

CHALLENGED FOREIGN AWARD No. 611 – EX (2005/0055688-0)

RAPORTEUR : **JUSTICE JOÃO OTÁVIO DE NORONHA**
CLAIMANT : FIRST BRANDS DO BRASIL LTDA.
CLAIMANT : STP DO BRASIL LTDA.
COUNSEL : LUIZ FERNANDO HENRY SANT'ANNA AND OTHERS
RESPONDENT : STP – PETROPOLUS PRODUTOS AUTOMOTIVOS S/A PPA
RESPONDENT : PETROPOLUS SUL COMÉRCIO EXTERIOR S/A PSC
COUNSEL : CARLOS HENRIQUE MENDES DIAS E OUTROS

SUMMARY

RECOGNITION AND ENFORCEMENT [*“homologação”*] OF FOREIGN AWARD. ARBITRAL AWARD. MERITS. IRRELEVANCE. ARTICLE 38 – LAW No. 9.307/96.

1. Article 38 of Law No. 9.307/96 allows consideration of more legal grounds that could be argued in the Statement of Defense than Article 221 of the RISTF [Institutional Rules of the Federal Supreme Court]. However, it does not allow an analysis of the merits of the award.
2. The existence of set aside proceedings of the foreign arbitral award before national courts does not preclude the recognition and enforcement of the award. There would be a violation of national sovereignty if there was a national judgment discussing the same issues that were decided by the arbitral tribunal. Article 33 paragraph 3 of Law No. 9.307/96 establishes that the judgment that sets the award aside will determine whether the arbitrator or tribunal shall render a new award. Therefore, the judge may not render a new judgment to replace the arbitral award. Hence, there are no conflicting decisions.
3. The recognition and enforcement of the award 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 after the opinion [*“voto-vista”*] of Justice Eliana Calmon and the opinions from Justices Paulo Gallotti, Laurita Vaz, Luiz Fux, Humberto Gomes de Barros and José Delgado unanimously decide to grant recognition and enforcement to the award in accordance to the

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terms of the opinion of the Judge-Rapporteur. Justices Teori Albino Zavascki, Nilson Naves, Humberto Gomes de Barros, Ari Pargendler, José Delgado, Carlos Alberto Menezes Direito, Felix Fischer, Gilson Dipp, Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Laurita Vaz and Luiz Fux concurred with the said opinion.

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

Cesar Asfor Rocha, Gilson Dipp, Jorge Scartezzini and Francisco Falcão were excused. Justices Antônio de Pádua Ribeiro and Francisco Peçanha Martins were absent

Justice Gilson Dipp was replaced by Justice Maria Thereza de Assis Moura.

Brasília (DF), 23 November 2006. (Judgment date)

JUSTICE BARROS MONTEIRO

President

JUSTICE JOÃO OTÁVIO NORONHA

Rapporteur

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REPORT

THE HONORABLE JUSTICE JOÃO OTÁVIO DE NORONHA:

The Claimants **First Brands do Brasil Ltda.** and **STP do Brasil Ltda.** requested the recognition and enforcement of a foreign arbitral award against **STP – Petropolis Produtos Automotivos S/A** and **Petropolis Sul Comércio Exterior S/A**. The Claimant states the following:

The Claimants and the company First Brands Bermudas acquired 51% of Respondents' voting shares and of the company Evolution S/A, through 3 contracts – referred to as *Joint Venture* (JVs). These contracts were entered into with the companies Bradan Sociedade Anônima, Belopoint Sociedade Anônima and Triton Equities S/A.

Subsequently, the companies that had their shares sold, filed an arbitral claim at the International Chamber of Commerce – International Court of Arbitration, in Miami, United States. Among these companies there were the Respondents along with three companies that entered into the joint venture (JVs) contracts with the Claimants.

The arbitral tribunal asserted that several companies did not have standing as claimants. It established that the Claimants and the Respondents were reciprocal debtors and creditors. However, after offsetting the debts, an amount of \$125,109.00 (one hundred and twenty five thousand, one hundred and nine American dollars) was not paid and remained

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outstanding in favor of the Claimants. Thus, the current recognition and enforcement proceedings were sought because the Claimants intended to pursue the execution of the arbitral award in question.

The Respondents jointly objected to the claim by describing the procedure undertaken in the arbitration in the first 21 pages of their Statement of Defense in order to conclude that the award was based on false premises. They subsequently asserted that the arbitral agreement inserted in the Joint Venture contracts was invalid or null because the Respondents had not given an effective consent; Respondents alleged the consent was based on a mistake as to the person and the object of the contracts under Articles 138 and 139 of the Civil Code.

