Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 856 – EX (2005/0031430-2)

RAPPORTEUR	:	**JUSTICE CARLOS ALBERTO MENEZES DIREITO**
CLAIMANT	:	L'AIGLON S/A
COUNSEL	:	LÚCIA MARIA FIGUEIREDO AND OTHER
RESPONDENT	:	TÊXTIL UNIÃO S/A
COUNSEL:	:	GILBERTO DA SILVA NOVITA AND OTHER(S)

SUMMARY

Foreign arbitral award. Arbitration agreement. Contract not signed by Respondent. Evidence of covenant. Absence of elements.

1. The requirement of consent to the arbitration agreement was deemed satisfied when Respondent, according to the evidence on record, argued its defense in the arbitral proceedings without challenging at any time the existence of an arbitration agreement.

2. In these proceedings, the merits of the foreign arbitral award shall not be reviewed according to precedents from the Federal Supreme Court.

3. Recognition and enforcement ["*homologação*"] granted.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned parties were involved, the Justices from the Special Court of the Superior Court of Justice unanimously decide to grant the recognition and enforcement in concurrence with the opinion of the Judge-Rapporteur. Justices Felix Fischer, Gilson Dipp, Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Luiz Fux, Joao Otavio de Noronha, Barros Monteiro, Francisco Peçanha Martins, Humberto Gomes de Barros, Cesar Asfor Rocha, José Delgado, José Arnaldo da Fonseca e Fernando Gonçalves concurred with the opinion of the Judge-Rapporteur. Sálvio de Figueiredo Teixeira and Ari Pargendler were excused. Justices

Edson Vidigal, Nilson Naves and Francisco Falcão were absent. Franciulli Netto took a leave of absence and was replaced by Justice Joao Otávio de Noronha. Ms. Maria Lúcia Figueiredo presented oral pleadings on behalf of the Claimant.

Brasília (DF), May 18, 2005. (Judgment date)

JUSTICE ANTONIO DE PADUA RIBEIRO

President

JUSTICE CARLOS ALBERTO MENEZES DIREITO

Rapporteur

Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 856-EX (2205/0031430-2)

REPORT

THE HONORABLE JUSTICE CARLOS ALBERTO MENEZES DIREITO:

L'Aiglon S.A., a company incorporated under the laws of Switzerland, registered at 45 Rue des Acacias, 1211, Geneva 26, Switzerland, requests recognition and enforcement of the arbitral award rendered by the Liverpool Cotton Association – LCA, itself registered at 620 Cotton Exchange Building, Edmund Street, Liverpool L3 9LH, England, against Têxtil União S.A., incorporated under Brazilian law and registered at Rodovia CE 021, Km 8, Distrito Industrial, Maracanau, Ceará.

The Claimant alleges:

> *"1.1 That on 24 July 2000, L'AIGLON S.A. (exporter/seller) and TÊXTIL UNIÃO (importer/buyer) agreed on* ***contract numbers 4447.00 and 5158.01*** *to sell respectively 500 metric tons and 1,500 metric tons of cotton originated from Africa (Senegal and Ivory Coast) through the intermediation of sale agents from Agrenco Sarls (exhibit 02).*
>
> *1.2 That contract 4447.00 as well as contract 5158.01 have the same* ***arbitration agreement*** *named "****RULES AND ARBITRATION****" (rules and arbitration), in which there is an explicit election of the* ***LIVERPOOL COTTON ASSOCIATION – LCA*** *as the arbitral tribunal with jurisdiction to decide on any possible claim.*
>
> *1.3 That Liverpool Cotton Association – LCA, with registered office at Liverpool, England, is one of the most established Anglo-Saxon arbitral tribunal with over a hundred and sixty years of existence.*
>
> *1.4 Further, the LCA is currently responsible for the* ***regulation and arbitration of over 60% of all international cotton trade****. Thus, it is the most respectable and established arbitral tribunal in the cotton market worldwide.*
>
> *1.5 In contracts 4447.00 and 5158.01 L'Aiglon and Têxtil União explicitly indicated, in* ***each arbitration agreement****, the LCA as the tribunal with jurisdiction to settle all disputes arising out of*

these commercial disputes. The LCA rules of arbitration are applicable if necessary.

