Unofficial English Translation

CHALLENGED FOREIGN AWARD Nº 3.660 - GB (2008/0218282-4)

RAPPORTEUR : JUSTICE ARNALDO ESTEVES LIMA
CLAIMANT: DEVCOT S/A
COUNSEL: GILBERTO GIUSTI AND OTHER(S)
RESPONDENT: ARI GIONGO
COUNSEL: GABRIEL GAETA ALEIXO

SUMMARY

FOREIGN AWARD. ARBITRATION. INTERNATIONAL CONTRACT EXECUTED CONTAINING ARBITRATION CLAUSE. BREACH OF THE CONTRACT. LAW No. 9.307/96 (ARBITRATION ACT), ARTICLES. 38(III) AND 39, SOLE PARAGRAPH. RECOGNITION AND ENFORCEMENT ["*homologação*"] GRANTED.

1. An international contract for the supply of cotton entered into by a Brazilian farmer and a French company that explicitly included an arbitration agreement. Arbitral proceedings commenced based on the Brazilian party's breach of the contract.
2. The claim that in this case it was necessary to provide service of process through letter rogatory is groundless pursuant to the sole paragraph of Article 39 of the Arbitration Act. The claim that no service of process occurred is also groundless since the evidence shows that the Respondent was informed of the commencement of the arbitral proceedings, as well as of the development of the proceedings, not only through courier services, but also through electronic mail and fax.
3. The Respondent did not meet the burden established in Article 38(III) of the Arbitration Act, which requires the Respondent to demonstrate that it was not notified of the commencement of the arbitral proceedings or that there was a violation of the principle of fair hearing ["*contraditório*"] or the principle of full defense ["*ampla defesa*"] .
4. Scholarly writings and precedents of the Special Court.
5. Recognition and enforcement of the arbitral award granted.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned parties are involved, Justices of the SPECIAL COURT of the Superior Court of Justice have unanimously decide to grant recognition and enforcement according to the opinion of the Judge-Rappoteur. Justices Nilson Naves, Fernando Gonçalves, Felix Fischer, Aldir Passarinho Junior, Eliana Calmon, Paulo Gallotti, Nancy Andrighi, Laurita Vaz, Luiz Fux and João Otávio de Noronha concurred with Judge-Rappoteur.

Justices Ari Pargendler, Gilson Dipp, Hamilton Carvalhido and Francisco Falcão were excused.

Brasília, 28 May 2009 (Date of Judgment).

JUSTICE CESAR ASFOR ROCHA
President

JUSTICE ARNALDO ESTEVES LIMA
Rapporteur

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REPORT

JUSTICE ARNALDO ESTEVES LIMA:

DEVCOT S/A, a corporation with its place of business in France, seeks the recognition and enforcement of the foreign arbitral award (pp. 34/35, vol. 1) rendered on 1 October 2007 in Liverpool, England, by the International Cotton Association Limited ("ICA" or International Cotton Association), against ARI GIONGO, a Brazilian farmer, domiciled in Rondonópolis, Mato Grosso.

The Claimant firstly contends that it signed a contract with the Respondent on 22 February 2006 for the purchase of 650 MT (metric tons) of cotton from Mato Grosso, 2005/2006 harvest.

It further claims that, pursuant to the contract, it was under the obligation to pay in advance the amount of US$ 500,000.00 (five hundred thousand dollars). However, the Respondent did not deliver the goods purchased after being paid.

In addition, it claims that the Respondent did not return the amount paid and that after negotiations the Claimant proposed to postpone such restitution until December 2008. It states that since the Respondent rejected the proposal it commenced arbitral proceedings pursuant to the arbitral clause included in the contract that referred to the ICA Rules.

The Claimant highlights the fact that the arbitral proceedings were conducted in strict compliance with the ICA Arbitration Rules and that the Respondent was granted an opportunity to present its case and to appoint an arbitrator. It notes that the award mentions copies of all documents and notifications sent by the ICA to the Respondent; however, despite the confirmation of receipt of the entire documentation, Respondent did not present any reply.

The Claimant argues that the arbitral award is final and binding. As certified by the ICA General Director, the Respondent could have appealed the arbitral award, but it failed to do so.

The Claimant requests the recognition and enforcement of the arbitral award in light of its the compliance with all requisites established by the Superior Court of Justice's Resolution, and the inexistence of any legal obstacle to its recognition and enforcement. The Claimant attaches documents located at pp. 25 to 479.

In its Answer (pp. 524/529, Vol. 3), the Respondent argues that the effective service of process in foreign proceedings can only occur through letter rogatory; in the present case, all requests, documents and the award were sent through courier. He also notes that he only became aware of the arbitration proceedings through this request for recognition and enforcement of the foreign award, because he was living in his farm.

