4A_338/2018[1]

Judgment of November 28, 2018

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Klett,
Federal Judge Hohl,
Federal Judge Niquille,
Federal Judge May Canellas,
Clerk of the Court: Curchod (Mr.).

Fédération Internationale de Football Association (FIFA),
Represented by lawyers Daniel Eisele and Tamir Livschitz,
Appellant,

v.

A._____ AG,
Represented by Lawyers Michael Wolff and Federico G. Pool,
Respondent

Facts:

A.
The Fédération Internationale de Football Association, FIFA (Respondent, Appellant) is a private association based in Zurich. As the World Football Association, it organizes the Football World Cup, which is held every four years.

A._____ AG (Claimant, Respondent), a public limited liability company with its registered office in U._____, to promote, advise on, and market sporting events in Germany and abroad, as well as the trade in goods of all kinds.

In 2010, the Claimant and the Respondent entered into an agreement regarding the purchase and sale of tickets for the 2010, 2014, and 2018 Football World Cups ("FIFA World Cup 2010, 2014, 2018 and to 2022 only if the US Soccer Federation wants to host the FIFA World Cup",[2] hereafter: 2010 Agreement).

[1] Translator's Note: Quote as FIFA *v.* A._____, 4A_338/2018.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

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

According to the 2010 agreement, the Claimant was entitled to acquire a significant number of tickets for these hosts from the Respondent. There were no problems between the parties in connection with the Football World Cup 2010 in South Africa. The first difficulties appeared with regard to the 2014 host in Brazil. After discussions regarding the restructuring of the agreement, the long-term partner of the Respondent, B._____ AG, and the Claimant concluded an "agency agreement", based on which the Claimant became the non-exclusive sales agent of B._____ AG for hospitality packages of the FIFA World Cup 2014 (see case 4A_546/2016 of January 27, 2017).

B.
On August 12, 2016, the Claimant initiated an arbitration at the Swiss Chambers' Arbitration Institution against the Respondent with the following request for relief (amended several times during the proceedings):

1. Respondent be ordered to pay Claimant an amount of USD 16,803,504.87 plus simple interest at 5% per annum since 12 August 2016;
2. Respondent be ordered to deliver the following 3'695 Category 1 tickets for the 2018 FIFA World Cup Russia to Claimant by 24 May 2018 (in return for the payment of the face value of the requested tickets, to paid directly [*sic*] to Respondent out of the security deposited at the Chairman of the Arbitral Tribunal's account):

Game No.	Game:	Tickets/Game:
# 1	Russia - Saudi Arabia	250
# 3	Portugal - Spain	130
# 7	Argentina - Island	70
# 11	Germany - Mexico	200
# 17	Russia - Egypt	250
# 25	Brazil - Costa Rica	50
# 27	Germany - Sweden	200
# 29	Belgium - Tunisia	40
# 33	Uruguay - Russia	250
# 37	France - Denmark	200
# 41	Serbia - Brazil	105
# 49	Round of 16 Sochi	50
# 51	Round of 16 Moscow	50
# 55	Round of 16 St. Petersburg	50
# 56	Round of 16 Moscow	50
# 59	Quarter Final Sochi	40
# 61	Semi Final St. Petersburg	300
# 62	Semi Final Moscow	410
# 64	Final Moscow	1'000

   whereas all the seats of these allocated tickets must be between the goal line (not behind the goal line), as well as not in the first 20 rows of the stadium and not in the last 40 rows of the stadium, and the allocated seats should not be in a restricted view area and should come in groups of 50 tickets together, containing the following tickets: [*sic!*]
3. Respondent be ordered to declare in writing its consent to Claimant transferring and/or reselling the above tickets [...][3]

The Respondent requested the dismissal of the claim.

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

By letters dated September 2, 2016 and September 16, 2016, the parties each designated one arbitrator.

By letter dated January 3, 2017, the Swiss Chambers' Arbitration Institution confirmed the President of the Arbitral Tribunal.