*1.6 That there was **partial compliance** with the aforementioned contracts as shown by extensive evidence attached herein, consisting of **several correspondence sent by Têxtil União to L'Aiglon referring to these commercial agreements as well as money transfers made by Têxtil União to partially pay the corresponding invoices** (exhibit 03).*

1.7 That problems arose regarding payment of invoices SEN No. 2716.00 and 2717.00 related to contract 4447.00 that L'Aiglon sent since October 2000 and invoices TOG No. 1142.01 to 1145.01 related to contract No. 5158.01.

1.8 That L'Aiglon S.A., as well as the sale agent (Agrenco) who intermediated the whole transaction, sent countless correspondence to Têxtil União from the beginning of January 2011 requesting payments of sent invoices as agreed (exhibit 04).

*1.9 Unfortunately, after waiting for **several months** without a response or payment from Têxtil União, L'Aiglon sent on 6 June 2011 a letter trying to amicably rescind the contract and requesting return of the goods (exhibit 05).*

1.10 That in the aforementioned letter (exhibit. 05), L'Aiglon granted a period of 48 (forty-eight) hours to Têxtil União to respond to the aforementioned proposal, otherwise the case would be taken to arbitration at the Liverpool Cotton Association, as provided in the contract.

*1.11 That after the lapse of time **without any statement from the other party**, L'Aiglon had to file a request for arbitration before the LCA regarding the breach of contract in question. It is worth mentioning that L'Aiglon demonstrated **loyalty and good faith** by sending a letter on 29 June 2001, to Têxtil União indicating that they had appointed Ms. Helen Anderson to act as their arbitrator at the LCA and requested the Brazilian company to appoint their own arbitrator (exhibit 06).*

*1.12 That, Têxtil União, through its arbitrator, Mr. **J. S. Glen**, with whom they exchanged **several letters** throughout the arbitral proceedings, **presented extensive documentation and allegations** regarding their defense before the LCA, all thoroughly analyzed (exhibit. 07).*

*1.13 Moreover, Têxtil União, as well as L'Aiglon, both **filed an appeal against the LCA's award** (exhibit. 08)*

*1.14 Therefore, **Têxtil União actively participated throughout the entire arbitral proceedings**, freely presenting their defense,*

> *producing documents, and even appealing the award (exhibits. 07 and 08).* ***Thus it was completely able to present its case.***
>
> *1.15 That in the end, after the decision on both appeals presented by each company, the LCA ordered Têxtil União to pay L'Aiglon the value of* ***US$ 910,297.89 (nine hundred and ten thousand two hundred and ninety-seven dollars and eighty nine cents),*** *plus interest due to delay, amounting to 2% per year on the preferential interest rate of New York, or, as appropriate, the average calculated based on the same interest rate prevailing as of December 2002 until the date of actual payment (exhibit. 08).*
>
> *1.16 That the arbitration decision can no longer be reviewed through an appeal, and* ***became final on 12 November 2002*** *(exhibit. 09) (pp. 2-4).*

Claimant attached documentation from pages 8 to 171.

This claim was filed on 29 April 2003 before the Federal Supreme Court ["*Supremo Tribunal Federal*"], Justice **Marco Aurélio** on 5 May 2003, as the current President of the Tribunal at the time, requested that the Respondent be notified (p. 174).

The Respondent was notified on 25 August 2003 (p. 432v), and presented its response on 18 September 2003 alleging that:

> "(…)"
>
> *2 – As a matter of fact, regarding the arbitration clause,* ***there is no*** *explicit consent from the Respondent in the contracts (Nos.: 4447.00 and 5158.01) (unsigned contracts on pp. 16/17 - translation on pp. 18/22 - pp. 23/24 – translation pp. 25/29). One could argue that commercial contracts, such as contracts for purchase and sale of goods, can be formed by mere correspondence without applying the rigorous formal requirements applicable to other types of contracts of civil nature.*
>
> *It is true. However, the arbitration clause in this case could only be considered valid if it had an explicit consent from the Respondent, which it did not have.*
>
> *3 – In contracts between merchants, whether formed by correspondence or not, it is important to include information on the price, the description of the goods, the time and place of payment, but not a* ***waiver*** *of any right as it requires an unequivocal statement.*
>
> *As there is no express consent from the Respondent in the present case, the arbitration agreement is null and void.*

