4A_540/2018[1]

Judgment of May 7, 2019

First Civil Law Court
Composition
Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Federal Judge May Canellas (Mrs.)
Clerk of the Court: Mr Curchod

Parties to the proceedings
Jérôme Valcke,
Represented by Mr. Alexandre Zen-Ruffinen, Mr. Baptiste Hurni and Mr. Laurent Crevoisier,
Appellant,
v.
The Fédération Internationale de Football Associations (FIFA),
Represented by Mr. Antonio Rigozzi and Mr. Sébastien Besson,
Respondent,

Facts:

A.

A.a. The Fédération Internationale de Football Associations (FIFA), an association under Swiss law, is the governing body of football at international level. It has disciplinary power over the national federations it groups, players or officials who do not respect its rules, in particular its Code of Ethics (hereinafter: CEF).

Jérôme Valcke (hereinafter, the Appellant) is the former Secretary General of FIFA. Appointed to this position by the FIFA Executive Committee on 27 June 2007, he was suspended from office on 17 September 2015. On 11 January 2016, his employment contract was terminated with immediate effect.

A.b. The present case concerns various breaches of the CEF alleged by FIFA that gave rise to disciplinary proceedings against the Appellant. These allegations concern several distinct themes, the main factual elements of which are summarized here.

[1] Translator's Note: Quote as Valcke. *v.* the Fédération Internationale de Football Association (FIFA), SA, 4A_540/2018. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

A.b.a.

A.b.a.a. Between 2009 and 2010, A._____, an officer of B._____ AG (hereinafter: B._____), threatened to sue FIFA for several million US dollars, claiming to have knowledge of irregularities related to the organization of the 2006 FIFA World Cup. In exchange for his silence, he demanded that FIFA agree to enter into a contract with B._____ to sell thousands of tickets to B._____ for several editions of the World Cup.

A.b.a.b. On 29 June 2009, FIFA and B._____ concluded a contract under which FIFA undertook to sell B._____ several thousand category 1 tickets for different editions of the World Cup at their nominal value. For the 2014 World Cup, the contract provided for the sale to B._____ of 1,000 tickets for the final, 500 tickets for each of the semi-finals, 150 tickets for each of the quarter-finals, 150 tickets for each of the last sixteen, up to 250 tickets for the group matches of the host nation, up to 200 tickets for 9 matches in the group stage of B. _____'s choice and up to 200 tickets for matches in the group phase.

This contract was signed, on behalf of FIFA, by the Appellant as well as by the association's Deputy Secretary-General, C._____. In particular, it provided that B._____ would provide 60 FIFA guests with an invitation to a golf tournament, organized and funded by B._____, which would take place once a year in the years of the World Cup (2010, 2014, 2018 and 2022). According to the contract, B._____ would have to comply with the "Guidelines for the General Ticket Terms and Conditions" as well as with FIFA Sales Regulations and all applicable national and international regulations. It was intended that B._____ would be in direct and exclusive contact with the office of the FIFA Secretary General.

During the negotiations of the above-mentioned contract, FIFA refused to sign a side letter drafted by B._____ containing the following clause: "B._____ will have the rights to purchase from FIFA a limited number of Cat 1 tickets for the FIFA World Cup in 2010, 14, 18 and under certain conditions 2022 and resell to clients/buyers." FIFA had also refused the amendment to Clause 9 of the contract proposed by B._____ providing for the following addition: "however selling the ticket inventory does not constitute a breach of this agreement."

In anticipation of the 2014 World Cup in Brazil, the Brazilian Parliament enacted a law providing, among other things, for civil and criminal penalties in the event of the sale of tickets for sporting events at a price higher than the nominal value.

A.b.a.c. On February 27, 2013, and March 5, 2013, A._____ sent emails to the Appellant concerning the resale of tickets for the 2013 Confederations Cup, a competition organized by FIFA for which B._____ had also obtained tickets, as well as for the 2014 World Cup, asking him to give his authorization to formalize the sale of tickets for these competitions. The Appellant replied in the affirmative to these emails, either by indicating that he would do what was necessary or by directly authorizing B._____ to resell the tickets in question.

In March 2013, a meeting between A._____ and the Appellant took place at FIFA headquarters concerning, in particular, the allocation of tickets to B. for the 2014 World Cup. According to A._____, the Appellant allegedly granted B._____'s request for tickets other than those contractually provided for, in particular tickets for all the matches played by the Brazilian team, the first three matches of the German team and two other matches to be determined after the draw. In return,

the Appellant allegedly negotiated for himself a participation of 50% of the proceeds from the sale of tickets for 12 matches as well as for any other tickets that B._____ might obtain from him. If the latter acknowledges having received such an offer from A._____, he denies having accepted it.

On April 2, 2013, the Appellant sent an email to D._____, member of the Board of Directors of B._____ confirming the amendment of the contract to include all matches of the Brazilian team up to the semi-final, i.e. 1,200 category 1 tickets, as well as 200 category 1 tickets for the final of the competition. It specified that the tickets for the last five matches, i.e. 1,000 category 1 tickets, would be selected by FIFA after the final draw in December 2013.

On April 3, 2013, A._____ and the Appellant exchanged emails about a meeting in Zurich on the same day, referring to the transmission of "documents" by the former to the latter. In particular, the Appellant wrote in the context of this exchange that these "documents" constituted his pension fund ("Documents are my pension fund when looking for something else if not anymore at FIFA by end of 2014 first half of 2015 [...]"). In an email sent the same day to the Appellant's private email address,

A._____ writes that the "document" will grow as the match date approaches ("It will growing [sic] as we get close to the games [...]"). According to A._____ and D._____, the terms "document" or "documents" referred to a sum of money in cash corresponding to an advance on the payment of the bribe agreed with the Appellant. According to the testimonies of A._____

and D. _____, this sum of money was between CHF 300'000 and CHF 500'000, A._____ specifying that it was USD 500'000 converted into Swiss francs at the rate of the time. The total amount of the bribe was estimated at around CHF 2 million, depending on the proceeds from the sale of the above-mentioned tickets. According to the Appellant, the term "document" referred to the particularly sensitive information concerning irregularities in connection with the 2006 World Cup used by A._____ to blackmail FIFA.

On April 23, 2013, A._____ sent an email to the Appellant's private address with the subject matter "pension fund" and containing information on the proceeds of ticket sales for the first three matches of the German team as well as for three rounds of the last sixteen. According to A._____, the purpose of this email was to keep the Appellant informed of the amount to which he would be entitled under the agreement between them.

