federal Statute of December 19, 2008, regulating civil procedure, RS 272.

The applicability, as such, of the CEF to the facts alleged against Michel Platini is not disputed. The application *ratione temporis* of this regulation is governed by Art. 3 CEF, which implies an approach corresponding to the traditional principle of *lex mitior*. In view of this principle and from the examination of the subsequent versions of the CEF, it appears that the application of the 2012 edition of these rules does not lead to sanction Michel Platini for offenses not provided for in the previous versions of the CEF nor does it impose more severe penalties than those laid down in previous editions.

C.b.b. With regard to the burden of proof, Michel Platini argued that since Joseph S. Blatter and he had always asserted that the payment in 2011 was a performance of a contract, it was FIFA's responsibility to prove otherwise, that is, to prove the non-existence of the disputed oral agreement, which it failed to do.

According to art. 52 CEF, the burden of proof for a breach of the provisions of this Code rests with the Ethics Commission. In other words, the burden of establishing the violation of the CEF was with FIFA in this case.

Art. 8 CC,[4] under which each party must prove the facts it alleges in order to derive its right therefrom unless the law provides otherwise, is interpreted by the doctrine in that the burden of proving the facts giving rise to the right lies with plaintiff, while it is incumbent on the defendant to prove the facts that annul that right. In the present case, the fact that gives rise to the right is the existence of the written agreement of August 25, 1999, and the lack, *a priori*, of a ground for a remuneration higher than that the one provided for in the said agreement. The fact annulling that right is the existence of the oral agreement, which would serve as a basis for the higher remuneration according to Michel Platini. Given that FIFA denies that it had entered into such an agreement, Michel Platini had to prove its existence. There is therefore no reversal of the burden of proof in this case: FIFA must prove that Michel Platini violated the CEF, because the payment he received was unfounded, while Michel Platini has to prove that such a basis existed.

As to the standard of proof, it is indeed the one provided for in Art. 51 CEF, "*personal conviction*." This means that the Panel must be firmly convinced of the non-existence of the oral agreement in order to confirm a violation of the CEF and vice versa.

C.b.c. According to Art. R57 of the Code, the CAS has the full power of review of facts and the law. This power allows it to hear the parties again on all the factual circumstances and on the legal arguments they wish to raise. Thus, the procedure before the CAS cures all procedural violations that might have been committed by the previous instances. It is therefore not necessary for the Panel to rule on the existence of procedural violations alleged by the Appellant.

[4] Translator's Note: CC is the French abbreviation for Code Civil, the Federal Statute of 10 December 1907 on the civil law, RS 210.

C.b.d. According to the Appeals Committee, Michel Platini was not entitled to the CHF 2'000'000, received in 2011. The payment of this amount constituted an undue advantage within the meaning of Art. 20 CEF.

The Appellant replied that this payment made by FIFA was in fulfillment of a contractual obligation from the agreement he had made orally with Joseph S. Blatter in 1998, under which he would receive an annual remuneration of CHF 1'000'000 in exchange for his services as a sports or technical advisor to Joseph S. Blatter if the latter was elected as a president of FIFA.

The Panel carefully studied the evidence before it. It had not found any evidence establishing the existence of the alleged oral agreement. First, there was no direct and contemporaneous evidence for the conclusion of the said agreement, the only contemporaneous evidence being the written agreement of August 25, 1999, which provided for an annual remuneration of just CHF 300'000, and no similarity of subject matter with the alleged oral agreement. Furthermore, the indirect evidence relied upon by the Appellant, consisting of testimony and documents, could not convince the arbitrators. Neither could the fact that FIFA paid the sum of CHF 2'000'000 in 2011, because the conduct of a party in the execution of a contract could not be used to interpret a non-existent contract.

Moreover, FIFA's intent could not have been expressed by Joseph S. Blatter, even if it is accepted that the parties agreed that the latter had concluded the oral agreement, because Art. 55 CC cannot be applied in a case where Mr. Blatter – at that time only FIFA General Secretary – exceeded his powers of representation of FIFA and Michel Platini both acted in bad faith. Moreover, the fact that oral contracts (mandates or contracts of employment) are possible under Swiss law does not alter the lack of evidence relating to the disputed oral agreement. Had this agreement existed, there is nothing to substantiate that it continued after the signature of the written contract, as vague statements of the two parties concerned are not sufficient to prove the postponement of the alleged remuneration.

The Appellant's allegations are not credible also on other grounds: for example, it is unlikely that an experienced leader in football would fail to see the importance of codifying such an important agreement in written form. Similarly, one wonders why he did not claim what he was owed in 2007, while the financial situation of FIFA, which was certainly difficult in 2002, had become sound and stable again. As for the amount of the invoice claimed by him more than 8 years after the conclusion of his activity as a FIFA advisor, it is surprising that the Appellant only requested the payment of CHF 2'000'000, whereas, according to his own allegations, the part of his allegedly unpaid salary amounted to CHF 2'800'000 (CHF 700'000 [CHF 1'000'000 – CHF 300'000] x 4 years). Furthermore, the Panel does not have sufficient evidence that the payment of the CHF 2'000'000 was specifically approved by the FIFA supervisory bodies and it is impossible, given the circumstances, to consider the undated signature of Julio Grondona, then President of the FIFA Finance Committee, at the bottom of a spreadsheet mentioning this payment, as a ratification by this Association. On the other hand, the mere fact that the offense of bribery was dismissed by the domestic authorities of FIFA does not make it possible to hold that the reason for the payment at issue was the alleged oral agreement. Finally, as this agreement has not been established, and in the

absence of good faith on its part, Michel Platini cannot impute to FIFA a violation of the *venire contra factum proprium* principle and Art. 55 CC is not applicable in the present case.

As a conclusion, the CHF 2'000'000 paid to Michel Platini in 2011, without this payment being based on a contract, did constitute an undue advantage within the meaning of Art. 20 CEF, a gift prohibited by this provision, thus the violation is sustained.

C.b.e. The Panel notes that Michel Platini clearly lacked the right to benefit from the pension plan for the years 1998 to 2002, as he was not a member of the FIFA Executive Committee at that time. It further notes that, although he had not yet received any payment under the pension plan, he benefited from an undue expectation from the moment when Joseph S. Blatter agreed to include the years 1998 to mid-2002 in the reference period. Thus, assuming that the present proceedings had not commenced, the Appellant would have received, at the time of his retirement, an amount greater than that to which he would have been entitled, based on the ordinary rules on the pension plan. In accepting the application, Joseph S. Blatter exceeded his powers of representation within the meaning of Article 55 CC, in the same way as he had done in connection with the payment of CHF 2'000'000, and Michel Platini, who knew the applicable rules, cannot claim that he had acted in good faith when he was granted that advantage. Accordingly, Joseph S. Blatter's decision to extend the reference years for calculating the Appellant's pension is not binding on FIFA.

Art. 20 CEF refers to any acceptance of an undue advantage and does not provide that the benefit must be immediate. When he sought and obtained the extension of the reference years used to calculate the pension, Michel Platini accepted this advantage. As a result, he once again violated this provision of the CEF.

C.b.f. Art. 19 CEF sanctions conflicts of interest. According to the Appeals Committee, Michel Platini was in such a situation upon signing a declaration of support of Joseph S. Blatter on May 6, 2011, when he had just received a large payment from him. The Panel is of the opinion that, if this conflict of interest existed, it was against UEFA, the statement of support having been signed by the Appellant in his capacity as President of the UEFA and not as a FIFA official, so it does not fall under Art. 19 CEF.

On the other hand, the Panel agrees with the Appeals Committee that the Appellant violated Art. 19(2) CEF by participating in the meeting of the FIFA Finance Committee on March 2, 2011, and that it also disregarded Art. 19(3) CEF by not immediately disclosing the existence of the conflict of interest by serving as a member of the Finance Committee during that meeting despite that conflict. It is also clear that Michel Platini could not act with integrity, independence, and determination as a member of this Committee, since he had a personal interest in hiding the existence of the undue payment of CHF 2'000'000 that he had benefited from, in order to have the FIFA's 2010 accounts, in which the payment had been included, adopted without reference to the said payment.

C.b.g. The Appeals Committee further held, on Michel Platini's part, a violation of Art. 15 CEF, concerning the requirement of loyalty, and Art. 13 CEF, concerning compliance with the general rules of conduct. The Panel does not share this opinion and will therefore annul those two points of the contested decision.

Indeed, the Appellant's conduct is fully covered by Art. 19 and 20 CEF, which absorb Art. 13 and 15 CEF. Consequently, no separate breach of these two provisions exists in the present case (*lex specialis derogat generali*).

C.b.h. The Panel holds that a ban on all football activities for 3 years for violation of Art. 20 CEF, and for 1 year for violation of Art. 19 CEF, i.e., a total of 4 years due to the concurrent offenses (Article 11(1) CEF) is proportionate because, although the infringements committed are serious, such a period is sufficient to reach the objective, which is to prevent the Appellant from committing other acts contrary to the CEF and to sanction established violations. Such a length of time is sufficient to sanction the violation of the interests protected by Art. 19 and 20 CEF. It takes into account both the mitigating factors and the aggravating factors. The former consist of the fact that Michel Platini has no history of wrongdoing, he has rendered considerable services to FIFA, UEFA and football for many years, he is 61 years old and is moving towards the end of his career, having devoted his entire professional life to football, and has co-operated to some extent during the proceedings, with FIFA having initiated the investigation initiated by the MPC, in other words several years after knowing of the disputed payment, if not of its real motive. The latter consist of the very high positions that Michel Platini held both at FIFA and at UEFA and the heightened duty to respect the rules of these organizations which resulted from it, as well as the lack of remorse expressed by the Appellant. Moreover, the ban from all football-related activities will extend to administrative, sporting, and other fields, as explicitly provided for in Art. 22 of the FIFA Disciplinary Code (hereinafter “CD”), to which Art. 6(2) CEF refers, such that the Appellant's grievance in relation to the scope of the prohibition must be dismissed. The clear wording of Art. 22 CD also allows a ban from “*any*” football-related activity, which means a total ban at the national and international level. Such a geographical extension is justified in this case, as Michel Platini violated very important obligations when he was one of the officials of the organization that oversees football at the international level.