Finally, Respondent argues for the dismissal of the request for recognition and enforcement and that the Claimant should be ordered to pay all legal costs.

The Claimant replied in pp. 540/550, reiterating several arguments and highlighting that the argument that Respondent was not aware of the arbitral proceedings has no legal basis. It further claims that providing service of process through letter rogatory is outside the scope of a private justice system, since "*arbitral institutions (…) only have at their disposal regular services of dispatch for the delivery of documents*". This is why Law No. 9.307/96 (Arbitration Act), pursuant to the sole paragraph of Article 39, allows service of process through courier. Claimant argues that the documents were sent by courier and also by fax and electronic mail, as demonstrated by the documentation attached to the claim. Claimant also argues the Respondent bears the burden of showing that he was not notified of the commencement of the arbitral proceedings pursuant to Article 38 of the Arbitration Act.

The Public Prosecutor's office gave its opinion in pp. 552/555 in favor of the recognition and enforcement of the award.

This is the report.

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SUMMARY

FOREIGN AWARD. ARBITRATION. INTERNATIONAL CONTRACT EXECUTED CONTAINING ARBITRATION CLAUSE. BREACH OF THE CONTRACT. LAW No. 9.307/96 (ARBITRATION ACT), ARTICLES. 38(III) AND 39, SOLE PARAGRAPH. RECOGNITION AND ENFORCEMENT ["*homologação*"] GRANTED.

1. An international contract for the supply of cotton entered into by a Brazilian farmer and a French company that explicitly included an arbitration agreement. Arbitral proceedings commenced based on the Brazilian party's breach of the contract.
2. The claim that in this case it was necessary to provide service of process through letter rogatory is groundless pursuant to the sole paragraph of Article 39 of the Arbitration Act. The claim that no service of process occurred is also groundless since the evidence shows that the Respondent was informed of the commencement of the arbitral proceedings, as well as of the development of the proceedings, not only through courier services, but also through electronic mail and fax.
3. The Respondent did not meet the burden established in Article 38(III) of the Arbitration Act, which requires the Respondent to demonstrate that it was not notified of the commencement of the arbitral proceedings or that there was a violation of the principle of fair hearing ["*contraditório*"] or the principle of full defense ["*ampla defesa*"] .
4. Scholarly writings and precedents of the Special Court.
5. Recognition and enforcement of the arbitral award granted.

OPINION

JUSTICE ARNALDO ESTEVES LIMA (Rapporteur):

As reported, the French company DEVCOT S/A and the Brazilian farmer, ARI GIONGO, concluded an agreement for the sale of cotton on 22 February 2006. Due to a breach of the contract by Respondent, Claimant commenced arbitral proceedings. Claimant seeks recognition and enforcement of an award rendered by the International Cotton Association Limited (ICA).

Preliminarily, the existence of an arbitration clause in the contract signed by the parties must be emphasized. The contract may be found at p. 262, its translation is located at pp. 463/465, in [where is located] clause "G" that states (p. 464): "G – Arbitration: this contract incorporates the Rules of the International Cotton Association Ltd.".

Regarding the alleged failure to summon the Respondent to participate in the arbitral proceedings, it is correct to say that the Supreme Court's precedents indicated that service of process needed to be done through letter rogatory. However, after the Arbitration Act came into force this understanding changed, pursuant to the sole paragraph of Article 39:

> The services of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including mail with confirmation of receipt, shall not be considered as offensive to Brazilian public policy, provided the Brazilian party is granted sufficient time to exercise its right of defense.

Professor ANDRÉ DE ALBUQUERQUE CAVALCANTI ABBUD discussing the issue in the book "Recognition and enforcement of foreign arbitral awards" (São Paulo: Atlas, 2008, p. 150) is apposite. He states:

> However, the presumption that the Respondent has been notified of the existence of the foreign procedure is not the same when analyzing foreign arbitral awards and court decisions. Concerning the recognition and enforcement of a court decision, the Claimant must demonstrate, from the very beginning, that the Respondent was summoned (Article 5(II) STJ [Superior Court of Justice] Resolution No. 9/2005; Article 333(I) Code of Civil Procedure). Concerning the recognition of arbitral awards, however, the law places on the Respondent the burden of proof that it was not notified of the commencement of the proceedings or of the appointment of the arbitrator (Article 38(III) Arbitration Act). Notwithstanding this, as the demonstration of the absence of notification has a negative character, normally it is not reasonable to place this burden on the Respondent (*negative non sunt probanda*). Therefore, if the Respondent raises an objection in this sense, the Claimant who seeks recognition and enforcement must demonstrate that the other party was notified, pursuant to Article V(1)(b) of the New York Convention and Article 38(III) of the Arbitration Act.