On July 16, 2013, after the Appellant asked B. to suspend the sale of tickets for the World Cup, A._____ sent an email to the Appellant's private address to complain about this request, while making it clear that it had been respected by B._____. One day later, the Appellant wrote to A._____ from his private e-mail address, indicating that B._____ could continue to sell the tickets and that only the way to obtain them remained uncertain ("You can sell. It is just about from where you will get the tickets. So easy, we talk on Monday").

A few months later, A._____ asked the Appellant to provide B._____ with 2,282 additional tickets in order to conclude an agreement with a Brazilian group wishing to acquire such tickets for the 2014 World Cup. The Appellant granted this request, increasing the number of tickets provided by FIFA for this competition to B._____ from 8,750 to 11,032.

A.b.a.d. On November 26, 2013, E._____ AG (hereinafter, E._____), FIFA's exclusive partner for the promotion of hospitality packages, sent a letter to FIFA complaining that A._____ was selling tickets without FIFA's authorization, stating that the resale of tickets at a price higher than their nominal value was in breach of FIFA rules and Brazilian law and that the sale of such tickets as part of hospitality packages would amount to a breach of the exclusive agreement between FIFA and E._____. In that letter, E._____ considered that the only viable option was to designate B._____ as its sales agent.

Subsequently, steps were taken to restructure the business relationship between FIFA and B._____ to this end, which involved the termination of the contract between B._____ and FIFA and the conclusion of a new agency agreement between B._____ and E._____. To A._____, who communicated by e-mail on 12 December 2013 his lawyer's skepticism that the contract between B._____ and FIFA would be terminated, the Appellant replied on the same day that B._____ had no choice but to accept the new structure, stating that if B._____ did not accept it, the "deal" would be cancelled by FIFA and that criminal proceedings would ensue ("the deal will be cancelled by FIFA or we all face as individuals criminal offense").

On December 18, 2013, FIFA handed D._____ in person a letter signed by the Appellant, in which he thanks B._____ for confirming that he was in the process of signing an agency agreement with E._____. In response to an email sent by A._____ a few days earlier to the Appellant's private email address in which he stated, inter alia, that the first contract between FIFA and B._____ should remain in force in order to prevent B._____ from breaching contracts concluded with third parties who had purchased tickets, the Appellant expressed his surprise. In particular, he explained that the contract between FIFA and B._____ prohibited B._____ from reselling tickets without FIFA's prior consent, which was lacking in this case, and that B._____ could only resell tickets by becoming E._____'s agent. He also made it clear that any resale of tickets would contravene the contract between FIFA and B._____, FIFA's General Terms and Conditions and the aforementioned Brazilian law. The Appellant alleges that this letter was prepared by FIFA's Legal Department and that his signature was affixed in his absence.

On December 20, 2013, B._____ and FIFA terminated their contract and B._____ concluded a non-exclusive agency agreement with E._____. The latter contract provided that B._____ would act in the future as E._____'s agent, providing its customers with "hospitality packages" in accordance with FIFA's ticketing policy and E._____'s pricing structure. On the same day, E._____'s CEO, F._____, acting on its own behalf, signed a side letter to the contract in which it undertook to pay B._____ USD 8.3 million. According to an internal memorandum dated September 22, 2014, FIFA had given an oral undertaking to reimburse this amount to F._____.

On December 23, 2013, A._____ expressed in a new email to the Appellant his dissatisfaction, considering in particular the new structure much less favorable than the old one for B._____. He regretted that he was no longer able to sell certain premium tickets, citing a shortfall of USD 7 to 8 million. In reply the next day, the Appellant acknowledged that the new situation was not as favorable for B._____ as the previous one, but nevertheless considered that this reorganization was necessary because of the hostile environment and the fact that some people could have used the agreement to harm them ("We are not in a friendly environment and the deal could have been an opportunity for some people to create troubles").

A.b.b. According to an audit carried out by the audit firm G._____, the Appellant has, on four occasions, breached FIFA's internal travel rules by using private jets for no legitimate reason and by being accompanied by his family at FIFA's expense.

In particular, the Appellant traveled, together with his family, to an extraordinary meeting of the FIFA Executive Committee and to the preliminary draw for the 2018 World Cup in St Petersburg by means of a private jet, resulting in additional costs of USD 71'699 that were never reimbursed or deducted from his salary. In September 2012, the Appellant travelled to Delhi by private jet for commercial reasons, accompanied by a FIFA delegation as well as his wife and one of his sons. In order to visit the Taj Mahal, the Appellant delayed the return of the private jet to Zurich, with the other two FIFA members making the return flight by commercial flight. While FIFA deducted CHF 18'870 from the Appellant's salary, it did not deduct the additional costs of parking the aircraft in the Indian city of Agra, nor the cost of return tickets for the other two members of the organization on the date originally planned. Travelling to Doha to meet the Emir of Qatar in September 2013, the Appellant used a private jet rather than a commercial flight, resulting in additional costs for FIFA of approximately CHF 135'609 that were never reimbursed or deducted from his salary. Finally, in July 2012, on the occasion of the 2012 Olympic Games, the Appellant, accompanied by one of his sons, flew in a private jet to Manchester to attend a football match. The additional costs incurred by this trip, amounting to approximately USD 21'066, were neither deducted from the Appellant's salary nor reimbursed.

On October 11, 2013, the then FIFA Chief Financial Officer, C._____, sent the Appellant a memorandum and an overview of the costs associated with the use of private jets by the Appellant between January 2011 and September 2013, or USD 11.7 million. C._____ encouraged the Appellant to use less expensive alternatives where possible and appropriate.

A.b.c. On July 8, 2013, the Appellant had a business meeting with his son H._____ and I._____ then FIFA's Marketing Director, at the offices of J._____ Inc. (hereinafter, J._____) in Manchester. H._____ was working at the time with J._____, a company specializing in virtual reality, but was not an employee of it. J._____ had developed a technology that could potentially be used during the 2014 World Cup. After this first meeting, the FIFA marketing team began negotiations with J._____.