As for the fine imposed on the Appellant, it must be reduced to CHF 60’000 in order to take account of the fact that the Panel rejected two out of the four offenses retained by the Appeals Committee. This amount appears to be fair and proportionate in the light of all the circumstances of the specific case.

D.

On October 17, 2016, Michel Platini (hereinafter: the Appellant) lodged a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award of September 16, 2016. Relying on Art. 393(e) CPC, he submits that the Panel rendered a decision that was arbitrary in its result on two grounds, first, that it was based on findings manifestly contrary to the facts of the case and second, that it constituted a manifest violation of the law.

By letter of November 23, 2016, the CAS, which produced the case file, informed the Federal Tribunal that the Panel waived its right to file a reply, given the essentially appellatory nature of the appeal.

In response to its reply of December 7, 2016, FIFA (hereinafter: the Respondent) argued that the action was inadmissible and, in the alternative, that the action should be dismissed.
The Appellant, in his reply dated January 3, 2017, and the Respondent, in its rejoinder of January 17, 2017, maintained their respective submissions.

Reasons:

1.

The Respondent argues that the appeal is inadmissible. First, it submits that the contested award closed the international arbitration proceedings, so that the Appellant's only plea – namely, arbitrariness in the determination of the facts and the application of the law within the meaning of Art. 393(e) CPC – is not admissible as it is not included in the exhaustive list of Art. 190(2) PILA. Secondly, the Respondent submits a further ground for the inadmissibility of the appeal in the allegedly appellatory character of this submissions. These two objections concerning the admissibility of the action must be considered in turn.

1.1.
1.1.1. Art. 77(1) LTF[5] distinguishes international arbitration (a) from domestic arbitration (b). According to Art. 176(1) PILA, which employs a formal criterion for deciding the international character of an arbitration (4P_148/2006 of January 10, 2007, rec. 2), an arbitration is international if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties was neither domiciled nor had its habitual residence in Switzerland at the time of the conclusion of the arbitration agreement. On the other hand, arbitration is domestic when the arbitral tribunal has its seat in Switzerland and Chapter 12 PILA does not apply (Art. 353(1) CPC). The pertinent time for the determination of the domicile or habitual residence of the parties is at the conclusion of the arbitration agreement. This means that an arbitration can be international even when the case no longer has international elements at the outset of the proceedings because one of the parties transferred its domicile to Switzerland after the conclusion of the arbitration agreement (4A_254/2013 of November 19, 2013, paragraph 1.2.1 and the author cited). In addition, the parties may opt-out, that is, opt for the application of Part III of the CPC when an arbitration has an international character, excluding Chapter 12 PILA, and vice versa (see Art. 176(2) PILA and Art. 353(2) CPC).

[5] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

The CAS and the Respondent Association both have their headquarters in Switzerland (the first in Lausanne and the second in Zurich). When the appeal was filed with the CAS, as well as when the contested award was rendered, the Appellant was also domiciled in Switzerland. In this state of affairs, the domestic nature of the present arbitration in the field of sport would be uncontested. However, as indicated above, neither of these two factors is temporally decisive in determining the arbitration in question; the only decisive factor in this respect being whether the Appellant had his domicile in Switzerland or abroad at the time of the conclusion of the arbitration agreement. Fixing that moment is not that simple when the jurisdiction of the arbitral tribunal, in view of the particularities of sports arbitration in disciplinary matters, does not arise directly from the conclusion of an agreement, strictly speaking, but is based on another foundation more difficult to capture, like in the present case. It should be noted that, according to the first of the two hypotheses contemplated by Art. R47 of the Code, an appeal may be filed with CAS against a decision of a federation if the statutes or regulations of the said sports body so provide and to the extent that the Appellant has exhausted the available remedies in accordance with the statutes or regulations of the sports body in question (on the validity of statutory arbitration clauses in general, see ATF 142 III 220 at 3.4.2 and 3.4.3 with numerous references). The Respondent introduced such an arbitration clause in its rules on January 1, 2004, and this clause has remained unchanged since then (on the legal nature of the CAS appeal against a Respondent's decision, see ATF 136 III 345, paragraph 2.2.1, at 349). Art. 81 CEF also reserves the possibility of appeal to the CAS in accordance with the relevant provisions of the Respondent's rules. Art. 7 thereof (2004 version) provides that organs and officials shall comply with the statutes, regulations, decisions and the CEF in the exercise of their activities. As the Appellant joined the Respondent's Executive Committee in 2002, he was *ipso jure* subject to the Association's Articles of Association from then on, so the arbitration clause introduced in the latter on January 1, 2004, immediately applied. However, on the latter date, which was the decisive moment in this context, the Appellant did not yet reside in Switzerland but was still living in France. The Appellant did not dispute the allegation relating thereto, made under para. 29 of the Answer, as well as the supporting documents, where it appears that he took up residence in Switzerland, in the canton of Vaud, only at the end of February 2007. Moreover, this allegation and the supporting documents do not fall within the prohibition of new evidence, provided for in Art. 99(1) LTF (provision not covered by the exclusion clause of Art. 77(2) LTF), since they concern the admissibility of the present appeal, which is an issue that the Federal Tribunal examines on its own motion and only the decision of the arbitrators, can preclude the application of Chapter 12 of the PILA (Award, para. 142). Hence it follows that the contested award was, in all likelihood, made in the context of an international arbitration covered by Art. 176 ff. PILA. This finding would imply that the civil action brought against the award on September 16, 2016, was inadmissible, since Art. 190(2) PILA, which is exhaustive, does not include arbitrariness in the determination of facts and in the application of the right to appeal against an international arbitral award.

1.1.2. Under para. 126 of its Award, the Panel states that at the outset of the hearing on April 29, 2016, it resolved several preliminary matters. In the same paragraph, it states that it admitted the amendment by one of the Appellant's counsel of the procedural order of April 26, 2016 – *i.e.*, striking out the original printed text of the introductory clause of that order (" ..., the provisions of Chapter 12 of the [PILA] shall

apply, to the exclusion of any other law. ") and replacing it with the following handwritten sentence: " ... this arbitration is subject to the provisions of [CPC], in particular Part 3 (Art. 353 SCC) ".

Referring to this part of the award, the Appellant sees it as a “preliminary ruling,” confirmed in the main part of the award (para. 144), against which the respondent should have had recourse, foreclosure.

It is true that, when the arbitral tribunal rules on its jurisdiction by an interlocutory decision (Art. 186(3) PILA), this decision can – and must – be challenged directly before the Federal Tribunal (Art. 190(3) PILA, ATF 118 II 353 (2)). Is it also true that the decision by an arbitral tribunal to rule on the validity of an exclusion clause within the meaning of Art. 176(2) PILA or Art. 353(2) CPC is subject to appeal (ATF 116 II 721 at 3, 115 II 390, PFIFFNER / HOCHSTRASSER, in Basel Commentary, *Internationales Privatrecht*, 3rd edition 2013, ad Art. 176 PILA, paras. 7 and 49). However, the circumstances of the case in dispute differ from this case. The interlocutory decision relied on by the Appellant was taken at the hearing held on April 29, 2016, at the CAS headquarters, that is to say, only about ten days before the notification of the award to the parties (May 9, 2016), and was not disclosed to them in writing, so that it would be difficult to criticize the Respondent for not attacking it. Moreover, this decision had no impact on the powers of the CAS, which was in any case competent to rule on the Appellant's appeal regardless of the domestic or international nature of the pending arbitration. Finally, and above all, the Respondent, who was satisfied with the award on the merits, had no vested interest in bringing the matter before the Federal Tribunal for the sole purpose of ascertaining that the Panel had erroneously treated the appeal as an domestic arbitration (see Art. 76(1)(b) LTF).

Accordingly, the Respondent cannot be held liable for its inaction.

1.1.3. The Appellant does not, quite rightly, argue that the parties had validly availed themselves of the possibility of exempting international arbitration against them from the rules of the PILA and preferring them to those of the CPC. In this regard, Art. 176(2) PILA – the only possible assumption in this case – for the possibility for the parties to exclude by a subsequent agreement the application of Chapter 12 PILA, in favor of the third part of the CPC. There is no need to examine here the delicate issues raised by the interpretation of this provision, such as the time up to which the exclusion agreement may take place or the form that that convention must or may not take (in this respect see, among others: PFIFFNER / HOCHSTRASSER, op.cit., paras. 42-47 ad art. 166 PILA, KAUFMANN-KOHLER / RIGOZZI, International Arbitration - Law and Practice in Switzerland, 2015, para. 2.40 ff.). Indeed, on the basis of the facts found in the award, it cannot be accepted that the parties have mutually expressed their willingness to exclude the application of Chapter 12 PILA in order to comply with the relevant rules of the CPC. The Appellant has undoubtedly taken a first step in this direction by manually modifying a sentence of the procedural order of April 26, 2016, relating to the type of the applicable arbitral procedure. However, the Respondent did not follow that course by signing the same order without amending that clause. The decision to apply Art. 353 ff. CPC, taken at the outset of the hearing of April 29, 2016, was not the result of an *ad hoc* agreement concluded by the parties, but the mere expression of the opinion of the members of the Panel based either on an erroneous finding as to the domicile of the Appellant at the time of conclusion of the arbitration

agreement, or, as the text of para. 142 of the award on the equally inaccurate view of the fact that the two parties were domiciled in Switzerland at the time of the award was sufficient to make a domestic arbitration out of the pending arbitration.