> *4 – It is not possible to allege that there was a tacit agreement from the Respondent because the waiver of a right must be explicit and **unequivocal** (Article 111, paragraph 1, Code of Civil Procedure).*
>
> *In this case, the arbitration agreement is inserted at the end of the correspondence as if it was usually and routinely included in the contract and was usually printed.*
>
> *But without the express agreement of the Respondent it has no validity, and consequently the arbitral tribunal **has no jurisdiction.** Thus the award is **null and void**.*
>
> *5 – In fact, it is worth mentioning that the purchase and sale contracts in question were never transmitted to the Respondent. Nothing more than the commercial invoices were sent. Moreover, the arbitration clause was not included in the commercial invoices" (pp.184-186).*

According to the Respondent, Claimant's allegations on the right to a legal defense "are only **apparent** truths" (p. 187). The Respondent argues that:

> "(...)
>
> *2 - Indeed, as noted from the records of the case, the Respondent did not appoint an arbitrator. Notified to do so, it remained silent exactly because it did not recognize the arbitral tribunal's jurisdiction.*
>
> *The arbitrator - in light of the Respondent's omission – was appointed by the arbitral institution and, therefore, without the Respondent's declaration of will. The Respondent did not file an appeal; it simply sent a correspondence in which it stated its opposition to the decision mentioning culpable facts and acts by the Claimant, obviously with the intention to restore the factual truth. It is obvious that such a statement cannot be considered to be an appeal in its formal sense. (**p. 76).***
>
> *7 – Truthfully, the facts demonstrate that the Respondent was **indirectly and coercively induced** into an error of judgment by corresponding with the arbitrator; but it did so only to restore factual truth, without having the intention to appeal the decision.*
>
> *Had the Respondent had the intent to appeal, it would have sought representation, which it did not. Thus, all the factual circumstances demonstrate its refusal to be subject to arbitration.*

8 – The arbitrators did not analyze the underlying circumstances. In fact, they refused to do so explicitly, alleging that they should not assess the culpability of contracting parties, but only decide on the content of the contract, ***as following****:*

> *P. 145*
>
> *27 – It is not for us to* ***allocate blame between the parties****, but to account for compliance or not with the contracts according to the Statute and the Rules of the Liverpool Cotton Association Limited, which both contracts are submitted thereto. (emphasis added)*

But how do you decide on a conflict without analyzing the underlying factual circumstances, the degree of ***culpability*** *of each contracting party? It is impossible. To base the decision only on the formal content of the contracts without looking into the breach or any culpable behavior is equivalent to denying access to justice.*

Because of this, the arbitral award is also ***null and void****" (pp. 187 to 189)*

Respondent also challenges the content of the arbitral award:

"(...)

9 – The content of the award must be rejected due to its final orders.

It determines the renegotiation of the price of the goods (new invoices), and to that end the decision fixed the prices and imposed them on the Respondent.

This order is unacceptable because it is impossible to be performed. And why? Because Respondent ***authorized and ordered*** *the goods to be transferred to a third party (Mabela Agência Marítima Ltda.) through endorsement of a bill of lading, that was made on 19 October 2001, at the beginning of the arbitral proceedings.* ***(Documents attached).***

Therefore, it is no longer possible to consider a renegotiation of the prices.

10 – Indeed, since Claimant gave an explicit order to transfer the goods, any debt that the Respondent could have had is excluded.

11 – As it is known, the endorsement of a bill of lading transfers the title of the goods.

Certainly, Claimant must have sold the goods to third parties, thereby generating profits. It is not possible to discuss renegotiation of

*the prices due to the **absence of renegotiable goods** and thereby no payments may be sought from the Respondent.*

*Also due to this point, the arbitral award cannot be granted recognition and enforcement because it is **unenforceable.***

12 – Further, based on the content of the award, it is worth clarifying that it is not enforceable due to its invalidity.