During the aforementioned negotiations, the Appellant and his son exchanged several emails in which the former provided the latter with advice on how to conduct himself and negotiate with J._____. On October 27, 2013, H._____, having in the meantime concluded an employment contract with J._____, transferred to the Appellant by email exchanges between him and the founder of J._____ in which the potential agreement between FIFA and J._____ as well as H._____'s remuneration in the event of agreement were discussed. In response to this email, the Appellant instructed his son to contact I._____ to keep him informed of the new terms of the agreement. On October 29, 2013, one day after J._____ signed an amendment to H._____'s employment contract reflecting the remuneration concluded between the parties, the latter expressed his dissatisfaction with J._____'s proposed conditions in an email to the Appellant, and subsequently signed this amendment. H._____ continued to keep the Appellant informed of the progress of the negotiations between J._____ and FIFA, in particular by email dated November 4, 2013. On November 14, 2013, the Appellant sent an email to I._____ asking him if the agreement with J._____ had been finalized. I._____ immediately replied by email that FIFA would send the

contract with J._____ that very day; the Appellant forwarded the email to his son. On January 16, 2014, FIFA and J._____ concluded a services agreement, signed on behalf of FIFA by I._____ and C._____.

A.b.d. On March 6, 2011, K._____, then President of the Caribbean Football Union (hereinafter, CFU), sent an email to the Appellant requesting that he grant CFU media rights for the 2018 and 2022 World Cups. Referring to several prior contacts on this subject to which the Appellant had not followed up, K._____ wrote to insist one last time. In his reply the following day, the Appellant wrote that he wanted to "gift" the media rights for the two editions of the World Cup in question to K._____ for USD 1 million, despite the receipt of other much more advantageous offers, mentioning the figure of 4 million dollars. The email was sent less than two months before the elections for FIFA President, when Mohamed Bin Hammam was expected to stand against the outgoing President, Joseph Blatter. According to the Appellant, he would not have been reappointed to the FIFA if Joseph Blatter had been defeated by Mohamed Bin Hammam. With the 25 nations forming the CFU using the block vote system, this union is of significant importance in the context of elections. FIFA ultimately allocated the media rights in question for the Caribbean region to M._____ rather than CFU for USD 20 million.

On March 19, 2011, the Appellant suggested in an email to N._____ then a member of FIFA's Television Department, that he should not grant favors to the Thai Football Association and its President O._____ in the allocation of media rights due to the latter's support for Mohamed Bin Hammam.

A.b.e. On June 2, 2015, FIFA's Legal Officer, P._____, and a law firm sent a letter to all FIFA employees, including the Appellant, concerning the Swiss and American authorities' investigations against the organization. In this letter, all employees were asked not to modify, destroy or alter in any way relevant documents, which were defined very broadly. Subsequently, the aforementioned law firm asked the Appellant's lawyer whether he had indeed preserved all the relevant documents and pressed the Appellant to produce them. A subsequent analysis of the laptop by a specialist showed that the Appellant tried - unsuccessfully - to install a computer tool for data destruction and deleted a total of 1,034 files between September 24, and October 11, 2015. According to the Appellant, only two of these files were linked to FIFA, the others being of a private nature.

After initiating a disciplinary investigation against the Appellant, the Investigatory Chamber of the Independent Ethics Committee of the FIFA (hereinafter, the Investigatory Chamber) called him for an interview on September 21, 2015, in Zurich. The Appellant, through his lawyer, requested access to all documents in the possession of the Investigatory Chamber in connection with the investigation and that the interview be postponed in order to allow him to consult these documents. On September 21, 2015, the Investigatory Chamber rejected the Appellant's corresponding request, refusing to grant him access to the documents in its possession and claiming that the relevant elements of the file could be consulted at a later stage. Subsequently, the Investigatory Chamber requested the Appellant to produce all his correspondence with A._____, D._____ or any other person related to B._____ and called him back for an interview. It has repeatedly reminded the Appellant of his duty to cooperate in accordance with Art. 41 CEF. The Appellant expressed his willingness to cooperate, provided, however, that he was granted prior access to the file, and in particular expressed concern that his cooperation in FIFA's disciplinary proceedings might be prejudicial to him in view of the criminal investigations carried

out by the Swiss and American authorities. He expressed concern that documents produced during the disciplinary proceedings might reach the Swiss or American criminal authorities.

B.

B.a.

B.a.a. By a decision issued on October 7, 2015, and reasoned the following day, the FIFA Adjudicatory Chamber of the Independent Ethics Committee (hereinafter, "the Adjudicatory Chamber") provisionally suspended the Appellant from all activities related to football for a period of 90 days. This suspension was confirmed on November 24, 2015, and extended on January 5, 2016, for a period of 45 days.

The Adjudicatory Chamber issued its final award on February 10, 2016. Finding that Appellant had violated Articles 13, 15, 19, 20 and 41 CEF, it prohibited him from engaging in any activity related to football at a national and international level for a period of 12 years from October 8, 2015, and additionally imposed a fine of CHF 100'000.

B.a.b. By decision of June 24, 2016, the FIFA Appeal Committee (hereinafter, the Appeal Committee) partially confirmed the decision of the Adjudicatory Chamber. Confirming the breach by the Appellant of Articles 13, 15, 16, 18, 19, 20 and 41 CEF, it nevertheless reduced the duration of the prohibition imposed on him from 12 to 10 years, while ratifying the amount of the fine.

B.b. On February 23, 2017, the Appellant appealed to the Court of Arbitration for Sport (hereinafter, CAS) for the annulment, in the alternative, the reduction, of the sanctions imposed on him.

The arbitration procedure was conducted by a Panel of three Arbitrators. On July 26, 2017, the CAS sent the parties an Order of Procedure which they signed without reservation. On October 11, 2017, the Panel held a hearing at the CAS headquarters in Lausanne, in the presence of the Appellant and his counsel and the Respondent's counsel.

By decision of July 27, 2018, the Panel rejected the Appellant's appeal against the decision of the Appeal Committee of June 24, 2016.

C.

The Appellant submitted a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award of July 27, 2018. Considering that the arbitration is internal in nature, he mainly gives reasons for his grievances under Art. (393) CPC. First, he infers from the absence of a decision by the Panel on the international or domestic nature of the arbitration a breach of his right to be heard. He then argues that the Panel made an arbitrary award in so far as it disregarded mandatory provisions of Swiss labor law applicable in the present case and manifestly violated Art. 10 of the 2009 version of the CEF. In his view, the award would also constitute a clear breach of Art. 6 (1) ECHR and 14 of the International Covenant on Civil and Political Rights (ICCPR) which entered into force for Switzerland on June 18,1992, (UN Covenant II; SR 0.103.2) and is therefore incompatible with procedural public policy. Finally, he considers that the excessive nature of the sanction imposed on him would constitute a breach of both the principle of preventing arbitrary procedures and substantive public policy.

At the end of his reply of November 28, 2018, the Respondent argued that the action was inadmissible and, in the alternative, that it should be dismissed. The Appellant, in his reply of December 14, 2018, and the Respondent, in its reply of January 11, 2019, maintained their respective submissions.

