Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 507 – EX (2005/0209540-1)

RAPPORTEUR	:	**JUSTICE GILSON DIPP**
CLAIMANT	:	GRAIN PARTNERS SPA
COUNSEL	:	LÚCIA MARIA DE FIGUEIREDO E OUTRO
RESPONDENT	:	COOPERATIVA DOS PRODUTORES E TRABALHADORES URBANOS E RURAIS DE SORRISO LTDA. – COOPERGRÃO
COUNSEL	:	VANDERLEI LANZ
RESPONDENT	:	OITO EXPORTAÇÃO E IMPORTAÇÃO DE CEREIAS E DEFENSIVOS AGRÍCOLAS LTDA.
COUNSEL	:	WILSON JOSÉ ANDERSEN BALLAO E OUTROS

SUMMARY

RECOGNITION AND ENFORCEMENT ["*homologação*"] OF FOREIGN ARBITRAL AWARD. DEPOSIT. UNNECESSARY. LAW 9.307/96. IMMEDIATE IMPLEMENTATION. CONSTITUTIONALITY. USE OF ARBITRATION AS A DISPUTE SETTLEMENT MECHANISM. NO PUBLIC POLICY VIOLATION. IMPOSSIBILITY TO REVIEW THE MERITS OF SUBSTANTIVE RIGHTS. VIOLATION OF PRINCIPLES OF FAIR HEARING AND FULL DEFENSE. INEXISTENCE. *EXCEPTIO NON ADIMPLETI CONTRACTUS*. DETERMINATION OF ATTORNEYS' FEES AND COURT COSTS. ARTICLE 20, PARAGRAPH 4 OF THE CPC [Code of Civil Procedure]. REQUEST FOR RECOGNITION AND ENFORCEMENT GRANTED.

I - Claims for recognition and enforcement of foreign decisions do not require a deposit. Precedents from the Federal Supreme Court ["*Supremo Tribunal Federal*"].

II – In Brazil, the recognition and enforcement of arbitral awards is governed by Law No. 9.307/96. This law has immediate application and is constitutional as already decided by the Federal Supreme Court.

III – The use of arbitration as a dispute settlement mechanism does not violate public policy as previously stated by this Court.

IV – Judicial review of the recognition and enforcement of arbitral awards is limited to aspects established in Articles 38 and 39 of the Law No. 9.307/96. The merits of the underlying substantive law regarding the subject matter of the award for which recognition and enforcement is sought shall not be reviewed. Precedents.

V – There is no violation of the fair hearing principle or of the full defense principle if the parties freely entered into a contract in which there was an explicit arbitration agreement; both parties had full knowledge of the commencement of the arbitral proceedings and both presented preliminary considerations and defenses.

VI – The honorable Special Court of this Tribunal has already stated that the discussion of the rule *exceptio non adimpleti contractus* is not related to public policy, thus it does not fall within the scope of the concept of national sovereignty. Furthermore, the issue refers specifically to the merits of the award for which recognition and enforcement is sought, thus it shall not be reviewed at this stage.

VII – The grant of recognition and enforcement to foreign decisions is limited to the analysis of formal requirements. In other words, the object of the limited review in recognition and enforcement proceedings shall not be confused with the object of the proceedings that resulted in the foreign award. Therefore, both decisions do not have the same nature. In recognition and enforcement proceedings the value of the claim [because it is a declaratory judgment] does not have an economic content. The enforcement proceedings that will commence after the decision [on recognition and enforcement] is rendered may be based on a monetary claim.

VIII – In most proceedings for enforcement and recognition of foreign decisions – particularly the ones referring to foreign arbitral awards – the value of the claim corresponds to the compensatory amount of the foreign award, usually of great value. Therefore, when the foreign award is challenged, the determination of attorney fees and court costs based on a percentage of the value of the claim might be exaggerated.

IX – The determination of attorneys' fees must be based on Article 20 Paragraph 4 of the Code of Civil Procedure in the case of challenged foreign decisions since there is no order to pay a certain amount. The items in Paragraph 3 of the above-mentioned article must also be followed. Furthermore, the judge is not limited to the amount referred to in Article 20 Paragraph 3 in accordance with the understanding of this Court.

