4A_374/2014[1]

Judgment of February 26, 2015

First Civil Law Court

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

Club A._____,
Represented by Mr. X._____ and Mr. Y._____,
Appellant

v.

1. B._____,
2. C._____,
Both represented by Mr. Z._____,
Respondents

Facts:

A.
A.a. B._____ and C._____ (hereafter referred to collectively as 'the coaches' or the Respondents) are Argentinean professional football coaches.

Club A._____ (hereafter: the Club or the Appellant) is a Mexican professional football club and a member of the Mexican Football Federation (MFF), which is affiliated with the *Fédération Internationale de Football Association* (FIFA). The Club, which plays in the first division in the national championship, is managed by the company named D._____ SA of CV (hereafter: D._____).

[1] Translator's Note: Quote as Club A._____ SA *v.* B._____ and C._____, 4A_374/2014.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

In an employment contract entered into on his behalf by D._____ on February 25, 2009, the Club hired the coaches in order for them to take charge of the technical management of its first division team until June 30, 2009, which would be the close of the tournament known as "Closure 2009." An arbitration clause inserted into the contract invited the parties to submit possible disputes between them to the labor courts of the state of [name of country omitted] and to the MFF.

At the end of the contract, the Club, which remained in the first division, hired a new coach.

A.b. On July 24, 2009, the coaches seized the Conciliation and Conflict Resolution Committee (hereafter: the CCRC) of the MFF of a monetary claim against the club. They argued in support that they had additionally entered into a second contract with the Club on February 25, 2009, which contained the same arbitration clause for the term from July 1, 2009, to June 30, 2011, with the entry into force of the contract dependent upon the Club remaining in the first division. According to them, as this condition was met, the Club had illegally breached the employment relationship with them by hiring a new coach, so that it was liable towards them for this contractual breach.

The defendant Club submitted that the coaches' claims should be rejected. It denied the existence of the second employment contract invoked by them, claiming that a signature at the bottom of the contract, purportedly of the president of the Club, was forged, which led to its bringing the matter to criminal authorities on June 12, 2009.

Taking into account this defense, the CCRC issued a decision on September 9, 2009, (hereafter: the 2009 CCRC Decision) pursuant to which it held the following (French translation from the Spanish text, excerpted from the official translation of the award under appeal submitted by the Appellant as Exhibit 2 *bis*):

> The [CCRC] of [MFF] being duly constituted and the first vote having taken place as to the respective positions of the parties; taking into account the documents submitted and considering that they bear witness of complaint [of the Club] as to facts which may constitute a crime, this Commission decides to stay the proceedings concerning the dispute because the examination, the subject and the decision as to the existence of the crimes are beyond the knowledge and the jurisdiction of this authority, so that the rights of the parties are reserved to assert them in the form and in the wording they consider appropriate.

Two years later, specifically on October 6, 2011, the CCRC issued the following decision (hereafter: the 2011 CCRC Decision): (French translation from the Spanish text, excerpted from the official translation of the award under appeal submitted by the Appellant as Exhibit 2 *bis*):

> During the time allotted to him [the president of the CCRC] states that: considering the status of the proceeding and the certificate of the secretary of this Commission; considering that the proceedings were interrupted longer than six months and that no decision is in progress as to any action, diligence, receipt of reports or copies that were requested; considering that

> a prescriptive date may be reached simply by the time passing pursuant to the provisions of Article 773 of the Federal Labor Law, it is held that the Claimant tacitly forfeited any and all the actions it seeks in the present proceedings, which must be dropped as a case totally and definitively closed.

A.c. In the meantime, on October 1, 2009, namely less than a month after the 2009 CCRC Decision was notified, the coaches seized the Players' Status Committee of FIFA (hereafter: the PSC), with the same submissions as in the CCRC.

In a letter of March 18, 2011, followed by another letter on April 25, 2011, the Club advised the PSC through the MFF that it challenged its jurisdiction in view of the pending proceedings in the CCRC, even though they were stayed. Invited by the PSC on April 12, 2012, to provide information as to the status of the aforesaid proceeding, the CCRC indicated on the following day that it had ordered the proceedings closed in a decision of October 6, 2011.

In his decision of May 11, 2012, the single judge of the PSC admitted jurisdiction on the basis of Art. 22(c) of the Regulations on the Status and Transfer of Players (hereafter: RSTP) considering the international nature of the dispute. However, he rejected the coaches' claim because the employment contracts in dispute signed by them were not with the defending Club, which therefore had no standing to defend, but with D._____ Company, which was not affiliated with FIFA and did not fall within the scope *ratione personae* of the sport jurisdiction established by the federation.

B.
B.a. On January 10, 2013, the coaches appealed to the Court of Arbitration for Sport (CAS). They submitted that the aforesaid decision, which was notified to them on December 21, 2012, should be annulled and they should be awarded the amounts claimed.

A Panel composed of three South American lawyers (hereafter: the Panel) was constituted on March 12, 2013.

In its defense, the Club raised a defense of *lis pendens* due to the criminal proceedings ongoing at the time of the 2009 CCRC and a defense of limitation, due to the time between the alleged date of the termination of the employment relationship – May 25, 2009 – and the referral to the CAS.

After inviting the parties to produce a number of documents, the Panel ordered a report from an independent forensic handwriting expert on September 10, 2013.

On October 8, 2013, the CAS sent a procedural order to both parties, which they signed without any objection as to the jurisdiction of this arbitral body.

A hearing was held in Sao Paolo (Brazil) on October 18, 2013.

On December 17, 2013, the expert issued her report.

B.b. The Panel issued its award on March 28, 2014. Upholding the coaches' appeal in part, it annulled the decision of the single judge of the PSC of May 11, 2012, and ordered the Club to compensate its former employees on several counts. To the extent that they impact the proceedings at hand, the reasons on which the award rest may be summarized as follows.