The CAS waived its right to submit comments.

Reasons:

1.

In accordance with Art. 77 (1) LTF[2], Civil appeals are admissible against the decisions of arbitral tribunals: (a) for international arbitration, under the conditions provided for in Art 190 to 192 of the of the Federal Private International Law (SR 291); and (b) for domestic arbitration, under the conditions provided for in Articles 389 to 395 CPC.

1.1. The question of the domestic or international character of the arbitration is of great importance, as the grounds for admissible appeals against an award made in the context of international arbitration are considerably more limited than those admissible against a domestic arbitral award. In particular, Art. 190 (2) PILA[3], which is exhaustive, does not in particular establish arbitrariness as a ground for appeal against an international arbitral award.

The CAS recognized the importance of the question of the international or domestic nature of the arbitration for a possible Civil appeal to the Federal Tribunal. Nevertheless, considering that it was essentially insignificant for the proceedings before it and that the parties were not requesting a decision, it did not consider it necessary to decide. The Appellant, who also considers that this lack of a position on the issue amounts to breaching his right to be heard (see below at (2)), is of the opinion that this is a domestic arbitration and that the grounds for appeal under Art. 393 CPC can therefore be relied upon before the Federal Court. The Respondent considers that it is dealing with an international arbitration in which only the grievances enumerated in Art. 190 (2) PILA are admissible in the proceedings.

1.2. According to Art. 176 (1) PILA, an arbitration is international if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties was, at the time of the conclusion of the arbitration agreement (see judgment 4A_600/2016 of June 29, 2017, at 1.1.1), neither domiciled nor had its habitual residence in Switzerland. When the seat of the arbitral tribunal is in Switzerland and the provisions of Chapter 12 of the PILA are not applicable, the arbitration is domestic and governed by Art. 353 et seq. CPC (Art. 353. (1) CPC).

The CAS considered, in the light of these criteria and subject to a declaration by the parties in accordance with the requirements of Art. 353 (2) CPC, to be in the presence of an arbitration of an domestic nature. As the parties agree on this point, there is no need to return to it. The only issue in dispute is whether the parties have validly agreed on a choice of law under Chapter 12 of the PILA.

1.3.

[2] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110

[3] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

1.3.1. According to Art. 353 (2) CPC, the parties can, by an express declaration in the arbitration agreement or in a subsequent agreement, opt out of Part III of the CPC and agree that the provisions of Chapter 12 of the PILA are applicable. Art. 176 (2) PILA gives the parties, when the arbitration is of an international nature, the opposite possibility, namely to opt for the provisions relating to arbitration of the CPC, excluding those of the PILA.

1.3.2. According to the case law of the Federal Tribunal relating to Art. 176 (2) PILA, a choice of law must satisfy the three conditions set by law in order to be valid. Under the authority of the Concordat on Arbitration of March 27, 1969, it was laid down that such choice of law should, first, expressly exclude the application of federal law, second, provide for the exclusive application of cantonal rules on arbitration and, third, take the written form. The Federal Tribunal held that there were no serious grounds for departing from the clear text of the law according to which an exclusion agreement required not only an agreement as to the exclusive application of the Concordat but also the express exclusion of the federal law on international arbitration (**ATF 116 II 721** at. 4; **115 III 393** at 2b/bb; judgments 4P.140/2000 of November 10, 2000, at 2a.; 4P.243/2000 of January 8, 2001, at 2b; 4P.304/2006 of February 27, 2007 at 2.2.4; 4A_254/2013 of November 19, 2013 at 1.2.3). The entry into force of the CPC did not bring any significant changes to these conditions. According to the current version of Art. 176 (2) PILA, the parties can, by an express declaration in the arbitration agreement or in a subsequent agreement, opt out of the provisions of Chapter 12 of the PILA and agree to the application of Part III of the CPC.

1.3.3. There is nothing to prevent the case law relating to Art. 176 (2) PILA from being applied *mutatis mutandis*[4] to the opting out in accordance with Art. 353 (2) CPC (AMBAUEN, 3. Teil ZPO versus 12. Kapitel IPRG, Eine Gegenüberstellung im Kontext der Opting-out-Möglichkeiten, 2016, no.198; BERGER/KELLERHALS, International and domestic arbitration in Switzerland, 3rd ed. 2015, no.112; DASSER, in Kurzkommentar ZPO, 2nd ed. 2013, No. 11 on art. 354; PFISTERERER, in Berner Kommentar, Schweizerische Zivilprozessordnung, 2012, no. 32 to Art. 353 CPC). According to the clear text of this provision, an opting out is valid if, first, the application of Part III of the CPC is expressly excluded, second, the exclusive application of the provisions of Chapter 12 of the PILA is agreed, and third, the express declaration of the parties is in written form. Thus, an agreement by the parties to apply the rules of international arbitration exclusively is not sufficient on its own. It is imperative that the parties expressly exclude the application of the provisions of the CPC relating to domestic arbitration.

In a recent award, the Federal Tribunal indicated as an *obiter dictum*[5] that an opting out under Art. 353 (2) CPC cannot be validly agreed in order to avoid the restriction on the arbitrability of disputes concerning claims arising from a purely Swiss employment relationship which the worker cannot waiver (Art. 354 CPC with Art. 341 (1) CO[6]) (**ATF 144 III 235** at 2.3.3). If this is not strictly speaking a supplementary condition in addition to those of Art. 353 (2) CPC, it must be noted that, even in the event of an opting out, the arbitrability of a domestic dispute within the meaning of the aforementioned provisions is determined in accordance with Art. 354 CCP[7] and Art. 177 PILA.

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[4] Translator's Note: In Latin in the original text. The expression means "with the necessary changes".
[5] Translator's Note: In Latin in the original text. The expression means "thing said in passing".
[6] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations
[7] Translator's Note: CCP is the abbreviation for the Swiss law of Civil Procedure, or CPC, *Code de procédure civile*

1.4.

1.4.1. The procedural order, transmitted by the CAS to the parties on July 26, 2017, and signed without reservation by them in the following days, contained the following provision:

> "In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the "Code"). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law"[8].

1.4.2. The Appellant considers that the parties have not validly agreed on an opt-out. His argument is divided into three points. Firstly, he considers that the clause in question would not comply with the condition of validity of a choice of law under Art. 353 (2) CPC that the clause should expressly exclude the application of Part III of the CPC. Since the procedural order signed by the parties merely excludes "any other procedural right", it would not meet the requirements of the case law.