X – Request for recognition and enforcement is granted.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned parties are involved, the Justices from the SPECIAL COURT of the Superior Court of Justice are in agreement. The Special Court unanimously grants the request for recognition and enforcement according to the terms of the opinion of the Judge-Rapporteur. Justices Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Laurita Vaz, João Otávio de Noronha, Teori Albino Zavascki, Francisco Peçanha Martins, Humberto Gomes de Barros, Ari Pargendler, José Delgado, Fernando Gonçalves, Carlos Alberto Menezes Direito, Felix Fischer and Aldir Passarinho Junior concurred with the opinion of the Judge-Rapporteur.

Fernando Gonçalves, Aldir Passarinho Junior and Maria Thereza de Assis Moura did not participate in the decision.

Justices Antônio de Pádua Ribeiro, Nilson Naves, Cesar Asfor Rocha, Jorge Scartezzini, Francisco Falcão and Luiz Fux were absent.

Ms. Lúcia Maria de Figueiredo pleaded for the Claimant.

Brasília (DF), 19 October 2006. (Judgment date)

JUSTICE **BARROS MONTEIRO**
President

JUSTICE **GILSON DIPP**
Rapporteur

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CHALLENGED FOREIGN AWARD No. 507 – EX (2005/0209540-1)

REPORT

THE HONORABLE JUSTICE GILSON DIPP:

GRAIN PARTNERS SPA (GALAXY GRAIN ITALIA SPA), a corporation with its place of business in Italy, sought the enforcement and recognition of a Foreign Arbitral Award rendered by the FEDERATION OF OILS, SEEDS AND FATS ASSOCIATIONS LIMITED – FOSFA, registered in London, England, against OITO EXPORTAÇÃO E IMPORTAÇÃO DE CEREAIS E DEFENSIVOS AGRÍCOLAS LTDA. and COOPERATIVA DOS PRODUTORES E TRABALHADORES URBANOS DE SORRISO – COOPERGRÃO.

The Claimant argues that it signed, as a buyer, in 2001 and 2002, several soy sale contracts with the Brazilian corporations which are Respondents in the present case, amounting to a total of 46.000 (forty-six thousand) metric tons of soy. Following a breach by the Respondents, it initiated arbitral proceedings as provided for by the arbitration clause included in the contracts. After the Respondents presented their Statement of Defense, [the arbitral tribunal] rendered the arbitral award for which recognition and enforcement is sought.

Duly summoned, the Respondent OITO EXPORTAÇÃO E IMPORTAÇÃO DE CEREAIS E DEFENSIVOS AGRÍCOLAS LTDA. presented a Statement of Defense (pp. 605/616) emphasizing, preliminarily, the need for the Claimant to pay a deposit to be eligible for filing the present claim, pursuant to Article 835 of the Code of Civil Procedure, considering that the claim concerns a foreign legal person.

In the merits, the Respondents claim that the arbitration does not fulfill the conditions for being admissible due to the following reasons:

a) the arbitration clause had no effect due to the unconstitutionality of Article 7 of Law 9.307/96, and because of a violation of Article 4 of the referred statute, having in view that in contracts for adhesion it is necessary that the party adhering to the contract recognizes the clause in question (what would happen if the party took the initiative of initiating arbitration) or that the clause be highlighted in bold and signed by the parties;

b) even if the arbitral clause were considered valid, after the parties agreed to it, both of them expressed their intention to resort to the Brazilian courts, clearly waiving a recourse to arbitration. It argues that the Respondent - OITO EXPORTAÇÃO – filed two judicial claims, an accounting claim and a preliminary injunction for seizure – before the courts of the State of Paraná, and the Claimant filed a claim for damages against OITO requesting an order for the payment of damages for the alleged breach of the contract that gave rise to the arbitration;

c) there was a violation of the principle of full defense [“*princípio da ampla defesa*”], and of the principle of fair hearing [“*princípio do contraditório*”]. The Respondent was precluded from nominating an arbitrator as arbitration proceedings are extremely costly. [The arbitrator] was eventually nominated by the English Tribunal, in violation of the arbitral procedure. Also because of the high costs it did not have the possibility to appeal against the arbitral award; and

