Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 760 – EX (2005/0123948-2)

RAPPORTEUR	**:**	**JUSTICE FELIX FISCHER**
CLAIMANT	:	TREMOND ALLOYS AND METALS CORP.
COUNSEL	:	CELSO BOTELHO DE MORAES AND OTHERS
	:	TREMOND ALLOYS AND METALS CORPORATION
RESPONDENT	:	METALTUBOS INDUSTRIA E COMERCIO DE METAIS LTDA.
COUNSEL	:	JOÃO LUIZ AGUION AND OTHERS

SUMMARY

FOREIGN ARBITRAL AWARD. JUDICIAL REVIEW. IMPOSSIBILITY OF REVIEWING THE MERITS. RESPECT OF FORMAL REQUIREMENTS. RECOGNITION AND ENFORCEMENT [“*homologação”*] 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 along with verifying that the award does not undermine national sovereignty, public policy and common decency [“*bons costumes*”].

Recognition and enforcement granted.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned parties are involved, Justices from the Special Court unanimously decide to grant recognition and enforcement according to the opinion of the Judge-Rapporteur. Justices Gilson Dipp, Hamilton Carvalhido, Jorge Scartezzini, Paulo Gallotti, Castro Filho, Laurita Vaz, Luiz Fux, Teori Albino Zavascki, Nilson Naves, Cesar Asfor Rocha, Ari Pargendler, José Delgado, Fernando Gonçalves e Carlos Alberto Menezes Direito concurred with the Judge-Rapporteur.

Justices Antônio de Pádua Ribeiro, Barros Monteiro, Humberto Gomes de Barros, Francisco Falcão and João Otávio de Noronha were excused. Justices Aldir Passarinho Junior and Eliana Calmon were absent. Justice Humberto Gomes de Barros was replaced by Justice Castro Filho.

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

JUSTICE BARROS MONTEIRO
President

JUSTICE FELIX FISCHER
Rapporteur

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REPORT

THE HONORABLE JUSTICE FELIX FISCHER (Rapporteur): TREMOND ALLOYS AND METALS CORP., a corporation with place of business in the city of New York, United States of America, requires the recognition and enforcement of a FOREIGN ARBITRAL AWARD, rendered in the United States of America by the AMERICAN ARBITRATION ASSOCIATION (AAA), on 5 May 2004, against METALTUBOS INDÚSTRIA E COMÉRCIO DE METAIS LTDA., a corporation with its place of business in the city of São Paulo/SP.

The Claimant states that the arbitral dispute concerns the breach of a sales contract for 90 (ninety) metric tons of vanadium pentoxide waste, by the Respondent.

It stated that, although duly notified, the Respondent did not present a defense before the arbitral tribunal, and an award was rendered in favor of the Claimant (pp. 128/131) in the following terms:

"1. In 30 (thirty) days to be counted from the date when this Award was rendered to the Parties, Metaltubos Indústria e Comércio de Metais, Ltda., hereinafter identified as "Metaltubos", shall pay to Tremond Alloys and Metals Corporation, hereinafter identified as "Tremond", the value of $60,010.87 (sixty thousand, ten dollars and eighty seven cents), added to interest rate of 9% (nine percent) per year, starting from 28 October 2000.

2. The fees and expenses of the arbitrator in the amount of $1,400.00 (one thousand and four hundred dollars) will be the responsibility of Metaltubos. Therefore, Metaltubos shall pay to Tremond the amount of $1,400.00 (one thousand and four hundred dollars) for the fees already paid in advance by Tremond to the Association.

3. The administrative fees and expenses of the American Arbitration Association, in the amount of $2,050.00 (two thousand and fifty dollars), will be the responsibility of Metaltubos. Therefore, Metaltubos shall pay to Tremond the amount of

$2,050.00 (two thousand and fifty dollars), for its share of the administrative expenses and fees already paid in advance by Tremond to the Association." (p. 128)

The Claimant has attached the relevant documents (pp. 21/181).

Summoned through a judicial order ["*carta de ordem*"] (p. 189), the Respondent has presented its Statement of Defense (pp. 198/201), in which it claims, in sum, that the arbitral award is a nullity for want of a report and legal reasoning.

Furthermore, it argues that the present contract was performed, because it had paid part of the amount charged by the Claimant and because, "confronted with the difference between the weight of the material mentioned in the contract and that received, with the high level of impurity and contamination detected in the laboratorial analysis and processing done in the material" (p. 200), the parties would have agreed verbally that the remaining amount would be offset, thus paying off the obligation.

The Respondent attached documentation at pp. 213/255.

In its reply (pp. 266/279), the Claimant alleges that the arbitral award fulfills all the requisites for its recognition and enforcement, and that the decision under examination for recognition and enforcement would have already ascertained the values paid by the Respondent in relation to the contract.

