

CHALLENGED FOREIGN AWARD No. 3.035 – EX (2008/0044435-0)

RAPORTEUR : JUSTICE FERNANDO GONÇALVES
CLAIMANT : ATECS MANNESMANN GMBH
COUNSEL : SÔNIA MARIA GIANNINI MARQUES DOBLER AND OTHER(S)
RESPONDENT : RODRIMAR S/A TRANSPORTES EQUIPAMENTOS INDUSTRIAIS E ARMAZÉNS GERAIS
COUNSEL : IVES GANDRA DA SILVA MARTINS AND OTHER(S)

SUMMARY

FOREIGN ARBITRAL AWARD. STANDING [*“legitimidade ativa; interesse”*]. PURCHASE AND SALE CONTRACT. MERITS OF THE ARBITRAL AWARD. REVIEW BY THE STJ [Superior Court of Justice] IMPOSSIBILITY. ABSENCE OF PUBLIC POLICY VIOLATION.

1. Any person interested in the effects of a foreign award may request recognition and enforcement [*“homologação”*].

2. The Superior Court of Justice cannot review the merits of a foreign award because recognition and enforcement proceedings are restricted to the analysis of formal requirements.

4. The request for recognition and enforcement must be granted because there is no violation of public policy and because the award complies with the mandatory requirements of Resolution No. 9/2005 of the Superior Court of Justice and Articles 38 and 39 of Law 9.307/96.

4. Request for recognition and enforcement granted.

DECISION

Having seen, reported and discussed the record of the proceedings, the Justices of the Special Court of the Superior Court of Justice, in accordance with the opinion [*“voto-vista”*] of Justice Nancy Andrigli, who concurred with the opinion of the Judge-Rapporteur, and the concurring opinions from Justices Laurita Vaz, Luiz Fux, João Otávio de Noronha, Nilson Naves and Ari Pargendler have unanimously decided to grant recognition and enforcement, with costs amounting to R\$ 1,000.00 (one thousand reais). Justices Félix Fischer, Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Francisco Falcão, Nancy Andrigli, Laurita Vaz, Luiz Fux, João Otávio de Noronha, Nilson Naves and Ari Pargendler concurred with the Judge-Rapporteur. Justice Teori Albino Zavascki was absent. Justice Aldir Passarinho Junior recused himself. Justice Gilson Dipp was excused.

Brasília, 19 August 2009 (Date of Judgment).

JUSTICE CESAR ASFOR ROCHA, President

Unofficial English Translation

JUSTICE FERNANDO GONÇALVES, Rapporteur

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REPORT

THE HONORABLE JUSTICE FERNANDO GONÇALVES:

This is a request for recognition and enforcement of a foreign arbitral award containing an order to pay losses and damages resulting from a breach of contract, claimed by ATECS MANNESMANN GMBH who is the succeeding company of Mannesmann Dematic AG. The International Court of Arbitration rendered the award on 5 May 2003.

Following the request, Justice BARROS MONTEIRO, ordered that RODRIMAR S/A TRANSPORTES, EQUIPAMENTOS INDUSTRIAIS E ARMAZÉNS GERAIS (p. 157) shall be summoned. Rodrimar S/A later presented its Answer on pp. 174–209.

The Respondent preliminarily raised objections on the grounds of *res judicata* stating that the same foreign award was the object of a request for recognition and enforcement before this Court – SEC [Challenged Foreign Award] No. 968–EX, Judge-Rapporteur Felix Fischer. That claim had been dismissed without prejudice because the Claimant Gottwald Port Technology GMBH had lacked standing.

In addition, it asserts that Claimant was not mentioned “formally or informally in the body of the text of the award” of which recognition and

enforcement is sought and therefore has no standing to make such request.

The Respondent also contests the power of attorney attached on pp. 14/15 because it does not include an address and the identity of Claimant's representatives.

On the merits, Respondent argues that the award violates domestic public policy because “Swiss rules” were applied rather than Swiss substantive law, which was expressly chosen by the parties.

Moreover, Respondent argues that the award is contrary to Article 49(I) and Article 84(VIII) of the Federal Constitution because of the application of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, to which Brazil is not a party.

Finally, Respondent alleges that the order to pay an indemnification is not admissible under Brazilian civil law as there is no proof of damage; thus, the award violates the principle of prohibition of unjust enrichment.

Claimant replied on pp. 319–339.

The Public Prosecutor’s Office requires the filing of the instrument through which Mannesmann Dematic AG was succeeded by Atecs Mannesmann GMBH, as well as the rectification of the power of attorney (pp. 343–345).

The Claimant attached documents on pp. 361–410, 420–460 and 478–512 and Respondent on pp. 468–474.

In a new statement, the Public Prosecutor’s Office gave its opinion in favor of the request (pp. 533–534).

This is the report.

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OPINION

**THE HONORABLE JUSTICE FERNANDO GONÇALVES
(RAPPORTEUR):**

Claimant – ATECS MANNESMANN GMBH is the company that succeeded Mannesmann Dematic AG through an acquisition. Claimant requests recognition and enforcement of the foreign arbitral award rendered by the International Court of Arbitration that orders Respondent to pay 510,078.90 euros, plus 5% simple annual interest from 28 March 2001 until the full payment of the compensation for breach of a contract concerning a purchase and sale of a mobile harbor crane (pp. 94–106).