See below:

a) – in relation to the first contract No. 4447.00, the award requires payment of 200 tons or 440,920 Lp (libra peso) at the price stipulated in the contract. At the rate of 0,58 U.S. cents to a 'libra peso', this totals to an amount of US$ 255,735.60;

b) – the award requires payment of interest of 8.5% a year to be levied on the amount (US$ 255,735.60) for the period between 21 September 2000 to 12 November 2002, valued at US$ 46,571.54;

c) – in relation to the second contract No. 5158.01, the award requires payment of 275 tons or 606,265 Lp at the price stipulated in the contract. At the rate of 0,59 U.S. cents to a libra peso, this totals to an amount of US$ 357,696.35;

d) – [the award] requires interest of 7.75% a year to be levied on the amount (US$ 357,696.35) for the period between 3 January 2001 to 12 November 2002 in the total amount of US$ 45,569.54.

e) – [the award] requires payment of the price difference of 1200 tons or 2,645,520 Lp for the price of 0.07 Lp in the total amount of US$ 185,186.40;

f) – [the award] requires interest of 7.35% per year to be levied on the amount (US$ 185,186.40) for the period between 6 June 2001 to 12 November 2002, valued at US$ 19.540,46; TOTAL = US$ 910.297,89;

g) – [the award] also requires interest of 2% over the total amount of the award of US$ 910.297,89 based on the Basic Interest Rate of New York" (pp. 189-192).

After arguing factual considerations in its favor, the Respondent concludes:

*"It is confirmed, based on the facts herein briefly described and also on the documentation herein attached that the arbitral award is invalid because it determines payment of goods rejected due to defects (475 tons) and that were **transferred** at **Claimant's request** to a third party to whom the goods were certainly sold.*

*Furthermore, interest applies to the price of goods **until 12 November 2002, whereas the goods were transmitted by endorsement***

***to third parties on 19 October 2001**. The award is also invalid because it directs the Respondent to **pay the price differential** between the price of US$ 0,07 for the **1200 tons of cotton** that were not delivered to the Respondent and not even shipped by the Claimant.*

*Furthermore, the decision required payment of interest on such difference calculated until **12 November 2002, when the goods were not even shipped**.*

*Finally, the invalidity is even more blatant when the award requires that interest shall also apply to **the total amount of the award** to redress Claimant's financial situation,* i.e.*, **interest on interest**, that is not allowed under Brazilian law.*

13 – Claimant, in its request for recognition and enforcement of the foreign arbitral award, claims that the Respondent should bear all the procedural costs if the award is granted recognition and enforcement; but it does so disregarding the procedural rules governing the matter.

Its claim has no legal support as it is invalid to grant recognition and enforcement to foreign awards full of errors and without legal effect" (pp. 195/196).

The Claimant attached to the record documents from pp. 198 to 249.

The record was given to Justice **Celso de Mello** and the other party was notified to submit a reply (pp. 253 and 436).

Claimant on 2 September 2004 submitted its reply, arguing:

"(…)

1. - THE LAW No. 9.307/96 AND THE NEW YORK CONVENTION OF 1958, RATIFIED BY BRAZIL THROUGH DECREE No. 4.311/2002. DO NOT REQUIRE THE PARTIES' SIGNATURE AS A CONDITION FOR THE VALIDITY OF THE ARBITRATION AGREEMENT:

1.1 The Respondent asserts that because contracts No. 4447.00 and 5158.01 are not signed by the purchasing party –Têxtil União – the arbitration agreements therein are not valid.

*1.2 In fact, Brazilian legislation never requires a signature as a condition for the validity of the arbitration agreement. In fact, Law No. 9.307/96, dealing with formal issues of a **national arbitration** agreement requires that:*

Article 4. (...)

