Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 887 - EX (2005/0034903-8)

RAPPORTEUR : JUSTICE JOÃO OTÁVIO DE NORONHA
CLAIMANT : BOUVERY INTERNATIONAL S/A
COUNSEL : LUIZ NORTON NUNES AND OTHER(S)
RESPONDENT : IRMÃOS PEREIRA – COMERCIAL E EXPORTADORA LTDA.
COUNSEL : ARTHUR DE CASTILHO NETO AND OTHER(S)

SUMMARY

RECOGNITION AND ENFORCEMENT OF FOREIGN AWARD ["*homologação*"]. ARBITRAL AWARD. ARBITRAL PROCEEDINGS CONDUCTED EX PARTE. ARBITRATION AGREEMENT. NON EXISTENCE.

1. In proceedings for the recognition and enforcement of a foreign arbitral award rendered ex parte, the burden falls to the Respondent to prove that it was not dully notified of the commencement of the arbitral proceedings pursuant to Article 38, item III of Law No. 9.307/96

2. 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 unanimously decide to grant the recognition and enforcement requested, in accordance with the opinion of the Judge-Rapporteur. Justices Nilson Naves, Francisco Peçanha Martins, Humberto Gomes de Barros, Cesar Asfor Rocha, Ari Pargendler, José Delgado, Fernando Gonçalves, Carlos Alberto Menezes Direito, Felix Fischer, Aldir Passarinho Junior, Hamilton Carvalhido, Jorge Scartezzini, Paulo Gallotti, Francisco Falcão, Laurita Vaz and Luiz Fux concurred with the opinion of the Judge-Rapporteur.

Justices Antônio de Pádua Ribeiro and Eliana Calmon were excused. Justices Edson Vidigal and Gilson Dipp were absent.

Dr. Luiz Norton Nunes has refrained from presenting oral pleadings.

Judgment was chaired by Justice Barros Monteiro.

Brasília, 6 March 2006 (Date of Judgment).

JUSTICE BARROS MONTEIRO
President

JUSTICE JOÃO OTÁVIO DE NORONHA

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Rapporteur

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REPORT

THE HONORABLE JUSTICE JOÃO OTÁVIO DE NORONHA:

Bouvery Internacional S/A entered into a contractual relationship with Irmãos Pereira, Comercial e Exportação Ltda. for the purchase of 3,300 coffee sacks, as related by the former in its statement of claim, in which it is also stated that the contracts were not performed. Consequently, it commenced arbitral proceedings before the "Coffee and Pepper Arbitral Chamber of Havre", located at Le Havre, Paris.

In 1996, an arbitral award was issued in favor of the Claimant, ordering the Respondent to pay damages amounting to US$ 150,263.78, with interest and freight costs.

On 27 February 1998, Claimant sought the recognition and enforcement of the arbitral award before the Brazilian Supreme Court.

After being served, the Respondent raised objections to the Claimant's claim based on the following main arguments:

1º) "13. (..) considering that the French arbitral award (..) was not confirmed by any judicial court, and considering also, that the objections to the constitutionality of Article 35 of Law No 9.307/96 and numerous precedents from this Supreme Court, the Respondent challenges the request for recognition and enforcement of the arbitral award";

2º) "14. (..) It can be noticed at the outset that the Respondent did not take part in the arbitral proceedings (..), it did not exercise its right to a defense as granted by international treaties, by the Brazilian Constitution and by the Brazilian Arbitration Act in case it is found to be constitutional…;"

3º) “33. It is possible to conclude from an analysis of the abovementioned documents that there was no prior submission agreement [“*compromisso*”] with the purpose of establishing the arbitral tribunal; thus, the sole paragraph of Article 6 of Law No. 9.307/1996 is applicable and the claim should have been filed before the national courts having jurisdiction to hear the claim (..)”.

After Claimant’s reply, the Public Prosecutor’s Office concluded that the requirements of Article 37(I) and (II) of the Brazilian Arbitration Act had not been met, granting Claimant the opportunity to remedy such situation.

The documents referred to by the Public Prosecutor’s Office were produced. However, although translated, they lacked the consular seal. Claimant then explained that there is a judicial cooperation agreement in force since 1985 which is why the Brazilian embassy in Paris does not grant the required seal.

In a second statement, the Public Prosecutor’s Office considered that *“…the absence of unequivocal evidence of the existence of an arbitration clause has a direct effect on the issue of the Coffee and Pepper Arbitral Chamber of Le Havre’s jurisdiction to decide the dispute*”; and, also, that “*despite the proper conduct of the proceedings, there is no evidence that the service of process occurred as required by Article 38, item III, of the Brazilian Arbitration Act*”.