Secondly, the Appellant considers that he is not bound by this clause because he is unwilling to submit the dispute to the rules on international arbitration. If he does not dispute that he signed the procedural order in question, the Appellant considers that the inclusion of an opting out clause would correspond to a clerical error of the CAS Court Office of the that went unnoticed at the time of signing the procedural order. According to him, procedural orders are ostensibly standard documents distributed "almost mechanically" by the CAS in all proceedings and "signed [by the parties] in the same way". Since the Appellant expressly requested the application of Part III of the CPC in its Appeal Brief and the Respondent did not object to it in its reply, the Arbitral Tribunal cannot, in the Appellant's opinion, reclassify the arbitration as international arbitration on its own initiative without drawing its attention to this point, for example by highlighting the clause in question or referring to it in the letter accompanying the procedural order. In his view, this was not the case in this instance, since the disputed provision was formulated as an introductory remark placed in the preamble, outside the operative part of the order. Even if it were not an error on the part of the CAS, but rather a desire "to impose an opting-out on the parties", this conduct of the Arbitral Tribunal would be contrary to the principle of good faith (Art. 2 CC[9]).

Thirdly, the Appellant doubts that the parties can validly agree on a choice of law after the opening of the arbitration proceedings, let alone after submitting appeal briefs that do not contest the domestic nature of the arbitration.

The Respondent, however, considers that the parties have validly agreed on an opting out under Art. 353 (2) CPC. In particular, it points out that the disputed provision differs from the choice of law clauses under Art. 176 (2) PILA on which the Federal Tribunal has had to rule. The PILA does not contain - unlike the CPC - any procedural provisions that could be chosen by the parties within the meaning of Art. 373 (1) CPC; the phrase "exclusion from any other procedural law" cannot be interpreted otherwise than as an exclusion from Art. 353 et seq. CPC. It also rejects the thesis of a clerical error put forward by the Appellant as well as his allegations concerning a breach of Art. 2 CC by the CAS. With

[8] Translator's Note: In English in the original text.

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

respect to the time at which the agreement was entered into, the Respondent considers that legal opinion infers from Art. 353 (2) CPC that such an agreement is possible until the award is made.

1.5. It appears from the outset that the Appellant cannot be followed when he claims that the opting out is not valid because of his unwillingness to submit the dispute to the rules on international arbitration. The Appellant, whose argument is based essentially on the hypothesis of a clerical error by the CAS that went unnoticed at the time the procedural order was signed, would ultimately like his agreement to the choice of law not to be enforceable against him. As the Panel rightly points out, his reasoning is problematic. A party, in particular when assisted by counsel, cannot sign a procedural order containing a choice of law clause and, subsequently, argue that it is not bound by it. To admit otherwise would be to violate the principle of contractual fidelity (*pacta sunt servanda*)[10]. The Appellant does not demonstrate how the agreement would be vitiated by being tainted with lack of consent within the meaning of Art. 23 et seq. of the Swiss Code of Obligations, in particular how the strict conditions of a fundamental mistake would be met in this case. It should also be noted that, although a choice of law under Chapter 12 of the LDIP[11] is not currently favorable to the Appellant, since he did not prevail before the previous court and has an interest in the admissibility of the broader grounds for appeal that may be invoked against domestic arbitration, it was not necessarily unfavorable to him at the time the procedural order was signed. Indeed, if the CAS had followed his findings and annulled the sanctions imposed on him, it would have been to the Appellant's advantage if this award could only be challenged under the more restrictive conditions of Art 190 et seq. PILA.

The Appellant wrongly considers that it was the responsibility of the CAS to clearly highlight the opting out clause because of its unusual nature in this case. He seems to refer to the "unusualness rule" (*Ungewöhnlichkeitsregel*), the rule according to which unusual clauses, to the existence of which the contracting partner's attention has not been specifically drawn, are excluded from the supposedly overall adherence to general conditions (see ATF 138 III 411 at 3; judgment 4A_499/2018 of December 10, 2009, at 3.3, intended for publication). He disregards the fact that this rule based on the principle of trust is intended to protect the party who consents to the general conditions governing a contractual relationship. It is not clear how it should apply to a procedural order signed by two experienced parties assisted by counsel in an arbitration. The use by an arbitral tribunal of templates or standard documents does not change this and does not in any way exempt the parties from carefully reading the provisions which the tribunal suggests should govern the procedure. Thus, and without having to rule on whether or not the clause in question is unusual, the Appellant cannot be followed on this point. The same is true of its reasons - which are difficult to understand - regarding the principle of good faith and the prohibition against abuse of rights. Contrary to what he seems to argue, the CAS in no way "imposed" on the parties an international arbitration but simply suggested a procedural order containing an opting-out clause that the parties accepted without reservation. The Appellant's lack of diligence cannot be attributed to the CAS as nothing indicates that it breached Art. 2 CC.

1.6. In the context of the examination of the validity of the choice of law, two specific legal questions arise. The first is to ask whether the disputed clause of the procedural order satisfies the condition of validity of an opting out according to which the application of the third part of the CPC must be expressly excluded. The second is whether an opting out could still be concluded in the procedural order signed by the parties at the end of July 2017.

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[10] Translator's Note: In Latin in the original text. The expression means "treaties are observed.".

[11] Translator's Note: LDIP is the French acronym for the Federal Private International Law Act FPILA

1.6.1.

1.6.1.1. In the disputed clause of the procedural order, the parties not only agreed to the exclusive application of Chapter 12 of the PILA but also specified that this choice of law should be "to the exclusion of any other procedural law", a phrase on whose meaning in French ("*à l'exclusion de toute autre loi de procédure*") the parties agree. Thus, this provision differs from the opting out clauses on which the Federal Tribunal had to decide in the context of its case-law relating to Art. 176 2 PILA (see above at 1.3.2). In the latter, the parties had completely failed to mention either the standards to be applied or those to be excluded, which is why one of the conditions of the opting out was not met.

1.6.1.2. In order to implement the requirements relating to opting out, it is useful to draw inspiration from the case law on the waiver of appeal against arbitral awards under Art. 192 PILA, which also requires an "express declaration" by the parties (CASEY-OBRIST, Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren, p. 157). In particular, Art. 192 (1) PILA states that:

> "[i]f the two parties have neither domicile, habitual residence nor a place of business in Switzerland, they may, by explicit declaration in the arbitration agreement or a subsequent written agreement, waive the right of appeal against the awards of the arbitral tribunal; they may also waive the right of appeal only for one or other of the reasons listed in Art. 190 (2) PILA."