The learned Public Prosecutor's Office gave its opinion in favor of the request.

This is the report.

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SUMMARY

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 along with verifying that the award does not undermine national sovereignty, public policy and common decency.

Recognition and enforcement granted.

OPINION

THE HONORABLE JUSTICE FELIX FISCHER (Rapporteur): Claimant seeks the recognition and enforcement of an arbitral award rendered by the AMERICAN ARBITRATION ASSOCIATION (AAA) that ordered Respondent to pay the amount of US$ 60,010.87 (sixty thousand and ten dollars and eighty seven cents), plus interest of 9% (nine percent per year) and arbitration costs related to the breach of a purchase and sale contract of 90 (ninety) metric tons of vanadium pentoxide waste.

The issue requires some consideration.

Articles 38 and 39 of Law No. 9307/96 establish the situations in which recognition and enforcement of an arbitral award may be rejected. This is the content of the aforementioned legal provisions:

"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.

Article 39 - The request for recognition or enforcement of a foreign award shall also be denied if the Federal Supreme Court finds that:

I - according to Brazilian law, the subject-matter of the dispute is not capable of settlement by arbitration;

II - the recognition or enforcement of the award is contrary to Brazilian public policy.

Sole paragraph - 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."

Thus, it is clear that the judicial review of a foreign arbitral award **is limited to formal aspects and that it is not possible to review the merits of the award**. Consequently, the Answer to the Statement of Claim [for recognition and enforcement] must be restricted to the grounds listed in the aforementioned articles.

In this case, the Respondent presented its Answer arguing that the contract analyzed by the arbitral tribunal was performed because it had complied with its obligations. Respondent also argued that the arbitral award is null and void because it failed to state reasons and because it lacks a report ["*relatório*"].

At first, it is clear that Respondent's defense regarding the alleged performance of the contract **pertains to the merits**, since **the legal question** presented to the

arbitral tribunal was the Respondent's breach of the contract. For this reason, this Court may not review this issue.

In this sense, I quote precedents from the highest Court:

> *"FOREIGN AWARD – RECOGNITION AND ENFORCEMENT – LIMITED REVIEW ´*["sistema de delibação"] *– CONTOURS OF LIMITED REVIEW – REQUISITES FOR RECOGNITION AND ENFORCEMENT – ABSENCE OF CONSULATE CERTIFICATION OF* RES JUDICATA *IN THE RECORDS – LOSING PARTY ORDERED TO PAY ATTORNEY FEES – POSSIBILITY – LACK OF REQUIREMENTS WHICH ENTAILS REFUSAL OF RECOGNITION AND ENFORCEMENT – CLAIM DISMISSED WITHOUT PREJUDICE.*
>
> *(…)*
>
> ***- The system of limited review that was established under Brazilian law regarding recognition and enforcement of foreign decisions does not allow the Federal Supreme Court*** [Supremo Tribunal Federal] ***to review the merits of foreign judgments while acting as the Court of the Forum; the only exception is the limited review analysis of issues concerning national sovereignty, public policy and common decency.***
>
> *There is no discussion of the merits of the decision based on which the recognition and enforcement is requested.*
>
> *(…)*
>
> *Precedents from the Federal Supreme Court have explicitly admitted the application of the principle that the losing party must pay attorney fees. The criteria to determine the amount is established in Article 20, paragraph 4 of the CPC* [Code of Civil Procedure]. *Precedents.*
>
> (SEC [Challenged Foreign Award] No. 4738-2/EUA, Plenary session, Judge-Rapporteur. Celso de Mello, DJU [Official Gazette] of 7 April 1995).

Precedents form this court also show the same understanding:

> *"FOREIGN ARBITRAL AWARD. JUDICIAL REVIEW. IMPOSSIBILITY OF REVIEWING THE MERITS. LACK OF AN ARBITRATION AGREEMENT. ARBITRAL TRIBUNAL LACK OF JURISDICTION. VIOLATION OF NATIONAL PUBLIC POLICY.*
>
> ***I – Judicial review of foreign awards is limited to formal aspects. The merits of the arbitration may not be reviewed.***
>
> *II – There is* ***not enough evidence*** *to show Respondent's consent to the arbitration agreement.*

> *III – The decision for which recognition and enforcement is sought violates the national public policy since an arbitral tribunal has jurisdiction on the basis of the existence of an arbitration agreement (Article 37(II), and Article 39(II) of Law No. 9.307/96). Precedent of the* ***Federal Supreme Court****.*
>
> *IV –* ***In this case****, the Respondent presented its defense before the arbitral tribunal alleging, primarily, that the tribunal did not have jurisdiction; thus it is not possible to find consent to the arbitration agreement, not even tacitly.*
>
> *Recognition and enforcement denied."*
>
> (SEC 866/EX, **Special Court**, in which I was the reporting judge, case decided on 17 May 2006).

