Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 874 – EX (2005/0034908-7)

RAPPORTEUR:	**JUSTICE FRANCISCO FALCÃO**
CLAIMANT:	UNION EUROPÉENNE DE GYMNASTIQUE - UEG
COUNSEL:	MARCELO ROBERTO FERRO AND OTHER(S)
RESPONDENT:	MULTIPOLE DISTRIBUIDORA DE FILMES LTDA.
COUNSEL:	CÉLIO RODRIGUES PEREIRA AND OTHER(S)

SUMMARY

FOREIGN ARBITRAL AWARD. ORDER FOR BRAZILIAN COMPANY TO COMPLY WITH CONTRACT CLAUSE. FORMAL REQUIREMENTS FOR THE RECOGNITION AND ENFORCEMENT ["*homologação*"] MET. ARBITRATION IS RECOGNIZED AS A LEGAL METHOD OF DISPUTE RESOLUTION OF DISPOSABLE RIGHTS. LAW No. 9.307/96. ABSENCE, IN THE *PRESENT CASE*, OF PUBLIC POLICY CONCERNS.

I - The use of arbitration as a dispute settlement mechanism does not violate Brazilian public policy, as Law No. 9.307/96 (Arbitration Law) is currently in force. It is not possible to argue that Respondent was forced to choose this mechanism, as it suggests, especially because there is no evidence to substantiate such a claim.

II - Pursuant to the sole paragraph of Article 39 of the Brazilian Arbitration Law, "*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.*"

III - Moreover, there is substantial evidence demonstrating that the Respondent received, through *courier*, not only the service of process, but also notifications requesting its appearance at the hearings conducted ex parte.

IV - The formal legal requirements regarding this procedure, including those provided by Resolution No. 9/STJ [Superior Court of Justice], of 4 May 2005, were observed, thus the request for recognition and enforcement of the foreign arbitral award must be granted.

V - Therefore, the request for recognition and enforcement is 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 unanimously decide to grant recognition and enforcement in accordance with the opinion of the Judge-Rapporteur. Justices TEORI ALBINO ZAVASCKI, HUMBERTO GOMES DE BARROS, ARI PARGENDLER, JOSÉ DELGADO, CARLOS ALBERTO MENEZES DIREITO, FELIX FISCHER, ALDIR PASSARINHO JUNIOR, GILSON DIPP, HAMILTON CARVALHIDO and PAULO GALLOTTI concurred with the Judge-Rapporteur. Justice LUIZ FUX recused himself

and was excused. Justices ANTÔNIO DE PÁDUA RIBEIRO, NILSON NAVES, BARROS MONTEIRO, CESAR. ASFOR ROCHA, FERNANDO GONÇALVES, JORGE SCARTEZZINI, ELIANA CALMON, LAURITA VAZ and JOÃO OTÁVIO DE NORONHA were absent. Costs, as provided by the law.

Brasília (DF), 19 April 2006 (Date of Judgment).

JUSTICE FRANCISCO PEÇANHA MARTINS
President

JUSTICE FRANCISCO FALCÃO
Rapporteur

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REPORT

THE HONORABLE JUSTICE FRANCISCO FALCÃO: *Union Européenne de Gymnastique* seeks the recognition and enforcement of the arbitral award rendered by the Court of Arbitration for Sport, in Lausanne, Switzerland.

The records show that the Respondent entered into a contract with the Claimant for the acquisition and distribution of TV shows, on 18 November 1996, for the exclusive exhibition of gymnastics competitions to be held in 1997 and 1998.

The Respondent, however, did not comply with Clause 3 of the contract that called for the payment of US$ 100,000.00 (one hundred thousand dollars). This is why the Claimant has sought an award based on Clause 12, which provides that disputes arising out of the contract should be decided pursuant to the law of Switzerland by the Court of Arbitration for Sport in Lausanne.

Upon completion of the proceedings, the Court rendered an award ordering the Respondent to pay the amount established in the contract, with interest of 5% (five percent), which led the Claimant to seek the recognition and enforcement of the arbitral award.

The Respondent, however, challenges the recognition and enforcement, arguing, in line with the opinion from the representative of the Public Prosecutor's Office ["*Procurador-Geral da República*"] (541/555) that: (i) Respondent was not summoned to participate in the arbitral proceedings; (ii) the recognition and enforcement would offend public policy due to the lack of proper service of process; (iii) there is no Portuguese translation of the Arbitration Rules concerning sports; (iv) [the award] contravenes Article 51 of the Consumer Protection Code; and (v) the award did not take into consideration the Change in Circumstances theory ["*teoria da imprevisão*"].

The Federal Public Prosecutor's Office gave its opinion in favor of recognition and enforcement of the award.

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This is the report.

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OPINION

THE HONORABLE JUSTICE FRANCISCO FALCÃO (Rapporteur): The arguments brought forth by the Claimant stating that the signed contract is invalid do not find support under Brazilian law. The use of arbitration as a dispute settlement mechanism does not violate Brazilian public policy, as Law No. 9.307/96 (Arbitration Law) is currently in force. It is not possible to argue that the Respondent was forced to choose this mechanism, as it suggests, especially because there is no evidence to substantiate such a claim.

As provided by Article 38 of Law No. 9.307/96:

> "*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.*"

Therefore, in the present case, all the objections raised can be readily dismissed except the objection concerning the lack of proper service of process and consequently lack of opportunity for the Respondent to present its case.

It was argued that there was no service of process through letter rogatory. However, the sole paragraph of Article 39 of the Brazilian Arbitration Law considers that "*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."

Moreover, there is substantial evidence demonstrating that the Respondent received, through *courier*, not only the service of process, but also notifications requesting its appearance at the hearings eventually conducted ex parte. See, *e.g.* the documents of pp. 399/413.

The documents translated at pp. 160/185, from the Court of Arbitration for Sport, also corroborate this conclusion, where it is demonstrated that the Respondent has received a registered letter: (a) requesting it to declare if it agreed with the appointment of the sole arbitrator and providing a deadline for it to do so; (b) communicating the appointment of a sole arbitrator to decide the dispute; (c) inviting the Respondent to present its defense; and (d) requesting the Respondent's appearance at the hearings. The argument that Respondent was not offered the opportunity of a fair hearing ["*contraditório*"] is completely unfounded.

Therefore, since the formal legal requirements were observed, including those provided by Resolution No. 9/STJ [Superior Court of Justice] of 4 May 2005, I hereby grant recognition and enforcement of the foreign arbitral award.

This is my opinion.