> *§ 1. The arbitration agreement must be* ***in writing*** *and can be inserted in the contract or in a document to which it refers.*

*1.3 In addition****, Law No. 9307/96 does not require at any time the parties' signature as a condition of validity of the arbitration clause****, requiring merely that it is stipulated* ***explicitly in writing.***

1.4 Specifically in relation to the ***recognition and enforcement of foreign arbitral awards****, now under discussion, the Law No. 9307/96 provides in its* ***ARTICLE 34*** ***that international treaties*** ***effectively integrated into Brazilian law are applicable****, absent [an international treaty], Law No 9.307/96 will apply according to its own terms.*

1.5 Recently, the Federal Republic of Brazil ratified the ***New York Convention of 1958*** *that deals with recognition and enforcement of foreign arbitral awards,* ***by Decree No. 4311 published in the Federal Official Gazette*** ["Diário Oficial da União"] ***on 24 June 2002****.*

1.6 The New York Convention, incorporated into Brazilian positive law through the above-mentioned decree, ***also does not require the parties' signature as a condition for the validity of the arbitration agreement****.*

1.7 In fact, the official translation of Decree No. 4.311/2002, ***article II****(2) provides that:*

> *2. The term agreement in writing shall include an arbitral clause in a contract or arbitration agreement,* ***signed*** *by the parties or contained* ***in an exchange of letters or telegrams.*** (emphasis added)

*1.8- The word "*firmado*" in Portuguese according to mini-dictionary Aurélio, 28th edition. Publisher Nova Fronteira means:*

"Firmar"*: 1. make firm, secure; fixate 2. Corroborate 3. Adjust, settle (…)*

1.9 Therefore, ***the New York Convention****, that has been incorporated into Brazilian law through* ***Decree No. 4.311/2002****, consequently governs the recognition and enforcement of arbitral awards in Brazil, in the exact terms of* ***Article 34 of Law No. 9307/96. The New York Convention also does not require the parties'***

> ***signature as a condition of validity of the arbitration agreement***" *(pp. 438/439).*

The Claimant also states that it is not in dispute that contracts 4447.00 and 5158.01 were partially complied with and that those contracts explicitly elected the Arbitration Rules of Liverpool Cotton Association Ltd. Then, it adds:

> "(...)
> *2.3 In addition, there were several* ***correspondence sent by the Respondent*** *to L'Aiglon S.A. and also to the intermediary agency in the transaction. This correspondence deals with* ***compliance of the aforementioned contracts, explicitly mentioning the contract numbers 4447.00 and 5158.01.***
> *2.4 Further, based on a simple reading of the award rendered by the LCA, it seems that the* ***Respondent had knowledge of all contractual terms agreed since, in its defense presented before the LCA, the Respondent explicitly made allegations in relation to contract 4447.00, as well as contract 5158.01***
> *2.5 It should be noted that the* ***Respondent was not forced to agree to the purchase and sale of cotton with the Claimant****.* ***If it agreed to do so, it was freely and willingly, according to the principle of party autonomy.***
> *2.6 In fact,* ***the Respondent did not return the shipments of cotton sent by the Claimant; on the contrary, it received and subsequently made payments related thereto until the breach of contract.***
> *2.7* ***Considering that shipments were made in accordance with the agreed contracts No. 4447.00 and 5158.01, according to the conditions contained therein, and also that the Respondent recognizes these facts in writing, how could one not accept the validity of the arbitration agreement included in the referred contract?***
> *2.8 Therefore,* ***the arbitral proceedings through the Liverpool Cotton Association were absolutely valid, since it resulted from an explicit clause inserted in the commercial contract whose existence the Respondent acknowledges in writing*** *and also recognizes partial compliance with the contract (item 12 of the Respondent's Answer (p. 440)."*

Claimant alleges that Respondent did not prove that the arbitration agreement is not valid under English law, as required by article V, “a”, “A” [*sic*], of the New York Convention; that Respondent did not contest the validity of the arbitration agreement when it filed its appeal against the arbitral award and that, in line with the jurisprudence of the Federal Supreme Court, there is no possibility to discuss the merits, the contractual terms or any facts at this stage of the proceedings.

Mr. **Cláudio Fonteles,** an honorable Public Prosecutor of the Republic, gave his opinion to deny the request for recognition and enforcement notwithstanding the provisions in Article 40 of Law No. 9307 of 23 September 1996 (pp. 450-455).

This is the report.

Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 856-EX (2205/0031430-2)

SUMMARY

Foreign arbitral award. Arbitration agreement. Contract not signed by Respondent. Evidence of covenant. Absence of elements.

