Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 839 – FR (2005/0034467-0)

RAPPORTEUR	:	**JUSTICE CESAR ASFOR ROCHA**
CLAIMANT	:	BOUVERY INTERNATIONAL S/A
COUNSEL	:	JOSÉ PAULO FERNANDES FREIRE AND OTHER(S)
RESPONDENT	:	VALEX EXPORTADORA DE CAFÉ LTDA.
COUNSEL	:	ANTÔNIO CAMARGO JÚNIOR

SUMMARY

CHALLENGED FOREIGN AWARD. ARBITRATION AGREEMENT. LAW No. 9.307/96. COMPLIANCE WITH MANDATORY REQUIREMENTS.

Law No. 9.307 of 23 September 1996, fully in force, governs arbitration.

Once the requirements established in the Arbitration Act and Articles 5 and 6 of Resolution No. 09 of the Superior Court of Justice are observed, the request for recognition and enforcement ["*homologação*"] of foreign awards shall be granted.

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 of the Superior Court of Justice, in conformity with the following opinions, unanimously decide to grant recognition and enforcement according to the opinion of the Judge-Rapporteur. Justices Ari Pargendler, Fernando Gonçalves, Carlos Alberto Menezes Direito, Felix Fischer, Gilson Dipp, Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Francisco Falcão, Laurita Vaz, Luiz Fux, Teori Albino Zavascki, Francisco Peçanha Martins and Humberto Gomes de Barros concurred with the Judge-Rapporteur.

Justice Nilson Naves was excused. Justices Antônio de Pádua Ribeiro, José Delgado, Aldir Passarinho Junior, Nancy Andrighi and João Otávio Noronha were absent.

Brasília (DF), 16 May 2007. (Judgment date)

JUSTICE BARROS MONTEIRO, President

JUSTICE CESAR ASFOR ROCHA, Rapporteur

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REPORT

THE HONORABLE JUSTICE CESAR ASFOR ROCHA: *Bouvery International S.A.* seeks recognition and enforcement of a foreign arbitral award rendered by the Coffee and Pepper Arbitration Center in Le Havre, France, against *Valex Exportadora de Café Limitada.*

The parties entered into a contract for the purchase of one thousand and two hundred sacks of Brazilian Coffee. Claimant alleges that Respondent has not complied with the contract and, therefore, commenced arbitration at the Coffee and Pepper Arbitration Center in order to solve the dispute.

After being summoned, Claimant states as a preliminarily in its Answer to the request that the parties only entered into a consultancy process without finalizing any agreement. It asserts that the Arbitration Centre is a mere collegiate "(..) *formed by union brokers who impose unilateral arbitral decisions"* (p. 100), not being recognized under French law (pp. 98/101).

Reply on pp. 114/116, in favor of the recognition and enforcement.

Asked for its opinion, the Public Prosecutor's Office pointed to an obstacle to grant the request because it could not find the original arbitration agreement or a certified copy in the file (pp. 119/122).

The irregularity was rectified and the Public Prosecutor's Office (pp. 159/160) gave its opinion in favor of the request.

Pursuant to Article 1 of the Constitutional Amendment No. 45/2004 the records were sent to me [Judge-Rapporteur] at this Court of Justice. The amendment shifted the competence to hear requests for recognition and enforcement of foreign arbitral awards and to grant *exequatur* to letter rogatory.

I decided to hear again the Public Prosecutor's Office, who reiterated the previous opinion in favor of the request (p. 179).

This is the report.

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Recognition and enforcement granted.

OPINION

THE HONORABLE JUSTICE CESAR ASFOR ROCHA (RAPPORTEUR): Claimant requests the recognition and enforcement of an arbitral award rendered in France.

The arbitral award and its recognition and enforcement are governed in Brazil by Law No. 9.307 of 23 September 1996. This Law has immediate application and is constitutional, as held by the Federal Supreme Court in its decision on Interlocutory Appeal ["*agravo regimental*"], SE [Foreign Award] No. 5206- 7/Reino da Espanha, DJ [Official Gazette] of 30 April 2004, Judge-Rapporteur **Sepúlveda Pertence**. From this Court, see SEC [Challenged Foreign Award] No. 507/EX, Judge-Rapporteur **Gilson Dipp** DJ 13 November 2006.

Pursuant to Article 3 of this Law: "*the parties may submit their disputes to arbitration by virtue of the arbitration agreement, which may be in the form of either an arbitration clause or a submission agreement* (*compromisso*)."

The arbitration clause is the agreement in writing, included in the contract itself or in a separate document, whereby the parties undertake to settle all disputes that may arise out of contract by arbitration.

To be recognized and enforced in Brazil, a foreign arbitral award needs to be granted recognition and enforcement. Pursuant to Article 38 of Law No. 9.307/96, the recognition and enforcement shall only be denied when the respondent proves 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 its 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."*

In the present case, as correctly remarked by the Public Prosecutor's Office, the request must be granted.

In its Answer to the request, Respondent failed to establish any of the grounds listed in the aforementioned article. Respondent merely raised objections to the effectiveness of the contract and the jurisdiction of the Arbitration Centre.

The argument that the sale and purchase were not concluded pertains to the merits of the award since the question raised in the arbitration proceedings was precisely the breach of the contract by Respondent. Therefore, this matter requires an assessment by this Court. In the same vein, among others, SEC No. 760/EX DJ of 28 August 2006, Judge-Rapporteur **Félix Fischer**.

Arbitration is governed by Law No. 9.307/96, which is fully in force.

The enforcement of the foreign award is also subject to the mandatory requirements of Articles 5 and 6 of Resolution No. 9 of the Superior Court of Justice, as well as to the requirements determined in the course of the proceedings, which were complied with.

The arbitral award does not violate sovereignty, public policy or common decency in accordance with Article 6 of this Resolution.

Therefore, absent any bar to grant recognition and enforcement, I grant the request. I order Respondent to pay attorney' fees, set at R$ 5,000.00 (SEC No. 63, Judge-

Rapporteur **Eliana Calmon**, published on 27 March 2006 and SEC No. 802, Judge-Rapporteur **José Delgado**, published on 19 September 2005).

This is my opinion.