In their respective briefs, both parties acknowledged the jurisdiction of the CAS to handle the appeal; moreover, they ratified it by signing the pertinent procedural order. The jurisdiction of the CAS relies on Art. 67(1) of the FIFA Statutes and is thus given. As to applicable law, the Panel shall rely first on the FIFA rules. It will also apply Swiss law, as the federation has its seat in Switzerland. It shall also take into consideration the statutes and the regulations of the MFF as well as Mexican employment law. In any event, the Panel, emphasizing that the dispute concerned a double employment relationship, shall review the matter by reference to two acknowledged principles in this field: the first requires taking into consideration the fact that the employee, as the weakest party to the relationship, requires special protection; the second known as the principle of primacy of the reality of the facts, invites the court to privilege the actual position in which the employee finds himself when it defers from that which the parties agreed upon.

The defense of *lis pendens* must be rejected because its conditions are not met. Indeed, there is no identity of the parties as the coaches are not directly implicated in the criminal proceedings, judging from the text of the complaint filed by the club. Both actions initiated are also not identical as to their respective subject matter, as one falls within criminal law and the other seeks payment of compensation for the allegedly illegal termination of an employment contract. Should these requirements be met, the defense of *lis pendens* should be rejected anyway insofar as the Club, which has the burden of proof, did not succeed in demonstrating that, contrary to the assertions of the coaches and the documents in support, the criminal investigation at hand remains active. Yet, this is a necessary requirement to admit a defense of *lis pendens*.

The defense of limitation will meet the same fate as the former because by seizing the PSC on October 1, 2009, as a consequence of the unilateral termination of their employment relationship on May 25, 2009, the coaches acted well before the two-year time limit of Art. 25(5) RSTP expired.

This being so, it must first be determined whether the PSC had jurisdiction as to the action initiated by the coaches on October 1, 2009. To resolve this issue, one must wonder at first whether or not the coaches should have continued the proceedings they had initiated in the CCRC on July 24, 2009, instead of seizing a FIFA jurisdictional body. If the preliminary question is answered in the negative, the next issue will be the impact on the PSC jurisdiction of the fact that one of the signatories of the employment contract in dispute, namely D._____, is not affiliated with FIFA.

The answer to the first question depends upon the interpretation of the 2009 CCRC Decision. The parties disagree in this respect: for the coaches, the decision left them free to act as they deemed appropriate and consequently to seize FIFA; for the Club, however, the only possibility was for the coaches to seize the CAS of an appeal if they were unhappy with the aforesaid decision. The Panel holds that the text of the 2009 CCRC Decision is not sufficiently clear one way or the other, so it must be interpreted. Considered in the light of the principle of protection of employees, the text must be understood as meaning that the CCRC chose not to exercise jurisdiction whilst enabling the coaches to continue to submit their claims in another jurisdiction which would accept jurisdiction, as opposed to the former.

Indeed, the opposite view, namely that the proceedings stayed should have been continued by the CCRC once the criminal case was decided, appears contrary to the aforesaid principle because it would mean that as of now, more than four years after the CCRC was seized, the coaches still would not be able to exercise their rights as former employees of the Club, which would be equivalent to a denial of justice. As to the 2011 CCRC Decision in which notice was taken of the tacit withdrawal of the coaches for failure to continue to exercise their rights in the CCRC, it was not compatible with the 2009 CCRC Decision, which forbade them from doing so as a consequence of the pending criminal investigation. Therefore, the declaration of discontinuance contained in the October 6, 2011, Decision could not prevent the coaches from seeking a new body, which could decide the dispute with the Club.

As to the second issue, applying the principle of primacy of the reality of the facts and in the absence of any objection of the Club as to its standing to be sued, it must be admitted that the Panel has jurisdiction to handle the dispute between the parties, despite the fact that the employment contracts of the coaches were formally signed with D._____.

[*The substantive examination of the claims of the coaches follows and that part of the award is without impact on the outcome of the present recourse proceedings*.]

C. On June 16, 2014, the Club filed a civil law appeal with a request for a stay of enforcement. Arguing a violation of Art. 190(2)(b) and (e) PILA,[2] it invites the Federal Tribunal to annul the March 28, 2014, award. Among other exhibits to the appeal brief, there was an expert legal opinion issued in Spanish on June 6, 2014, by the Mexican attorney and university professor, E._____, dealing with the issue of *res judicata* of the 2011 CCRC Decision and an official French translation of the legal opinion.

Pursuant to an *ad hoc* request of the Respondent coaches, the presiding judge of the First Civil Law Court ordered the Appellant to provide security for costs in an order of August 21, 2014, which it so provided.

In its answer of October 10, 2014, the CAS submitted the file of the case and asked for the appeal to be rejected.

[2] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

On October 21, 2014, the coaches submitted their joint answer to the court office of the Federal Tribunal, submitting that the appeal should be rejected insofar as the matter is capable of appeal. They attached to their brief a legal opinion in Spanish with a French translation, delivered by the Mexican attorney and law professor, F._____, as to the interpretation of the 2009 and 2011 CCRC Decisions.

In a letter sent to the Federal Tribunal on the same day, Mr. Z._____, a counsel for the Respondents, submitted his explanations as to the compliance with the time limit to answer, with exhibits.

The Appellant challenged the accuracy of these explanations in its reply of November 7, 2014, and asked the Federal Tribunal to take no account of the Respondents' answer or their exhibits. It attached to its brief an additional expert opinion written in Spanish by the aforesaid expert, E._____ with an official French translation.

In a letter of November 14, 2014, with two exhibits, the Respondents supplement their argument as to compliance with the time limit to answer. They also filed an additional exhibit in this respect in their reply of November 25, 2014.