1.1.4. Anyone involved in the proceedings must comply with the rules of good faith (see Art. 52 CPC). The principle of good faith, laid down for ordinary civil proceedings, is of general application, so that it also governs arbitral proceedings, both in the field of domestic arbitration and in international arbitration (4A_374/2014[6] of February 26, 2015, at 4.2.2 and the precedent quoted).

Rightly or wrongly, the Panel decided to refer the arbitral proceedings conducted by it to Art. 353 ff. CPC. These provisions include Art. 389(1) CPC, which opens the way for an appeal to the Federal Tribunal against an award rendered in a domestic arbitration, and Art. 393 CPC, which exhaustively lists the grounds of appeal. One of these grounds permits to sanction an award which is arbitrary in its result (e). This has no counterpart in international arbitration because the ground of inconsistency of the award with public policy as contemplated by Art. 190(2)(e) PILA is a more restrictive concept than the one of arbitrariness (judgment 4A_150/2012[7] of July 12, 2012, at 5.1). The Panel's decision on the procedural law applicable in this case was thus far-reaching in that it indirectly indicated to the parties the means to develop in a civil law appeal to the Federal Tribunal, which is the unique way, apart from the revision, to challenge the CAS award. The indirect information that was provided by the Arbitral Tribunal to the parties on the grounds to be raised in a possible appeal could thus have potentially harmed the Appellant had he been not well advised and could have resulted in pleas before the Federal Tribunal that would be found to be inadmissible (see 4A_214/2017 of May 1, 2017, at 2.2).

From the recording of the hearing of April 29, 2016, it appears that, at the outset of the hearing, the Chairman of the Panel informed the participants that he took note of the modification made by hand on the Procedural Order by Counsel for the Respondent on the April 26, 2016, where he replaced the reference to Chapter 12 of the Act by referring to Part 3 of the CPC, as the Appellant was in Switzerland. The Chairman noted that the Act did not apply in this case and considered that this amendment could be adopted. He then addressed the parties and both stated that they had no objection thereto. Under para. 126, the Award under appeal summarizes this preliminary statement by the President of the Panel.

Based on these declarations concerning the applicable procedure, the Appellant filed an appeal to the Federal Tribunal by means of a civil law appeal based on Art. 77(1)(b) LTF (domestic arbitration), exclusively referring to the arbitrariness of the award in its result (Art. 393(e) of the CPC). Arguing the international nature of the arbitral proceedings in order to challenge the admissibility of the present appeal, the Respondent, who had raised no objection when the Chairman of the Panel had indicated to the parties,

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/public-policy-defense-under-new-york-convention

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

at the outset of the aforementioned hearing, that he considered that this was a domestic arbitration, shows a contradictory stance, incompatible with the rules of good faith (*venire contra factum proprium*) and deserves no protection.

The objection of inadmissibility raised by the Respondent must therefore be dismissed and the appeal should be treated as an appeal in civil proceedings against an award made in the context of a domestic arbitration. It follows that the plea of arbitrariness formulated in this appeal is, in principle, admissible.

1.2.
According to the Respondent, the appeal is inadmissible because of its appellatory character.

The civil appeal against a domestic arbitral award differs partially from the appeal against a state judgment. In particular, only grievances listed exhaustively in Art. 393 CPC are admissible. In addition, the Federal Tribunal only examines the grievances that are raised and reasoned (Art. 77(3) LTF). The relevant requirements are similar to those for grievances concerning infringements of fundamental rights (see Art. 106(2) LTF, ATF 134 III 186,[8] para. 5). The Appellant must discuss the reasons for the decision and indicate precisely how it considers that the decision disregarded these rights; it cannot limit itself to repeating the submissions it made before the arbitral tribunal (ATF 140 III 86, paragraph 2). The reasons must be set out in the appeal itself; a mere reference to the content of previous submissions or documents from the file is insufficient (Judgment 4A_143/2015 of July 14, 2015, at 1.2 and references). Moreover, the Appellant may not rely on pleas that were not submitted in a timely manner, that is, before the expiry of the time-limit for bringing an action (Art. 100(1) LTF in conjunction with Art. 47(1) LTF), or to supplement, beyond the deadline, insufficiently reasoned submissions (judgment 4A_34/2016 of April 25, 2017, paragraph 2.2).

In less than one page, the Respondent attempts to establish the appellate nature of the Appellant's action as a whole. Without referring to a specific part in the Appellant's submissions, it asserts that the Appellant merely maintained that the disputed Award violated certain provisions of the Swiss Civil Code (CC, RS 210), the Swiss Code of Obligations (CO, SR 220) and the CEF, but fails to establish anything on this subject. Formulated in such general terms, this second submission cannot be relied upon to demonstrate that the action filed by the Appellant to this Tribunal by the Appellant was merely a substitute for an appeal. Therefore, it cannot lead to the immediate and complete inadmissibility of the action. It is self-evident that the various criticisms in support of the only plea raised in the appeal to this Tribunal are examined from the point of view of the statement of reasons. The plea in question is also contained in the exhaustive list of the reasons provided for in Art. 393 CPC.

1.3.

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

The Appellant, who took part in the proceedings before the CAS, is particularly affected by the contested decision because it prevents him from engaging in any activity related to football for four years and, in addition, imposes a fine of CHF 60'000. He thus has a personal interest, which is current and worthy of protection, to ensure that that decision was not rendered arbitrarily, thereby conferring on it the possibility to appeal (Art. 76(1) LTF).

The appeal was lodged in the form provided for by law (Art. 42(1) LTF). It was filed in a timely manner. Under Art. 100(1) LTF, an appeal against a decision must be lodged with the Federal Tribunal within 30 days of notification. According to the jurisprudence, the notification by fax or e-mail of a CAS award does not extend the time limit of Art. 100(1) LTF (judgment 4A_110/2012[9] of October 9, 2012, at 1 and the judgment quoted).
In the present case, the original award, signed by the Chairman of the Panel, was notified to the parties on October 4, 2016. By filing his appeal brief on 17 July, the Appellant therefore complied with the statutory time limit he had to appeal to the Federal Tribunal.

The appeal is therefore admissible.

2.

The Federal Tribunal, it should be recalled, adjudicates on the basis of the facts found in the contested decision (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, Art. 105(2) LTF). On the other hand, it has the power to review the factual basis of the contested award if one of the grievances referred to in Art. 393 CPC is raised against that fact or if new facts or evidence are exceptionally taken into account in the civil law appeal proceedings (judgment 4A_355/2016 of August 5, 2016, at 2.2).

The findings of the arbitral tribunal as to the course of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, the statements made in the course of the proceedings (judgment 4A_322/2015[10] of June 27, 2016, at 3, and the precedent cited therein), as well as to the contents of a testimony or an expert opinion or the information gathered during an eye inspection.

It is on the basis of those principles that it is at this point necessary to examine the various aspects of the Appellant's only plea.

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[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/grounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them

[10] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

3.

The Appellant criticizes the Panel for making an arbitrary award on the level of facts, law, and even fairness.

3.1.
The award arising from a domestic arbitration may be challenged, among other reasons, when it is arbitrary in its result because it is based on findings manifestly contrary to the facts resulting from the case or because it constitutes a manifest violation of the law or fairness (Art. 393(e) CPC). This ground of appeal was taken from Art. 36(f) of the Concordat on Arbitration of March 27, 1969 (CA).

According to the jurisprudence of Art. 36(f) CA, which retains its full value under the CPC, a finding of fact is arbitrary only where the arbitral tribunal, following an oversight, contradicted the documents of the file. This is possible either by losing sight of certain parts of a particular submission or by giving them a meaning other than what they actually have, that is by admitting by mistake that a fact is established by a document while in reality there is no indication in this regard. The subject of the arbitrariness of fact under Art. 36(f) CA is therefore restricted: it does not concern the assessment of the evidence and the conclusions drawn therefrom, but rather the findings of fact that are manifestly disproved by the documents of the file. The manner in which the arbitral tribunal exercises its discretion may not be the subject of an appeal; the grievance of arbitrariness is limited to findings of fact that do not depend on an assessment, that is to say those that are incompatible with the documents of the file (ATF 131 I 45, at 3.6 and 3.7). In other words, the error once sanctioned by Art. 36(f) CA and today by Art. 393(e) CPC is more akin to the notion of manifest inadvertence used in Art. 63(2) of the Federal Judiciary Act of December 16, 1943 (OJ,[11] for the definition of this concept, see ATF 115 II 399, at 2 a) rather than to the manifestly inaccurate establishment of facts of Art. 105(2) LTF which corresponds to arbitrariness (ATF 137 I 58, at 4.1.2).

The arbitrariness prohibited by Art. 393(e) of the CPC also derives from the fact that the arbitral award constitutes a clear breach of the law. Only the substantive law is covered, excluding procedural law. There is an exception, by analogy to the case-law relating to Art. 190(2)(e) PILA, for procedural errors that undermine procedural public policy (judgment 4A_117/2014 of July 23, 2014, at 3.1 and the aforementioned precedent). It must be noted at this point that, in accordance with the general definition of arbitrariness, a decision is only arbitrary if it utterly disregards a clear and unambiguous legal norm. It is not enough, therefore, that another solution seems conceivable or even preferable (ATF 140 III 16, paragraph 2.1 and the judgments cited).

As to the manifest breach of fairness sanctioned by the same provision, it presupposes that the arbitral tribunal has been authorized to decide on an equitable basis or has applied a fairness standard (judgment 5A_978/2015 of February 17, 2016, and the precedents cited).

[11] Translator's Note: OJ is the French abbreviation for the Federal Statute of December 16, 1943, on the organization of the judiciary (Organisation Judiciaire, RS 173.110).

In the above cases, however, it is necessary that the proven violation has rendered the award arbitrary in its result, as is expressly stated in the provision cited.

3.2.
Before examining the Appellant's grievances against the contested award in the light of those principles, it is necessary to resolve two general issues raised by each of the parties.