The hearings took place in Zurich from January 22 to January 24, 2018.

By Award of May 2, 2018, the Arbitral Tribunal essentially upheld the claim. It specifically ordered the Respondent to pay USD 16'803'504.87 plus interest at 5% from August 12, 2016 and to deliver the requested tickets for the 2018 World Cup in exchange for the face value of these tickets. The Arbitral Tribunal considered that the 2010 agreement had been terminated on December 20, 2013. However, the representatives of the Respondent had given guarantees that a relevant delivery would take place through B._____ AG. The fact that these representations or warranties that had been given without power of attorney had been remedied by the subsequent approval of the Respondent within the meaning of Art. 38 OR. The Arbitral Tribunal relied on various factual elements in order to accept that the corresponding assurances or guarantees that were issued without power of attorney were approved by the Respondent.

Decisive were (i) the relevant confirmations from two members of the legal department of the Respondent (ii) the content of the letter addressed to the Claimant dated December 20, 2013 for the termination of the 2010 Agreement, (iii) the payment of USD 8.3 million from the Respondent to B._____ AG or their business director C._____. (iv) the confirmation that C._____ made partial payments to the Claimant against appropriate compensation by the Respondent, (v) the confirmation of delivery of Tickets to B._____ AG as well as (vi) the confirmation of the former Secretary General of the Respondent to the Claimant that the tickets would be delivered as agreed.

C.
By a civil court appeal, the Appellant requested that the Swiss Chambers' Arbitration Institution Arbitration Court Award of May 2, 2018, be set aside and a new award be rendered.

The Appellant attacks – after a presentation of the facts from its point of view (running to 45 pages!) – numerous manifestly contrary findings and obvious violations of the law (Article 393(e) ZPO[4]) and infringements of the principle of the right to be heard (Article 393(f) ZPO). These complaints are grouped into five subject areas, with the last four brought forward on a subsidiary basis. First, the Appellant makes several complaints in connection with the unauthorized assurances or guarantees given regarding the delivery of tickets as adopted by the Arbitral Tribunal (Art. 38 OR[5]).

The second set of complaints relate to the actual assurances or the guarantee agreement regarding the receipt of tickets, with the Appellant essentially arguing that the Arbitral Tribunal arbitrarily assumed that such assurances or guarantees were given to the Respondent. Other complaints made by the Appellant

[4] Translator's Note: ZPO is the German abbreviation for the Swiss Code of Civil Procedure.
[5] Translator's Note: OR is the German abbreviation for the Swiss Code of Obligations.

concern the acceptance by the Arbitral Tribunal that the Appellant had committed a breach of contract. In a fourth set of arguments the Appellant complains about the assessment of the damage by the tribunal.

Finally, it complains about the allocation of costs by the Arbitral Tribunal. The Appellant consistently criticizes the lack of consideration or misunderstanding of the restructuring of the party agreement in the Award. After the transition from one purchase/resale contract to an agency contract structure was the Respondent only agent of B._____ AG. There would be no direct claims against the Appellant for delivery of tickets for the 2014 and 2018 World Cups.

The Respondent requests the dismissal of the appeal, in the alternative the annulment of para. 7 of the operative part of the arbitral Award regarding their damages. The Arbitral Tribunal renounced to file its observations.

After provisionally granting the Appellant's request for a suspensive effect of paragraphs 1, 4, 6, and 8 of the contested Award, the Federal Tribunal denied the suspensive effect through a Presidential Order of September 11, 2018.

Reasons:

1.
The Federal Tribunal examines *ex officio* and with full authority whether an appeal is admissible (Art. 29(1) BGG;[6] BGE 141 III 395 at 2.1 with references).