A last exchange of briefs took place on December 12, 2014 (Appellant) and December 17, 2014 (Respondents), as to the issue of compliance with the time limit to file the answer, whereupon the presiding judge of the First Civil Law Court closed the investigation of the matter.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its judgment in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language (here Spanish), the Federal Tribunal resorts to the official language chosen by the parties. Before the CAS they used Spanish. In the briefs sent to the Federal Tribunal, the Appellant used French. The Respondents did the same. In accordance with its practice, the Federal Tribunal shall adopt the language of the appeal and consequently issue its judgment in French.

2.
A civil law appeal is admissible against international arbitral awards pursuant to the requirements of Art. 190 – 192 PILA (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the grievances raised in the appeal brief, none of these admissibility requirements raises any problems in the case at hand. There is therefore no reason not to examine the appeal.

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

[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.

3.
First, it must be determined whether or not the appeal brief was filed in a timely manner. Indeed, the fate of this brief will determine a number of other issues, such as the admissibility of the legal opinion attached to the brief, the admissibility of the reply, to the extent that the Appellant seeks to refute the arguments developed in the Respondents' answer – to the exclusion of those of the CAS, whose answer was filed in a timely manner and could therefore be the object of a reply – the admissibility of the rejoinder and, as the case may be, the allocation of the costs to the Respondents and their payment by way of the security provided by the Appellant.

3.1. The documented explanations given by the parties in the various briefs and letters they put into the file of the federal proceedings enabled the following description of the circumstances around the filing of the Respondents' answer.

Upon receipt of the amount deposited by the Appellant as security for the Respondents' costs with the office of the Federal Tribunal, the latter were invited by order of the presiding judge of September 8, 2014, to file their answer by September 29, 2014, which was extended until October 20, 2014, upon their request by order of the presiding judge on September 30, 2014. On October 20, 2014, the Lausanne office of the XY._____ firm, of which Mr. Z._____ is a partner, submitted to the St-François post office in Lausanne five packages with barcodes finishing with the numbers 980 to 984. This is certified by the postal stamp bearing the aforesaid date on the form entitled: "List of bar codes for letters with electronic tracking". The same form also shows the sender – namely the stamp of the law firm in question to which a precision was penciled in: "Mr. Z._____ – and a hand-written reference to the aforesaid numbers. One also finds the words: "83 = package", the word "four," and the hand-written signature written with a pencil (Ex. 51, doc. 7, and Ex. 55, doc. 1). The barcode ending in 983 corresponds to a registered mail to the First Civil Law Court of the Swiss Federal Tribunal. Using the IFS Smart Stamping System, the sender, whose name and address are at the back of the envelope concerning this mailing, *i.e.* the law firm of XY._____ printed on the other side of the envelope the date (October 20, 2014) and the amount paid (CHF 5.30) in the top right corner and the barcode with a capital R and the three aforesaid numbers in the middle left. A postal employee hand-wrote the indication: "1 kg 086" below the barcode which he scanned and the former most likely refers to the weight of the envelope and its contents, then he put the package in the sender's mail box and stuck a label on the envelope inviting the latter to pay the missing postage, with the following hand-written precision next to the verb "missing": "5.70 = package" (Ex. 37, Ex. 43 doc. 2 and Ex. 51 doc 8).

Still on October 20, 2014, in an electronic mail sent at 3:27 pm, the law firm XY._____ sent to Mr. W._____, Argentine counsel for the Respondents, a file 0762_001.pdf containing the scanned text of the answer (Ex. 43 doc. 3 to 6). A copy of the brief would also have been sent to counsel for the Appellant on the same day (Ex. 39, 3rd§).

On October 21, 2014, at 8:35 am, an employee of the law firm XY._____ deposited at the reception of the Federal Tribunal a sealed envelope containing three copies of the answer, the exhibits and a copy of the envelope deposited the previous day at the St-François post office (Ex. 37). The same day, Mr. Z._____ sent to the Federal Tribunal an explanation letter concerning compliance with the time limit to answer (Ex. 42) to which he attached among other things a photocopy of both sides of the envelope which, according to the lawyer, contained the answer to the appeal and its enclosures (Ex. 43, doc. 2).

3.2. Pursuant to Art. 48(1) LTF, briefs must be submitted to the Federal Tribunal or to the Swiss Mail to its attention or to a Swiss embassy or consulate on the last day of the time limit. In the case at hand, the time limit to answer, extended pursuant to Art. 47(2) LTF expired on October 20, 2014, at midnight. The answer and its enclosure submitted to the Federal Tribunal on October 21, 2014, therefore took place after the time limit. As to compliance with the time limit, the only decisive issue is therefore to know whether or not the brief and the exhibits were given to a Swiss Post office on October 20, 2014, as the coaches claim. It behooved the latter to prove it. Indeed, proof that a procedural document was sent in due course falls upon the party or its counsel. Strict proof is required and highest probability does not suffice (judgment 9C_564/2012 of September 12, 2012, at 2 and references; Jean-Maurice Frésard, *Commentaire de la LTF,* 2nd ed. 2014, n. 29 and Art. 48 LTF).