Furthermore, he highlights (p. 152):

> (...) the Arbitration Act established a specific rule, under which the summons of a party resident or domiciled in Brazil conducted in accordance with the procedure of the seat of arbitration does not violate Brazilian public policy even if the summons is not done through letter rogatory (Article 39, sole paragraph). The important point is that the procedural notification is done within a reasonable time to give the opportunity to the Respondent to present defense, i.e. that due process has been observed.

The precedents of the Special Court of this Superior Court of Justice agree with that understanding:

> FOREIGN ARBITRAL AWARD. ORDER FOR BRAZILIAN COMPANY TO COMPLY WITH CONTRACT CLAUSE. FORMAL

> REQUIREMENTS FOR THE RECOGNITION AND ENFORCEMENT MET. ARBITRATION IS RECOGNIZED AS A LEGAL METHOD OF DISPUTE RESOLUTION OF DISPOSABLE RIGHTS. LAW No. 9.307/96. ABSENCE, IN THE PRESENT CASE, OF PUBLIC POLICY CONCERNS.
>
> I - The use of arbitration as a dispute settlement mechanism does not violate Brazilian public policy, as Law No. 9.307/96 (Arbitration Law) is currently in force. It is not possible to argue that Respondent was forced to choose this mechanism, as it suggests, especially because there is no evidence to substantiate such claim.
>
> II – Pursuant to the sole paragraph of Article 39 of the Brazilian Arbitration Law, "*The services of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including mail with confirmation of receipt, shall not be considered as offensive to Brazilian public policy, provided the Brazilian party is granted sufficient time to exercise its right of defense.*"
>
> III - Moreover, **there is substantial evidence demonstrating that the Respondent received, through courier, not only the service of process, but also notifications requesting its appearance at the hearings that were conducted ex parte.**
>
> IV – The formal legal requirements regarding this procedure, including those provided by Resolution No. 9/STJ [Superior Court of Justice], of 4 May 2005, were observed, thus the request for recognition and enforcement of the foreign arbitral award must be granted.
>
> V - Therefore, the request for recognition and enforcement is granted (SEC [Challenged Foreign Award] 874/EX, Judge-Rapporteur FRANCISCO FALCÃO, DJ [Official Gazette] of 16 April 2007 – emphasis added)

Moreover, the Respondent failed to meet its burden of proof established in Article 38(III) of the Arbitration Act:

> "The request for recognition and enforcement of an arbitral award may be denied only if the defendant furnishes proof that:
>
> .....
>
> III - it was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present its case;"

In this sense:

> RECOGNITION AND ENFORCEMENT OF FOREIGN AWARD. ARBITRAL AWARD. ARBITRAL PROCEEDINGS CONDUCTED EX PARTE. ARBITRATION AGREEMENT. NON EXISTENCE.
>
> 1. In proceedings for the recognition and enforcement of a foreign arbitral award rendered ex parte, the Respondent has the burden of proof of demonstrating that it was not dully notified of the commencement of the arbitral proceedings pursuant to Article 38 item III of Law No. 9.307/96
>
> 2. Recognition and enforcement granted. (CHALLENGED FOREIGN AWARD 887/EX, Judge-Rapporteur JOÃO OTÁVIO DE NORONHA, DJ of 3 April 2006)

Therefore, in the present case, it cannot be claimed that service of process must be done through letter rogatory. It was demonstrated that Respondent was notified of the commencement of arbitral proceedings, as well as of the other procedural acts not only through courier services, but also through electronic mail and fax. Thus, Respondent was summoned. The records demonstrate the receipt of communications sent by courier through: "A. NETO" (pp. 338/348/350/353 and 354); "ADRIA" (pp. 371/397/408) and "A. LOPES" (pp. 417/429/454). It is important to note that when Respondent was served for this procedure, the Court Officer ["*Oficial de Justiça*"] delivered a copy of the claim to Ms. Adriana Lopes, employee of Respondent (p. 498).

In brief, none of the objections raised by Respondent are valid. Moreover, the study of the case records in light of the requirements of Law No. 9.307/96, particularly Articles 21 and 32, do not demonstrate any legal bar to the recognition and enforcement [of the award].

Concerning the legal costs, the rules of the Code of Civil Procedure are applicable, in particular paragraph 4 of Article 20, taking into consideration that the Respondent provided an Answer.

In conclusion, **I hereby grant the recognition and enforcement of the foreign arbitral award**, ordering Respondent to pay legal costs in the amount of R$ 50,000.00 (fifty thousand Brazilian reais).

This is my opinion.