Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 833 – US (2005/0032212-5)

RAPPORTEUR : JUSTICE ELIANA CALMON
RAPPORTEUR : JUSTICE LUIZ FUX
FOR THE DECISION
CLAIMANT : SUBWAY PARTNERS C V
COUNSEL : ANA LUIZA BROCHADO SARAIVA MARTINS AND OTHERS
RESPONDENT : HTP HIGH TECHONOLOGY FOODS CORPORATION S/A
COUNSEL : MÁRCIO PEREIRA PINTO GARCIA – AD HOC CURATOR

SUMMARY

CIVIL PROCEDURE. CHALLENGED FOREIGN AWARD. RECOGNITION AND ENFORCEMENT [*"homologação"*]. **NO SERVICE OF PROCESS.**

1. The recognition and enforcement of the foreign award presupposes compliance with the fair hearing principle that is observed when there is no question that the party was properly summoned. In this case, the award was rendered ex parte; in accordance with precedents from this Court service by letter rogatory must not leave any doubt [that the party was properly served], establishing unequivocal evidence that the service reached its destination. In this vein, the *ad hoc* Curator is right when he affirms:

> *"The request for recognition and enforcement cannot be granted because there is no clear evidence that the party, or its counsel, was properly summoned to present its statement of defense in the Connecticut District Court in the United States of America. Proper summons service of the parties is a mandatory requirement to grant recognition and enforcement; so it is the determination, in accordance with the law, that the party is* in default *(Article 5(II) of Resolution No. 9 of 4 May 2005, which governs, temporarily, the shift of competence to the Superior Court of Justice established by the Constitutional Amendment No. 45/2004).*
>
> *Concerning foreign decisions, except in cases when the party voluntarily appears before a Court* [even if not properly summoned] *and consequently consents to the Foreign Jurisdiction, it is necessary to summon a Respondent resident in Brazil. The proper summons service must be done by means of letter rogatory after such letter is granted exequatur by the President of the Superior Court of Justice (Article 105(I)(i) of the CF* [Federal Constitution] */88). In this vein, there are copious precedents from the Federal Supreme Court before*

> *the Constitutional Amendment No. 45/2004 was in force (see among various others, SEC* [Challenged Foreign Award] *3.495, SEC 6.122, SEC 6.304). Precedents from the Superior Court of Justice are also in the same sense (see SEC 295 Judge-Rapporteur José Arnaldo da Fonseca; and SEC 856, Judge-Rapporteur Ari Pargendler).*
>
> *Therefore, the fact that the judgment mentions that Respondent "failed to appear, were breached, Claimant was heard" (p. 43), or "did not appear, in default and Claimant was heard" (p. 65), or "since it was not present, judgment was rendered ex parte and Claimant was fully heard" (p. 292), do not demonstrate clearly that Responded was properly summoned! The fact that the judgment was rendered ex parte is no indication the Respondent was properly summoned as Claimant tries to argue (item 8, pp. 224 and 309). It is not possible to accept an argument based on rhetoric ["…CLAIMANT was able to give the Service in the hands of RESPONDENT's partner Ms. Alice Navarro Santos." (p. 185) or yet, "it is established, therefore, that RESPONDENT was notified through its representative of the confirmation of the arbitral award before the American Court…" (p. 185)]* <u>*It was mandatory to demonstrate that respondent was properly summoned in Brazil by means of letter rogatory concerning the American judicial proceedings*</u>*. This did not happen.*
>
> *Therefore, the judgment rendered in November 1997 by the Connecticut District Court of the United States of America must not be granted recognition and enforcement. (pp. 68/72; translation, pp.65/67)."*

2. Hence, the honorable Rapporteur undeniably confirms that there was no confirmation of the notification, since she affirmed that: "*The arbitral award rendered on 28 February 1998 that was confirmed on 17 November of the same year by the District Court of the United States of America – District of Connecticut. Therefore, the party complied with a requirement that existed prior to the Arbitration Act. Although this requirement is no longer in force, the seal of legality granted by the American legal system is not detrimental to this request. The American court summoned the party who is now Respondent, but it was in default as the judgment demonstrates. Consequently, simply because it was not possible to find the partners of the company, except one, for the recognition and enforcement of the award, this does not constitute a defect that would render the judgment null and void."*

3. It is settled that the effect of *res judicata* of a foreign judgment does not take precedence over the national decision regarding its recognition and enforcement. It is certain that in our judicial system the lack of proper summons contaminates the entire proceedings even if the defect is

perceived only during the enforcement proceedings (Article 741 of CPC [Code of Civil Procedure]).