After taking into consideration the conflicting explanations of the parties and the exhibits in the federal file, this Court holds that the envelope allegedly containing the answer and its enclosures was indeed deposited with the St-François post office on October 20, 2014. The Court's conviction in this respect is based on the form entitled "List of barcodes for letters with electronic tracking" which bears a stamp of the Swiss Mail dated October 20, 2014, on which the references are sufficient to connect the date officially ascertained and the envelope and the barcode ending with the numbers 983, which allegedly contained the answer and its enclosures. The Appellant's demonstration in its letter of December 12, 2014, (Ex. 59) with a view to challenging the conclusive nature of the exhibit or to challenge its authenticity, is not convincing. Furthermore, it essentially relies on a misunderstanding insofar as the Appellant believes it can infer from case law and legal writing in this respect that the *acceptance* of a mail item by the Mail is decisive to determine if the item was deposited in the prescribed time. Yet, this is not the case, at least supposing that one should deduce from the highlighted word that the remittance of an item in a timely manner but with a curable deficiency would not be sufficient to safeguard the time limit imposed by the law or by the court for the filing of a brief, as the Appellant apparently suggests. The author invoked in support of this view is of no help to the Appellant as he too emphasizes, with regard to another deficiency, that if the Mail returns the letter to the sender to correct the deficient address without refusing it, the item is deemed to have been remitted at the date of the first sending (Yves Donzallaz, *Loi sur le Tribunal fédéral, Commentaire*, 2008, n. 1236; see also: Poudret and Sandoz-Monoz, *Commentaire de la loi fédérale d'organisation judiciaire*, vol. I, 1990, n° 4.3.1 ad Art. 32 OJ, with reference to ATF 39 I 54; in the same vein, see judgment 9C_564/2012, *op. cit*, at 2.2.) To return to the case at hand, it must be pointed out that at n. 2.2.4 of its "general conditions 'mail delivery services' for commercial clients" (January 2014 ed.), the Mail does not sanction the inadequacy of the stamping with a refusal to take possession of the item and to communicate it to the addressee but reserves the right to claim the difference due from the sender and a surcharge for handling

or, should the sender be unknown, to collect the difference from the addressee. In other words, the item remitted to the post office of St-François by the law firm XY._____ on October 20, 2014, was not critically flawed.

Therefore, the only item in discussion concerns the contents of the envelope remitted to the post office on October 20, 2014. The issue arises because counsel for the Respondents, instead of paying the missing postage in accordance with the instructions of the Mail and to give the envelope back to the latter for it to be sent to the Federal Tribunal as such, according to what he says would have opened the envelope which had been placed in his mailbox, extracted the contents and inserted them in the new envelope brought to the entrance of the Federal Tribunal the day after the time limit expired. In doing so, the Respondents' counsel combined the two alternate methods foreseen by the law to file a brief in Switzerland, namely the delivery of the brief of the Federal Tribunal directly and its remittance to the Swiss Mail to the court's attention (Art. 48(1) LTF). Such an approach is contrary to the letter of the law and not admissible. Indeed, as to time limits, one should stick to simple principles and clear solutions to avoid long and idle discussions or even abuses. In the case at hand, the dispute concerning compliance with the time limit to answer if it did not overshadow the merits of the case, did generate an endless debate and illustrates the very point. Moreover, it goes without saying that the closer a time limit, the greater the risk not to comply with it and this is a circumstance that cannot escape the attention of any diligent professional and led him to step up precautions when the time limit is on the horizon. Under such conditions, it is not justified to allow the Respondents to prove that the envelope duly remitted to the post office of St-François did contain the answer and its enclosures.

The foregoing shows that only the deposit of the answer and its enclosures on October 21, 2014, is established, namely, one day after the extended time limit given to the Respondents expired. As to a possible further extension of the time limit to answer based on Art. 50 LTF, which was not specifically requested by the Respondents, it could not be granted because the failure to comply is linked to them (insufficient postage on the one hand; opening the envelope when the insufficient postage should simply have been completed according to the instructions of the Mail and the sealed envelope given back on the other hand). Therefore, the Federal Tribunal can only exclude the answer and its exhibits from the file as the rejoinder submitted by counsel for the Respondents on November 25, 2014, (Ex. 54). Logically, this Court will also disregard the arguments developed by the Appellant in its reply only with a view to refute the Respondents' answer, insofar as they do not also address the arguments raised in the CAS answer. Finally, should the appeal be rejected, the Respondents would not be entitled to costs so that the security for costs deposited with the office of the Federal Tribunal would be returned to the Appellant.

4.

4.1. In its main argument based on Art. 190(2)(e) PILA, the Appellant argues that the Panel disregarded public policy in the award under appeal without recognizing the *res judicata* of the 2011 CCRC Decision. According to the Appellant, the PSC should have declined jurisdiction as to the claim submitted by the coaches on October 1, 2009, as a case concerning the same claim had been pending in the CCRC since July 24, 2009. As to the CAS, it should have declined jurisdiction as to the Respondents' appeal against the

decision of the sole judge of the PSC of May 11, 2012, or at the very least, declared the appeal inadmissible as the CCRC had issued an enforceable decision susceptible to recognition in Switzerland on October 6, 2011.

4.2.

4.2.1. An arbitral tribunal violates public procedural policy, which is included in the broader concept of public policy within the meaning of Art. 190(2)(e) PILA, if it issues a decision without taking into account the *res judicata* of a previous decision or if in the final award it departs from the opinion expressed in a preliminary award deciding a preliminary issue on the merits (ATF 140 III 278[5] at 3.1, p. 297 and the cases quoted). *Res judicata* also applies internationally and governs among others the relations between a Swiss arbitral tribunal and a foreign state court or arbitral tribunal. Hence, if a party seizes an arbitral tribunal sitting in Switzerland of a claim identical that which was decided in a judgment or an enforceable award issued between the same parties by a state court or an arbitral tribunal sitting elsewhere than in Switzerland, the Swiss arbitral tribunal must declare the request inadmissible provided the foreign judgment or award are susceptible to recognition in Switzerland pursuant to Art. 25 PILA or to Art. 194 PILA (ATF 140 III 278[6] at 3.1, p. 279; judgment 4A_508/2010 of February 14, 2011, at 3.1; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 1664). Failing this, it will be found in breach of procedural public policy.

4.2.2. The recognition of a foreign award is how a court grants such award the same legal effects as a local court decision. The party purporting to oppose the submission to a Swiss state court or an arbitral tribunal sitting in Switzerland of a claim with the same object as the foreign award shall raise a *res judicata* defense and incidentally seek the recognition of the award, an eponymous recognition proceeding not being necessary for this purpose (judgment 4A_508/2010, *op. cit.*; Kaufmann-Kohler and Rigozzi, *Arbitrage International*, 2nd ed., 2010, n. 867).