According to case-law, a direct waiver does not have to include the reference to Art. 190 PILA and/or Art. 192 PILA. It is sufficient for the express declaration of the parties to show clearly and unequivocally their shared desire to waive their right to any appeal **ATF 143 III 589** at 2.2.1, **143 III 55** at 3.1; **134 III 260** at 3.1; **131 III 173** at 4.2.31). The Federal Tribunal considered that making the valid waiver subject to the use of the express mention, in the arbitration clause, of these articles of the PILA would be tantamount to a formalism that was not appropriate. This would imply ignoring, for a purely formal reason, the willingness of the parties to waive any appeal against an arbitral award. Such an exclusion would also exclude any waiver made before the coming into force of the PILA. Thus, for example, the Federal Tribunal held that the following clause constituted a valid exclusion within the meaning of Art. 192 LDIP: "All and any awards or other decisions of the Arbitral Tribunal [...] shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made"[12] (**ATF 131 III 173** at 4.2.3.1 and 4.2.3.2). The consequences of waiver of appeal under Art. 192 LDIP are farther-reaching than those of an opting out according to Art. 353 2 CPC in view of the parties' potential to challenge the arbitral award. While the choice of law under Chapter 12 of the PILA has the effect of replacing the grounds of appeal in Art. 393 CPC by the more restricted ones of Art. 190 PILA (see above at 1.1), the waiver according to Art. 92 PILA deprives the Appellant of all grounds of appeal. This waiver applies to all the grounds listed in Art. 190 (2) PILA, unless the parties have excluded the appeal only for one or the other of those grounds (**ATF 143 III 589** at 2.1.1; **III 55** at 3.1 and the judgments cited). Nor is it justified to adopt stricter requirements for an opting-out agreement than for a waiver of appeal (ATF 116 II 639 at 2; BUCHER, in Commentaire romand, Loi sur le droit international privé, Convention de Lugano, 2011, no.36 to Art. 176 PILA).

1.6.1.3. If the Federal Tribunal has not been asked to decide on the degree of precision with which the exclusion of the third part of the CPC (or, in the case of an opting-out under Art. 176 (2) PILA, Chapter 12 of the PILA) must be formulated, it nevertheless specified that the use of a standard form

[12] Translator's Note: In English in the original text.

could not be imposed on the parties and that the shared desire to exclude the provisions in question could be clarified by interpretation. According to the case law, however, legal certainty requires that this desire be clear from the terms used by the parties (ATF 115 II 390 at 2b/bb; judgments 4P.243/2000 of January 8, 2001, at 2b; 4A_254/2013 of November 19, 2013 at 1.2.3).

It is not necessary, in order to establish such a desire, for the parties to have cited the provisions whose application is excluded. Where the terms used by the parties clearly indicate their shared desire to submit the dispute to the provisions of Chapter 12 of the PILA instead of the third part of the CPC, making an explicit reference to these provisions a sine qua non condition for opting out would be tantamount to ignoring this desire for formal reasons. As in the case of waiver of appeal against an international arbitral award, such formalism is not justified. If the law requires that an opting out agreement satisfy the three conditions of Art. 353 (2) CPC, it does not require the parties to cite certain provisions or use certain expressions. For obvious reasons of clarity, however, it can only be recommended that they - and institutions formulating opting-out clauses for them - refer expressly to the aforementioned provisions.

In view of the above, a valid opting out according to Art. 353 (2) CPC and 176 (2) PILA does not require an express reference to Part III of the CPC or, respectively, Chapter 12 of the PILA, in the arbitration agreement or in a subsequent agreement. If such a reference is advisable in order to avoid any discussion, the validity of a choice of law does not depend on it. As the Federal Tribunal has stated in its case law on Art. 176 (2) PILA, it is sufficient that the shared desire of the parties to exclude the application of these provisions is clear from the terms used.

1.6.1.4. The disputed clause in the procedural order, according to which the provisions of Chapter 12 of the PILA must apply to the exclusion of any other procedural law, does not raise any problem of interpretation. The parties agreed on the application of the CAS Sports Arbitration Code as it stands in 2017 and the provisions of Chapter 12 of the PILA, the latter to be applied to the exclusion of any other procedural law. If it would have been desirable for the parties to explicitly mention the CPC and its third part, the categorical wording of this clause ("any") leaves no reasonable doubt that these provisions should not apply to the dispute in question. Moreover, in view of Switzerland's dual arbitration system, it is clear that a clause providing for the application of Chapter 12 of the PILA as a *lex arbitr*[13]*i* instead of any other procedural law is intended in the first instance to exclude alternative provisions of the CPC governing domestic arbitration, which should be particularly clear for two parties having their seat or domicile in Switzerland and being assisted by counsel at the time of signing the procedural order. As the express mention of the provisions of the CPC is not a condition for the validity of an opting out within the meaning of Art. 353 2 CPC, the absence of such a reference in the disputed clause shall not invalidate it.

In the present case, the parties' desire to exclude the application of the CPC's provisions on domestic arbitration is clear from the terms used in the procedural order. Regardless of what the Appellant may say, the disputed clause constitutes from this point of view a valid opting out within the meaning of Art. 353 (2) CPC.

1.6.2.

[13] Translator's Note: In Latin in the original text. The word/expression means "law of the arbitration".

1.6.2.1. With regard to the time of conclusion of the exclusion agreement, Art. 353 (2) CPC provides that an opting out may be concluded "in the arbitration agreement or in a subsequent agreement". In almost the same way, Art. 176 (2) PILA stipulates that the parties may provide for a choice of law under the third party of the CPC "in the arbitration agreement or in a subsequent agreement". In a decision issued before the revision of Art. 176 2 PILA, the Federal Tribunal left open the question of whether such an agreement could be concluded at any time (**ATF 115 II 390** at 2b/cc).

The majority of legal opinion considers that an opting-out agreement may be concluded at any time, even during arbitration (OETIKER, in Zürcher Kommentar zum IPRG, 3rd ed. 2018, no.104 to Art. 176 PILA; DUTOIT, Droit international privé suisse, Commentary on the Federal Law of 18 December 1987, 5th ed. 2016, no.6 to Art. 176 PILA; BERGER/KELLERHALS, op. cit., no.108; PFIFFNER/HOCHSTRASSER, in Basler Kommentar, Internationales Privatrecht, 3rd ed. 2013, No. 47 to Art. 176 PILA; DASSER, op. cit., no. 13 to Art. 353 CPC; PFISTERER, op. cit, no. 35 to Art. 353 CPC; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, 1989, No. 18 to Art. 176 LDIP), some commentators specifying that such a change of system may take place until the arbitral award is made (STACHER, in Schweizerische Zivilprozessordnung (ZPO), Kommentar, 2nd ed. 2016, No. 25 to Art. 353 LDIP; IMBAUEN, op. cit., op. cit., No. 89 ff.; KAUFMANN-KOHLER/RIGOZZI, International Arbitration, Law and Practice in Switzerland. 2015, no. 2.44; BERGER/KELLERHALS, op. cit., nos. 108 and 112; CORBOZ, in Commentary on the LTF, 2009, no. 30 to Art. 77 LTF).