4. Indeed, regarding the arbitral award itself, which is the object of recognition and enforcement, its text is apocryphal (pp. 5/8). It is impossible to identify who agreed to the terms of the settlement award in name of the Respondent (pp. 7/8; translation pp. 11/12) in the arbitral award (pp. 5/6; translation pp. 9/10).

5. Furthermore, this is the exact content of Articles 5, 21, 37(II), 39 sole paragraph and 40 of Law 9.307/96:

> *Article 5 - If the arbitration clause makes reference to the rules of a particular arbitral institution or specialized entity, the arbitration shall be commenced and conducted in accordance with such rules; it being also possible that the parties determine in the arbitration clause itself, or in a stand-alone document, the agreed procedure for commencing arbitral proceedings.*
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> *Article 21 - The sole arbitrator or the arbitral tribunal shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialized entity, it being possible for the parties to empower the sole arbitrator or the arbitral tribunal to regulate the procedure.*
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> *§ 1 - In the absence of any provisions on the procedure, the sole arbitrator or the arbitral tribunal shall conduct the arbitration in such a manner it considers appropriate.*
>
> *§ 2 - The principles of due process of law, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected.*
>
> *§ 3 - The parties may be represented by legal counsel, and may always be free to choose their representative or assistant at the arbitral procedure.*
>
> *§ 4 - The sole arbitrator or the arbitral tribunal shall, at the commencement of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this law.*
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> *Article 37 - The request for recognition and enforcement of a foreign award shall be submitted by the interested party; this written motion shall meet the requirements of Article 282 of the Code of Civil Procedure, and must be accompanied by:*
>
> *(…)*
>
> *II - the original arbitration agreement or a duly certified copy, accompanied by a sworn translation.*

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

6. The precedents of this honorable Court already settled that recognition and enforcement of foreign decisions requires proof that Respondent was properly summoned, whether in the place of the decision or in Brazil through letter rogatory in accordance with the purpose of Article 217(II) of RISTJ [Institutional Rules of the Superior Court of Justice].

7. Indeed, it is settled in the Supreme Court that: "A person domiciled in Brazil must be summoned through letter rogatory when the judgment is rendered abroad due to the principle of real knowledge about the claim. Without proper summons recognition and enforcement shall not be granted (…)" (SEC 7696/HL, Judge-Rapporteur Marco Aurélio, DJ [Official Gazette] of 11 November 2004).

8. Precedents from STF [Federal Supreme Court]: **SEC 6684/EU**, Judge-Rapporteur Sepúlveda Pertence, DJ of 19 August 2004; **SEC 7570/EU**, Judge-Rapporteur Ellen Gracie, DJ of 30 April 2004 and **SEC 7459/PT**, Judge-Rapporteur Nelson Jobim, DJ of 30 April 2004.

9. Regarding the issue, the honorable STF also decided:

"SUMMARY: FOREIGN ARBITRAL AWARD. ARBITRATION AGREEMENT. NON-EXISTENT. JURISDICTION NOT DEMONSTRATED. RECOGNITION AND ENFORCEMENT. IMPOSSIBILITY.

1. The request for recognition and enforcement of foreign arbitral award must be filed with the arbitration agreement otherwise it is impossible to determine the jurisdiction of the tribunal who rendered the decision (Law 9.307, Articles 37(II) and 39(II) RISTF [Institutional Rules of the Federal Supreme Court]*, Article 217(I)).*

2. Purchase and sale agreement not signed by the buyer. The terms of the contract do not allow the conclusion that [the parties] agreed to the arbitration agreement. In addition, there were no documents indicating otherwise. There is a lack of evidence showing Respondent's clear declaration to refrain from using State courts in favor of arbitration.