3.2.1. Concerning the substance, the Panel, based on Art. R58 of the Code and Art. 66(2) of the Statutes, decided to apply, first of all, the internal regulations of FIFA, in particular the CEF, and to refer to Swiss law only subsidiarily. The Appellant considers this approach "erroneous" on the ground that Swiss law is fully applicable under Art. 75 CC. Apart from the fact that this qualifier is not synonymous with arbitrariness, which precludes a valid statement of a grievance falling within Art. 393(e) CPC, the Appellant's remark is not correct.

According to Art. 75 CC, a member is authorized by law to take legal action within one month of the day on which he became aware of the decisions to which he has not adhered and which violate legal or statutory provisions. This provision is mandatory in the sense that the statutes of the association cannot exclude the review of decisions of the association by an independent tribunal. It is generally accepted that disputes relating to such decisions, including those relating to disciplinary punishments (Heini / Scherrer, in Basler Commentary, Zivilgesetzbuch I, 5th ed. 2014, no 9, ad Art. 75 CC) can be filed with a proper arbitral tribunal, such as the CAS (see ATF 119 II 271, paragraph 3b, pp. 276 ff., see also: ATF 136 III 345, paragraph 2.2.1, Benedict Foex, in *Commentaire romand*, Code Civil I, 2010, No. 3 Ad Article 75 CC). For the rest, Art. 75 CC does not say what are the "applicable legal or statutory provisions." Art. 381(1)(a) CPC, for its part, states that the arbitral tribunal shall act in accordance with the rules chosen by the parties. The latter may opt for non-State rules, such as those issued by sports associations, within certain limits (Michael Lazopoulos, in Bernese Commentary, *Schweizerische Zivilprozessordnung*, vol. III, 2014, n. 15, 16 and 18, ad Art. 381 CPC). In this specific case, the Appellant was subject to the Respondent's regulations when he joined the Respondent's Executive Committee. However, Art. 66(2) of the Statutes invites the CAS to apply in the first place the various regulations of the Respondent, providing for the application of Swiss law only subsidiarily. Accordingly, it does not appear that the Panel violated Art. 75 CC, by giving priority to the relevant rules emanating from the Respondent rather than to Swiss substantive law (as the law of the country in which that federation has its registered seat), as required by Art. R58 of the Code.

3.2.2. For its part, the Respondent argues that, according to the case-law, only the arbitrary application of substantive law, that is to say State law, can be sanctioned for the manifest violation of the law referred to in Art. 393(e) CPC. Based on this premise, and underlining that its own regulations, such as the CEF, do not contain substantive law in that sense, it concludes that the arbitrary application of Art. 19 and 20 CEF, pleaded by the Applicant, cannot be reviewed by the Federal Tribunal.

Such an argument cannot be accepted. First, the limitation of the scope of Art. 393(e) CPC to substantive law is highly disputed in the doctrine (cf. Marugg / Neukom Chaney, in *Bernese Commentary, Schweizerische Zivilprozessordnung*, vol. III 2014 n. 106 ad Art. 393 and references; Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, n. 2113; see already at the time when the CA was applicable: Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, n. 4 ad art. 36 CA, p. 215; Pierre Jolidon, *Commentaire du Concordat Suisse sur l'arbitrage*, 1984, n. 91 ad art. 19 and 20 CA). Secondly – and this exempts this Tribunal from submitting this case-law to a possible re-examination – Art. 19 and 20 CEF, in so far as they set out the conditions for the conclusion that there is a conflict of interest or the acceptance or distribution of gifts and other benefits, are not procedural rules but fall within the substantive law concerning disciplinary sanctions adopted by an association of private law. Last but not least, the Respondent gives the rules of law an erroneous meaning in the context of the present case. It is true that in the judgment cited by the Respondent, the Federal Tribunal held that the standards laid down by such bodies are not rules of law, however detailed they may be (ATF 132 III 285, 1.3 and the references). However, this was held for the purposes of Art. 116 PILA on the election of law, that is for a specific purpose. This does not mean that those standards are necessarily missing a legal effect. As one author points out, if they are incorporated into a contract, they give rise, as contractual clauses, to the application, in particular, of the rules of law on the interpretation of contracts, the performance or the non-performance of obligations (Bernard Corboz, in *Commentary of the LTF*, 2nd edition, 2014, no. 13 ad article 95 LTF). Whatever the Respondent may say, the same reasoning may be applied, *mutatis mutandis*, to an action for the annulment of the decisions of the association which violate the law or the articles of the association (Article 75 CC). It is admitted that such an action may serve to sanction the breach (in addition to the "legal provisions") not only of the association's own statutes, but also of other rules adopted by it (Foëx, op. cit., N. 22 ad Art.75 CC, Heini / Scherrer, op cit, n. 14 ad Art. 75 CC). It is therefore self-evident that the party aggrieved by a disciplinary sanction imposed by the association based on pre-established *ad hoc* rules must be able to contest such violation through Art. 75 CC, but if it were to do so in the context of an domestic arbitration procedure through an appeal to the Federal Tribunal against the award based on Art. 393(e) CPC, it could only lodge a complaint for manifest violation of those "rules of law" by the arbitral tribunal. Indeed, not accepting this action for annulment by wrongly applying the specific rules of the association in question would constitute "a manifest violation of the law," in this case of Art. 75 CC, covered by Art. 393(e) CPC. In any event, a different conclusion, as the Respondent would like, would render the appeal against an award in domestic arbitration as limited as the appeal to the Federal Tribunal in international arbitration, and even more limited than the latter, since the incompatibility of the award with public policy within the meaning of Art. 190(2)(e) PILA, is not one of the grounds of appeal exhaustively listed in Art. 393 CPC.

That being so, this Court will consider below whether the Panel arbitrarily applied the Respondent's internal rules, relied on by the Appellant, in particular Art. 19 and 20 CEF.

3.3.
One of the main points of disagreement concerns the temporal application of the CEF.

3.3.1. This issue is regulated by Art. 3 CEF:

> This Code shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed nor subjected to a sanction greater than the maximum sanction applicable at the time the conduct occurred. This shall, however, not prevent the Ethics Committee from considering the conduct in question and drawing any conclusions from it that are appropriate.

As highlighted by the Panel, without being criticized on this point, the provision cited follows an approach equivalent to the traditional principle of *lex mitior*, as expressed, for example, in Art. 2(2) of the Swiss Penal Code (PC, SR 311.0), even if, contrary to the latter article, it derogates from the ordinary rule of non-retroactivity and provides that the version of the CEF in force applies to any offense committed before its entry into force unless the offense has been repealed or a less severe sanction is foreseen by the CEF version that was applicable at the time of the infraction.

In the present case, the relevant facts for the temporal application of the CEF, at least those still relevant at this stage of the procedure, occurred in 2007 (request to extend the retirement plan) and in 2011 (receipt of the disputed payment and attendance at the meeting of the FIFA Finance Committee). Rules potentially applicable to the facts are included in the 2006, 2009, and 2012 versions of the CEF. We must refer to the relevant excerpts before analyzing them in light of Art. 3 CEF and based on the arguments put forward in the parties' written submissions.

Art. 11 CEF (2006 version) states the following [*emphasis added by the Court*]:

> Officials are not permitted to accept gifts or other benefits **from third parties** which exceed the value generally accepted by local and cultural customs, and in case of doubt the gift shall be refused. Acceptance of pecuniary gifts is prohibited in any form whatsoever.
> As part of their duties, officials are permitted to offer **to third parties** gifts and other benefits the value of which does not exceed local and cultural criteria and to the extent that such gifts do not result in a dishonest advantage or a conflict of interest.
> [...]

Art. 10 CEF (2009 version) reads as follows [*emphasis added by the Court*]:

> 1. Officials shall not be permitted to accept gifts or other advantages of a higher value than those traditionally given in accordance with local custom **by third parties**, and in case of doubt they shall refuse the gift. It is strictly prohibited to accept sums of money irrespective of amount or form.
> 2. In the performance of their duties, officials shall be entitled to offer gifts and other benefits **to third parties,** of a value equivalent to those traditionally delivered according to local custom, provided that it is not possible to draw a dishonest advantage and do not give rise to a conflict of interest.
> 3. ...

As to Art. 20 CEF, it reads as follows [*emphasis added by the Court*]:

> 1. Persons bound by this Code may only offer or accept gifts or other benefits to **and from persons within or outside FIFA**, or in conjunction with intermediaries or related parties as defined in this Code, which a) have symbolic or trivial value; b) exclude any influence for the execution or omission of an act that is related to their official activities or falls within their discretion; c) are not contrary to their duties; d) do not create any undue pecuniary or other advantage and e) do not create a conflict of interest. Any gifts or other benefits not meeting all of these criteria are prohibited.
>
> 2. If in doubt, gifts shall not be offered or accepted. In all cases, persons bound by this Code shall not offer to or accept **from anyone within or outside FIFA** cash in any amount or form.

3.3.2. The Appellant argued before the CAS that Art. 11 (version 2006) and 10 (version 2009) of the CEF did not refer to "third parties within or outside FIFA," contrary to Art. 20 CEF, but only referred to "third parties" or "third persons." For the Appellant, the latter two expressions could only refer to persons (natural or moral) completely outside FIFA, which would mean that he had not accepted undue advantages since all he had received was from FIFA and not from third parties. He therefore claimed, by invoking Art. 3 CEF, that his case was adjudicated by the 2006 and 2009 versions of the CEF.
The Panel rejected this argument. In its view, the term "third parties" simply refers to "any person other than the person receiving the benefit," in accordance with the ordinary use of those words. The jurisprudence of the FIFA and CAS bodies confirmed the broad interpretation of the phrase by applying it to a FIFA official who had given an unfair advantage to another FIFA official. Moreover, the 2012 version of the CEF had not extended the comparable provisions of the previous versions but had instead clarified them by stating that the notion of "third parties" could apply to persons both inside and outside of FIFA. The Panel also added that the application of the 2012 version of the CEF did not lead to condemning the Appellant for offenses not provided for in the earlier versions of this Code or to impose more severe penalties than those contained in those versions.