d) there was a violation of public policy, because the arbitral procedure, in addition to limiting Respondent’s right of defense, allows a foreign company to acquire damages from an aggrieved party through a private justice system. It is clear that in Brazil, the rule of universal jurisdiction [of the Brazilian courts] is in effect, and private parties cannot exercise self-help. Moreover, in Brazil, the rule of *exceptio non adimpleti contractus* has force, which authorized the Respondent not to comply with the contracts. Finally, the conduct of the Claimant, intending to appropriate someone else’s property is considered in the national legal system as misappropriation [“*apropriação indébita*”], a crime listed in the Criminal Code.

The Respondent COOPERATIVA DOS PRODUTORES E TRABALHADORES URBANOS DE SORRISO – COOPERGRÃO presented its Statement of Defense (pp. 684/699) arguing that the breach of contracts happened due to acts of the Claimant, and that the Claimant does not have any legal basis to ask for the alleged damages. Respondent stated that the decision rendered by the arbitral tribunal is null as Respondent was not notified of the nomination of the arbitrators or of the procedure of the arbitration, which is an express violation of the principle of fair hearing and the principle of full defense.

Finally, the Respondent argues that the arbitral clause cannot bind the Respondent as it is not contained in the contracts in written form.

Reply on pp. 840/846 and 848/857.

On pp. 862/863, the Public Prosecutor's Office gave its opinion in favor of the request.

Statement of the Claimant on pp. 884/888.

Opinion of the Public Prosecutor's Office, on pp. 899/904, for the approval of the request for recognition and enforcement of the award.

Statement of the Respondent OITO EXPORTAÇÃO on pp. 906/910.

This is the report.

Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 507 – EX (2005/0209540-1)

OPINION

THE HONORABLE JUSTICE GILSON DIPP (*Rapporteur*):

The Claimant requests recognition and enforcement of the foreign award rendered by the FEDERATION OF OILS, SEEDS AND FATS ASSOCIATIONS LIMITED – FOSFA that ordered Respondents to pay damages for breach of contracts concluded for the delivery of soy, along with interest, attorney fees, legal costs and expenses of the arbitration proceedings (pp. 439/437).

Respondent OITO EXPORTAÇÃO E IMPORTAÇÃO DE CEREAIS E DEFENSIVOS AGRÍCOLAS LTDA., in summary, states that: a) the Claimant needs to make a deposit in order to file this request; b) the arbitration agreement is null and void due to the unconstitutionality of Article 7 of Law No. 9.307/96; c) a violation of Article 4 of the aforementioned Law occurred since the contract [containing the arbitration agreement] was a contract of adhesion; d) both parties waived their right to arbitrate when they filed their claims before the Brazilian courts; e) a violation of the fair hearing principle and the full defense principles; and f) a violation of public policy occurred.

Respondent COOPERATIVA DOS PRODUTORES E TRABALHADORES URBANOS DE SORRISO – COOPERGRÃO, in summary states that: a) the Claimant breached the contract; b) the award is null and void, since the Respondent was not notified of the appointment of the arbitrator or of the commencement of the arbitral proceedings, in clear violation of the principles of fair hearing and the full defense; and c) the arbitration agreement is not binding on the Claimant because it is not in writing in the concluded contracts.

Firstly, it is important to note that OITO EXPORTAÇÃO is incorrect in its assertion that the arbitration agreement is null and void because of the alleged unconstitutionality of Article 7 of Law No. 9.307/96.