According to Art. 194 PILA, the recognition and enforcement of foreign arbitral awards is regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, (RS 0.277.12; hereafter: New York Convention).

Art. V of the New York Convention exhaustively sets forth the grounds to refuse recognition and enforcement of a foreign arbitral award (ATF 135 III 136[7] at 2.1, p. 139). These must be interpreted

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[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/binding-character-of-an-award-enforcement-of-an-award-stayed-in-

restrictively in order to facilitate the recognition and enforcement of the arbitral award (ATF 135 III 136[8] at 3.3). It behooves the party opposing recognition or enforcement to show that one of the grounds for refusal listed at Art. V(1) of the New York Convention exists (ATF 135 III 136[9] at 2.1, p. 139), while the court may find *ex officio* the two grounds to refuse recognition or enforcement at Art. V(2) of the New York Convention (Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 897). Pursuant to Art. V(2)(b) of the New York Convention, the recognition and enforcement of an arbitral award may also be refused if the competent body of the country in which recognition and enforcement are sought finds that the recognition or the enforcement of the award would be contrary to the public policy of that country. Being an exception clause, the reservation in favor of public policy shall be interpreted restrictively, particularly as to the recognition and enforcement of foreign judgments, for which its bearing is narrower than for the direct application of foreign law (limited effect of public policy). Public policy is breached when the recognition or the enforcement of a foreign award clashes in an intolerable manner with Swiss concepts of justice. An arbitral award may be incompatible with the Swiss legal order not only due to its substantive content but also as a consequence of the procedure from which it arose. In this regard, Swiss public policy demands compliance with the fundamental rules of procedure inferred from the constitution such as the right to a fair trial and the right to be heard (judgment 4A_124/2010 of October 4, 2010, at 5.1; judgment 4A_233/2010[10] of July 28, 2010, at 3.2.1; judgment 4P.173/2003 of December 8, 2003, at 4.1 and the precedents quoted).

Any procedural participant must comply with the rules of good faith (see Art. 52 of the Code of Civil Procedure [CCP]; RS 272). As stated in ordinary civil procedure, the principle of good faith has a general scope so it also governs arbitral procedure, whether domestic or international (judgment 4A_606/2013 of September 2, 2014, at 6.2.1; judgment 4A_214/2013[11] of August 5, 2013, at 4.3.1). Pursuant to this principle, it is not admissible to keep grievances as to procedural deficiencies in reserve when they could have been rectified immediately, only to raise them in case of an unfavorable outcome of the arbitral procedure. The rule also requires that grounds to refuse recognition of the foreign award pursuant to the New York Convention may not be validly invoked if they have not been raised in a timely manner when the arbitral procedure was pending (*Präklusionswirkung*, according to German terminology). However, the New York Convention does not require the party contesting enforcement who argued a procedural defect without success *pendente lite* should also have challenged the award by the available avenues of recourse at the seat of the arbitration (judgment 4A_124/2010, *op. cit*., at 6.3.3.1 and references). Indeed, it is far from assured that forfeiture could also extend to a deficiency falling within procedural public policy, such as

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/binding-character-of-an-award-enforcement-of-an-award-stayed-in-

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/binding-character-of-an-award-enforcement-of-an-award-stayed-in-

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/issues-of-lack-of-independence-raised-against-enforcement-of-awa

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/irreconcilable-contradiction-domestic-award-leads-annulment

compliance with the right to be heard, which is both a ground for refusal to be invoked by the parties (Art. V(1)(b) of the New York Convention) and an *ex officio* ground of refusal (Art. V(2)(b) of the New York Convention) (Patocchi and Jermini, *Commentaire bâlois, Internationales Privatrecht*, 3rd ed. 2013, n. 90, ad Art. 194 PILA; see also Franz Satmer, *Verweigerung der Anerkennung ausländischer Schiedssprüche wegen Verfahrensmängeln*, 1994, p. 94, Ch. V). Moreover and broadly speaking, the issue of forfeiture as invoked here is strongly disputed in specialized legal writing and case law. Furthermore, it can hardly be disassociated from the circumstances of the case at hand, so that it may be presumptuous to try to solve it in the abstract and definitively (on this issue, see among others Borris and Hennecke, *New York Convention Commentary*, Reinmar Wolff [ed.], 2012, n. 46 *ff* ad Art. V of the New York Convention; Christian Josi, *Die Anerkennung und Vollstreckung der Schiedssrüche in der Schweiz*, 2005, p. 137 *ff*; Satmer, *op. cit.*, p. 94 *ff*; Poudret and Besson, *Comparative Law of International Arbitration*, 2nd ed. 2007, n. 943 *ff*). This Court shall therefore resort to a specific approach of the issue based on the analysis of the respective behavior of the parties from the point of view of the rules of good faith.

A recognized foreign judgment does not have more effect in Switzerland than that which it was given by the legal order from which it came and it has in Switzerland only the authority it would have if it had been issued by a Swiss court (ATF 140 III 278 at 3.2). The scope of *res judicata* in Switzerland of a foreign arbitral award susceptible of recognition in this country obeys the same jurisprudential principle (aforesaid judgment 4A_508/2010, at 3.3; Patocchi and Jermini, *op. cit.*, n. 136 ad Art. 194 PILA).

