Unofficial English Translation

CHALLENGED FOREIGN AWARD No. 918 – IT (2006/0028461-5)

RAPPORTEUR	:	**JUSTICE CESAR ASFOR ROCHA**
CLAIMANT	:	GUIDOSIMPLEX DRIVE LTDA.
COUNSEL	:	JOSÉ FRANCISCO MACHADO AND OTHER(S)
RESPONDENT	:	CAVENAGHI CAVENAGHI E COMPANHIA LTDA.
COUNSEL	:	FERNANDO TADEU REMOR AND OTHER(S)

SUMMARY

CHALLENGED FOREIGN AWARD. ARBITRAL AWARD. LAW No. 9.307/96. COMPLIANCE WITH MANDATORY REQUIREMENTS. RECOGNITION AND ENFORCEMENT ["*homologação*"] **GRANTED.**

The recognition of arbitration is governed by Law No. 9.307/96 of 23 September 1996 in force.

It is necessary to grant recognition and enforcement to a foreign award once the mandatory requirements of the Arbitration Act and of Articles 5 and 6 of STJ [Superior Court of Justice] Resolution No. 9 are observed.

Recognition and enforcement granted.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned parties are involved, the Justices from the Special Court of the Superior Court of Justice in accordance with the following opinions decide unanimously to grant the request for recognition and enforcement in accordance with the opinion of the Judge-Rapporteur. Justices Ari Pargendler, José Delgado, Carlos Alberto Menezes Direito, Felix Fischer, Aldir Passarinho Junior, Gilson Dipp, Hamilton Carvalhido, Eliana Calmon, Paulo Gallotti, Laurita Vaz, Luiz Fux, Teori Albino Zavascki, Arnaldo Esteves Lima, Antônio de Pádua Ribeiro, Nilson Naves, Francisco Peçanha Martins and Humberto Gomes de Barros concurred with the Judge-Rapporteur.

Justices Francisco Falcão and João Otávio de Noronha were excused. Justice Fernando Gonçalves was absent.

Brasília, 26 June 2007 (Judgment date).

JUSTICE BARROS MONTEIRO, President

JUSTICE CESAR ASFOR ROCHA, Rapporteur

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REPORT

THE HONORABLE JUSTICE CESAR ASFOR ROCHA: *Guidosimplex – Drive Ltda.* requires recognition and enforcement of a foreign arbitral award rendered by the Arbitral College of Roma, Italy, against *Cavenaghi, Cavenaghi & Companhia Ltda.*

The Claimant states that the dispute relates to a distribution contract signed between the two companies and terminated due to the Respondent's breach.

After being summoned, the Respondent raised objections to the request, arguing, preliminarily, a lack of standing ["*ilegitimidade ativa*"], arguing that the Claimant company was not mentioned in the distribution contract signed in Italian territory, thus, it did not have standing to claim [the right of another company] in its own name.

The Respondent argued that the arbitral award was rendered beyond the scope of the arbitration clause, as there was an unjustified inversion of the burden of proof. It also violated national public policy. Respondent argued that the claim is of a condemnatory nature which once recognized and enforced, would constitute real credit in favor of the Claimant (pp. 86/99).

Asked to provide an opinion, the Federal Public Prosecutor's Office requested the proper rectification of the Statement of Claim, in the terms of Article 284 of the Code of Civil Procedure (p. 137), which I ordered.

At pp. 164/169, the Claimant attached to the records the updated powers of attorney, refuting the argument on lack of standing raised by the Respondent. It stated, in sum, that the company that was mentioned in the arbitral agreement and the Claimant in this dispute are the same, having as sole representative Mr. Luciano D'Amico. It alleged that the contracting party, *Guidosimplex – Societá In Nome Colletivo di Giancarlo Venturini*, with its place of business in Rome, Italy, represented by Mr. *Giancarlo Venturini* at the time of the contract, had granted special proxy to Mr. *Luciano D'Amico*, the Claimant's representative to act on behalf of both companies, "(…) *including special powers to execute in national territory the arbitral award that initiated the arbitral proceedings between* Guidosimplex S.N.C. and Cavenaghi &

Cavenaghi Ltda.". The Claimant argued that this would be a simple rectification of the Statement of Claim so that it would include as Claimant the company *Guidosimplex S.N.C. di Giancarlo Venturini*.

The records were sent again to the Federal Public Prosecutor's Office which, this time, gave opinion for the dismissal of the claim without prejudice, based on the argument that the Claimant had not demonstrated standing (pp. 215/216).

I ordered the presentation of the by-laws of both companies; attached at pp. 230/260, and later, the representative of the Federal Public Prosecutor's Office was heard insisting on the dismissal of the claim (p. 262).

This is the report.

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SUMMARY

CHALLENGED FOREIGN AWARD. ARBITRAL AWARD. LAW No. 9.307/96. COMPLIANCE WITH MANDATORY REQUIREMENTS. RECOGNITION AND ENFORCEMENT GRANTED.

The recognition of arbitration is governed by Law No. 9.307/96 of 23 September 1996 in force.

It is necessary to grant recognition and enforcement to a foreign award once the mandatory requirements of the Arbitration Act and of Articles 5 and 6 of STJ [Superior Court of Justice] Resolution No. 9 are observed.

Recognition and enforcement granted.