1.1. The Award under appeal is an arbitral award on a dispute between parties that at the time of the conclusion of the arbitration agreement had their registered office in Switzerland. Neither in the arbitration agreement nor later have the parties agreed on the application of the provisions on International Arbitration (Art. 176 et seq. of the Federal Law on Private International Law [PILA SR 291]) (see Art. 353(2) ZPO). Thus, the rules on domestic arbitration apply in accordance with the third Part of the Swiss Code of Civil Procedure (Art. 353 ff. ZPO). The Parties have not exercised their right to designate a cantonal court as the court of appeal as granted by Art. 390(1) ZPO. The final award is therefore subject to appeal to the Federal Tribunal (Article 389(1) and Art. 392(a) ZPO and Art. 77(1)(b) BGG).

1.2. The grounds of appeal against an arbitral award are more limited than a state court judgment; they are listed exhaustively in the law (Art. 393 ZPO). The federal court only checks only the grounds of appeal raised and reasoned in the appeal (Art. 77(3) BGG). This requirement corresponds to the violation of fundamental rights provided for in Art. 106(2) BGG (BGE 134 III 186[7] at 5). The aggrieved party must name the individual grounds of appeal that are satisfied in its opinion; it is not for the Federal Tribunal to investigate which individual grounds of appeal under Art. 393 ZPO are pleaded with the appeal, when this is not specified by the aggrieved party. Then, this party has to show in detail why the invoked grounds

[6] Translator's Note: BGG is the German abbreviation for Law of the Swiss Federal Tribunal.
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

of appeal are met, without criticizing the assessment of the Arbitral Tribunal (Judgment 4A_356/2017 of January 3, 2018, at 1.2 with references).

1.3. The Federal Tribunal bases its judgment on the facts established by the Arbitral Tribunal (Art. 105(1) BGG). It cannot rectify nor complement the factual assessment of the Arbitral Tribunal even if it is obviously incorrect or due to an infringement in law within the meaning of 95 BGG (see Article 77(2) BGG, which excludes the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal can correct the findings of the contested arbitral Award, if these factual findings are allowed within the meaning of Art. 393 ZPO or exceptionally considered as *nova* (BGE 138 III 29[8] at 2.2.1 p. 34; 134 III 565 at 3.1 p. 567; 133 III 139 p. 5 p. 141, with references). Whoever refers to an exception to the rule that the Federal Tribunal is bound by the actual findings of the Arbitral Tribunal and wishes to rectify or supplement the facts, must present file references, that the relevant statements had already been established in the arbitration procedure in accordance with the rules (see BGE 140 III 86 at 2 with references).

1.4. The Respondent may not file independent requests against the contested Award. Consequently, their alternative request for repeal of para. 7 of the operative part of the arbitral Award concerning their damages is inadmissible.

2.
According to Art. 393(e) ZPO it is possible to attack an arbitral award for being arbitrary in its result, where it is based on factual findings contrary to the records or on an obvious violation of the law or equity. This ground of appeal was taken from the former Concordat (Article 36(f) KSG) (message of June 28, 2006 on the Swiss Code of Civil Procedure, BBl 2006 7405 p. 5.25.8 to Art. 391 of the draft). The description of the arbitrariness in Art. 393(e) ZPO or Art. 36(f) KSG is in line with the concept of arbitrariness that the Federal Supreme Tribunal has developed regarding Art. 4(a) BV and Art. 9 BV[9] (BGE 131 I 45 at 3.4). The facts where arbitrariness can be invoked are however limited. A limitation of arbitrariness concerns the factual findings. It is only possible to invoke obvious infringement of the record; this must be distinguished from arbitrary assessment of the evidence. The Arbitral Tribunal proceeds to a factual assessment that is obviously contrary to the record in the sense of Art. 393(e) ZPO when it overlooked the file, either by oversight or by giving a different meaning to the real content, by wrongly concluding that a fact was correctly documented in the files, while in reality the files contained no such information. A violation of the law is only possible if the judge in the assessment of the evidence is based on wrong factual premises; the result and the procedure of evidence assessment as well as the appreciation falling therein are not subject to the complaint of arbitrariness but merely factual findings that do not depend on further appreciation because they are not compatible with the files (BGE 131 I 45 at 3.6 and 3.7, judgments 4A_642/2017 of November 12, 2018 at 4.1.1; 4A_407/2017 of November 20, 2017, at 1.5). The obvious violation of Art. 393(e) ZPO only covers the violation of the substantive law provision and not one of procedural law (BGE 131 I 45 at 3.4 p. 48; 112 Ia 350 at 2 p. 352; Judgments 4A_649/2012 of May 13, 2013 at 2.2.2; 5A_73/2012 of March 26, 2012 at 1.4). There is an exception for procedural errors,