However, some of these authors provide clarifications that put their position into perspective. For KAUFMANN-KOHLER/RIGOZZI, it seems reasonable to exercise the option of a system change before or at the beginning of the arbitration in order to avoid potential difficulties. According to them, where the arbitral panel has already been constituted, the agreement of the court is required, as the arbitrators have agreed to operate under another *lex arbitri*[14] (KAUFMANN-KOHLER/RIGOZZI, op. cit., no.2.44). According to OETIKER, the agreement of the arbitral tribunal is necessary when decisive stages of the proceedings ("*entscheidende Prozessschritte*") have been reached (OETIKER, op. cit., no.104 to Art. 176 PILA; see also ORELLI, in Arbitration in Switzerland - The Practitioner's Guide, Arroyo [ed.], 2nd edition. 2018, no.31 to Art. 176 PILA). DUTOIT specifies that an exclusion agreement is possible "provided that the procedure has not already reached such an advanced stage that a change in the applicable law is no longer possible" (DUTOIT, op. cit., no.16 to Art. 176 PILA). According to IMBAUEN, an opting out is no longer possible once the arbitral tribunal has decided in a partial or interlocutory decision on a contentious issue relating to a mandatory provision, citing the example of a partial decision of the tribunal on its jurisdiction. According to this author, "[...] it must be assessed in the specific case whether the arbitral tribunal has already carried out acts which are based on mandatory provisions of a lex arbitri[15] and may no longer be repeated."[16] (IMBAUEN, op. cit., no. 90 f.). Finally, referring to the possibility for the parties to return to the PILA system after having concluded an exclusion agreement within the meaning of Art. 176 (2) PILA, LALIVE/POUDRET/REYMOND advise against a change of system during arbitration in view of the difficulties that such a change could raise (LALIVE/POUDRET/REYMOND, op. cit., no.18 to Art. 176 PILA, citing as an example a provision of the Concordat).

[14] Translator's Note: In Latin in the original text. The word/expression means "law of the arbitration".
[15] Translator's Note: In Latin in the original text. The word/expression means "law of the arbitration".
[16] Translator's Note: In German in the original text.

Other authors believe that the parties cannot agree on a change of system at all times. This is the case of WEBER-STECHER, according to which a choice of law is only possible until the first organizational session the first organizational session ("*Organisationsbesprechung*" or "organizational hearing"). For this author, it is decisive that the change of system does not cause a significant slowdown in the procedure (WEBER-STECHER, in Basler Kommentar, Schweizerische Zivilprozessordnung, 3rd ed. 2017, no 11 to Art. 353 CCP). GÖKSU considers it appropriate to allow the possibility of opting out until the end of the organizational sessions or until the decision to set up the arbitral tribunal ("until the conclusion of the organizational meetings or the constitutional resolution") (GÖKSU, Schiedsgerichtsbarkeit, 2014, no. 236). According to BUCHER, a "subsequent agreement" within the meaning of the aforementioned provisions may be concluded until one of the parties takes steps to set up the arbitral tribunal, thereby creating *lis pendens*[17]. According to this author, the more flexible solutions suggested by the legal commentary could lead to serious difficulties of application. As the parties entered into a legal relationship with the arbitrators governed by Chapter 12 of the PILA from the moment the arbitral tribunal was constituted, they could no longer change the rules of the game without the agreement of the latter (BUCHER, op. cit., no.2 to Art. 176 PILA).

All the authors cited above, either commenting on Art. 353 2 CCP or on Art. 176 (2) PILA, or on these two provisions, do not distinguish between them. Only DASSER justifies the possibility of an opting out according to Art. 353 (2) CPC at each stage of the procedure, in particular by the fact that such an choice of law would correspond to a transition to a more liberal system, without however coming to a decision on the time until which the opposite transition is possible (DASSER, op. cit., no. 13 to Art. 353 CPC; see also on this point LALIVE/POUDRET/REYMOND, op. cit., no.18 to Art.176 PILA).

1.6.2.2. It must be noted that the practical importance of the issue is limited. In view of the small differences between the third part of the CPC and Chapter 12 of the PILA (see, for a detailed comparison, AMBAUEN, op.cit., no.158 ff., in particular no.567; DASSER, op.cit., no.13 to Art. 353 CPC), a change of system - even during arbitration - should generally not have any consequences for the proceedings before the arbitral tribunal. The present case provides a clear example of this, since the CAS noted that the question of the validity of the choice of law clause was of no importance for the proceedings before it and would only become relevant at the time of a possible appeal to the Federal Tribunal (see above, at 1.1).

It should also be remembered that opting out is by nature consensual. Any inconveniences that a change of system during the arbitration process may cause for the parties, such as slowing down the proceedings, are therefore only the consequences of their own choice. Thus, even if such inconveniences might justify advising the parties not to agree on a change of system during the arbitration, they do not require it to be prohibited. As KAUFMANN- KOHLER/RIGOZZI and BUCHER point out, the real problem of the time limit of an opting out lies in the relationship between the parties and the arbitrators. To allow the possibility of a change of system at all stages of the arbitration without the agreement of the latter would amount to forcing them to arbitrate a dispute according to the rules of a *lex arbitri*[18] other than that which governed the procedure at the time the tribunal was constituted.

1.6.2.3. The question of the last moment at which the parties may agree on an opt-out without the agreement of the arbitrators does not have to be decided in this case. Indeed, as the Appellant himself

[17] Translator's Note: In Latin in the original text. The word/expression means "pending lawsuit".
[18] Translator's Note: In Latin in the original text. The word/expression means "law of the arbitration".

acknowledges, it was the CAS that suggested the disputed clause to the parties. Thus, there can be no question of a choice of law without the agreement of the arbitral tribunal. There is nothing to prevent an opting out in such a situation until the arbitral award is made.