The Respondents state that the subjective and objective limits of the arbitration agreement were violated because the arbitral award excluded from the dispute the sole company that would have truly undertaken performance in the real world in relation to the contract of **Joint Venture**, namely, FBC or Clorox. They present the following assertions:

- the arbitration did not settle the real issue between the parties, making the Respondents file a claim in the Brazilian courts, where they have made claims regarding all the issues that were not decided [in the arbitration];
- they sought to set aside the arbitral award and [to declare] a nullity of the arbitration agreement at the 35th Civil Chamber of the Central Court of São Paulo;
- there was a violation of national sovereignty because the requisites of Article 11(IV) of Law No. 9.307/96 had not been complied with;
- the principle of due process, the principle of equal treatment of the parties [*“princípio da isonomia”*], the principle of fair hearing [*“princípio do contraditório”*] and the principle of full defense [*“princípio da ampla defesa”*] were violated.

The records were sent to this Tribunal through the order included in p. 582 due to the Constitutional Amendment No. 45 and the Statement of Defense was received here.

The Claimants replied to the Statement of Defense.

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The Public Prosecutor's Office presented its opinion for the granting of the recognition and enforcement of the arbitral award, noting however that an authentication of the documentation presented must be provided beforehand.

This is the report.

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SUMMARY

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1. Article 38 of Law No. 9.307/96 allows consideration of more legal grounds that could be argued in the Statement of Defense than Article 221 of the RISTF [Institutional Rules of the Federal Supreme Court]. However, it does not allow an analysis of the merits of the award.
2. The existence of set aside proceedings of the foreign arbitral award before national courts does not preclude the recognition and enforcement of the award. There would be a violation of national sovereignty if there was a national judgment discussing the same issues that were decided by the arbitral tribunal. Article 33 paragraph 3 of Law No. 9.307/96 establishes that the judgment that sets the award aside will determine whether the arbitrator or tribunal shall render a new award. Therefore, the judge may not render a new judgment to replace the arbitral award. Hence, there are no conflicting decisions.
3. The recognition and enforcement of the award is granted.

OPINION

THE HONORABLE JUSTICE JOÃO OTÁVIO DE NORONHA(*Rapporteur*):

The Claimants seek recognition and enforcement of an arbitral award rendered in Florida, United States, by the International Chamber of Commerce – International Court of Arbitration. It is a long award that determined that Claimants and Respondents had mutual debts; however, the payment of each party’s debt resulted in a credit in favor of Claimants. Thus, Claimants have standing to seek the enforcement of the arbitral award.

Recognition and enforcement of arbitral awards is governed by Law No. 9.307 of 23 September 1996. Article 37 establishes some requisites that ought to be

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respected. In this case, Claimants complied with these requirements by attaching a duly certified copy of the award for which recognition and enforcement is sought, as well as a certified translation of the award. See pp. 162/393-v, 163 and 396/525, respectively.

Regarding the arbitration agreement, Claimants supplied uncertified copies contrary to what Article 37 item II requires. This was noticed in the opinion made by the representative of the Public Prosecutor's Office [*"Subprocurador-Geral da República"*]. Claimants attached new copies along with proper certification after being requested to rectify the files. I also note that Respondents did not formally object to the manner in which the documents were presented; instead they argued, based on the terms as written in the agreement, that there was a consent issue regarding the acceptance of some clauses in accordance with Articles 138 and 139 of the Civil Code.

In their Statement of Defense, Respondents argued several issues and presented them in sections named after the items of Article 38 of Law No. 9.307/96 laying down the grounds for denying recognition and enforcement of foreign arbitral awards. This Article reads:

“Article 38 - The request for recognition or enforcement of an arbitral award may be denied only if the defendant furnishes proof that:

I - the parties to the arbitration agreement were under some incapacity;

II - the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

III - it was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;

IV - the arbitral award was rendered beyond the limits of the arbitration agreement and it was not possible to separate the exceeding part from what has been submitted to arbitration;

V - the commencement of the arbitration proceedings was not in accordance with the submission agreement (*compromisso*) or the arbitration clause;

VI - the arbitral award has not yet become binding on the parties or has been set aside or suspended by a Court of the country in which the arbitral award has been made.”