3.3.3. Before the Federal Tribunal, the Appellant argues that Art. 20 of the 2012 version of the CEF extended the material scope of the rule of conduct entitled "*Acceptance and distribution of gifts and other benefits*" by including in the notion of third parties or third persons the persons working "within FIFA", while the previous versions only included persons outside FIFA. Also, in his view, the Arbitrators failed to indicate in the award that FIFA was itself a third party within the meaning of that term.

With regard to the interpretation process, the Appellant begins by putting into perspective the lessons from FIFA practice and the previous cases of CAS, arguing that the decisions of the former do not have a judicial character and the arbitral awards of the latter do not constitute precedent. He further supports that the statutes and regulations of FIFA, given the high number of recipients, must be interpreted like the laws and, moreover, with regard to the *nulla poena sine lege principle* in order to give meaning to provisions of penal law nature. Turning to the current case, the Appellant stresses, first of all, that the fact of isolating the concept of third parties from its context has the effect of distorting the literal interpretation that must be

given of the aforementioned provisions. For him, considering the text as a whole, it appears that the fact of accepting gifts or other advantages necessarily implies that these presents come from a person other than the donee. There was therefore no need to specify this. Consequently, the third parties or parties referred to in Art. 11 (version 2006) and Art. 10 (version 2009) of the CEF could – logically – only be persons not subject to the CEF, that is to say, persons from outside of FIFA.

According to the Appellant, this literal interpretation is corroborated by a teleological and systematic interpretation of the same provisions. Indeed, the distinction made in the text between third-party and non-third-party FIFA members is easily understood because of the lack of penalization that the donor would enjoy within FIFA, which would exclude that a gift freely authorized by a FIFA official could constitute, in the eyes of FIFA, a reprehensible behavior allowing it to sanction the beneficiary. The same reason would explain that, when FIFA extended the scope of the above provisions in order to be able to penalize also the offering of gifts or other advantages, it was obliged to specify that the prohibition of giving and/or accepting gifts would now also apply to "*third parties within FIFA*," a clarification which gave a wider scope to the notion of third parties. The Appellant finds this extension (through the interpretation of the meaning to be given to the relevant provisions) even more flawed, as it would result in creating a state of affairs that was not punishable until that point, by derogation of the principle “no sanction without law.”

The Appellant concludes that, by a legally unsustainable interpretation of Art. 11 (version 2006) and Art. 10 (version 2009) of the CEF, the Panel arbitrarily disregarded the rule of non-retroactivity of laws by applying rules established in 2012 (Art. 20 CEF) to previous events.

3.3.4.

3.3.4.1. When interpreting statutes, the interpretation methods may vary according to the type of association. For the interpretation of the statutes of large associations, we use methods of interpreting the law. For the interpretation of the statutes of small associations, reference is made instead to the methods of interpretation of contracts, namely an interpretation according to the principle of trust (judgment 4A_235/2013 of May 27, 2014, paragraph 2.3 and the case law quoted). The Federal Tribunal ruled the same when it was called to interpret the statutes of a major sports association, such as UEFA, in particular its statutory clauses relating to questions of jurisdiction (judgment 4A_392/2008[12] of December 22, 2008, and the references).

In the present case, the interpretation concerns rules of a sports association at a lower level than the Statutes, *i.e.*, the CEF. Although they do not deal with an issue related to jurisdiction, these rules have been enacted by the organization governing football at world level, so that their scope is global. Their interpretation according to the principle of legitimate expectation is therefore not taken into consideration. The Appellant is thus right to interpret them in accordance with the methods of statutory interpretation.

[12] Translator’s Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/review-by-the-federal-tribunal-of-an-award-upholding-jurisdictio

3.3.4.2. Any interpretation begins with the letter of the law (literal interpretation), but this is not decisive: the interpretation still has to find the true scope of the norm, which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, particularly the protected interest (teleological interpretation), as well as the will of the legislator as it may be understood from the "*travaux préparatoires*" (historical interpretation). The judge departs from a clear legal text only when the aforementioned other methods of interpretation show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results which the legislator could not have wanted, which conflict with the sense of justice, or the principle of equal treatment. In short, the Federal Tribunal does not favor any method of interpretation and does not establish a hierarchy, based on a pragmatic pluralism in order to seek the true meaning of the norm (ATF 142 III 402 at 2.5.1 and the judgments quoted). When it comes to the interpretation of the criminal law by the judge, this is dominated by the principle *nulla poena sine lege* laid down by Art. 1 CP.[13] However, without violating this principle, the judge may conduct an extensive interpretation of the legal text in order to determine its true meaning, which is the only one that complies with the internal logic and purpose of the provision in question. If an interpretation in accordance with the spirit of the law deviates from the letter of the legal text, to the detriment of the accused, the aforementioned principle prevents a judge from relying on elements that the law does not contain to create new punishable acts (ATF 137 IV 99, at 1.2). At this point it must further be noted that, on a more general level, in the application of disciplinary sanctions imposed by private law associations such as sports federations, the automatic application of criminal law concepts such as the presumption of innocence and the principle in *dubio pro reo*, as well as the corresponding safeguards contained in the European Convention on Human Rights, is not self-evident (judgment 4A_488/2011[14] of June 18, 2012, at 6.2 and the case law quoted).

3.3.4.3. Applied by analogy in the present case, these jurisprudential principles do not allow the Panel to violate the law and, for what matters from the point of view of arbitrariness within the meaning of Art. 393(e) CPC, to manifestly violate the law.

It is undeniable that in its broadest sense, which corresponds to its ordinary and non-juridical use, the word *third* is simply a person other than the one we speak of, namely, *the other* (*Dictionaire des synonymes, nuances et contraires*, Le Robert, Ed., 2011, p.990, for "third party"). The term in question also has a generic and vague meaning in law, even if in this field it is subject to many other more specific definitions. Gérard Cornu, for example, considers as a third party any person who is not a legal person or even a person other than the person referred to (*Vocabulaire juridique*, 11th éd., 2016, p. 1026, third party; see also Catherine Puigelier, *Dictionnaire juridique*, 2015, p. 968, n. 5606). To quote another example, it is doubtless that same notion of a third party when the author asks whether one can publish the work of a third party on social networks or include the video of a third party on its website (Steve Reusser, in

[13] Translator's Note: CP is the French abbreviation for the Federal Statute of December 21, 1937, on criminal law (Code Pénal, RS 311.0).

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an

Plaidoyer, 2015, n. 4 p. 13, or 2016, n. 4 p. 41). By the same token, *tierces parties* or *tierces personnes*[15] are not fundamentally different from those of *third parties*[16] (*any third-parties*[17] in the 2006 and 2009 versions of the corresponding provision of the CEF in English, which is the authentic language in the event of discrepancies in the interpretation of a text drafted in the official FIFA languages, see Art. 20(2) [2009] and Art. 87(2) [2012]). In this literal and quite general sense, from which the use of the determinant "*any*"[18] in Art. 11 (2006) and Art. 10 (2009) of the CEF seem to bring the reader closer, these three expressions support the definition given by the Panel, for which they are simply aimed at "anyone other than the one receiving the benefit" (Award, para. 169). In the same context, the donor is undoubtedly a third party compared to the donee. The fact that both of them have the status of officials does not change this situation, for there is indeed an official who receives gifts or other benefits and a second official, not to be confused with the donee, that is a third party *lato sensu*, who offers the gifts. From that point of view, Joseph S. Blatter, notwithstanding his status as a FIFA official, was a third person, respectively a third party in relation to the Appellant, another FIFA official, for the purposes of the application of Art. 11 (version 2006) and Art. 10 (version 2009) of the CEF. It is in the same sense that the word *third*, as is found in Art. 20(1) (2012) CEF, has to be understood literally: this is a generic term describing persons "within or outside FIFA" and thus places in the same category two (subjective) elements that are antagonistic to the same infringement of a given rule of conduct. Undoubtedly, the earlier versions of the provision in question did not contain a text as explicit as the instant wording of the provision. In this respect and in the strict sense of the text, the reference made in each of the two successive versions to gifts or other advantages of a value not exceeding "commonly accepted by local and cultural customs" (Art. 11(1) CEF [2006 version]), "that of presents traditionally handed over according to local custom" (Art. 10(1) CEF [version 2009]) respectively, would be more like giving presents to FIFA officials by persons outside the association from time to time, for example, during the inspections of sites proposed by candidate countries for the organization of future competitions, such as the World Cup. On the other hand, and conversely, it is not clear from the text of the provisions cited how the Appellant can infer from it, as he does under para. 90 of his appeal brief, "the absence of any criminal offense vis-à-vis the donor within FIFA." These provisions, by including a limit to which FIFA officials are entitled to "offer gifts and other benefits to third parties" in each provision's second paragraph, have the effect, on the contrary, to incriminate the donor within FIFA who would offer gifts above the limit to third parties.