Unofficial English Translation

Recognition and enforcement of arbitral awards is governed in Brazil by Law No. 9.307 of 23 September 1996 and it has immediate application and is constitutional as previously decided by the Federal Supreme Court in the judgment of *AgRgSE* [Interlocutory Appeal on the Foreign Award] 5206-7/Reino da Espanha:

> *"1. Foreign award: arbitral decision that settled a dispute between two corporations regarding rights freely transferable by the parties – the existence and the amount of credits regarding commissions for commercial representation of a Brazilian company abroad: arbitration agreement signed by the Claimant that requests recognition and enforcement: absence of seal of approval in the home country from a judicial authority or equivalent public organ: recognition and enforcement denied by the President of the Federal Supreme Court in accordance with precedents from said Court that prevailed at the time:* ***interlocutory appeal*** ["agravo regimental"] ***is unanimously granted taking into account ulterior publication of Law No. 9.307 of 23 September 1996 that governs arbitration, so that the arbitral award once recognized and enforced is equivalent to a judicially enforceable title*** ["título executivo judicial"].
>
> *2. Arbitral award: recognition and enforcement: Arbitration Act: incidental review of constitutionality* ["controle acidental de constitucionalidade"] *and the role of the Federal Supreme Court. Constitutionality is one of the first innovations of the Arbitration Act – the possibility of specific performance of the arbitration agreement – it is not detrimental to the recognition and enforcement of the arbitral award in this case; this possibility [specific performance of the arbitration agreement] only refers to the old requirement that it was necessary to recognize and enforce the arbitral award in the home country (Articles 18 and 31), consequently the recognition and enforcement of the award is not necessary in the home country for recognition of a foreign award in Brazil (Article 35). The complete equivalence under Brazilian law of the arbitral award and a national judgment according to the new Arbitration Act provides enough grounds to authorize the recognition and enforcement in Brazil of a foreign arbitral award independently from prior recognition and enforcement from the judicial system of the country where the award was rendered. Even if it is not essential to the case, the Tribunal cannot avoid deciding about the unconstitutionality claimed incidentally due to its role of "Guardian of the Constitution" (v.g. MS* [Writ of mandamus] *20.505, Néri).*

> ***3. Arbitration Act (Law No. 9.307/96): argued constitutionality of arbitral proceedings; incidental discussion of the constitutionality of several topics of the new law, particularly about the compatibility, or the lack thereof, between specific performance of possible future disputes regarding the arbitration agreement and the constitutional guarantee of universal jurisdiction of the Brazilian Courts (Federal Constitution, Article 5(XXXV)). Constitutionality declared by the plenary. The Tribunal considered by a majority of votes, that the expression of the party's consent to the arbitration agreement when concluding the contract does not violate Article 5(XXXV) of the Federal Constitution, in the same manner that the legal permission given to the judge to replace the consent of the party avoiding the establishment of an arbitration agreement does not violate Article 5(XXXV) of the Federal Constitution. Minority opinion*** *– including the one from the rapporteur – which understood that the arbitration agreement was unconstitutional – due to indetermination of the object. The declaration that the provisions of Law No. 9.307/96 (Article 6, sole paragraph, Article 7 and its paragraphs and Article 41 of the new terms attributed to Article 267(VII) and Article 301, item IX of the Code of Civil Procedure; and Article 42) are unconstitutional for violating the guarantee of universal jurisdiction of the Judicial branch is based on the possibility that one party could request the judiciary to compel the other party resisting the arbitration proceedings to agree to the terms of the arbitration. Constitutionality – then by unanimous decision, on the provisions of the Arbitration Act, which establish that it is not possible to appeal (Article 18) and the other provisions on the effects of the arbitral award being equivalent to a nationa*l judgment (Article 31)." (SE-AgR [Interlocutory Appeal on the Foreign Award] 5206/EP – Espanha, Judge-Rapporteur SEPÚLVEDA PERTENCE, Plenary session, DJ [Official Gazette] of 30 April 2004, p. 29).

OITO EXPORTAÇÃO is incorrect in claiming that a deposit is required for filing this claim, in accordance with Article 835 of the Code of Civil Procedure.

Indeed, the recognition and enforcement of foreign awards is foreseen in Article 483 of the Code of Civil Procedure that establishes in its sole paragraph that *"The recognition and enforcement shall comply with the provisions of the institutional rules of the Federal Supreme Court*".

Due to the Constitutional Amendment No. 45, the jurisdiction for recognition and enforcement of foreign awards shifted to the Superior Court of Justice. The recognition and enforcement is now governed by Resolution/STJ [Superior Court of Justice] No. 9 of 4 May 2005. Note that there is no requirement of deposit for the recognition and enforcement in the above-mentioned resolution.