OPINION

THE HONORABLE JUSTICE CESAR ASFOR ROCHA (*RAPPORTEUR*):

Claimant requests recognition and enforcement of an Italian award rendered based on a *compromis*.

The honorable Public Prosecutor's Office gave its opinion to dismiss the claim without prejudice due to the Claimant's lack of standing.

I analyze this issue *prima facie*. Despite the legal considerations from the Public Prosecutor's Office, this preliminary argument cannot be accepted.

Indeed, the company mentioned in the arbitral award whose company name is Guidosimplex S.N.C. di Giancarlo Venturini and Claimant – Guidosimplex Drive Ltda., are not part of the same group of company, despite the fact that both of them work in the same industry of exportation and importation of materials designed for persons with disabilities.

The by-laws attached to the files on pp. 231/247 demonstrate that the Claimant (Guidosimplex Drive Ltda.) is a partner of the Italian company Guidosimplex S. N. C. and of Mr. Luciano D'Amico. The company's capital stock is divided among both partners and Mr. Luciano D'Amico is the company's manager and administrator (pp. 233 and 245).

The Italian company, managed by Mr. Giancarlo Venturini (p. 259), gave Mr. Luciano D'Amico a power of attorney, allowing him to file claims or request interim relief as it is the case so that the company could be represented on Brazilian territory.

Once it was foreseen that Guidosimplex lacked standing to request the recognition and enforcement of an arbitral award where it did not participate in the arbitration proceedings. I determined that the company [Guidosimplex S.N.C.] should be subpoenaed to rectify the irregularity, otherwise its initial petition could be rejected. (p. 139)

The Claimant then presented new documents, requesting, on the occasion, the correction of the Statement of Claim so that *Guidosimplex S.N.C. di Giancarlo Venturini* would be mentioned in it, thereby properly amending its position as per the records.

It is to be noted that *Guidosimplex S.N.C.* granted powers of attorney to Mr. *Luciano D'Amico* to act on its behalf. *Mr. Luciano D'Amico*, however, made the request on behalf of the company of which he was the representative, namely, *Guidosimplex Drive*. Notified of the irregularity, Mr. *Luciano D'Amico* corrected the mistake, amending the Statement of Claim to make it mention the name of the Italian company.

Under the case-law of the Supreme Court, the issue in these records does not encompass nor extends to topics, agreements or clauses not incorporated in the text of the decision under examination for recognition and enforcement. There should be no analysis of any other kind of legal transaction. What happened was a company appointed a representative to claim on its behalf in another jurisdiction.

Therefore, after these considerations, I refuse the argument of lack of standing.

The arbitral award and its recognition and enforcement is governed in Brazil by Law No. 9.307, of 23 September 1996, which has immediate application and is considered constitutional, as already decided by the Federal Supreme Court in the judgment of AgRg in SE [Interlocutory Appeal in Foreign Award] No. 5206-7/Reino da Espanha (DJ [Official Gazette] of 30 April 2004), Rapporteur Justice **Sepúlveda Pertence**. In this Court, SEC [Challenged Foreign Award] 507/EX, Rapporteur Justice **Gilson Dipp** (DJ [Official Gazette] of 13 November 2006).

Article 3 of the above-mentioned statute established that "the interested parties may submit the settlement of their disputes to arbitration by virtue of the arbitration agreement, which may be in the form of an arbitration agreement or a submission agreement ('*compromisso*')".

In order to be recognized and executed in Brazil, the foreign arbitral award is subject to recognition and enforcement, which, in the terms of Article 38 and 39 of Law No. 9.307/96, will be denied only when the Respondent demonstrates that:

> *Article 38 – 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.*
>
> *Article 39 – The request for recognition or enforcement of a foreign award shall also be denied if the Federal Supreme Court finds that:*
>
> *I – according to Brazilian law, the subject-matter of the dispute is not capable of settlement by arbitration;*
>
> *II – the recognition or enforcement of the award is contrary to Brazilian public policy.*

In its Statement of Defense, the Respondent alleges that the award was not rendered in accordance with item IV of Article 38 transcribed above, because it was outside the

limits established in the agreement. Respondent states that the contract undertaken did not contain a penalty clause, and no condemnation can be imposed for a possible breach.

The reasons presented by the Respondent, however, denote that the objections are concerned with the own merits of the arbitral award that dealt with the termination of the distribution contract because of a breach by one of the parties. As it is known, the recognition and enforcement of a foreign arbitral award is limited to the examination of formal aspects, and it is not possible to analyze the merits of the arbitration. In this sense, among innumerable others, see the SECs Nos. 760 (DJ of 28 August 2006) and 866 (DJ of 16 October 2006), both reported by Justice **Félix Fischer**.

The grant of the request is also conditioned upon compliance with the mandatory requirements mentioned in Articles 5 and 6 of Resolution No. 9 of the STJ [Superior Court of Justice], as well as compliance with the orders that were complied with and determined in the course of the procedure.

The arbitral award does not violate sovereignty, public policy or common decency in accordance with Article 6 of Resolution No. 9 of the STJ.

Thus, there being no obstacle preventing the recognition and enforcement, I grant the request. I order the Respondent to pay legal fees, established at R$ 5.000,00 (SEC [Challenged Foreign Award] No. 63, Rapporteur Justice **Eliana Calmon**, DJ of 27 March 2006; and SEC No. 802, Rapporteur Justice **José Delgado**, DJ of 19 September 2005).

This is my opinion.