In any case, the literal interpretation, as we have seen, is not decisive if it does not restore the real scope of the norm and, in particular, the aim pursued by its author (cf. see para. 3.3.4.2 above). In the preamble to each of the CEF versions discussed here, emphasis has been placed on the special responsibility of FIFA to ensure the image of football throughout the world and to protect its own image from any unlawful, immoral, or unethical conduct or practice by providing a series of sanctions for anyone who violates the applicable rules of conduct. It would therefore be contrary to the result of this historical and teleological interpretation to restrict the scope of these rules of conduct solely to gifts or other advantages which FIFA

[15] Translator's Note: French language used in the original version of the judgment.
[16] Translator's Note: "tiers" in the original version of the judgment.
[17] Translator's Note: English used in the original version of the judgment.
[18] Translator's Note: English used in the original version of the judgment.

officials would receive from third parties outside the organization. Indeed, in view of one of the main purposes of these rules, which is to preserve the image of the governing body of football at international level, the unlawful delivery of gifts by a FIFA official to another official from the point of view of the association is undoubtedly as serious as the same act performed by a donor outside the association because it involves two persons that are both in a relationship of trust as the basis of their professional dealings *vis-à-vis* the association, even if they are sporadic. Accordingly, to give the notion of *third* parties or *third* persons, as contained in the text of the rules of conduct applicable at the time of the commission of the acts at issue, a meaning as restrictive as proposed by the Appellant would be tantamount to tolerating an official flooding another official with gifts, unbeknownst to FIFA, without exposing the official doing so to disciplinary sanctions when it is revealed. This was certainly not the intention of the Respondent when it enacted the disputed rules of conduct. In order to interpret the latter, the Panel took into account the practice of the FIFA bodies and CAS jurisprudence. In a judgment of March 30, 2015, in the case CAS 2014/A /3537 X. v. FIFA, the CAS, interpreting Art. 12 (version 2006) of the CEF related to corruption, dismissed the Appellant's argument that this provision was limited to prohibiting officials from bribing third parties outside FIFA, excluding other officials (para. 84). As regards the Appeals Committee, in its decision of February 15, 2016, on the present case, it referred to earlier decisions in the same vein, in particular to a decision of September 15, 2011, in which it held, with respect to Art. 11 (2006) CEF, that the expression of "*third parties*" was synonymous with "*other parties* or *other persons*" (para. 155). Whatever the Appellant may say, these precedents are relevant in resolving the problem of interpretation which arises in the present case. The fact that decisions of FIFA bodies do not have the status of judicial decisions as such does not in any way detract from the fact that they, at a minimum, can offer information about the will of the drafter of the rules under interpretation. The aforementioned award weighs even more heavily on this interpretation as it comes from an independent FIFA arbitral tribunal. It was indeed made well after the regulations to be interpreted were enacted, as noted by the Appellant (Appeal Brief, para. 84). However, to deny it any relevance, as argued in the Appeal Brief (*ibid*.), would be to skip a step, as we would overlook the fact that the rule interpreted in that award was in the same version (2006) as one of those before this Court. Similarly, the Appellant's vague remark regarding the legal scope of awards in general and those of the CAS in particular should be put into perspective. It is true that the First Civil Law Court has pointed out, on occasion, that in theory at least, it seems difficult to consider arbitral jurisprudence as a source of law of arbitration (judgments 4A_616/2015 of September 20, 2016, at 3.4.1 and 4A_110/2012[19] of October 9, 2012, at 3.2.2). It did so, however, in a manner contrary to the jurisprudence of the Federal Tribunal, the judgments of which serve as precedents for the lower courts, citing for the rest an author according to whom legal practice was quite different (*ibid*., the author cited is Antonio Rigozzi, *L'arbitrage international en matière* de sport, 2005, paras. 433-435).

At the end of this interpretative approach, it appears, on balance, that the Panel did not render a legally unsustainable decision by holding that gifts or other benefits given to an official (the Appellant) by another official of the FIFA (Joseph S. Blatter) fell within Art. 11 (version 2006) and 10 (version 2009) of the CEF,

[19] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/grounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them

as Art. 20 CEF (2012 version) merely clarified the notion of *"third parties*." Thus, in deciding the case in light of the latter rule of conduct, did it not arbitrarily infringe Art. 3 CEF, which governs the application in time of the said Code, as well as the principle *nulla poena sine lege*, if we are to assume that it applies by analogy to the question of disciplinary sanctions under private law.

The Appellant's first plea is thus doomed to fail.

3.4.
3.4.1. On the merits, the Appellant first attacks, the criticism of him in relation to the extension of the retirement plan (*see* C.b.e. above; paras. 94-108 of the appeal to the Federal Tribunal).

Primarily, the Appellant challenges the applicability of Art. 20 CEF to the act attributed to him with respect the acceptance of an unfair advantage, the act having been committed well before the entry into force of this provision of the 2012 version of the Code of Ethics. According to him, FIFA, by relying on this rule of conduct that was unenforceable *ratione temporis*, sanctioned him without a valid legal reason, thus manifestly violating Art. 75 CC.

In the alternative, the Appellant denounces the allegedly contradictory nature of the arguments adopted by the Arbitrators in order to justify the *in concreto* application of the aforementioned rule of conduct. The contradiction lies in the fact that, for the Panel, Joseph S. Blatter's decision to extend the retirement plan in favor of the Appellant was deemed inoperative, but the Appellant was found guilty of accepting an advantage prohibited by Art. 20 CEF in the form of an inappropriate expectation. In doing so, the Panel arbitrarily applied Art. 55 CC, 75 CC and 20 CEF. The contested award would thus stifle the attempt to obtain an undue advantage, which the CEF did not allow, once again disregarding the *nulla poena sine lege* principle. Finally, it contained an alternative reason on this point which was not a valid one.

3.4.2. The main issue raises the question of the applicability over time of the 2012 version of the CEF. This issue has already been decided against the Appellant (see para. 3.3). The examination of this plea is therefore no longer possible. With respect to the alternative argument purporting to support the same plea, the Respondent is correct when arguing, by referring to Art. 77(3) LTF, that the Appellant in no way demonstrates how the Panel arbitrarily applied Art. 55 and 75 CC. In fact, the few lines which he devotes to this subject, referring for the remainder to the text of the Award, besides being entirely unclear, cannot in any case constitute proper reasoning.

It is established that the Appellant was not entitled to benefit from the pension plan for the years 1998 to 2002, as he was not a member of the FIFA Executive Committee during that period. At the Appellant's request, Joseph S. Blatter agreed to include these years in the retirement plan. As a result, the Appellant benefited from an unrealistic expectation, which would have materialized upon retirement from the Executive Committee, of being granted an amount higher than the one to which he would have been entitled on the basis of the ordinary rules governing this had the present proceedings not been initiated. Art. 20 CEF refers to any acceptance of an undue advantage and does not provide that the benefit must be

immediate. Thus, when he spontaneously applied and obtained the extension of the reference years used for the calculation of the pension, far from making a mere attempt, the Appellant indeed accepted such an advantage in the form of an expectation more akin to a term receivable (the future retirement of the Executive Committee being a certain event) than to a conditional claim. In his appeal, he does not demonstrate why it would be unsustainable to incorporate this form of benefit into Art. 20 CEF, assuming that the rule of conduct in question would only penalize the very receipt of the undue financial advantage and not the corresponding expectation. Similarly, he failed to demonstrate how the Panel acted in an arbitrary way by failing to note the contradiction of its own motivation. In this respect, if we accept that mere expectation is punishable under disciplinary law, there is not necessarily a complete contradiction between the act of punishing the behavior that generated the unreasonable expectation and the subsequent discovery, by the debtor of the retirement insurance (risking the opening of various criminal and disciplinary proceedings),and that the natural person that conferred that benefit to the so-called creditor had, in fact, exceeded his powers of representation under Art. 55 CC to such an extent that the represented legal entity was not legally bound by it towards the third-party beneficiary of the contested advantage. Inversely, it would have been contradictory on the part of the Respondent to maintain that it was bound by the legal act of its representative because the latter had not exceeded its powers or, that this act had been ratified by the Respondent, while demanding the punishment of the third-party beneficiary of an advantage that could no longer be regarded as undue under those circumstances.

Thus, the alternative submission of the appeal to the Swiss Federal Tribunal on this point, if it is admissible, cannot demonstrate how the disciplinary sanction of the Appellant based on Art. 20 CEF with respect to the extension of the retirement plan could be arbitrary.

3.5.
3.5.1. The Appellant further seeks to establish that he did not violate Art. 20 CEF by accepting the disputed payment of CHF 2'000'000, holding that his conviction on that count was arbitrary. His arguments in this respect can be summarized as follows:

The Panel should have applied Art. 10 (version 2009) of the CEF, instead of Art. 20 CEF. Had it done so, it would have been led to conclude that this provision did not preclude a FIFA official from accepting a gift from another official within the association. This is Appellant's main argument against the Panel.

In the alternative, it was for the Respondent, pursuant to Art. 52 CEF and Art. 8 CC to prove that the contested payment had been made without valid cause and that the Appellant had violated the CEF by accepting the payment. The arbitrators deviated from that general rule and reversed the burden of proof of the violation of the CEF by requiring the Appellant to demonstrate that there had been no breach of the rule of conduct to consider. It was for them to examine whether FIFA had proved that the incriminating payment had no legal basis. Had they done so, they could not have missed the fact that a gift is a disposition that is in fact anchored in the law (Art. 239 et seq. CO), so that, like salary supplements, bonuses, and other discretionary bonuses paid by the employer, the contested payment had a valid legal basis. In addition, the Panel should have considered the potential violation of Art. 20 CEF from the premise that the payment of

CHF 2'000'000 had been made by FIFA, validly represented by Joseph S. Blatter, since it had not accepted and it had not been established that the latter had exceeded his powers of representation (Art. 55 CC). Had the Panel done so, it would have seen the validity of the gift made by FIFA to the Appellant via the aforementioned person, as the literal, teleological, and systematic interpretation of Art. 20 CEF makes it possible to exclude that FIFA, as opposed to its officials and other persons mentioned in Art. 2 CEF, could be the source of a prohibited donation.

In any event, a different conclusion on this point would not alter the unfairness of FIFA's sanction, which should in any event be attacked for adopting a contradictory attitude, constituting an abuse of rights (Art. 2 para. 2 CC) for validly paying a discretionary amount to one of its officials and subsequently condemning the official for accepting the gift.

3.5.2. The Appellant's main argument, based on the arbitrary application of the relevant rules of inter-temporal law, can no longer be examined for the reasons stated above (cf. at 3.3). There is therefore no need to dwell on it.