The Federal Supreme Court had already decided on the issue:

> *"**RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD. DEPOSIT: UNNECESSARY**. JURISDICTION OF FOREIGN JUDGE. APPLICABILITY OF LAW No. 9.307/96. INEXISTENCE OF POWER OF ATTORNEY FROM RESPONDENT. SERVICE OF PROCESS NOT CONFIRMED. OTHER ISSUES CANNOT BE ANALYZED DUE TO THE LACK OF REPRESENTATION. POSSIBILITY TO RE-FILE THE CLAIM.*
>
> ***1. A deposit is not requested for recognition and enforcement of foreign decisions (SEC*** [Challenged Foreign Award] ***No. 3.407, Oscar Corrêa, DJ of 7 December 1984).***
>
> *(omissions)*
>
> *6. Situation in which the claim can be filed again if the requirements are complied with. Request for recognition and enforcement not granted." (SEC 5378/FR – FRANÇA,* Judge-Rapporteur *MAURÍCIO CORRÊA, DJ of 25 February 2000).*

> ***"RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD. FORMAL REQUIREMENTS: ESTABLISHED. DEPOSIT: UNNECESSARY.** IMMEDIATE APPLICATION OF LAW No. 9.307/96. CONTRACT OF ADHESION: INEXISTENCE OF CHARACTERISTICS. NON APPLICABILITY OF THE CONSUMER PROTECTION CODE.*
>
> *1. Situation in which the requirements for recognition and enforcement were established. (RISTF [Institutional Rules of the Federal Supreme Court], Article 217).*
>
> ***2. The Federal Supreme Court understands that a deposit is unnecessary in proceedings for recognition and enforcement of foreign decisions (SE No. 3.407, Judge-Rapporteur OSCAR CORRÊA, DJ of 7 December 1984).***
>
> *(omissions)*
>
> *Request for recognition and enforcement granted." (SEC 5487/IN – GRÃ-BRETANHA (INGLATERRA), Judge-Rapporteur, MAURÍCIO CORRÊA, DJ of 17 December 1999).*

Respondent OITO EXPORTAÇÃO states that the arbitration agreement is null and void for contravening Article 4 of the Arbitration Act because in a contract of adhesion the party agreeing to the terms must expressly accept the arbitration agreement (which would occur if it took the initiative to file a request for arbitration) or if the arbitration agreement is in bold letters, by initialing it.

Law No. 9.307/93 determines, *verbatim:*

> *"Article 4 - An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.*
>
> *§ 1 - The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.*
>
> *§ 2 - In contract of adhesions, the arbitration clause will only be valid if the adhering party takes the initiative to initiate arbitration proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type. "*

Before analyzing this allegation, it is necessary to note that judicial review of recognition and enforcement of arbitral foreign award is limited to the aspects of Articles 38 and 39 of Law No. 9.307/96. The merits of the object of the arbitration cannot be reviewed. In this sense, the following decision of the Federal Supreme Court has provided clarifications:

> *"FOREIGN JUDGMENT – RECOGNITION AND ENFORCEMENT – SYSTEM OF LIMITED REVIEW – REQUIREMENTS FOR RECOGNITION AND ENFORCEMENT – ABSENCE OF CONSULAR CERTIFICATION THAT THE DECISION IS FINAL – ORDERED THE LOSING PARTY TO PAY ATTORNEYS' FEES – REFUSAL OF RECOGNITION AND ENFORCEMENT DUE TO LACK OF ONE OF THE REQUIREMENTS – DISMISSAL WITHOUT PREJUDICE.*
>
> *- Judgments rendered by foreign tribunals will only be valid in Brazil after being declared recognized and enforced by the Federal Supreme Court.* ***The proceedings for recognition and enforcement have a constitutive nature and establish a limited adversarial situation. Based on the verification of the legal requirements established in the national law, the purpose of a claim for recognition and enforcement is to allow recognition of foreign decisions by Brazil to give judicial effects that are inherent to acts of such kind.***
>
> ***- The system of limited review that was established under Brazilian law regarding recognition and enforcement of foreign awards does not allow the Federal Supreme Court, acting as a* Forum *Court, to review any issue***