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[9] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

by analogy to the case law on Art. 190(2)(e) PILA, that violate procedural public policy, such as the right to an independent and impartial expert or the observance of the principle of res judicata, including its own, earlier partial awards of the same Arbitral Tribunal (Judgments 4A_599/2014 of April 1, 2015 at 3.1, in: SJ 2015 I 405; 4A_511/2013 of February 27, 2014 at 2.3.2).

3.
The Appellant alleges that the findings of the Arbitral Tribunal are contrary to the facts of the case.

3.1. A total of 26 factual findings contrary to the facts are criticized, with only 25 of them portrayed in the tabular summary of the individual grounds at the end of the appeal. Concerning the acceptance of the Arbitral Tribunal of the subsequent approval, the Appellant supports that such authorization cannot be inferred from the factual elements on which the Arbitral Tribunal based its judgment. Neither from the meeting of December 18, 2013, nor from the Termination letter dated December 20, 2013, the payment of USD 8.3 million and the delivery of tickets from the Appellant to B._____ AG, the payments from C._____ to the Respondent or from the e-mail from D._____ to E._____ of April 16, 2014 could be inferred an authorization within the meaning of Art. 38 OR. Such a conclusion is contrary to the records. Further elements that were disregarded by the Arbitral Tribunal would have shown that the conclusion of the Arbitral Tribunal on the continuation of a purchase / resale structure regarding tickets is contrary to the files. It is arbitrary to assume that the delivery obligation of the Appellant under the 2010 Agreement and at the same time to find that such agreement was repealed as of December 20, 2013. An appropriate delivery obligation is in particular incompatible with the commitment contained in the termination letter of December 20, 2013, according to which there should be no claims between the parties following the repeal of the 2010 agreement. The approval of the authorization by the Appellant was also in gross contradiction to the Agency Agreement, according to the Respondent's statements, who stated that their role as agent of B._____ AG. after the repeal of the 2010 agreement and according to letter of the Appellant of December 20, 2013, through which the Respondent was authorized to act as agent. Last but not least, it is against the file the non-consideration of the fact that direct contracts were concluded between B._____ AG and the Respondent's clients, as well as of other statements of the Respondent, which would refute the acceptance of assurances or guarantees.

With respect to the submission of assurances or guarantees through its representatives, the Appellant supports that the Arbitral Tribunal disregarded the written form reservation clause 6.11 contained in the 2010 Agreement, according to which there should not be any non-written new or other commitments ("Additional agreements and modifications to this agreement must be in writing to be valid").[10] On the basis of this clause, an oral concluded guarantee agreement between the parties is formally invalid, which the Arbitral Tribunal wrongly failed to take into account. It is further contrary to the file the acceptance of assurances or guarantees regarding the delivery of tickets in view of the termination letter, the agency contract, the e-mail of the Respondent of December, 20 2013, between B._____ AG and the direct contracts brought through the Respondent's clients as well as other statements by the Respondent. In this respect, the Appellant is largely repeating its arguments already made in connection with the approval of the authorization. With regard to the acceptance of a breach of contract by the Arbitral Tribunal, the Appellant claims that the Arbitral Tribunal accepted in a manner contrary to the law that the object of the

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

alleged assurances was a purchase contract and not merely the granting of a purchase option. The Arbitral Tribunal has arbitrarily failed to consider factual elements, according to which the Respondent did not procured other clients beyond the 7'700 hospitality packages and for the procured clients did not request further hospitality packages. Another complaint essentially concerns again the alleged exclusion of the agency structure from the Arbitral Tribunal: it is contradictory to assume that the same tickets were sold through an agency structure and at the same time through a resale structure; such a double delivery of the same tickets is simply impossible. It can be deduced from the file, particularly from the termination letter of December 20, 2013, that there was no delivery obligation of the Appellant after the restructuring.