1.7. In view of the above, the parties' agreement to submit their dispute to the rules of Chapter 12 of the PILA is in accordance with the requirements of Art. 353 (2) CPC. Therefore, only the grounds for appeal in Art. 190 (2) PILA are admissible against the arbitral award of July 27, 2018. As Art. 190 (2) PILA does not establish arbitrariness as an admissible ground of appeal (see above at 1.1), the Appellant's claims relating to the alleged arbitrary violation of the mandatory rules of Swiss labor law and of Art. 10 of the 2009 version of the CEF must be declared inadmissible.

As for the rest of the appeal, there is no obstacle to the commencement of the proceedings. As the Appellant took part in the proceedings before the CAS (Art. 76 (1) LTF), he is entitled to appeal. His appeal, which is admissible by reason of the matter (Art. 72 (1) LTF), is directed against a final award (Art. 90 LTF) and has been submitted in the form provided for by law (Art. 42 LTF) and in due time (Art. 100 al. (1) LTF).

2.

The Appellant infers from the absence of a decision on the international or domestic nature of the arbitration a breach of his right to be heard.

2.1. It is settled case law that the right to be heard in adversarial proceedings, enshrined in Art. 182 (3) and 190 2(d) PILA, does not require an international arbitral award to be reasoned (**ATF 142 III 360** at 4.1.2, **134 III 186** at 6.1 and references). However, case law has deduced a minimum duty for the arbitral tribunal to consider and deal with the relevant issues. This duty is violated when, inadvertently or with misunderstanding, the arbitral tribunal does not take into consideration the allegations, arguments, evidence submitted or tendered by one of the parties and important to the award to be issued It is incumbent on the alleged wronged party to demonstrate, in its appeal against the award, how an oversight of the arbitrators prevented it from being heard on an important issue (**ATF 142 III 360** at 4.1.1 and 4.1.3).

2.2. Contrary to the Appellant's claim, the question whether the arbitration was governed by the provisions of Part III of the CPC or Chapter 12 of the PILA was irrelevant to the proceedings before the arbitral tribunal, which the CAS expressly specified in the award issued (see above at 1.6.2.2). In no case shall it be inferred from the right to be heard that such a question, irrelevant to the outcome of the dispute, should be decided. Nor can the Appellant be followed when he alleges that, by not ruling on the question at issue, the CAS deprived him of the opportunity to learn what arguments were available to him against the award, thereby placing him in an “extremely uncomfortable” position. He ignores the fact that an arbitral tribunal, unlike a cantonal authority whose decision may be appealed in the Federal Tribunal (see Art. 238(f) CPC; Art. 112(d) PILA), is not required to indicate in its award the legal remedies against the award (see KLETT/LEEMANN, in Basler Kommentar, Bundesgerichtsgesetz, 3rd ed. 2018, no.7). For the rest, it should be noted that the Federal Tribunal examines its jurisdiction on its own motion. The fact that the Panel ruled on the question of the international or domestic nature of the arbitration would not have prevented this Court from overturning the position of the Arbitral Tribunal.

3.

3.1. The Appellant claims that there was a violation of Art. 6 (1) ECHR and 14 of the UN Covenant II, the purpose of which, in his view, is to provide guarantees forming part of procedural public policy. He considers that the disciplinary action imposed on him because of his alleged failure to cooperate, while criminal proceedings relating to the same facts were ongoing, constitutes a violation of the right to a fair trial conferred by the aforementioned provisions. In his view, forcing him to cooperate with the FIFA authorities when the results of FIFA's internal investigation were likely to be forwarded to the criminal authorities would be tantamount to rendering meaningless the principle that no one is required to accuse himself. In the Appellant's opinion, the award issued is ostensibly incompatible with his right to a fair trial, which he considers to be part of procedural public policy.

3.2. It is true that the Appellant's grievance raises particularly interesting questions relating to the application and scope of the principle *nemo tenetur se ipsum accusare*[19] in a disciplinary procedure within a private law association while criminal proceedings relating to the same facts are pending or contemplated. However, in order for this Court to examine them, the existence or imminence of such criminal proceedings should be shown. In the present case, the CAS did not elaborate on the possible application of the aforementioned principle, finding that the Appellant had not substantiated his allegations about possible criminal investigations by the Swiss and US regarding FIFA and its directors when the Investigatory Chamber requested him to cooperate. According to the CAS, the object of these investigations is not established. This is a finding of fact which binds the Federal Tribunal, as it conducts its legal reasoning on the basis of the facts found in the award under appeal (Art. 105 (1) LTF). In so far as it refers to criminal proceedings against him concerning the same facts as those alleged against him in the context of the disciplinary proceedings, the Appellant relies on a factual situation which was not retained by the Panel. His grievance is not admissible.

4.

In a final argument, the Appellant argues against the disciplinary action imposed on him, a penalty which he considers to be excessive. He alleges in particular a breach of substantive public policy, since in his opinion the disciplinary action excessively undermines his personality rights.

The Appellant is prohibited from carrying out any activity related to football at a national and international level for a period of 10 years and received a fine of CHF 100'000. It is not up to the Federal Tribunal to judge whether this disciplinary action is adequate or not. Be that as it may, this is by no means incompatible with substantive public policy. In fact, sanctioning serious acts of a senior officer of a sports association with a heavy penalty does not in itself amount to disregarding the essential and widely recognized values which, according to the prevailing conceptions in Switzerland, should constitute the foundation of any legal order (**ATF 132 III 389** at 2.2.3). If the disciplinary action inflicted is likely to significantly affect the end of the Appellant's career, the latter's personality rights are not so constrained that it becomes a question of an award that is incompatible with public policy. In particular, the disciplinary action in question cannot be compared to that imposed on the Brazilian football player Francelino da Silva Matuzalem, namely the threat of an unlimited prohibition to practice his profession in the event that he does not pay an indemnity of more than 11 million euros at short notice (**ATF 128 III 322**). The age of the Appellant and the duration of his career in the world of sport and especially football do not change anything. The Appellant's grievance is not well-founded.

[19] Translator's Note: In Latin in the original text. The expression means "the right to silence".

5.

Under these circumstances, the present appeal must be dismissed in so far as it is admissible. Consequently, the Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and shall pay the Respondent's costs (Art.68 (1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected insofar as the matter is capable of appeal.

2.

The judicial costs, set at CHF 18'000, are to be borne by the Appellant.

3.

The Appellant shall pay the Respondent compensation of CHF 20'000 as costs.

4.

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

Lausanne, May 7, 2019

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

The Presiding Judge: The Clerk of the Court:

Kiss Curchod