> ***regarding the merits, or to analyze any issue related to the* meritum causae *of judgments rendered abroad, except regarding the limited review. This Court ought to apply the system of limited review when analyzing aspects related to national sovereignty, public policy and common decency. In the recognition and enforcement of foreign decisions' proceedings, one may not discuss the underlying substantive law reflected in the foreign award.***
>
> *(omissions). (SEC 7.473/EU, Judge-Rapportuer Celso de Mello, DJ of 7 April 1995).*

In this case, **the analysis of the allegation that the contract in the arbitration was a contract of adhesion implies an analysis of the merits of the underlying substantive law of the foreign arbitral award, which is not possible in these proceedings.**

Furthermore, even if it was not understood in this manner, Claimant's assertion is irreproachable when it affirms that: "*In the concrete case, the contracts were freely concluded and signed by the contracting parties* ***with an arbitration agreement in all of them – item 16 –*** *(…). The contract of adhesion, which is governed by Article 54 of the Consumer Protection Code, is characterized, under Brazilian law, when a service or goods provider unilaterally establishes the terms of the contract without the possibility of the consumer, who is the weaker party, to review its content." (pp. 842/843)*

The considerations of the Federal Supreme Court about this subject in an analogous situation is worth noting, *verbatim:*

> *"35. Respondent argues that it is a contract* ***of adhesion*** *and because of this, the arbitration agreement must be written* ***in bold*** *letters as established in Article 4 Paragraph 2 of the Law No. 9.307/96, otherwise the award may be considered null and void.*
>
> *36. To the extent that this issue relates to the merits of the case, it must not be analyzed by this Court in the proceedings for recognition and enforcement of foreign decisions. The analysis of the document in pp. 221/222 clearly demonstrates that the selling company was freely chosen by TEKA, despite the existence of hundreds of other cotton providers in the international market. It is evident that the* ***contract of adhesion*** *is not characterized by a printed document with blank spaces, as Respondent believes, but by the subjection of one party to the conditions imposed by the other party, without any possibility to bargain. In this case, there are clauses in the agreement that relate to the place of delivery of the goods, to the manner that the weight should be ascertained, to the amount of the insurance policy, to the freight payment and finally to the rules of arbitration.*

> *All of it was subject to modification by agreement. Such a contract is not a contract of adhesion and there is no clause that could be considered unconscionable, which is a matter, as already said, outside of the scope of the nature of th e recognition and enforcement proceedings.*
>
> *In the same manner, the award rendered by the* ***Liverpool Cotton Association Ltd.*** *has nothing to do with the* ***National Consumer Protection Code*** *in order to excuse the debtor of the accepted obligation. This is so because the Code does not apply to an importer of goods. The Code is meant to apply to the end consumers in accordance with Article 2. This article defines consumers as all individuals or legal entities that acquire or use goods or services as the* ***end user****." (SEC 5847/IN – GRÃ-BRETANHA (INGLATERRA), Judge-Rapporteur MAURÍCIO CORRÊA, DJ of 17 December 1999).*

Respondent OITO EXPORTAÇÃO also alleges that even if the arbitration agreement was considered valid; after its conclusion both parties waived their right to arbitration by manifesting their intent to go to the Brazilian courts, establishing a clear waiver to the arbitration agreement. It argues that it filed two claims in the courts of the State of Paraná – a claim for recovery and an interim relief request for preventive attachment – and Claimant filed a claim for compensation against OITO for an alleged breach of the contract under arbitration.

Note that despite the declaration from OITO EXPORTAÇÃO in pp. 906/910 where it argues that Claimant filed a claim in Brazilian courts, there is no evidence regarding this assertion in the record. Therefore, it is impossible to analyze the alleged waiver to have recourse to arbitration.

Further, as it was properly indicated by the Public Prosecutor's office, "*The Claimant's allegation that requirements under the Arbitration Act regarding the admissibility of the arbitration proceedings were absent contradicted the fact that Claimant accepted the arbitration when it argued its defense before the Arbitral Tribunal." (p. 903).*

Regarding the alleged violation of the principle of full defense and of fair hearing, OITO EXPORTAÇÃO affirms that arbitral proceedings are extremely costly, which is why it was not able to nominate an arbitrator. The English Tribunal, in violation of the arbitral procedure, eventually appointed the arbitrator. Still, OITO did not have the financial means to appeal the arbitral award.