> *3. The jurisdiction of the Tribunal which rendered the award was not demonstrated, therefore it is not possible to grant recognition and enforcement by the Federal Supreme Court. Claim dismissed." (SEC 6.753/UK* – Reino Unido da Grã-Bretanha e da Irlanda do Norte, Judge-Rapporteur *Maurício Corrêa, Plenary, DJ of 4 October 2002*)

10. Finally, it was necessary to add to the files the rules of the A.A.A. (American Arbitration Association), which were missing. The absence of AAA's rules is detrimental to the request for recognition and enforcement.

11. Opinion for dismissing the recognition and enforcement (Article 217(I) and II and 216, RISTF as well as 17 of LICC [Law of Introduction to the Civil Code]), dissenting opinion from the honorable Rapporteur.

DECISION

Proceeding to render judgment, after Justice Nilson Nave's opinion dismissing the motion for recognition and enforcement, Justices Ari Pargendler, José Delgado, Fernando Gonçalves, Carlos Alberto Menezes Direito, Felix Fischer and Hamilton Carvalhido concurred with his opinion. The Special Court decides by majority vote to deny the motion for recognition and enforcement.

The Judge-Rapporteur and Justices Paulo Galloti and Laurita Vaz dissented from the majority opinion.

Justice Luiz Fux will sign the decision. Justices Ari Pargendler, José Delgado, Fernando Gonçalves, Carlos Alberto Menezes Direito, Felix Fischer and Hamilton Carvalhido concurred with Justice Luiz Fux's opinion.

Justices Cesar Asfor Rocha and Francisco Falcão were excused. Justices Antônio de Pádua Ribeiro and Humberto Gomes were absent.

Justices Francisco Peçanha Martins and Gilson Dipp did not participate in the decision.

Brasília (DF), 16 August 2006.

JUSTICE **BARROS MONTEIRO**

President

JUSTICE **LUIZ FUX**

Rapporteur

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CHALLENGED FOREIGN AWARD No. 833 – EX (2005/0032212-5)

RAPPORTEUR	:	**JUSTICE ELIANA CALMON**
CLAIMANT	:	SUBWAY PARTNERS C V
ATTORNEY	:	ANA LUIZA BROCHADO SARAIVA MARTINS AND OTHERS
RESPONDENT	:	HTP HIGH TECHONOLOGY FOODS CORPORATION S/A
ATTORNEY	:	MÁRCIO PEREIRA PINTO GARCIA – *AD HOC* CURATOR

REPORT

THE HONORABLE JUSTICE ELIANA CALMON: The case is about a request for recognition and enforcement of an arbitral award rendered by the ARBITRAL TRIBUNAL OF THE AMERICAN ARBITRATION ASSOCIATION, with seat in the United States of America, made by the company SUBWAY PARTNERS C. V. in which the company HTP HIGH TECHNOLOGY FOODS CORPORATION S.A., also known as SUBWAY BRASIL SANDUÍCHES E SALADAS LTDA is the Respondent.

The Claimant states that the parties to the present dispute signed an agreement pursuant to a previous agreement duly recognized and enforced. Thus, the Claimant seeks recognition and enforcement of the arbitral award pursuant to Article 35 of Law 9.037/96.

Claimant requested that the Respondent was served summons through its deputy managers, MÁRIO HENRIQUE PEIXOTO DA SILVA and ALICE NAVARRO SANTOS, who, upon not being available at the addresses provided, had service provided through public notice. Subsequently, an *ad-hoc* Curator was nominated who, before presenting a Statement of Defense, sought the attachment of two documents: the arbitration agreement and the franchise contract. The *ad-hoc* Curator justified the request of attachment of the first agreement because, as arbitration has a consensual nature, it is the arbitral agreement or the submission agreement ["*compromisso*"] that creates the jurisdiction of the arbitrator and confers power upon him. Regarding the franchise contract, the *ad hoc* curator stated that it was required in order to comply with Article 217 of the RISTF that considered the document indispensable.