In connection with the determination of the damage, the Appellant asserts that the Arbitral Tribunal has wrongfully failed to focus on the remaining sales commission of 7% due to the Respondent. In doing so, it again and again argues that the Arbitral Tribunal unlawfully disregarded that the Respondent after the restructuring was only agent of B._____ AG without transactional power. As an agent, the Respondent was not entitled to the selling prices, but only to a commission of 7% of the income of B._____ AG from the sale of the hospitality packages, which the Respondent itself recognized. The Arbitral Tribunal has further failed to focus on the number of 1'050 tickets in the context of the damage calculation, e.g. on the difference between the 8'750 tickets envisaged in the termination letter and the 7'700 tickets that were delivered to customers according to the offer of B._____ AG. The Arbitral Tribunal finally disregarded the duly filed fact that the Respondent, despite its corresponding obligation, did not acquire any customers and, consequently, did not lose any revenue.

3.2. The Appellant misinterprets the scope of the plea of Art. 393(e) ZPO in terms of factual findings. Its – largely overlapping or repetitive – complaints pertain exclusively to the evidence taken by the Arbitral Tribunal. If the Appellant supports that the facts given by the Arbitral Tribunal cannot be proven, in order to prove its subsequent authorization of the assurances or guarantees, or that the Arbitral Tribunal should have focused on other files, it does not criticize the lawfulness of the files but only its assessment. It stands out in particular that all factual elements whose failure to take into account are suggested by the Appellant (letter of termination, agency contract, ...), are mentioned in the contested Award. The Appellant does not state that the Arbitral Tribunal has wrongly reproduced the content of these files or oversaw parts of the files or gave them a meaning other than their real meaning.

The Arbitral Tribunal has in fact deliberately focused on other elements during the evidence assessment, which is not the subject of the arbitrariness plea of Art. 393(e) ZPO. Nothing else applies in relation to the second set of arguments on the writing obligation in accordance with section 6.11 of the 2010 agreement. The Arbitral Tribunal has - as the Appellant itself acknowledges - expressly observed this in its judgment. A misrepresentation of the content of this clause is not stated by the Appellant and can also not be found. The Arbitral Tribunal has only attached a different meaning to this clause than the one that is given by the Appellant in its appeal. This also applies to the rest of evidence, the non-consideration of which is considered as arbitrary by the Appellant: the Arbitral Tribunal has considered both the termination letter and the email of the Respondent of December 20, 2013. The direct contracts concluded between B._____ AG and the customers as well as the other submissions of the Respondent have also been considered by the Arbitral Tribunal in its Award. Furthermore, with regard to the acceptance of a breach of contract as well as the determination of the damage, the Appellant could not show any record infringement. The interpretation of the party agreements with respect to the restructuring might not

correspond to the version supported by the Appellant but does not rely on any factual findings contrary to the record. The Appellant does not show any factual findings obviously contrary to the law in the sense of the Federal Tribunal jurisprudence.

The repeated use of the term "unlawfulness" by the Appellant cannot hide the fact that the Appellant with its complains attacks exclusively the assessment of the evidence by the Arbitral Tribunal. The Appellant fails to explain to what extent the factual findings of the Arbitral Tribunal contradict the files. On the contrary, it largely recognizes itself that the Court has referred to the files in question and correctly reproduced the facts contained therein. How the Arbitral Tribunal assessed these facts is not subject to the plea of arbitrariness but is exclusively related to the factual findings, which do not depend on further assessment because they are incompatible with the file. The Appellant would have to be concrete and explain in a substantiated manner how the Arbitral Tribunal, in the context of the determination of the facts of the case, due to an oversight contradicted the file. It fails to do so and only limits itself to show, why the deductions from the factual findings made by the Arbitral Tribunal are, in its opinion, obviously untenable. It merely criticizes appreciation or discretionary questions of the Arbitral Tribunals; these pleas are therefore inadmissible.