1. The requirement of consent to the arbitration agreement is deemed satisfied when Respondent, according to the evidence in the record, argued its defense in the arbitral proceedings without challenging at any moment the existence of an arbitration agreement.

2. In these proceedings, the merits of the foreign arbitral award shall not be reviewed according to precedents from the Federal Supreme Court.

3. Recognition and enforcement granted.

OPINION

THE HONORABLE JUSTICE CARLOS ALBERTO MENEZES DIREITO:

The Claimant seeks recognition and enforcement of an arbitral award rendered by the Liverpool Cotton Association, Ltd., on 21 December 2001; translated (pp. 120-150) and already analyzed by the appellate level of the Members Committee of the Liverpool Cotton Association Ltd. (pp. 152-167), that requires the Respondent to pay the amounts mentioned on pp. 147 to 150 and 165 for the purchase of cotton from the Claimant.

The recognition and enforcement of arbitral awards is governed in Brazil by Law No. 9307 of 23 September 1996, which is directly applicable and was considered constitutional by several decisions of the Plenary Session of the Federal Supreme Court (see

AgRgSE [Interlocutory Appeal on Foreign Award] No. 5206-7, Reino da Espanha, Judge-Rapporteur **Sepúlveda Pertence**, decided on 12 December 2001, DJ of 30 April 2004; SEC [Challenged Foreign Award] No. 5847-1, Reino Unido da Grã-Bretanha e da Irlanda do Norte, Judge-Rapporteur **Maurício Corrêa**, decided on 1 November 1999, DJ [Official Gazette] of 17 December 1999; SEC 5828-7 Reino da Noruega, Jude-Rapporteur: **Ilmar Galvão**, decided on 6 December 2000, DJ of 23 February 2001).

Specifically regarding AgRgSE No. 5206-7, Reino da Espanha, the Plenary Session of the Federal Supreme Court declared the constitutionality of the Arbitration Act (Law No. 9307 of 23 September 1996), *"considering, by a majority vote, that the intention of the party, as expressed in the arbitral provision inserted in the original contract, as well as the court's power to substitute the intention of a party who resists signing the submission agreement, does not violate Article 5(XXXV) of the Federal Constitution."*

Today, there is no doubt that the Arbitration Act applies to the recognition and enforcement of foreign awards; one must then analyze the fundamental question of whether there is consent to the arbitration agreement.

Mr. **Claudio Fonteles**, of the Public Prosecutor's Office, gave his opinion to deny the recognition and enforcement of the arbitral award, based on the following reasoning:

> *"Indeed, the requirements for the petition were not fully observed, namely, that the original or certified copy of the arbitral agreement is attached to the documents. (Article 37(II) of Law 9307/96).*
>
> *The absence of unequivocal evidence that the parties consented to the arbitration agreement (the source of arbitration) affects the entire legal reasoning regarding the analysis of the arbitral decision, since the arbitral agreement regulates and promotes the settlement of disputes arising out of commercial transactions of private parties, as it is the case in the record.*
>
> *The arbitration clause, besides demonstrating the contracting parties wish to avoid national courts, must also show the explicit consent from the parties in accordance with Article 37 of Law 9.307/96.*
>
> *It should also be borne in mind the comment made by Joel Dias Figueira Júnior of which we highlight the following excerpt:*

> *"The arbitration will always depend on exhaustive evidence about the existence of a previous arbitration agreement signed by the contracting parties." (Arbitragem, Jurisdição e Execução, Análise Crítica da Lei 9.307, de 23-09-96, 2ª edição, RT, SP, p. 167)."*
>
> *The issue in these proceedings is very similar to an issue resolved during a recent decision in the proceedings SEC* [Challenged Foreign Award*] No. 6753, in which the Plenary of this Court, on 13 June 2002, unanimously refused the recognition and enforcement requested. Similarly, see SEC 6885 – DJ 31 October 2002 (pp. 454/455).*
>
> *In fact, Article 37, item II of the Arbitration Act, dictates:*
>
> *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.*

An arbitration agreement is undoubtedly indispensable for ascertaining whether the body issuing the decision had jurisdiction. In addition, one must not forget that recognition and enforcement may be refused pursuant to Article 38(IV) and (V) of the Arbitration Act whereby "*the arbitral award was rendered beyond the limits of the arbitration agreement and it was not possible to separate the part exceeding, from what has been submitted to arbitration*" and when "*the commencement of the arbitration proceedings was not in accordance with the submission agreement (*compromisso) *or the arbitration clause*."