4.2.3. The Federal Tribunal freely reviews the legal issues including preliminary issues which may arise to determine whether the Panel disregarded the *res judicata* authority of the 2011 CCRC Decision. If necessary, it will also review the application of pertinent Mexican law. But, it will not become a court of appeal. Thus, it shall not itself seek in the award under appeal which legal arguments could justify upholding the grievance based on Art. 190(2)(e) PILA which the Appellant would not have invoked, contrary to the requirements of Art. 77(3) LTF. In any event however, the Federal Tribunal shall decide on the basis of the facts established by the Arbitral Tribunal (Art. 105(1) LTF) including those concerning the handling of the arbitral procedure (ATF 140 III 16 at 1.3.1 and references), except as provided by *ad hoc* case law (ATF 140 III 278[12] at 3.4, p. 283).

Moreover and despite the objection raised in this regard by the CAS in its answer to the appeal, nothing prevents the Court from taking into account the legal opinion from attorney and professor E._____ quoted by the Appellant in its appeal brief (judgment 4A_146/2013 of January 10, 2013 at 2.6 and the cases quoted) and with the same reservations as above (see 3.2, last §), the additional legal opinion from the same individual that the Appellant filed with its reply.

4.3.

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

4.3.1. In its answer to the appeal, the CAS argues that the Appellant never raised a *res judicata* defense but invoked *lis pendens* in connection with the 2009 CCRC Decision and that the Respondents' case was time barred. According to the CAS, it would have been contradictory for the Appellant to argue both that the case was pending in the CCRC on the one hand and on the other hand that by seizing the PSC, the coaches did not take into account the *res judicata* effect of the decision issued by the CCRC on October 6, 2011. The CAS adds that this decision indeed appeared only when the PSC invited the MFF to provide information as to the status of the procedure in the CCRC and was told by the Mexican Federation, and not by the appealing club, that the case had been closed with the decision at issue, an answer given on April 13, 2012 (see A.c, 2nd §, above), namely six months after the decision was notified to the parties.

The findings in the award under appeal as to the procedure followed by the Panel and the reasons of the award, as summarized above (see B, above) show that in that procedure, the Appellant did raise only the defense of *lis pendens* and prescription. As to the 2011 CCRC Decision, he did not invoke it in support of *res judicata* but to substantiate his defense that the claim was time barred and argue that the discontinuance of the proceedings by the coaches, noted in the decision, recreated the legal situation before filing of the claim with the CCRC, so that the coaches' claim was time barred (award n. 94). The findings concerning these procedural facts bind the Federal Tribunal. Moreover, the Appellant does not raise one of the few exceptions, which would enable this Court to review them. It does argue with references that it raised the existence of the 2011 CCRC Decision and that it prevented the CAS from issuing a new decision on the Respondents' claim (reply p. 22 *f*, n. 2), which is why it invites the Federal Tribunal to request from the CAS the recording of the October 18, 2013, hearing (Ex. 10). However, besides the fact that this evidentiary submission is not sufficiently precise because it refers the entire recording without indicating the determinant passage and the excerpts of briefs invoked by the Appellant are not conclusive, with the exception of the Appellant's letter of January 3, 2014, which the Panel considered filed late (see appeal brief p. 14 *f*, n. 33 and 34 and the exhibits quoted), the Appellant's argument is a mere inadmissible challenge of the aforesaid factual findings.

Under such conditions, one hardly sees how the Panel could have disregarded the *res judicata* effect of the 2011 CCRC Decision and consequently issue an award incompatible with procedural public policy, even though it was not seized of the corresponding defense. Be this as it may, should one hypothetically consider that the defense was raised by the Appellant, or that the Panel was bound to recognize the *res judicata* effect *ex officio* as to the 2011 CCRC Decision, the issue of the appeal would not change for the following reasons.

4.3.2.
4.3.2.1. The New York Convention does not define what should be understood as an *arbitral award* (Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 874). It merely treats in the same manner institutional arbitration and *ad hoc* in this respect (Art. I(2) of the New York Convention; Andreas Bucher, *Commentaire romand, Loi sur le droit international privé – Convention de Lugano*, 2011, n. 20 ad Art. 194 PILA). Furthermore, knowing whether characterization as an arbitral award within the meaning of the New York Convention depends upon the law of the state of origin of the decision, upon the law of the state of enforcement, or

upon an autonomous decision germane to the convention is a disputed issue (in this respect, see among others Bernd Ehle, *New York Convention Commentary*, Reinmar Wolff [ed.], 2012, n. 12 *ff* ad Art. I of the New York Convention), even if the last approach seems to have the preference of legal writers (Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 877). Be this as it may, in order to be characterized as an arbitral award, a decision of private origin must be comparable to that of a state court (Poudret and Besson, *op. cit.*, *ibid.* and the examples quoted at n. 878). According to the case law of the Federal Tribunal, an actual award akin to the judgment of a state court supposes that the tribunal issuing it presents sufficient guarantees of impartiality and independence. In this respect, the decision taken by the body of sport federation, which is a party to the case, even if this body is called an 'arbitral tribunal,' constitutes a mere manifestation of will issued by the federation concerned; this is an act of governance and not a judicial act (ATF 119 II 271 at 3b, p. 275 *f.*).