4.
The Appellant alleges 13 obvious infringements (Article 393(e) ZPO).

4.1. In connection with the acceptance of a retrospective approval of the unauthorized assurances or guarantees through the Appellant, it alleges a violation of Art. 38 OR and Art. 1, Art. 115 and Art. 418(a) OR.

4.1.1. The Appellant supports that an authorization within the meaning of Art. 38 OR must be mandatory content with the given assurance. Since the Arbitral Tribunal's finding as to what are relevant authorization acts did not include the allegedly secured delivery of tickets, it manifestly violated the approval of the authorization under Art. 38 OR.

The Arbitral Tribunal recognized in its considerations that the approval must relate to the content of the business, as it has been done from the without authorization agent (BGE 93 II 302 at 4, judgment 4A_485/2008 of 4 December 2008, at 3.3) (see para. 231: *"A ratification not rendered unconditionally but with content-related modifications is basically regarded as a proposal for another agreement."*). The appeal does not contain an independent statement of reasons why the Arbitral Tribunal violated Art. 38 OR. The Appellant is rather limited to allege a violation of this provision following its individual allegations of alleged infringement with respect to the approval of the authorization. Whether it is an inadmissible attack to the facts, which deviates from the binding factual findings of the Arbitral Tribunal, cannot be addressed conclusively. In any case, its plea does not comply with the requirements of Article 77(3) BGG. It is therefore inadmissible.

4.1.2. The Appellant brings forward an infringement of Art. 1, 115 and 418(a) OR in the Award of May 2, 2018, in many places of its appeal, in short paragraphs in the course of its lengthy remarks. This criticism of appellatory nature is inadmissible. It should also be noted that the Appellant fails to proceed to a required analysis of the Award. Especially when it alleges the exclusion of the agency structure agreed

between the parties and B._____ AG, it fails to discuss in a sufficient manner the Arbitral Tribunal's arguments on the parties' positions as to the restructuring as well as the repeal of the 2010 Agreement and the given assurances or guarantees. The Arbitral Tribunal had neither excluded the repeal of the 2010 Agreement nor the "Agency Agreement" between the Respondent and B._____ AG but affirmed an additional obligation of the Appellant based on the corresponding assurances or guarantees. The Appellant should have alleged and substantiated - with respect to these legal provisions – that the existence of such assurances or guarantees as to the delivery of tickets was obviously unlawful with the agency structure that came after the restructuring. Since it does not do so, the criticisms of appellatory nature are inadmissible.

4.2. With respect to the acceptance of assurances or guarantees by the Arbitral Tribunal, the Appellant brings forward manifest infringements of Art. 1, 11 and 16 OR and of Art. 1 and 115 OR. In addition, it alleges a violation of Art. 111 OR.

4.2.1. With regard to the pleas of violation of Art. 1, 18 and 418(a) OR –also in this respect insufficiently presented - which in turn presupposes the continuation of the purchase / repurchase structure, the Tribunal refers to what has already been said. Nothing else applies to the alleged violation of Art. 1 and 115 OR. To the extent that Appellant asserts that it is inadmissible to conclude on the existence of mutual agreeing expressions of intent by the parties as to the termination of the delivery obligation and at the same time accept the further existence of such obligation, it insufficiently analyzes the relevant findings of the Arbitral Tribunal. In particular, it does not state to what extent the contested consideration should be absolutely inacceptable or arbitrary.

4.2.2. The Appellant considers Art. 1, 11, and 16 OR to be violated because the Arbitral Tribunal disregarded the written form reservation (point 6.11 of the 2010 Agreement) that was agreed between the parties. This criticism of appellatory nature on the alleged violation of Art. 111 OR, is, again, inadmissible.