First, as a preliminary matter, the objection based on *res judicata* is unsuccessful. Respondent itself says that the request for recognition and enforcement of foreign arbitral award SEC 968/EX, filed by Gottwald Port Technology GMBH, was dismissed without prejudice because of lack of standing resulting in formal [*“coisa julgada formal”*] rather than substantive *res judicata* [*“coisa julgada material”*]. A denial of recognition and enforcement due to an issue of form does not preclude the Claimant from resubmitting its claim after rectifying the issue (Article 40 of Law No. 9.306/96).

In this regard, see

“CIVIL PROCEDURE. PUBLIC CIVIL ACTION [“ação civil pública”]. TERMINATION. LACK OF STANDING. RE-FILING OF CLAIM. PRELIMINARY OBJECTION OF RES JUDICATA. RECTIFICATION OF THE REQUIREMENT. NECESSITY. INTERPRETATION OF ARTICLE 268 CPC [Code of Civil Procedure]. APPEAL HEARD BUT DENIED.

I – There is substantive res judicata only when the merits of the case are decided.

II – Dismissal without prejudice due to lack of standing does not result in

substantive res judicata. It does result in formal res judicata, that prevents a discussion of the dispute in the same proceeding but not in another. This means that Claimant may resubmit the claim if the issue is rectified and the claim cannot be excluded prima facie.

III – If the proceeding was terminated because Respondent lacked standing, the Claimant may not resubmit the original claim unless it indicates the correct party, in accordance with Articles 471 and 473 CPC. These provisions prevent discussing twice an issue that has already been decided.” (EREsp [Special Appeal] 160.850/SP, Judge-Rapporteur SÁLVIO DE FIGUEIREDO TEIXEIRA, Special Court, DJ [Official Gazette] 29 September 2003.)

Likewise, the argument that Claimant has no standing because it was not a party in the original proceedings is of no avail.

The request for recognition and enforcement can be filed by anyone who has an interest in the effects of the foreign award: the parties in the original proceedings, their successors or third parties. José Carlos Barbosa Moreira says:

“Any person that may bear the effects of the decision of which recognition and enforcement is sought has standing to claim [recognition and enforcement]: the parties to the foreign proceeding (or their successors) and even third parties that can be legally affected by the award, in accordance with the provisions of the legal system concerning the subjective extent of the award and of the res judicata effects.” (Comentários ao Código de Processo Civil, Vol. V, 9th ed., p. 85)

In this sense:

“FOREIGN AWARD. REQUEST FOR RECOGNITION AND ENFORCEMENT. STANDING. CONDITIONS COMPLIED WITH.

1. Any interested person may request the recognition and enforcement of a foreign award.

2. In this case, Claimant, Samsung Eletrônica da Amazônia Ltda., the exclusive representative of Samsung Aerospace Industries Ltda. in Brazil, has an interest in the recognition and enforcement of the arbitral award issued by the Korean Commercial Arbitration Centre, since this award can be useful in deciding the lawsuit commenced by the Respondent before the First Civil Court of the Petrópolis District.

3. The request for recognition and enforcement shall be granted when all the mandatory conditions for the recognition and enforcement of the foreign award are met and there is no violation of sovereignty or public policy.

4. The recognition and enforcement of the foreign award is granted.” (SEC [Challenged Foreign Award] 1.302/KR, Judge-Rapporteur PAULO GALLOTTI, Special Court, DJ 6 October 2008.

Moreover, Claimant rectified the issue concerning the power of attorney on pp. 420-424.

The arguments that the request for recognition and enforcement violates Brazilian public policy because the law expressly chosen in the contract was not applied, and that the request for recognition and enforcement violates the principle of the prohibition of unjust enrichment because there is no effective proof of damages caused are also of no avail.

In fact, these questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court, since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award.

In this sense:

“FOREIGN ARBITRAL AWARD. JUDICIAL REVIEW. IMPOSSIBILITY OF REVIEWING THE MERITS. RESPECT OF FORMAL REQUIREMENTS. RECOGNITION AND ENFORCEMENT GRANTED.

I – Judicial review of a foreign arbitral award is limited to formal aspects; it is not possible to review the merits of an award. Precedents.

II – The recognition and enforcement of foreign arbitral awards is mandatory once all the mandatory requirements are complied with; as well as upon verification that the award does not undermine national sovereignty, public policy and common decency [“bons costumes”]. Recognition and enforcement granted” (SEC 760/EX, Judge-Rapporteur FELIX FISCHER, Special Court, DJ of 28 August 2006).

It is appropriate to quote again here the lesson of Barbosa Moreira:

“The objections raised in the Answer shall be limited to the discussion of the authenticity of the documents, the legal reasoning in the award and the compliance with the conditions for recognition and enforcement (Article 221). This means that the Respondent may not raise arguments concerning the injustice of the award or defects in the foreign proceedings, with the sole exception of those that prevent recognition and enforcement under [Brazilian] law: e.g., lack of jurisdiction of the foreign judge.” (p. 88)

Therefore, the request for recognition and enforcement must be granted as there is no violation of public policy, the **award** complies with the mandatory conditions of Resolution No. 9/2005 of the Superior Court of Justice and Articles 38 and 39 of Law No. 9.307/96.

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There are no costs in accordance with the sole paragraph of Article 1 of Resolution 9 of 2005 of the Superior Court of Justice.

Respondent must pay attorney's fees set at R\$ 1,000.00 (one thousand reais).