The Claimant replied, stating that the arbitral agreement was presented along with the Statement of Claim, being an integral part of the settlement award ["*sentença de consentimento*"] delivered by the Arbitral Tribunal of the American Arbitration Association. It explained that the settlement award contained the Termination Agreement and the Acknowledgment of Debt by the Respondent.

Claimant also states that the Respondent's signature is not on the record of the ratification of the award ["*termo de confirmação da sentença*"], despite the fact one of the partners of the company was notified of the confirmation procedure of the arbitral award.

There was a subsequent Statement of Defense at pp. 192/202, where the following considerations were made:

a) Article 37 of the Law 9.307/96 requires the presentation of a copy of the award, or the original of the arbitration agreement or its certified copy accompanied by an official translation for the recognition and enforcement of the arbitral award;

b) the arbitration agreement indicates the arbitrator's jurisdiction, but it is the submission agreement that gives jurisdiction to the arbitrator and confers authority upon him to declare the rights of the parties in a certain legal dispute. This submission agreement must be an expression of the parties' free will, which did not occur in the present case.

c) the settlement award presented, besides being apocryphal, does not contain the elements that would allow an examination as to its authenticity;

d) there is no evidence of the summons to the Respondent seeking its presence before the arbitral tribunal. Alternatively, either the presence of the interested party or the evidence of a letter rogatory judged final is required;

e) the Claimant attached a judicial decision of a U.S. Court to the award without explaining if it intended to have the award or the judicial decision subsequently attached recognized and enforced.

At the end, the *ad hoc* curator requested the denial of the request.

Upon being notified of the terms of the Statement of Defense, the Claimant gave a statement at pp. 209/213. It attached to the records the settlement award rendered by a U.S.

court. [This award] contained the franchise contract, which it sought to terminate which for its turn contained the arbitral clause. Upon recognition of the validity and the authenticity of the franchise contract and having in view the arbitral clause, the settlement award was presented to the Arbitral Tribunal, which enforced the arbitration agreement inserted in the franchise contract.

Subsequently, the statement of the representative of the Federal Public Prosecutors' Office was sought, who gave an opinion at pp. 217/220 for the denial of the request due to the non-fulfillment of the requisites for the recognition and enforcement of the arbitral award.

Before the judgment was rendered, the Claimant presented an official document of the U.S. Court, which was final, without being subject to appeal and that confirmed the validity of the final arbitral award. The document also showed that the judgment was rendered ex parte even though due notification was given to the Respondent. Finally, the Claimant produced a copy of the franchise contract on the records.

The *ad hoc* curator issued a new statement, stating that the documents attached proved that there was an arbitration clause in the franchise contract, but it was still necessary to attach the submission agreement. In the *ad hoc* curator's opinion, the parties sign an arbitration agreement before the occurrence of a dispute. However, after a dispute arises, it is necessary, for the same reason, that a new document be signed: the submission agreement ["*compromisso de submissão*"].

Subsequently, there was a statement by the Public Prosecutor, Geraldo Brindeiro, who, reconsidering the previous position, gave an opinion in favor of granting the request for recognition and enforcement. His opinion was summarized as follows:

"Foreign arbitral award. A company, the Respondent, was provided service of process through public notice. Breach of international commercial contract. Documents currently attached to the records fulfill the requirements of Articles 37, 38 of Law No. 9.307/96 – Arbitration Act – which calls for *reconsideration* of our previous statement. The arbitral award was confirmed by a court of law that allows the presumption that the award is final. Opinion for granting the request. (pp. 302/305)"

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This is the report.

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OPINION

THE HONORABLE JUSTICE ELIANA CALMON (*Rapporteur*): We have in the records a franchising agreement signed by the parties to the arbitral proceedings. Recognition and enforcement of this award is sought. The contracting parties explicitly expressed, in the agreement, their intentions to use arbitration. See the franchising agreement items 22.00 and sub-items 22.3 and 22.4 that are included in the well-founded defense:

> 22.00. Except in the case of Paragraph 22.5 below, any dispute or claim arising from or related to this contract or any breach thereto must be settled through arbitration according to the Commercial Arbitration Rules of the American Arbitration Association to be held in New York City, New York, United States of America. The arbitration shall be conducted in English. The arbitration award shall be final and binding on the parties and it may be registered with any Court having jurisdiction in this respect.
>
> (pp. 281/282)

Hence, there was compliance with the requirement of Article 4, Paragrap 1 of Law 9.307/96, which states:

> The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.