The Arbitral Tribunal mentioned the written form reservation contained in the 2010 agreement in its judgment and reproduced the statement made by the Respondent (see para. 163):

> Due to the purpose of the restructuring, to formally cut the paper trail on the surface, further reaching written direct obligations, a written guarantee of Respondent or even a tripartite agreement were not possible, as they would have rendered the entire exercise of the restructuring of the SPA futile.[11]

Since it did not analyze this issue further, one can understand that the Arbitral Tribunal followed the version of the Respondent. The Appellant does not argue with this argument, which is reproduced by the Arbitral Tribunal, reason why this plea is inadmissible. The alleged violation would obviously and in any case not fall within Art. 393(e) ZPO, since according to Federal Tribunal jurisprudence it is possible to subsequently omit the reserved form through by conclusive actions (BGE 125 III 263 at 4c, with references).

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

4.3. The Appellant also complains of obvious infringements in its third set of arguments. It submits, in essence, that even in case of a retrospective approval of the without authorization assurances, the Respondent – or the customers that it procured - would only have a purchase option. Since this was not exercised, it was not possible to conclude on a delivery obligation – and a corresponding contractual violation following the non-delivery by the Appellant. The acceptance of such an obligation despite the lack of a purchase agreement is a gross violation of Art. 1 and Art. 184 and Art. 151 OR.

The affirmation of a breach of contract was considered to be a violation of Art. 97 OR in the light of the fact that the Respondent did not broker any customers beyond the 7'700 Hospitality Packages and requested no further Hospitality Packages for the customers whom it brokered. The Appellant had shared, according to the finding of the arbitral tribunal, the 8'750 tickets with B._____ AG. This corresponds to her (alleged) given assurance; an additional obligation to deliver tickets to the Respondent does not exist under the new agent structure.

The Appellant extensively confuses – again – legal and factual questions. Even though it refers in numerous parts of its appeal to "obvious violations", they concern mainly errors of record with respect to the pleas for the alleged violation of the contract. It bases its pleas on factual assumptions, that do not arise from the Award. In particular when it alleges that the delivery of tickets to B._____ AG corresponds to the assurances it allegedly gave, it ignores, again, that the assurances accepted in the Award under appeal, that is the guarantees, concern a direct obligation towards the Respondent. This plea is therefore inadmissible.

4.4. With regard to the determination of the damage, the Appellant alleges two obvious legal violations.

4.4.1. Insofar as the Appellant submits that the Arbitral Tribunal violated Art. 97 OR, since it ignored the owed commission of 7% owed under the new agency structure, or that it erred regarding the number of hospitality packages, this argument has to be rejected due to a lack of conflict with the Award under appeal (cf. at 4.1.2 above).

4.4.2. The second ground for appeal concerns the substantiation of the compensation. The Appellant submits that the Arbitral Tribunal violated Article 42(2) OR and Article 8 ZGB by stating that the conditions for the calculation of compensation are not met. The Arbitral Tribunal wrongly considered that the Respondent's calculation could not be questioned, even though it did not substantiate its losses in a sufficient way.

It must be noted that the infringement alleged *en passant* by the Appellant regarding Art. 8 ZGB is inadmissible, since the burden of proof governs the consequences of the lack of evidence. If, as in the present case, a court concludes that a factual statement has been proved or refuted, the allocation of the burden of proof is irrelevant (BGE 141 III 241 at 3.2; BGE 138 III 359 at 6.3; BGE 134 III 235 at 4.3.4).

With regard to the alleged infringement of Article 42(2) OR, it must be reminded that this provision relates to the judicial determination of the compensation for damages in case the damage relates to a not numerically determinable damage.

In the present case, however, the Arbitral Tribunal did not itself estimate the damage, but was based on the relevant figures of the Respondent (see item 260: "The respective calculation regarding the non-delivered tickets for the 2014 FIFA World Cup [...] is not to be objected [...] and is in essence also not sufficiently disputed [...]").