Despite the arguments presented, the analysis of the record demonstrates with certainty that both Respondents did not only freely enter into the contracts that contained an explicit arbitration agreement, but they also had full knowledge about the commencement of the arbitration proceedings. They pleaded in more than one occasion, i.e. in the preliminary considerations (pp. 370/385) and defense (pp. 352/369).

As soon as Respondents entered into contracts that contained the referred arbitration agreement, they explicitly accepted the possibility of dispute settlement through arbitration. It is inappropriate at this stage to attempt to discuss the onerous character of arbitration proceedings.

Similarly, OITO EXPORTAÇÃO's allegation of violation of public policy is groundless. The argument is based on the fact that arbitral proceedings would, besides imposing limitations on OITO's right to a fair trial, allow a foreign company to recover monies from the losing party based on a private justice, whereas in Brazil the rule of universal jurisdiction is in force. This rule determines that private persons shall not exercise self-help.

As previously asserted, arbitration was legally implemented in Brazil through Law No. 9.307/96. The Federal Supreme Court considered this Law constitutional and determined that the use of arbitration as a dispute settlement mechanism does not violate Brazilian public policy. In this sense:

> *"FOREIGN ARBITRAL AWARD. ORDER TO A BRAZILIAN COMPANY TO COMPLY WITH THE CONTRACTUAL CLAUSE. FORMAL REQUIREMENTS TO GRANT RECOGNITION AND ENFORCEMENT COMPLIED WITH. RECOGNITION OF ARBITRATION AS A LEGAL METHOD FOR SETTLING DISPUTES OF FREELY TRANSFERABLE RIGHTS. LAW No. 9307/96. ABSENCE OF VIOLATION OF PUBLIC POLICY IN THE CASE.*
>
> *I-* ***There is no violation of public policy in using arbitration as a dispute settlement mechanism since Law No. 9307/96 (Arbitration Act) is in force. It is not possible to affirm that Respondent was forced to choose this mechanism as it suggests, because there was no evidence to support these allegations.***
>
> *(omissions)*
>
> *IV- It is not possible to deny the recognition and enforcement of the foreign arbitral award requested if the legal requirements are complied with,*

> *including the ones relating to formal aspects of the proceedings in Resolution No. 9/STJ* [Superior Court of Justice] *of 4 May 2005.*
>
> *V- Therefore, the request for recognition and enforcement is granted." (SEC 874/EX Judge-Rapporteur FRANCISCO FALCÃO, DJ of 15 May 2006).*

It is worth repeating that in this case there was unequivocal manifestation of consent from the contracting parties regarding the choice of arbitral proceedings for dispute settlement. Thus, there is no violation of public policy. Regarding this issue this Court has already declared:

> *"CIVIL PROCEDURE. SEC – CHALLENGED FOREIGN AWARD. RECOGNITION AND ENFORCEMENT. UNFOUNDED. CHOICE OF ARBITRAL TRIBUNAL. ABSENCE OF EXPLICIT CONSENT FROM RESPONDENT. VIOLATION OF PUBLIC POLICY. RECOGNITION AND ENFORCEMENT DENIED.*
>
> *(omissions)*
>
> ***2. In accordance with the files of the case under analysis there was no expression of consent from Respondent regarding the choice of the Arbitral Tribunal. The contracts containing the arbitration agreement were not signed.***
>
> ***3. The*** [absence of] ***incontrovertible expression of consent to submit to an arbitral tribunal violates public policy for it violates the principle established in our judicial system that requires explicit acceptance from the parties to submit their disputes arising under private contracts to arbitration.***
>
> *4. In the case* sub judice *there was no explicit expression from Respondent regarding the choice of the Arbitral Tribunal, which prevented the use of this jurisdiction in this dispute.*
>
> *5. Request for recognition and enforcement not granted."(SEC 967/EX, Judge-Rapporteur JOSÉ DELGADO, DJ of 20 March 2006).*