Under the interpretation of the Arbitration Act, the only circumstance in which it is not possible to resort to arbitration is when there is no explicit arbitration agreement as stated by Article 7.

The *ad hoc* Curator's contention that it is necessary to have both the arbitration clause and the submission agreement was debunked by the Public Prosecutor's Office, quoting

Brazilian doctrine that asserts that the submission agreement is no longer required after the Arbitration Act, and that an arbitration agreement is enough [to have a binding arbitration].

There are precedents from the Federal Supreme Court where, having jurisdiction over requests for recognition and enforcement, the Court adopted a new position by requesting a submission agreement only when there was no clear arbitration agreement in the contract. In this sense, see:

> *"SUMMARY: FOREIGN ARBITRAL AWARD. ARBITRATION AGREEMENT. NON-EXISTENT. JURISDICTION NOT DEMONSTRATED. RECOGNITION AND ENFORCEMENT. IMPOSSIBILITY.*
> *1. The request for recognition and enforcement of foreign arbitral award must be filed with the arbitration agreement otherwise it is impossible to determine the jurisdiction of the tribunal who rendered the decision (Law 9.307, Articles 37(II) and 39(II); RISTF, Article 217(I)).*
> *2. Purchase and sale agreement not signed by the buyer. The terms of the contract also do not allow the conclusion that there was not an agreement with respect to the arbitration clause. Further, there were no documents indicating otherwise. There is a lack of evidence showing the Respondent's clear declaration to refrain from using State courts in favor of arbitration.*
> *3. The jurisdiction of the Tribunal which rendered the award was not demonstrated, therefore it is not possible to grant recognition and enforcement by the Federal Supreme Court. Claim dismissed." (SEC 6.753/UK – Reino Unido da Grã-Bretanha e da Irlanda do Norte, Judge-Rapporteur Maurício Corrêa, Plenary, DJ of 4 October 2002)*
>
> SUMMARY: 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 in these proceedings 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 until then: recourse [*"agravo regimental"*] is unanimously granted taking into account the subsequent publication of

Law No. 9.307 of 23 September 1996, which 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 of 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 (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 previous 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 a 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 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 – by unanimous decision, on the provisions of the Arbitration Act, that 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 national judgment (Article 31)." (SE-AgR [Interlocutory Appeal on the Foreign Award] 5206/EP – Espanha, Judge-Rapporteur Sepúlveda Pertence, Plenary session, DJ of 30 April 2004, p. 29).

Nevertheless, this is not the case in the records. This is a contract about freely transferable rights in which the parties elected arbitration as the dispute settlement mechanism for disputes arising under the contract and the parties signed and agreed to the contract.

After breaches of the contract one may ask: "What to do?" The creditor went before the arbitral tribunal obtaining an award terminating the contract and determining damages in accordance with contractual stipulations (pp. 9 and 12).

The arbitral award rendered on 28 February 1998 was confirmed on 17 November of the same year by the District Court of the United States of America, District of Connecticut. Therefore, a requirement prior to the entry into force of the Arbitration Act was complied with. Although this requirement is no longer in force, the seal of legality granted by the American legal system is not detrimental to this request. The American court summoned the party who is now Respondent, but it was in default as the judgment demonstrates.

Consequently, simply because it was not possible to find the partners of the company except for one, for the recognition and enforcement of the award, this does not constitute a defect that would render the judgment null and void.

Therefore, there is no bar to the recognition and enforcement of the arbitral award.

My opinion is for the recognition and enforcement of the arbitral award based on the explicit arbitration agreement in the contract signed by the parties, so it may have legal and judicial effects in Brazil.

There are no legal costs in accordance with sole paragraph of Article 2 of Resolution 9/2005. I determine the attorneys' fees for the *ad hoc* Curator considering the value of the claim in the amount of R$ 1.000,00 (one thousand reais).

This is my opinion.