On 1 January 2005, due to the Constitutional Amendment No. 45, Justice Eros Grau determined the dispatch of the case to this Court, and the records were subsequently transmitted to me, on 7 December 2005.

This is the report.

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1. In proceedings for the recognition and enforcement of a foreign arbitral award rendered ex parte, the burden falls to the Respondent to prove that it was not dully notified of the commencement of the arbitral proceedings pursuant to Article 38, item III of Law No. 9.307/96

2. Recognition and enforcement granted.

OPINION

THE HONORABLE JUSTICE JOÃO OTÁVIO DE NORONHA (Rapporteur):

There are two essential issues discussed by the parties that were also highlighted by the Public Prosecutor's Office. The first one concerns the absence of an arbitration agreement, and the second one concerns the violation of the principles of full defense ["*ampla defesa*"] and fair hearing ["*contraditório*"] during the arbitral proceedings conducted by the Coffee and Pepper Arbitral Chamber of Le Havre, located at Le Havre, Paris, France.

As to the first issue – absence of an arbitration agreement – it appears to me that there is no doubt that there was an arbitration agreement and the documents in the records confirm this conclusion. The arbitration award lists the arbitration agreement contained in each contract. In addition, the documents attached at pp. 199/231 expressly refer to the arbitration agreement as well.

Therefore, this requisite was fully complied with and does not constitute a bar to the recognition and enforcement of the award.

The other issues raised by the Respondent's Answer refer to the violation of the principles of full defense and fair hearing during the arbitral proceedings. I note,

however, that Respondent did not participate in the proceedings because of its own lack of interest, not because the arbitral proceedings were improperly conducted.

Article 38(III) of Law No. 9.307, enacted on 23 September 1996, provides the following:

> "*The request for recognition or enforcement of an arbitral award may be denied only* ***if the defendant furnishes proof that****:*
> *(…)*
> *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;"*

According to the text of this provision, the Respondent bears the burden of proving a lack of communication concerning the arbitral proceedings; Respondent failed to do so. In its Answer, Respondent claimed repeatedly that it did not take part in the arbitral proceedings, but it failed to demonstrate that it did not receive any notification. In fact, it did not even claim that such a discrepancy actually occurred. Rather, the Respondent merely quoted the law establishing the requirement of notifications [regarding the arbitral proceedings].

The records demonstrate that the arbitral proceedings were conducted ex parte not because Respondent was not notified, but because of its voluntary absence from the proceedings. The award of which recognition and enforcement is sought supports this conclusion since it expressly states that the necessary notifications were made via telex and fax. In fact, the Respondent rejected the correspondence intimating the decision of the arbitral tribunal (document attached at pp. 13/14), despite the fact that the courier contracted for its delivery presented the document to it seven consecutive times, prompting the Claimant to deliver the notification through a notary official ["*notificação cartorial*"]. (p. 15)

The documents in the records also lead to the aforementioned conclusion; Respondent did not raise any objection to such documentation. Respondent had failed to meet the burden of proof required by law to establish the applicability of the above-mentioned provision.

The Respondent raised one last objection in its Answer concerning the Brazilian Supreme Court decision in the proceedings of SEC [Challenged Foreign Award] No. 5,206, in which, according to Respondent, the constitutionality of Article 35 of the Brazilian Arbitration Act was considered. The proceedings are now finalized and the following decision was rendered:

> "*Decision: The Court, unanimously, grants the interlocutory appeal* ["Agravo"] *to grant recognition and enforcement to the arbitral award, with partial dissenting opinions by Justices Sepúlveda Pertence, Sydney Sanches, Néri da Silveira e Moreira Alves, concerning the unconstitutionality of the sole paragraph of Article 6; Article 7 and its paragraphs, Article 41, the new wording of Article 267(VII) and Article 301(IX) of the Code of Civil Procedure,; and Article 42, all from Law No. 9.307 of 23 September 1996. So voted the President, Justice Marco Aurélio. Plenary Session, 12 December 2001*."

Therefore, since the Respondent did not meet the burden of proof set forth by Article 38(III) of Law No. 9.307/96 and since there was no violation of the principles of full defense and fair hearing, the requirements of Article 21(2) are fully met. I hereby **grant the recognition and enforcement of the foreign arbitral award.**

The Respondent will pay the legal costs and attorneys' fees, which I hereby establish in the amount of 10% of the value of the claim.

This is my opinion.