According to the binding findings of the Arbitral Tribunal the Respondent claimed damages of USD 16'803'504.87 in the arbitration.

This was exactly the amount it was awarded in the first number of the operative part of the contested Award.

Consequently, Article 42(2) OR is not applicable in the present case. The Appellant's grievance, that this provision was applied in an arbitrary manner, is inadmissible.

5.
The Appellant alleges a total of 19 violations of its right to be heard. It argues that the Arbitral Tribunal has evidently left undecided and disregarded numerous important legal aspects (Art. 393(d) ZPO).

5.1. In almost all cases, the complaints made by the Appellant have no merit: it is clear that with respect to numerous pleas of arbitrariness it is argued in a few words a violation of the right to be heard. It even uses a standard formulation *("that the Arbitral Tribunal disregarded all these legally relevant facts notwithstanding the submissions brought by the Appellant, violates the right to be heard of the Appellant"*). In this regard the Appellant disregards the strict requirements to substantiate a ground for appeal ((Article 77(3) in conjunction with Article 106(2) BGG; see. BGE 134 III 186[12] at 5). It must be shown in detail why the grounds of appeal complained of are to be set to the considerations of the lower court regarded as legally erroneous. Criticisms of pure appellatory nature are not admissible.

5.2. The only relatively substantiated criticism is the one related to the application of Art. 38 OR by the arbitral tribunal. The Appellant considers that its right to be heard was infringed because the Arbitral Tribunal based its decision on a legal assessment that differed from that of the parties, without giving the parties the opportunity to address this issue. In the arbitration proceedings, neither the Appellant nor the Respondent alleged that there was a license in the meaning of Article 38 OR.

As the Appellant itself recognizes, the law is applied *ex officio* even in the field of arbitration (*iura novit arbiter*, BGE 120 II 172 at 3a, judgment 4A_56/2017 of January 11, 2018 at 3.3.2). A right of the parties to be heard on legal issues is according to the case law only exceptionally granted, when the legal issues at stake were not discussed during the proceedings, when no party could rely on them and the parties could not foresee the application of a legal basis in the case at stake (cf. the entire BGE 130 III 35 at 5).

The Appellant criticizes the Application of Art. 38 OR by the Arbitral Tribunal but it does not explain why the relevance of this provision was not predictable. However, this would be its task, not least because of

[12] 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 very restrictive federal jurisprudence (see judgment 4A_525/2017 of August 9, 2018 at 3.1, with references). Consequently, this ground is inadmissible.

6.
The Appellant complaints about the distribution of costs by the Arbitral Tribunal. Since the latter grossly disregarded the principle of allocation of costs, its decision is arbitrary within the meaning of Art. 393(e) ZPO.

Contrary to the opinion of the Appellant and the one cited in the Appeal before the entry into force of the Code of Civil Procedure, the distribution of the party and legal costs is a procedural question and not one of substantive law (BGE 142 III 284 at 3.2; Judgments 4A_511/2013 of February 27, 2014 at 2.3.3; 4A_60/2018 of June 27, 2018 at 5). With the exception of violations of procedural public policy, it is not possible to invoke a procedural violation based on Art. 393(e) ZPO. Since the Appellant invokes only the procedural costs and not the fees and expenses of the arbitral tribunal or a violation of procedural public policy, this plea is inadmissible.

7.
The Appeal is inadmissible. In view of this outcome, the Appellant shall pay the costs and compensation (Art. 66(1) and Art. 68(2) BGG).

Accordingly, the Federal Tribunal pronounces:

1.
The Appeal is inadmissible.

2.
The judicial costs of CHF 60'000 shall be borne by the Appellant.

3.
The Appellant shall pay the Respondent CHF 70’000 for the Federal Proceedings.

4.
This judgment shall be communicated in writing to the parties and the Arbitral Tribunal based in Zurich.

Lausanne, November 28, 2018

In the name of the First Civil Law Court

Federal Judge:	Clerk of the Court:
Kiss	Curchod