> *"Foreign arbitral award. Arbitration agreement. Contract not signed by Respondent. Evidence of covenant. Absence of elements.*
>
> *(..)*
>
> ***2. The merits of the foreign arbitral award shall not be reviewed according to precedents from the Federal Supreme Court.***
>
> *3. Recognition and enforcement granted."*
>
> (SEC 856/EX, **Special Court**, Judge-Rapporteur. Carlos Alberto Menezes Direito, DJU ["Federal Official Gazette] of 27 June 2005)

Respondent also alleges that the arbitral award is null and void because it does not state reasons and lacks a report.

In fact, according to Article 26(I) and (II) of Law No. 9307/96, the report and the statement of reasons in the award are mandatory requirements for arbitral awards. Thus, "*awards which merely state the final order without stating the reasons behind the arbitrator's decision cannot be recognized or enforced*." (SE [foreign award] 3.977, **STF** [Federal Supreme Court], Judge-Rapporteur **Francisco Rezek**, DJU [Official Gazette] of 26 August 1988).

In this case, although concise, **the arbitral award did present a report and it is well founded**, as it is can be seen on pp. 128/129:

"I, the undersigned, appointed arbitrator under the Arbitration Agreement concluded between the parties above on 26 May 2000, present my decision. A hearing was conducted on 7 April 2004 at which Metaltubos Industry and Commerce of Metals, Ltda, duly notified by phone and correspondence pursuant to the rules of the American Arbitration Association, was not present. The arbitrator took the proper oath and after hearing the evidence, hereby pronounced this AWARD:

"1. In 30 (thirty) days to be counted from the date when this Award was rendered to the Parties, Metaltubos Indústria e Comércio de Metais, Ltda., hereinafter identified as "Metaltubos", shall pay to Tremond Alloys and Metals Corporation, hereinafter identified as "Tremond", the value of $60,010.87 (sixty thousand, ten dollars and eighty seven cents), added to interest rate of 9% (nine percent) per year, starting from 28 October 2000.

2. The fees and expenses of the arbitrator in the amount of $1,400.00 (one thousand and four hundred dollars) will be the responsibility of Metaltubos. Therefore, Metaltubos shall pay to Tremond the amount of $1,400.00 (one thousand and four hundred dollars) for the fees already paid in advance by Tremond to the Association.

3. The administrative fees and expenses of the American Arbitration Association, in the amount of $2,050.00 (two thousand and fifty dollars), will be the responsibility of Metaltubos. Therefore, Metaltubos shall pay to Tremond the amount of $2,050.00 (two thousand and fifty dollars), for its share of the administrative expenses and fees already paid in advance by Tremond to the Association." (p. 128)

Reasons of the award

4. This Award is given based on the contract entered into on 26 May 2000 by the Parties, whereby Tremond sold and delivered metals to Metaltubos for the contract price of US$ 69,781.87. Metaltubos made a partial payment of US$ 9,771.00. Subsequently, Metaltubos failed to pay the remainder of the contractual price, in violation of the contract; the amount of US$ 60,010.87 became due and payable to Tremond according to the contract. The award is based on the amount owed by Tremond plus interest over the amount due. Interest is applicable from sixty days after the approximate delivery date, in which Tremond provided the materials described in the contract.

5. This Award settles all claims submitted to this Arbitration."

Thus, the allegation regarding the nullity of the arbitral award is unfounded because **the award presented enough arguments for judging the issue. It demonstrated the reasons for ordering the Respondent** [to pay the amount due].

Finally, it is worth highlighting that **the mandatory requirements for recognizing and enforcing a foreign arbitral award were complied with, since the Claimant presented evidence to support the existence of an explicit arbitration agreement in the contract signed by the parties (pp. 25/27). In addition, the documents in the records are certified and accompanied by sworn translations.**

Furthermore, the Respondent was duly summoned to participate in the arbitral proceedings, **thus, the proceedings were conducted ex parte in accordance with the legal requirements (pp. 41/51, 53/74, 75/82, 84/105, 107/112, 114/120, 122/133 and 125/126)**. The Respondent was also notified about the final judgment (see pp. 145/153).

Finally, it must be noted that the award based on which recognition and enforcement is sought does not violate national sovereignty, public policy or common decency.

Thus, in my opinion the request for **recognition and enforcement** of the foreign award shall be granted.

I order the Respondent to pay attorney fees of 10% (ten per cent) of the amount of the claim.

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