I notice that this legal provision must be construed in accordance with Article 221 of the RISTF [Institutional Rules of the Federal Supreme Court] that states: “The Statement of Defense shall only be based on the authenticity of the documents, the validity of the award and the requisites set out in Articles 217 and 218” (Article 9 of Resolution No. 9 of this Tribunal). Therefore, **the Respondent may not argue issues that are beyond the mandatory requirements for recognition and enforcement of foreign judgments. The same rule applies when the defense is based on the terms of Article 38 of Law No. 9.307/96.** Although, Article 38 of Law No. 9.307/96 allows the consideration of more legal grounds that could be argued in the Statement of Defense than Article 221 of the RISTF [Institutional Rules of the Federal Supreme Court], it does not allow an analysis of the merits of the award.

Despite this limitation, Respondents argued issues relating to the merits of the arbitral award under the pretext that they were demonstrating that there were no mandatory requirements or reasons to deny recognition and enforcement. Since it is a Statement of Defense, I will deal with the arguments in detail.

a) Respondents contend that the requisites set out in Article 37(I) of the Law No. 9.307/96 were not respected. According to them, another partial arbitral award needed to be submitted for recognition and enforcement.

However, p. 22 of the award for which recognition and enforcement is sought shows that a partial decision was made during the proceedings deciding on the parties’ standing [*“legitimidade das partes”*] and limiting the scope of their submissions in accordance with the arbitration agreement.

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Therefore, the award for which recognition and enforcement is sought is formally complete.

b) Respondents argue that the arbitration agreement is null and void because they were misled with regards to the subject matter and [who were] the parties;

They argue: “The Respondents’ mistake (the one that they were induced to commit) is directly related to the subject matter of the arbitration agreement. Thus, it is related to Respondents’ main expression of consent (Respondents’ intention to arbitrate the entire dispute – and not only a minimal part of it – their intention and will to have an arbitration against FBC or Clorox – not against two out of three intermediate subsidiaries)” (p. 651).

On the same issue, the Respondents clarify that the allegation that they were misled is actually based on the fact that the Arbitral Tribunal construed the arbitration agreement differently from how they had intended it to be construed; since Respondents had interpreted the arbitration agreement in a different manner.

The fact that Respondents consented to contractual clauses whose interpretation was different from what they had expected does not result in a lack of consent or in a substantial error. It is simply a conflict of interests that was decided against their own interests when it was submitted to arbitration.

Respondents even affirm that they were not advised by counsel when entering into the contract but by an economist whose name they indicated (item 125. p. 652). However, complaining about bad advice is complaining about their own choices when venturing in the international market to sell the controlling interest of a corporation without proper legal advice (despite having economic advice).

They took a risk by choosing economic advice over legal advice, even if they thought that the latter was not necessary. Now, Respondents must bear the consequences of

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that risk. In this sense, they cannot allege that they were misled because even a reasonable man (as Respondents alluded to) would have sought legal advice in addition to economic advice.

c) Respondents contend that the arbitral award was rendered beyond the scope of the arbitration agreement. However, they did not indicate in what terms the Arbitral Tribunal exceeded the scope of the signed arbitration agreement.

Actually, this assertion relates to the issue of parties' standing. Respondents insist that the arbitration proceedings needed to include Clorox as Clorox controls the other companies that participated in the proceedings.

Respondents argued on items 147 and 148 of their Statement of Defense:

“... Firstly, this award excluded two other Claimants and one Respondent from the proceedings. This was done even before the record was complete and before the pre-trial phase had started, clearly violating the principle of due process where both parties must be heard in an adversarial system.

Secondly, due to First Brands (Bermudas) Ltd.'s exclusion from the proceedings, the arbitral tribunal created an additional obstacle for the enforcement of any arbitral award favorable to the party having actual standing...”

The recognition and enforcement of the award would not be possible if the parties to the arbitral proceedings and the Respondents to the enforcement and recognition proceedings were different. This Court may not analyze the issue of standing relating to the parties to the arbitration proceedings because it would be equivalent to reviewing the [arbitral] decision.

Furthermore, based on the above quote, it is possible to see that, once again, the objections relate to the merits of the arbitral award. Therefore, despite the fact that in the Statement of Defense the heading of the argument is named after Article 38(IV) of Law No. 9.307/96 – “*the arbitral award was rendered beyond the scope of the arbitration agreement*”, the arguments are based on the merits. This is even more evident based on item 145 of Respondents’

Statement of Defense in which they admit: *“none of the facts and arguments presented by Respondents were accepted by the arbitral tribunal”*.

d) Respondents alleged that the recognition and enforcement would violate national sovereignty because they filed recourse to set aside the award before Brazilian Courts.

In accordance with Decree No. 4.311/2002, the court before which the recourse to set the award aside is filed must decide on the validity of the claim.