In this case, the Claimant attached the contracts 4447.00 (pp. 18 to 22) and 5158.01 (pp. 25 to 29), not signed by Respondent – Têxtil União S.A., in which only appears "Rules & Arbitration - The Liverpool Cotton Association Ltd" (pp. 21 and 28). Nothing more was included in the record submitted to the Court about the terms of the arbitration, not even any indication about the rules and limitations to enforce the arbitration agreement.

Indeed, the record does not have any correspondence between the parties showing the acceptance of an arbitral provision to settle future disputes.

Undoubtedly, Article II, paragraph 2, of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958" promulgated by Decree No. 4311 on 23 July 2002 provides:

> *"Article II*
>
> .....
>
> *2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*

Hence, one could leap to the conclusion that recognition and enforcement should be denied.

However, we must take into consideration the particularity of some attached documentation.

The documents attached to p. 67 include a translation of the correspondence that Claimant sent to Respondent appointing its own arbitrator and requesting the Respondent to appoint its own. However, there was no copy in the record demonstrating Respondent's agreement or that it appointed an arbitrator. In the record, there is an indication that the institution in charge of the proceedings appointed the arbitrator. The issue herein is not the validity of the contracts due to a lack of signature, but the absence of explicit consent to the arbitration agreement.

Respondent's entire defense, whether argued by Respondent itself or its counsel before the Liverpool Cotton Association, Ltd is not in the record. However, there is the translation of a duly signed letter sent to the above-mentioned arbitral institution by Respondent on 18 February 2002, in which Respondent states at the outset that "*we would like to make reference to our appeal motion*" (p.71). Subsequently, after discussing the merits of the case (pp. 71 to 73), Respondent further states that "*later on, we would like to designate a new arbitrator to represent us*" (p.73). Without any doubt, as is apparent from this document, the company sent letters to the Liverpool Cotton Association Ltd. referring to an appeal in that institution that

makes its participation in the proceedings explicit. This is reinforced, as previously stated, by the fact that Respondent referred to the reasons of appeal and even stated its intention to appoint a new arbitrator to represent it. It is important to note that this document is dated 18 February 2002 (p. 71) and seems to be a response to the letter sent by the Liverpool Cotton Association, Ltd., in which the Respondent indicated that it received in due time the notification of appeal. In addition, it seems that the deadline for appealing was established on the above-mentioned document dated 2 February 2002, the exact same date that Respondent presented its arguments on the merits concerning the two contracts (p. 75). Furthermore, there is no opposition to the institution of the arbitral proceedings in these documents.

It is public knowledge that it is common practice in international trade to submit disputes concerning enforcement of contracts to arbitration. It is certain that in the case of the purchase and sale of cotton, the Liverpool Cotton Association is the appropriate institution with experience in this specialized market.

Since there was partial performance under the contracts and the record precisely shows that Respondent effectively entered a defense on the merits of the dispute without objecting to the institution of arbitration proceedings, it seems unreasonable to accept Respondent's presented arguments. Furthermore, Respondent did not object to the validity of the arbitral clause when it became aware that arbitral proceedings commenced, but instead it presented its defense, it is undeniable that the arbitral clause was recognized by the Respondent.

The reading of Respondent's arguments in these proceedings reveals that its argumentation is centered on the absence of explicit consent to the arbitration clause. However, as it was demonstrated, there was clear acceptance of the arbitration agreement. This is shown through the participation in the arbitration proceedings according to the letter that Respondent sent in which it presents its defense on the merits. In these proceedings, Respondent seeks to disqualify such letter alleging that it did not appoint an arbitrator, remaining "*silent due to the fact that it did not recognize its submission to the arbitral tribunal*" (p. 187). Then, Respondent adds that it did not file an appeal "*but, it simply sent a correspondence in which it stated its opposition to the decision mentioning culpable facts and acts of the Claimant,*

obviously with the intent to restore the factual truth. It is obvious that such a declaration cannot be considered to be an appeal in its formal sense" (p. 188). With all due respect, such arguments cannot prevail. Soon after becoming aware of the existence of the arbitration, Respondent could have objected to its commencement. Its objection would have resulted in the invalidity of the arbitral proceedings that normally depend on acceptance by both parties.