Concerning the allegation that the principle of *exceptio non adimpleti contractus* is in force in Brazil, which would have allowed Respondent to breach the contracts, it is worth highlighting that not only does it refer specifically to the merits of the award for which recognition and enforcement is sought – which is impossible to review at this stage – but this honorable Special Court has also declared that the issue is not of public policy. Thus it is not related to the concept of national sovereignty. See the following precedent:

> *"FOREIGN ARBITRAL AWARD. RECOGNITION AND ENFORCEMENT NO VIOLATION OF PUBLIC POLICY, OF NATIONAL SOVEREIGNTY OR COMMON DECENCY.*
>
> *1. Foreign award rendered through proceedings without any formal defects.*
>
> ***2. Respondent's answer in the sense that it is not bound to comply with its financial obligation because Claimant did not follow a contractual clause. Arguments decided by the arbitral tribunal concerning the rule* exceptio non adimpleti contractus*, in accordance with Article 1092 of the 1916 Civil Code. The issue does not have a public policy character and it does not relate to the concept of national sovereignty.***
>
> *3. Foreign arbitral awards have constitutive force for being rendered formally and substantively in accordance with the principles of our judicial system.*
>
> *4. Request for recognition and enforcement granted. Attorney fees determined at 10% (ten per cent) of the value of the claim." (SEC 802/EX Judge-Rapporteur JOSÉ DELGADO, DJ of 19 September 2005).*

For reasons previously mentioned, after the examination of COOPERGRÃO's objections, it seems impossible to analyze the argument that Claimant would have breached the contracts, because the issue of compliance or noncompliance with the contracts pertains to the merits.

Also COOPERGRÃO has no grounds to argue that the arbitration agreement is not binding because it is not in writing. Similarly, the argument of nullity of the arbitral award because Coopergrão was not notified of the appointment of the arbitrator must also be rejected. The argument that the arbitral decision is invalid because Respondent has not been notified of the appointment of the arbitrator nor of the commencement of the arbitration proceedings in explicit violation of the fair hearing and full defense is also groundless.

Indeed, as explained above, the arbitration clause is explicitly mentioned in the signed contracts. It is certain that Respondents had extensive knowledge of the commencement of the arbitration proceedings, since they pleaded more than once – opening statements and defenses.

Finally, it is necessary to note an important aspect: the determination of attorneys' fees.

It should be remembered that the analysis in granting recognition and enforcement to foreign decisions is limited to formal requirements. In other words, the object of the limited review in the recognition and enforcement proceedings shall not be confused with the object of the proceedings that produced the foreign award. Therefore, both decisions do not have the same nature. In the recognition and enforcement proceedings, the value of the claim [because it is a declaratory judgment] does not have an economic content. The enforcement proceedings that commence after the decision [on recognition and enforcement] is rendered may be based on a monetary claim. In most proceedings for enforcement and recognition of foreign decisions – particularly the ones referring to foreign arbitral awards – the value of the claim corresponds to the compensatory amount of the foreign award, usually of great value.

Therefore, when the foreign award is challenged, the determination of attorney fees based on a percentage of the value of the claim might be exaggerated.

It is worth noting that there is no order in the proceedings to challenge a foreign award, thus, attorneys' fees must be established in accordance with Article 20 paragraph 4 of the Code of Civil Procedure and also paragraph 3 of the said article. In this case, according to the understanding of this Court the judge is not limited to the amount established in the aforementioned paragraph 3.

In the records under review, the value of the claim is R$ 2,477,798.40 (two million, four hundred and seventy seven thousand, seven hundred and ninety eight reais and forty cents), and the arbitral award ordered payment in the amount of – US$ 844,800 (eight hundred and forty four thousand and eight hundred dollars).

Therefore, since the legal requirements were complied with, I grant the recognition and enforcement of the foreign arbitral award. I order the Respondents to pay attorneys' fees in the amount of R$ 10,000.00 (ten thousand reais).

Without costs in accordance with the terms of Article 1 sole paragraph of Resolution/STJ [Superior Court of Justice] No. 9 of 4 May 2005.

This is my opinion.