As to the subsidiary argument put forward by the Appellant with regard to the disputed payment, its motivation is highly unsatisfactory and there are serious doubts as to its admissibility in view of Art. 77(3) LTF. The Appellant's case sets out his legal point of view as he would do before an appellate court, almost disregarding the reasons given in the Award. He does not attempt to demonstrate, as he is supposed to do at this point, why any of the reasons set out by the Panel were not only wrong under the applicable law, but also – the only point that matters in the procedural framework (*i.e*. arbitrariness within the meaning of Art. 393(e) CPC) – why any of the reasons set out would constitute a manifest infringement of that right so as to render the contested Award arbitrary in its result. In any event, this subsidiary argument is rejected.

This is so, primarily, for the question of the burden of proof. After finding the relevant facts for the application of the rule of conduct that was apparently violated by the Appellant (*i.e.* Art. 20 CEF), based on an assessment of the evidence in the arbitration file that cannot be reviewed by this Tribunal (see 3.1 above), the Panel proceeded to the subsumption by comparing the accepted facts with the conditions of application of the rule in question in order to draw the conclusion that all the constituent elements of the infringement described by that rule of conduct were present in the case at hand. In so doing, *i.e.*, by endorsing the decision of the Appeals Committee upon which the Appellant's appeal was based, it did not unreasonably disregard Art. 52 CEF, which places the onus of proof on the FIFA Ethics Commission for violations of the CEF provisions. In order to be held liable for such a breach, it would have been necessary for the Panel to have found the infringement in question to be insufficiently proved, but nevertheless condemned the Appellant for not having shown that he had not been guilty of it. However, not only did it fail to do so but instead found the constituent elements of that offense affirmatively proven, rendering moot the burden of proof issue set out in Art. 52 CEF.

Furthermore, the Arbitrators did not apply the (supplementary) provision of Art. 8 CC in an unsustainable manner. That provision requires each party – unless the law requires otherwise – to prove the facts alleged

by it in order to assert its rights. The few remarks made hereafter are sufficient to demonstrate it, without needing to go further on the distinction that is generally made by the civil law practitioners between operative facts, destructive facts, and nullifying facts (cf. Fabienne Hohl, *Procédure civile*, Volume I, 2nd ed., 2016, n. 2107 ff.). In this case, the Ethics Commission had to prove that the Appellant's acceptance of the CHF 2'000'000 that FIFA had paid into his account in 2011 involved a breach of the rule of conduct in Art. 20 CEF. It first demonstrated the legal basis of the relationships established by the Appellant and FIFA at the material time (1999-2002) by indicating, with supporting evidence, that those relations were based on a written agreement signed on August 25, 1999, by the Appellant and Joseph S. Blatter, who had acceded to the presidency of FIFA the previous year. The contract provided that the Appellant's services would be remunerated by an annual payment of CHF 300'000, the Appellant's claim was therefore an obligation validly subscribed by the Respondent, but not beyond that. However, in 2011, more than eight years after his activity as a FIFA advisor ended, the Appellant received an amount of CHF 2'000'000 from the FIFA accounts. Since this attribution could not be attached to the abovementioned agreement; its legal basis was not traceable.

The Appellant further attempted to explain its origin by referring to an agreement he had made orally with Joseph S. Blatter in 1998 and which, he said, provided him with an annual remuneration equal to CHF 1'000'000 in exchange for his services as a sports or technical advisor to the future president of FIFA. In accordance with Art. 8 CC, it was therefore for him to establish the existence of the alleged verbal agreement and to explain why the subsequent signed written agreement not only did not mention it, but also – curiously – provided for a remuneration lower than CHF 700'000 to that in the alleged oral agreement. He would still need to demonstrate, if he wished to avail himself of that state of affairs, that the written agreement had been faked in order to conceal the existence of the oral agreement, specifying that a person who knowingly participates in a 'simulation' and thus appearing contrary to reality must consider and accept that, subsequently, it will be difficult to bring proof of the fakery and the concealed act (see judgment 4A_501/2008 of January 30, 2009, at 3 and the judgments quoted). Thus, even if the hypothesis of corruption had been ruled out by the FIFA judicial bodies for lack of sufficient evidence, the Appellant must accept that the existence of a valid reason that could explain the disputed payment was not established. In this regard, it goes without saying that for the purposes of Art. 20 CEF, a gift, which in and of itself constitutes a valid legal act, is no longer valid if it does not comply with the conditions and limits laid down by that rule of conduct. Moreover, it would be unjustifiable to make the Respondent bear the burden of proving that the contested oral agreement was non-existent. For the rest, the Panel has merely drawn upon the legal consequences of Art. 20 CEF on the acceptance of an unfair advantage after finding that the Appellant has not been able to demonstrate that his enrichment was based on a valid cause.

Finally, the Appellant is not credible when he asserts, under Art. 55 CC, that as Joseph S. Blatter had the capacity to validly hire him, the Respondent was bound to pay the CHF 2'000'000 in 2011 and would therefore commit an abuse of right (*venire contra factum proprium*) by subsequently questioning the validity of that measure in order to sanction the beneficiary. Indeed, with regards to the oral agreement that had been reached in 1998, the Panel closed the analysis of the problem of the alleged valid representation of FIFA by Joseph S. Blatter (Award, para. 261) as follows:

> In conclusion, FIFA's wish could not have been expressed by Mr. Blatter, even if he had concluded the oral agreement, since Art. 55 CC was not applicable due to the bad faith of Mr. Platini and the overriding of the representation power of Mr. Blatter.

Furthermore, with regards to the actual execution of the disputed payment and the conclusions to be drawn by the Appellant based on the rules of good faith, the Arbitrators motivated their rejection of the objection raised as follows (Award, para. 283):

> ... the 2011 payment was only made due to the agreement given by Mr. Blatter and the misleading appearance of a contractual basis, which was created by the Invoice. Mr. Platini knew that the remuneration he claimed was not based on the written agreement. However, the existence of the alleged oral agreement has not been established (sic). In those circumstances, and in the absence of good faith by Mr. Platini, Mr. Platini cannot rely on the principle of "venire contra factum proprium", which is precisely intended to protect good faith. Furthermore, the Panel does not establish what provisions Mr. Platini would make on the basis of FIFA's conduct and which would place him at a disadvantage when FIFA called into question the payment made. Finally, as the Panel also found above, Art. 55 CC is not applicable in the present case (...), which also applies in the context of the principle of venire contra factum proprium irrespective of whether Mr. Blatter had full signing authority (signature only) on behalf of FIFA.

It is not possible to find in the Appellant's Appeal Brief a clear criticism of these considerations, which do not contain anything untenable in any case.

The appeal can therefore only be rejected on this point to the extent that it is admissible.

3.6.

3.6.1. Art. 19 CEF invites the persons to whom the Code of Ethics applies to avoid any situation which could give rise to a conflict of interest (paragraph 2). In particular, they are prohibited from performing their duties if they are in a potential or proven situation of conflict of interest (paragraph 3).

On March 2, 2011, the Appellant participated in a regular meeting of the FIFA Finance Committee in Zurich where UEFA's usual representative to that body was prevented from doing so for medical reasons. Under Art. 35 of the FIFA Statutes (2010 version), this Commission examines the financial management of FIFA, analyzes the annual reports, and submits them to the Executive Committee for approval, among other tasks. In short, it is the guarantor of FIFA's sound financial management. As an alternate member of this Commission, the Appellant had a duty to examine the 2010 Annual Report, which included the contested payment that he had received one month earlier. Knowing that this payment was not due by FIFA, he was therefore in a conflict of interest by taking part in a session devoted to the examination of this report. Indeed, while a diligent member of the Finance Committee, learning on this occasion that a payment of the not insignificant sum of CHF 2'000'000 had been made in favor of another member participating in the meeting of the said Commission would have raised questions to the recipient of this amount, the Appellant had every interest in hiding its existence so that the 2010 FIFA accounts could be adopted without

mentioning the substantial advantage granted to him shortly before. There was, therefore, a clear interference between FIFA's interest in challenging an act which had cost it money it without valid cause for such a significant sum and that of the Appellant to retain the result of his illegitimate enrichment, in other words a conflict of interest that prevented the official from fully carrying out his obligations as a commissioner in full independence.

This, in sum, is the argument by which the Panel justified the Appellant's conviction under Art. 19 CEF.

3.6.2. The Appellant criticizes the Panel in his penultimate plea. First, he seeks to demonstrate, by referring to various documents of the arbitration file and particularly to the minutes of the meeting of March 2, 2011, that all of members of the Finance Committee were aware of the substantial increase of the amounts paid to FIFA's managers over the previous financial year, that they were also aware of the existence of the contested payment, and that they had raised no objections or asked any questions in that regard. Accordingly, it should be inferred that the Finance Committee did not have to examine these remunerations at the said meeting, as the knowledge of the latter by its members was binding on FIFA in accordance with Art. 55 CC. On the basis of this premise, the Appellant, who accuses the Panel of having arbitrarily ignored this state of affairs, argues that it was untenable to hold that he had been in a situation of conflict of interest by attending the meeting on March 2, 2011. Such an argument rests entirely on the alleged failure of the Arbitrators to establish the relevant facts. However, under the pretense of bringing to light such an oversight, the Appellant in reality attacks the assessment of the adduced evidence by the Panel, thus disregarding the very restrictive nature of the corresponding plea according to the jurisprudence of the Federal Tribunal (see para. 3.1 above). Based on this inadmissible premise, the Appellant's resulting legal deduction is *ipso facto* doomed to failure.

Moreover, the conflict of interest imputed to the Appellant appears manifest, on the basis of the facts contained in the contested decision, so that in finding its existence and sanctioning the person who has not been able to avoid it, the Panel made a defendable decision, which is the only fact that matters under Art. 393(e) CPC.