In conclusion, taking into consideration international usages in similar contracts, it is not possible to determine the invalidity of the arbitration agreement. The Respondent's participation in the arbitration, by presenting arguments and stating expressly its intention to appoint an arbitrator, indicates an unequivocal acceptance of the existence of the arbitration clause.

Concerning the other arguments, it is not possible to review the merits of the dispute in the proceedings for recognition and enforcement of a foreign award (SE No. 3407/ French Republic, Plenary, Judge-Rapporteur **Oscar Correa**, DJ of 7 December 1984; SEC No. 7.473/EU, Plenary, Judge-Rapporteur **Celso de Mello** DJ of 7 April 1995).

In conclusion, I grant the request for recognition and enforcement of the foreign arbitral award. The Respondent must pay attorney fees in the amount of 3% of the value of the claim. The Claimant should not pay legal costs according to Article 3 of STJ [Superior Court of Justice] /Resolution No. 22 of 31 December 2004.

CHALLENGED FOREIGN AWARD No. 856-EX (2205/0031430-2)

OPINION

THE HONORABLE JUSTICE GILSON DIPP:

Mr. President, I would like to highlight the fact that the procedure adopted by this court concerning the recognition and enforcement of foreign judgment and also the grant **of exequatur** to the letter rogatory have been positively referred to by scholars, lawyers and the judiciary. This demonstrates that the expectations during the constitutional amendment No. 45/2004 were met. I consider that this Court, starting now and with this opinion by the Judge-Rapporteur, has a tremendous responsibility in analyzing, modernizing and bringing light to the subject herein discussed.

I concur with the opinion of the Judge-Rapporteur granting the recognition and enforcement to the foreign award.

PRESIDENT JUSTICE ANTÔNIO DE PÁDUA RIBEIRO

JUDGE-RAPPORTEUR CARLOS ALBERTO MENEZES DIREITO

CHALLENGED FOREIGN AWARD No. 856-EX (2205/0031430-2)

OPINION [“*Voto-Vogal*”]

THE HONORABLE JUSTICE ELIANA CALMON: Mr. President, I congratulate the Judge-Rapporteur for his excellent opinion, with which I concur, granting the recognition and enforcement to the foreign arbitral award.

CHALLENGED FOREIGN AWARD No. 856-EX (2205/0031430-2)

RAPPORTEUR	:	**JUSTICE CARLOS ALBERTO MENEZES DIREITO**
CLAIMANT	:	L'AIGLON S/A
COUNSEL	:	LÚCIA MARIA FIGUEIREDO AND OTHER
RESPONDENT	:	TÊXTIL UNIÃO S/A
COUNSEL	:	GILBERTO DA SILVA NOVITA AND OTHER(S)

OPINION ["*voto-mérito*"]

THE HONORABLE JUSTICE LUIZ FUX: Mr. President, the Judge-Rapporteur's brilliant opinion that considered the tacit arbitration agreement is in accordance with previous precedents from the Federal Supreme Court; this is a matter of commercial law in which formal requirements for the recognition and enforcement should not preclude the recognition and enforcement.

I completely concur with his opinion granting the request for recognition and enforcement of the foreign arbitral award.

PRESIDENT JUSTICE ANTÔNIO DE PÁDUA RIBEIRO

JUDGE-RAPPORTEUR CARLOS ALBERTO MENEZES DIREITO

SPECIAL COURT – 18 May 2005

OPINION

JUSTICE JOSÉ DELGADO: Mr. President, it is my understanding that the honorable Judge-Rapporteur affirmed what the doctrine in arbitration had already established, that is the possibility of a tacit *compromis* as long as the party participates in the arbitral proceedings and does not object to its existence.

I congratulate the Judge-Rapporteur for his opinion and I concur in granting the recognition and enforcement to the foreign award.