Additionally, the fact that Respondents requested to set the award aside before a Brazilian court does not preclude the recognition and enforcement of the award. Similarly, the fact that there is a pending decision to set the arbitral award aside does not mean that a violation of national sovereignty would occur as this would require the existence of a national judgment discussing the same issues that were decided by the arbitral tribunal.

e) Respondents affirm that there is a violation of national sovereignty since the arbitrator, although requested to do so by the parties, failed to apply Brazilian law according to Article 11, item IV of the Arbitration Act. However, this provision relates to the compliance or lack thereof with the terms of the arbitral agreement, and Respondents did not object to this issue.

Nevertheless, the award for which Claimants seek recognition and enforcement considers the effects of a contractual breach under Brazilian law. The Tribunal even quoted the teachings of Silvio Rodrigues, as demonstrated at pp. 502/503 of the records.

f) Finally, Respondents presented an argument under the heading *“violation of legal principles related to due process of law, principle of equal treatment of the parties [“Isonomia”], principle of procedural equality [“Igualdade das Partes; Isonomia Processual”], principle of fair hearing [“Contraditório”] principle of full defense [“Direito à Ampla Defesa”], principle to state reasons [“Motivação das Decisões”], principle of prohibition of illegal evidence [“Proibição da Prova Ilícita”]* contained in item No. 182 of Respondents’ Statement of Defense.

Respondents start by arguing that there was a violation of the principle of fair hearing, followed by the argument that there was a violation of the principle of full defense.

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However, the assertions supporting the violations regard the same questions as already presented. They are based on the objection regarding Clorox's exclusion from the arbitral proceedings and also on further decisions that were contrary to Respondents' interests.

There are no arguments related to Respondents' participation in the proceedings, or that Respondents were precluded from participating in the proceedings at the appropriate time.

Further, Respondents raised objections relating to the evidence presented and considered by the arbitral tribunal; they also raised objections relating to other evidences; they also objected to denied requests; they also raised objection related to partial decisions. They argued that there were illicit evidences in the declaration of testimonies; they also alleged that the arbitral tribunal denied their request to hear a testimony through video-conference; they also claimed that the parties were treated differently in regards to testimonial hearings. Further, they questioned the impartiality of the arbitrators because one of them was charged for false statement under Brazilian law, a crime that is currently being decided before the 15th Federal Chamber of the Federal District (item 236).

Regarding these assertions, I quote from the well-argued opinion of the Public Prosecutor's Office:

“Actually, Respondents' arguments are based on the composition of the arbitral tribunal and also on the merits of the award. Both issues cannot be argued in the proceedings for recognition and enforcement of foreign awards. The discussion of these aspects and all the others aspects presented in the Statement of Defense were properly argued before the International Court of Arbitration. The Arbitral Tribunal was chosen by the parties in the “JVs”, whose possible breach gave rise to this arbitration.

Regarding the arbitral proceedings in the country of origin, it is clear that both corporations presented their arguments and defenses. An attentive reading of the arbitral award demonstrates that.

On the other hand, once Respondents had participated and raised questions in the proceedings, they could no longer

challenge the award that was not favorable to them by claiming that it is null and void.”

Therefore, all the objections presented are irrelevant to the recognition and enforcement proceedings because they relate to the merits. (SE [Foreign Award] No. 3.407/French Republic, Plenary, Judge-Rapporteur **Oscar Correa**, DJ [Official Gazette] of 7 December 1984; SEC [Challenged Foreign Award] No. 7.473/EU, Plenary, Judge-Rapporteur **Celso de Mello**, DJ of 7 April 1995).

To conclude, I quote again from the Public Prosecutor’s Office:

“I note that arbitration can only be valid when the dispute relates to rights that the parties can freely dispose of. The arbitration needs to be based on the parties’ agreement to refrain from submitting their dispute to national courts. In this case, they may choose the applicable law to the merits of the dispute. The applicable law must aim to secure principles and provisions in force related to due process providing assurances of full defense, of the arbitrators’ impartiality and of the arbitrators’ freedom of decision within the limits agreed in the arbitration. The parties were present during the arbitration, providing their allegations and defenses as the records demonstrate; thus, no principle could bar the recognition and enforcement of the foreign award now under consideration.”

Based on all the arguments herein and since all the conditions set out in Article 37 of Law No. 9307/96 were complied with and since there are no violations of Article 38(I), I grant the recognition and enforcement of the foreign arbitral award.

I order Respondents to pay all legal costs and attorneys’ fees in the amount of R\$ 10,000.00 (ten thousand *reais*).

This is my opinion.