3.7.
3.7.1. In his final plea, to which he attributes a subsidiary character, the Appellant attacks the disciplinary sanction imposed on him.

Referring to the complaints made in the main part of his Appeal Brief concerning the constituent elements of the offenses against him, he argues, first, that the Arbitrators did not take into account, as they ought to have done, the Respondent's active participation in the alleged breaches by the Respondent, including the fact that it had knowingly agreed to pay the amount in dispute, that it had not called into question such attribution at the later meeting by its Finance Committee, and to have admitted the extension of the pension plan required by it.

The Appellant then focuses on the prohibition imposed on him to take part in any activity related to football for a period of 4 years. Based on three provisions drawn from Swiss private law – Art. 27 CC and Art. 163 CO in conjunction with Art. 4 CC – and on the relevant case law, in particular the *Matuzalem* judgment (ATF 138 III 322[20]), he submits that the sanction is excessively harsh and therefore arbitrary in two respects: first, due to its vagueness, it abandons the fate of the person sanctioned at the will of the perpetrator of the sanction, in that it would allow, for example, the Respondent, given its dominant position in the football world, to forbid him to be a consultant for a sportswear brand, or even a voluntary activity in connection with football, not to mention a simple football leisure activity as a Sunday player or spectator, which would constitute an unjustifiable interference with his personality, in addition to the infamous and vexatious nature of such a punishment inflicted on one of the great servants of this sport; secondly, the duration of the prohibition imposed would be excessive and disproportionate in view of the Appellant's age (61 years), who, having devoted his whole life to football and being of public notoriety, will not be able to reemerge in this field and already had to abandon his role as the president of UEFA.

3.7.2. Under Art. 6(1) CEF, the persons to whom the Code of Ethics applies shall be liable to one or more of the nine sanctions enumerated by this provision when they violate this code or any other FIFA regulations. Art. 9(1) CEF specifies that the penalty may be imposed by taking into account all factors relevant to the case, including the offender's assistance and cooperation, as well as the context, motivations and degree of culpability of the offender. These sanctions include the prohibition of any activity relating to football (Art. 6 (1)(h) CEF). According to Art. 22 of the FIFA Disciplinary Code (Version 2011), applicable by general reference to Art. 6(2) CEF, "*a person may be prohibited from engaging in any football (administrative, sporting or other) activity*".

In criminal law, the judge has wide discretion in determining the sentence to be imposed on an accused convicted of an offense. Accordingly, the Federal Tribunal only intervenes if the cantonal authority has fixed a penalty outside the legal framework, if it has relied on criteria other than those set out in the general provision of Art. 47 CP, if important evidence has not been taken into account or, finally, if the sentence imposed is excessively severe or mild to the point of constituting an abuse of discretion (judgment 6B_145/2016 of November 23, 2016, at 4.1). Similarly, with respect to disciplinary penalties imposed on athletes, it intervenes with respect to decisions made under a discretionary power only if they result in a manifestly unfair result or a shocking injustice (judgment 5A_805/2014 of June 22, 2015, at 5.2 and references). It does not act differently when it reviews the decision of fairness taken by the last cantonal instance under Art. 163(3) CO, a provision requiring the judge to reduce the penalties that he/she considers to be excessive (judgment 4A_268/2016 of December 14, 2016, at 5.1, not published, in ATF 143 III 1).

This Court's power of review will be even more limited in the present case, as it will be exercised within the narrow scope of the arbitrariness plea within the meaning of Art. 393(e) CPC. This should be borne in mind when analyzing the strong criticisms of the sanction at issue. Of course, there is no question here of doubly

[20] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

restricting the reasoning of the supreme judicial authority of the Confederation, like the now-barred theory that flourished in the name of "double arbitrariness"[21] (judgment 4A_683/2010 of November 22, 2011, at 2.1 and the case law cited). The Panel itself has freely reviewed the merits and proportionality of the punishment imposed on the Appellant (Award, para. 357), so that the above figure is irrelevant. The fact remains, however, that only the discovery of one or more gross violations of their discretion by the Arbitrators, which is also the cause of a severe disciplinary punishment, could justify the intervention of the Federal Tribunal.

3.7.3. In view of these rules and principles, within the pre-defined framework of this Tribunal's power of review, the pleas raised by the Appellant do not disclose any manifest breach of the law that would render the award arbitrary in its result as regards the disciplinary sanction imposed on him by the Panel.

In attempting to demonstrate, in conjunction with his substantive pleas, that the Respondent has actively participated in the offenses committed by him, the Appellant returns, in vain, to grounds which have already been rejected above (cf. at 3.3-3.6).

In quoting Art. 27 CC and Art. 163(3) CO (in conjunction with Art. 4 CC) together, as well as a number of judgments of the Federal Tribunal without indicating how they would apply to the specific circumstances of the particular case (appeal, para. 178-185), the Appellant infringes Art. 77(3) LTF, which renders his appeal inadmissible in this respect.

The "legality" of the penalty imposed is not subject to doubt. It follows from the regulatory provisions referred to in the first paragraph of para. 3.7.2 of this judgment. The Appellant also expressly agrees (reply, pp. 4, para. 4). The adjective "all", before the word "activity" in Art. 22 of the FIFA Disciplinary Code is sufficient to justify the territorial extension of the sanction at the global level, which is logical in the case of an international federation governing its sport. As to the qualifiers contained in the parenthesis which closed this provision ("*administrative, sporting or otherwise*"), they somewhat restrict the material scope of Art. 6(1)(h) CEF, which prohibits the exercise of "*any activity relating to football*". The Appellant nevertheless denounces the lack of precision of this addition, owing to the presence of the term "other". In this, he is not entirely wrong. It must be admitted that this formulation could theoretically encourage possible abuses on the part of the Respondent. It must therefore be clearly stated that it cannot be regarded as a blank check to the Respondent, which would justify the unlimited application of that prohibition to any activity, even unrelated to the fields governed by FIFA or its affiliated associations, that is essentially the organization of football competitions. It is not necessary to annul the contested award, however, because the penalty imposed may be interpreted in a sustainable manner. Moreover, if FIFA came with the idea to specifically prohibit the Applicant from exercising an activity that is clearly not prohibited by Art. 6(1)(h) CEF, its decision could be annulled on appeal (see, *mutatis mutandis*, 4A_458/2009[22] of June 10, 2010, at 4.4.8). Whatever the Appellant may say, it is difficult to imagine that

[21] Translator's Note: In French *arbitraire au carré*, in German *Willkür im Quadrat*.
[22] Translator's note: The English translation of this decision is available here:

FIFA, using the monopoly it would enjoy in its view in all matters concerning football from near or far, would endeavor to encourage the one or the other sponsor or media not to hire the Appellant, or even to put pressure on a third party to prevent him from entering a stadium as a mere spectator. This argument is pure speculation. As to the imposition of such measures to third parties by means of enforced execution, this is hardly conceivable for an association governed by private law. Moreover, in its reply to the appeal FIFA itself held that the prohibition in question could not be extended to private activities outside organized football, and that, even if the Appellant could not exercise official duties within FIFA, UEFA, or the French Football Federation until the end of his suspension, nothing would prevent him from attending a match, at least as a guest not invited by a federation, or to work as a consultant for a football clothing brand. These are the concessions that the Respondent could face if he desired to backtrack. It is true, however, that FIFA, which today seeks to restore its image that has been tarnished in recent years by a series of issues, would have better things to do than to apply a disciplinary sanction with a defined objective a little too broadly. For the rest, the prohibition imposed should be less problematic from the point of view of its material extent, in so far as it concerns administrative activity and sports activity. As regards the latter, the scope of the disciplinary sanction may be limited. Indeed, at his age, the Appellant cannot reasonably hold out hope of returning to the brilliant footballer that he once was, the offensive midfielder who made the glory of the biggest European clubs of his time and the extraordinary shooter who aggrieved a number of experienced goalkeepers, as in this field as in many others the popular saying goes that one cannot be and have been.

With regard to its duration, *i.e.* 4 years, the prohibition imposed does not appear to be manifestly excessive on the basis of the criteria set out by the Panel and which have been summarized above (see C.b.h). The arbitrators took into account all the incriminating and exculpatory evidence found in their case. They did not neglect any important circumstance for fixing this duration. The prominent services rendered by the Appellant to the cause of football did not escape them, nor did the present situation of the Appellant, as well as, conversely, the Appellant's lofty position at the highest level of football at the time of the commission of the offenses against him and the absence of regret of the convicted. In this respect, there is no common measure between the statutory penalty imposed on the active professional Brazilian footballer Matuzalem, namely the threat of an unlimited ban on practicing his profession in the case where he would not pay a compensation in excess of EUR 11 million at short notice (ATF 138 III 322[23]), and the one that was imposed on the Appellant. In any case, the latter is less than the six-year suspension imposed on Joseph S. Blatter in comparable circumstances.

Thus, the Panel did not fall into arbitrariness, within the meaning of Art. 393(e) CPC by prohibiting the exercise of any footballing activity which, duly interpreted, appears to be sustainable both as to its object and to its duration.

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http://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-

[23] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

The fine of CHF 60'000, which accompanies this sanction, is not specifically attacked in the application, so that it is not necessary to consider it (Art. 77(3) LTF).

4.

Under these circumstances, the present appeal must be dismissed in so far as it is admissible. Accordingly, the Appellant is ordered to pay the costs of the Federal proceedings (Art. 66(1) LTF) and to pay the Respondent a compensation for its legal costs (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is dismissed in so far as it is admissible.

2.
The judicial costs, set at CHF 20'000, are to be borne by the Appellant.

3.
The Appellant shall pay the Respondent a compensation of CHF 22'000 francs for the federal proceedings.

4.
This judgment shall be communicated to the parties' representatives and to the Court of Arbitration for Sport.

Lausanne, June 29, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Chair: Kiss
The Clerk: Carruzzo