The CAS seriously doubts that the 2011 CCRC Decision could be considered as an actual arbitral award because the Federal Tribunal considers that the jurisdictional bodies of FIFA are not real arbitral tribunals (answer n. 12 with reference to the judgment published at ATF 136 III 345[13] at 2.2.1). Such doubts are not appropriate in this case as to the legal status of the CCRC and irrespective of the procedure conducted by this body in the case at hand. Moreover, the CAS itself in an award of December 21, 2011, (n. 21 to 25; case CAS 2010/A/2091 *Dennis Latcher v. Derek Boateng Owusu*), acknowledged the decisions issued by the arbitral tribunal of the Israeli Football Association (IFA) – a federation comparable to the MFF – as actual arbitral awards susceptible of recognition and enforcement pursuant to the New York Convention and distinguished them from those issued by the PSC of FIFA (n. 26). Art. 22(c) RSTP gives FIFA jurisdiction to decide, in particular, the international disputes between a club and a coach concerning employment, unless an independent arbitral tribunal guaranteeing fair proceedings exists at the national level. According to the commentary of the RSTP published by FIFA, a dispute is international when the coach is a foreigner in the country concerned. The MFF availed itself of the reservation in the quoted provision. Art. 77 of its Statutes gives the CCRC jurisdiction as to all claims that its members could have against each other. Art. 91 of the same Statutes limits such jurisdiction to national domestic disputes, namely those between members of the MFF, such as the appealing club, as a direct member and the Respondent coaches, irrespective of their citizenship, as indirect affiliates (Art. 12 of the Statutes). According to its international regulation, the CCRC is a permanent joint body comprising a chairman, appointed by the Player Committee and by the representative of the clubs – the chairman being assisted by a secretary appointed by the national council – a representative of the clubs appointed by the professional clubs and a representative of the players chosen by the professional players and also entrusted with representing the interests of the coaches. The CCRC regulation provides for a conciliation phase which, as the case may be, is followed by an actual contradictory trail with adducement of evidence. The decision issued by a majority of the members of the CCRC after the case has been heard may be appealed to the CAS after exhaustion of the internal jurisdictional remedies (Art. 92 of the Statutes). In a well-reasoned legal opinion (n. 30 to 82), attorney and professor E._____, after analyzing the workings of this

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

jurisdictional body in detail, reaches the conclusion that the CCRC is a real arbitral tribunal according to Mexican law and that its decisions are arbitral awards within the meaning of Art. I(2) of the New York Convention. There is no reason to question the results of this analysis, which is not criticized as such by the CAS.

4.3.2.2. In principle, only a judgment on the merits has *res judicata* authority whilst an unenforceable procedural judgment may at best have it in connection with the issue of admissibility that the arbitral tribunal upheld or rejected (ATF 134 III 467 at 3.2, p. 469; 115 II 187 at 3a; François Bohnet, *Code de procedure civile commenté*, 2011, n. 112 ad Art. 59 CPC; Simon Zingg, *Commentaire bernois, Schweizerische Zivilprozessordnung*, vol. 1, 2012, n. 107 ad Art. 59 CPC). However, the Swiss Code of Civil Procedure sees certain unilateral acts of the parties as akin to a judgment (Bohnet, *op. cit.*, n. 120 ad Art. 59 CPC). This applies to the discontinuance of the action (Art. 241(2) CPC; also see Art. 208(2) CPC for conciliation proceedings) as opposed to the discontinuance of the proceedings, the conditions of which are set at Art. 65 CPC.[14] Although the code draws no terminological distinction in this respect, both institutions must not be confused (Denis Tappy, *Code de procedure civile commenté*, 2011, n. 22 ad Art. 241 CPC; as to the situation before the CPC came into force, see the aforesaid judgment 4A_124/2014 at 3.2 and the references). The discontinuation of the action strictly speaking, which is one form of acknowledgement of the other party's position, is the deed by which the claimant abandons his submissions in the case; it concerns the action and enjoys *res judicata*. The discontinuance of the proceedings or withdrawal of the claim, however, which does not have that authority, is an act terminating the proceedings only and does not constitute an obstacle to reintroducing the claim under certain conditions (Fabienne Hohl, *Procédure civile*, vol. 1, 2001, n. 1346 to 1348; Cohnet, *op. cit.*, n. *f* 1 to 7 ad Art. 65 CPC; Tappy, *ibid.*).

From the explanations of expert E._____ (legal opinion n. 83 to 106), Mexican procedural law also distinguishes the discontinuance of the action from the discontinuance of the proceedings and gives to both such unilateral procedural acts comparable effects to those they have under Swiss civil procedural law; in principle, the finding of a lapse resulting from procedural inactivity during a specific period is akin to a discontinuance of the proceedings only; as an exception to the general rule however, when such finding takes place in accordance with Art. 773 of the federal law on employment, as was the case in the 2011 CCRC Decision, it is considered as a discontinuance of the action, which has *res judicata*. Consequently, the said decision prevented the coaches from bringing their claims in a new case wherever, including in a jurisdictional body of FIFA.

On the basis of these explanations, it must be admitted that contrary to the view expressed by the CAS (answer n. 10), the 2011 CCRC enforceable Decision did not only put an end to the proceedings pending in the MFF sport arbitral tribunal but also excluded any new claim having the same object. Yet, it is not disputable, neither is it actually disputed, that the case opened in the PSC by the coaches on October 1, 2009, was identical as to its authors and its object (on the latter concept, see the judgment published at

[14] Translator's Note: CPC is the French abbreviation for the Swiss Code of Civil Procedure.

ATF 140 III 278[15] at 3.3 and the cases quoted) to that which had been submitted to the CCRC on July 24, 2009. Consequently, the single judge of the PSC, when he decided that claim on May 11, 2012, in awareness of the final decision issued by the CCRC issued on October 6, 2011, should have declared the action inadmissible due to *res judicata*. For its part, the CAS should not have addressed the coaches' appeal or issued an award on the merits to avoid breaching procedural public policy.

Yet, in order to find that the CAS disregarded the *res judicata* effect of the 2011 CCRC Decision, it must also be susceptible to recognition in Switzerland pursuant to the New York Convention. This remains to be examined.

4.3.2.3. The public policy of the country in which the recognition of the award is sought, which Art. V(2)(b) of the New York Convention turns into a ground to refuse enforcement *ex officio*, requires, when the country involved is Switzerland, compliance with the fundamental rules of procedure inferred from the Constitution, such as the right to be heard (see 4.2.2, 4th §, above). This right, which is also applicable to arbitration, supposes that each party has the right to state its views on the essential facts for the award to be issued, to present its legal arguments, to present evidence on pertinent facts and to attend the hearings of the arbitral tribunal (judgment 4A_606/2013 of September 2, 2014 at 4.1 and the cases quoted).

In the case at hand, the 2011 CCRC Decision was issued in manifest breach of the Respondents' right to be heard. It was indeed taken by the president of the CCRC on October 6, 2011, on the basis only of a report of the secretary of that arbitral tribunal, stating that no steps had been undertaken by the parties since September 9, 2009, when the CCRC stayed the proceedings (the 2009 CCRC Decision). It is neither established nor claimed that the parties were called to this hearing, which lasted only half an hour, or that they were even informed that it was held. Yet, as expert E._____ points out in his legal opinion (n. 101 and footnote 62), pursuant to Art. 772 and Art. 773 of the federal employment law, the discontinuance of an action may be taken notice of by the CCRC only upon request of one of the parties and after prior consultation with the employee who remained inactive, drawing the latter's attention to the consequences of his failure to act. In the case at hand, there are two Argentine employees represented by an Argentine lawyer who should be bound by a provision in the Mexican employment law which would definitively prevent them from claiming their rights in court by the legal fiction – contrary to the general rule providing for discontinuance of the proceedings only – of a discontinuance of the action resulting from their mere inactivity, without being able to defend themselves in any way, even though the same arbitral tribunal issued an ambiguous decision two years earlier inviting them if not to act in a more suitable body, at least not to act before the results of the criminal investigation for document forgery previously initiated upon the Appellant's complaint. Moreover, the coaches were not parties to the aforesaid criminal proceedings, and could not move it forward so that the Appellant could obtain an award finding that the action introduced against it by the Respondents was discontinued simply by letting the criminal proceedings run their course and by refraining from undertaking any steps which would move it forward. It must be admitted therefore

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

that the blatant violation of the coaches' right to be heard by the CCRC is ground to refuse recognition of the 2011 CCRC Decision.

The Respondents did not have an opportunity to defend themselves against this breach of their right to be heard *pendente lite* because they heard of the CCRC decision after it was issued. Therefore, they cannot be held in forfeiture of their right for not acting before that arbitral tribunal issued its decision. It is uncontestable that they did not appeal the 2011 CCRC Decision when they could theoretically have done so. However, considering the circumstances, the Appellant wrongly blames them for not using this legal recourse. As has already been emphasized, the issue of forfeiture for failure to use an available legal recourse is much disputed and it is far from clear that this would also apply to procedural deficiencies such as the violation of the right to be heard, which constitute grounds to refuse enforcement to be examined *ex officio* under the New York Convention (see above 4.2.2, 5th §). On the other hand it appears difficult, in light of the principle of procedural efficiency, to blame the Respondents for not appealing the 2011 CCRC Decision to the CAS. Requiring them to initiate an arbitral procedure before that body which could be long and costly only to obtain a finding that the decisions concerning them issued by the Mexican sport arbitral tribunal violated the pertinent provisions of Mexican law, which would also have enabled their opponent to challenge the award – which could have been in their favor – before the Federal Tribunal, to authorize them as the case may be to reactivate one or several years later the procedure wrongly closed by the CCRC with a view to obtaining a review of their claims on the merits, would hardly make any sense. One must also not forget that they did not act illogically by seizing the PSC regardless of the earlier introduction of their claim before the CCRC, considering that the CAS interpreted, like them, the 2009 CCRC Decision as meaning that the Mexican arbitral tribunal chose not to exercise its jurisdiction and left them free to raise their claims before another jurisdictional body. Consequently, the Respondents cannot be deemed to have forfeited their right by not appealing the 2011 CCRC Decision.

4.4. This review shows that the CCRC award of October 6, 2011, whilst being *res judicata* according to Mexican law, is contrary to Swiss public policy, so that its recognition must be refused pursuant to Art. V(2)(b) of the New York Convention. Therefore, the PSC single judge (and the CAS after him) did not violate public procedural policy within the meaning of Art. 190(2)(e) PILA when addressing the coaches' claim notwithstanding the 2011 CCRC Decision. The Appellant's argument fails in this respect.

5.

In an alternate argument based on Art. 190(2)(b) PILA, the Appellant claims that the CAS wrongly accepted jurisdiction. However, the Appellant submits this argument only because, in its view, it was not clear whether *res judicata* is a matter of admissibility or of jurisdiction. As to the rest, it develops its argument on the assumption that the 2011 CCRC Decision was *res judicata* and could be invoked against the Respondents. Yet, it has just been shown that the Decision, even if it is an award having *res judicata* effect in light of Mexican law, cannot be recognized in Switzerland. Therefore, the inferences the Appellant seeks to draw from the point of view of the jurisdiction of the CAS are deprived of any basis. Moreover, the Appellant does not challenge the jurisdiction of FIFA, from which the jurisdiction of the CAS arises, from another point of view and in particular as to the very contents of the arbitration clause inserted in the

employment contracts it entered into with the coaches. Therefore the issue of jurisdiction cannot be examined from a different perspective than that which it chose (Art. 77(3) LTF).

6. In view of the foregoing, the appeal must be rejected. The request for a stay of enforcement submitted by the Appellant becomes therefore moot. According to Art. 66(1) LTF, the costs of the federal proceedings shall be borne by the Appellant. However, it will not have to pay compensation to the Respondents, since their answer was late. The amount deposited with the office of the Federal Tribunal as security for costs shall therefore be returned.

Therefore the Federal Tribunal pronounces:

1.
The answer and the rejoinder submitted by the Respondents are not admitted to the file.

2.
The Appeal is rejected.

3.
The judicial costs set at CHF 15'000 shall be borne by the Appellant.

4.
No costs are awarded.

5.
The amount of CHF 17'000 deposited with the office of the Federal Tribunal as security for costs shall be returned to the Appellant.

6.
This judgment shall be notified to the representatives of the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, February 26, 2015

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo