

CHALLENGED FOREIGN AWARD No. 978 – EX (2006/0173771-1)

RAPORTEUR : JUSTICE HAMILTON CARVALHIDO
CLAIMANT : INDUTECH SPA
COUNSEL : SÉRGIO PALOMARES AND OTHER(S)
JOÃO BATISTA LIRA RODRIGUES JUNIOR AND
OTHER(S)
RESPONDENT : ALGOCENTRO ARMAZÉNS GERAIS LTDA.
COUNSEL : ANGELA MARIA AMARAL DA SILVA – PUBLIC
DEFENDER – AD HOC CURATOR
FEDERAL PUBLIC DEFENDER'S OFFICE – AD HOC
CURATOR

SUMMARY

FOREIGN ARBITRAL AWARD. RECOGNITION AND ENFORCEMENT [*“homologação”*]. ARBITRATION CLAUSE. LACK OF SIGNATURE. VIOLATION OF PUBLIC POLICY. PRECEDENTS FROM THE SUPERIOR COURT OF JUSTICE [*“Superior Tribunal de Justiça”*] AND THE FEDERAL SUPREME COURT [*“Supremo Tribunal Federal”*].

1. *“The absence of unequivocal expression of a party’s consent to join and be part of arbitral proceedings violates public policy, since it contravenes a principle embedded in our legal system, that requires explicit acceptance by the parties to submit commercial disputes to arbitration.”* (SEC [Challenged Foreign Award] 967/GB, Judge-Rapporteur José Delgado, DJ [Official Gazette] of 20 March 2006).
2. The lack of signature on the arbitration clause included in the sales contract, on its *addendum* and on the [document] appointing the arbitrator on Respondent’s behalf, prevents the recognition and enforcement of the award as it contravenes Article 4, paragraph 2, of Law No. 9.307/96, the principle of party autonomy and Brazilian public policy.
3. Request for recognition and enforcement of the foreign award is denied.

DECISION

Having seen, reported and discussed the records of the proceedings in which the aforementioned are involved, Justices of the SPECIAL COURT of the Superior Court of Justice decide to grant the recognition and enforcement according to the opinion of the Judge-Rapporteur. Justices Eliana Calmon, Francisco Falcon, Nancy Andrigli, Laurita Vaz, Joao Otávio de Noronha, Teori Albino Zavascki Albino Castro Meira, Arnaldo Esteves Lima, Nilson Naves, Ari Pargendler and Aldir Passarinho Junior concurred with the Judge-Rapporteur. Luiz Fux recused himself from participating in the decision. Justices Gilson Dipp and

Unofficial English Translation

Paulo Gallotti were excused and Justices Fernando Gonçalves and Felix Fischer. Justices were absent. Justices Gilson Dipp, Paulo Gallotti and Fernando Gonçalves were replaced, respectively, by Justices Teori Albino Zavascki, Castro Meira and Arnado Esteves Lima.

Brasília, 17 December 2008 (Judgment date)

JUSTICE *Cesar Asfor Rocha*, President

JUSTICE *Hamilton Carvalhido*, Rapporteur

CHALLENGED FOREIGN AWARD N° 978 – EX (2006/0173771-1)

REPORT

**THE HONORABLE JUSTICE HAMILTON CARVALHIDO
(Rapporteur):**

Indutech SPA seeks the recognition and enforcement of a foreign award rendered on 22 October 2004 by Helen S. Anderson, member of the Liverpool Cotton Association - England, in which Algocentro Armazéns Gerais Ltda. was ordered to pay US\$ 416,323.77 for breaching a contract for the supply of raw cotton.

The Claimant attached the foreign arbitral award bearing the consular seal, a translation thereof by a sworn translator and the contract for the sale of cotton.

Algocentro Armazéns Gerais Ltda. was served through a judicial order [“*carta de ordem*”] but it did not present its defense, which led to the appointment of an *ad hoc* curator, who argued that there was no evidence that the award was final and binding (p. 593). She argued that “(...) *it must be assessed whether the arbitrators have standing to declare the inexistence of the right to appeal since the award was not rendered by a judicial court*” (p. 633). She also argued that the Respondent did not sign the contracts that led to the decision.

On pp. 681/686, a declaration stating that the parties did not appeal the award can be found.

In its reply, the Claimant argues the following:

“(...) ”

Preliminarily, it must be emphasized that the verification and decision concerning the existence or otherwise of the signature in the contract is not allowed at this procedural stage, since the subject of analysis by this Court is the award rendered by a competent foreign tribunal.

It should be highlighted that if the signature had been an obstacle to render the award, this issue should have been raised during the arbitral proceedings. It must also be highlighted that the Respondent chose not to participate in the arbitral proceedings despite being duly summoned to do so.

Unofficial English Translation

Moreover, it is important to note that the request of the Public Prosecutor's Office for documents demonstrating that the parties entered into the contract ultimately violates the jurisdiction of the English Arbitral Tribunal; only the Tribunal had jurisdiction to conduct the proceedings and consequently it was the only one with legal authority to decide if the parties entered into a contract or not.

In any event, even if it was possible to analyze this legal question at this procedural stage it is worth highlighting that the foreign tribunal gave due consideration to the existence of the contract between the parties analyzing all the evidence presented by the parties.
(...)

In addition, the Respondent was fully aware of the arbitration and had consented to it since it even appointed an arbitrator, Mr. Paul Southworth (pp.)"

(...)" (pp. 723/725).

The Public Prosecutor's Office gave its opinion in favor of the recognition and enforcement of the award arguing there is evidence that the award is final and that "(...) *the parties had entered into a contract, given the continuous business relationship of the parties.*" (p. 730)

This is the report.

CHALLENGED FOREIGN AWARD N° 978 – GB (2006/0173771-1)

OPINION:

THE HONORABLE JUSTICE HAMILTON CARVALHIDO
(Rapporteur):

Mr. President, I quote from the text of Law No. 9.307 of 23 September 1996, which governs arbitration:

“Article 3 - 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).

Article 4 - An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.

*§ 1 - The arbitration clause **shall be in writing** and it can be inserted in the main contract or in a document to which it refers.*

§ 2 - In adhesion contracts, the arbitration clause will only be valid if the adhering party takes the initiative to initiate arbitration proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type.

Article 5 - If the arbitration clause makes reference to the rules of a particular arbitral institution or specialized entity, the arbitration shall be commenced and conducted in accordance with such rules; it being also possible that the parties determine in the arbitration clause itself, or in a stand-alone document, the agreed procedure for commencing arbitral proceedings.”

The national law recognizes arbitration as a dispute settlement mechanism. However, its effectiveness is conditioned upon **an explicit written expression of the parties regarding the choice of arbitration.**

This choice may be established in a separate document or in the contract itself, provided that the declaration of consent to the arbitration clause is express and

specific; thus tacit or implied consent is not allowed because the default rule is the selection of State courts.

Therefore, it is not necessary to discuss the existence or otherwise of the contract that is the object of a foreign award, since such discussion is outside the scope of the proceedings for recognition and enforcement as the Claimant correctly stated.

Indeed, the award affirmed the existence of the purchase based on the following “(...) *based on legal principles or commercial practice, the establishment of a valid contractual relationship does not depend on mutual signatures [of the parties] as long as a valid offer and acceptance can be established. In this case, and taking into account particularly the course of negotiations between the parties and the ongoing commercial relationship existing between them, I think the Sellers’ denial of the existence of a contract contradicts the available evidence.*”(pp. 211/212).

In the present case, however, as the case records demonstrate, the arbitration clause contained in the contract for the supply of cotton (pp. 57) and its *addendum* (p. 66), as well as the appointment of an arbitrator on Respondent’s behalf (p. 529), all lack a signature from Algocentro Armazéns Gerais Ltda., lacking, therefore, its consent to arbitration.

In consequence, since there is no clear evidence in the records of an autonomous declaration of consent from the Respondent to refrain from recurring to state courts in favor of arbitration, the request for recognition and enforcement of the award amounts to a violation of Article 4(2) of Law No. 9.307/96, national public policy and the principle of party autonomy. Pursuant to Article 5(I) and Article 6 of Resolution No. 9 of 4 May 2005, of this Superior Court of Justice, recognition and enforcement cannot be granted:

“Article 5 – The following are mandatory requirements for granting recognition and enforcement to a foreign decision:

I – the decision was rendered by the competent authority;

(...)

Article 6 - Foreign decisions will not be granted recognition and enforcement and letters rogatory will not be granted exequatur if they violate national sovereignty or public policy.”

This reasoning is consistent with precedents from the Superior Court of Justice as the opinion of the honorable Justice Felix Fischer, Judge-Rapporteur of SEC 866/EX, demonstrates in a case analogous to this one:

“(…)

*In fact, Brazilian legislation requires the arbitration clause to be stipulated **in written form** in the contract, provided however that such clause may **be signed in a separate document that refers to the contract**. In the wording of Article 4(1) of Law No. 9.307/96:*

“Article 4 - An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.

*§ 1 - The arbitration clause shall be in writing and it can be inserted **in the main contract or in a document to which it refers**.*

*Furthermore, Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention), incorporated into the Brazilian legal system through Decree No. 4.311/02, provides that “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**”.*

*Thus, the fact that the parties entered into the contract verbally does not preclude the establishment of an arbitration agreement, if the latter **was agreed upon** expressly and in writing in another document or **correspondence referencing the contract**.*

***In the case at hand**, despite the fact that the parties executed the contract verbally, the parties exchanged telexes to confirm the sales operation; in these telexes there was an arbitration agreement with an explicit reference to the GAFTA arbitration rules. **However**, the **Claimant** presented telexes (pp. 292/295, 298/301, 304 and 308), that make reference to the GAFTA arbitration clause, **but do not include Respondent’s signature or any other form of consent to the proposal**. The telexes were sent to the broker **CEREAGRO S/A** by a third-party company, the Argentinean broker **MERCOPLATE S/A**, representing Claimant’s interests.*

*In fact, it is stated on p. 5 of the records (**Claimant’s statement of claim**: ‘The four contracts concerning the award of which recognition and enforcement is sought were negotiated by telephone in São Paulo. The broker **Mercoplante S/A**, **from Buenos Aires designated the broker Cereagro S/A located in São***

Paulo to act on Claimant's behalf; on the other side, Mr. Antonio Adriano Farinha de Campos, acted on behalf of Respondent."

Indeed, there is no evidence in the records that the Respondent agreed with the arbitration clause deciding to refrain from recurring to State courts. Thus, the Arbitral Tribunal lacks jurisdiction.

(...)"(DJ [Official Gazette] 16 October 2006).

See also the SUMMARY of the **decision**:

"FOREIGN AWARD. JUDICIAL REVIEW. IMPOSSIBILITY TO REVIEW THE MERITS. NON-EXISTENCE OF AN ARBITRATION CLAUSE. LACK OF JURISDICTION OF THE ARBITRAL TRIBUNAL. VIOLATION OF NATIONAL PUBLIC POLICY.

I - The judicial review of a foreign arbitral award is limited to formal aspects. It is not possible to review the merits of the arbitration award.

II - There is no evidence in the records that demonstrates the Respondent's consent to the arbitration agreement.

III - The decision of which recognition and enforcement is sought violates national public policy, since the jurisdiction of the Arbitral Tribunal depends on the existence of a valid arbitration agreement (Article 37(II) and Article 39(II), of Law No. 9.307/96). Precedents of the Federal Supreme Court.

IV - In the present case, the Respondent presented its defense in the arbitration proceedings arguing, preliminarily, that the Arbitral Tribunal's lacked jurisdiction since it was not possible to establish consent to the arbitration, not even tacitly.

Recognition and enforcement denied." (SEC [Challenged Foreign Award] 866/GB, Judge-Rapporteur Félix Fischer, DJ of 16 October 2006).

The following decision from this Superior Court of Justice is also noteworthy:

"CIVIL PROCEDURE. SEC – CHALLENGED FOREIGN AWARD. RECOGNITION AND ENFORCEMENT. IMPOSSIBILITY. CHOICE OF ARBITRATION. NO EXPLICIT

CONSENT FROM RESPONDENT. VIOLATION OF PUBLIC POLICY. DENIAL OF THE REQUEST FOR RECOGNITION AND ENFORCEMENT.

1. PLEXUS COTTON LIMITED, a company organized and existing under the laws of England, based in Liverpool, England, seeks the recognition and enforcement of a foreign arbitral award, issued by the LIVERPOOL COTTON ASSOCIATION - LCA, which ordered SANTANA TÊXTIL LTDA. to pay Claimant the amount of US\$ 231,776.35. In addition it determined the partial billing of the goods or the equivalent of 2,204,600 pounds net on account of a breach of the contract executed by the parties.

2. As the records show Respondent's consent to the arbitration was not demonstrated in this case, since its signature does not appear on the contracts in which the arbitration clause was established.

3. The absence of an unequivocal demonstration of a party's consent to join and be part of arbitral proceedings violates public policy, since it contravenes a principle embedded in our legal system which requires explicit acceptance by the parties to submit commercial disputes to arbitration.

4. In this particular case Respondent did not explicitly consent to arbitration which precludes the use of this dispute settlement mechanism in the ongoing dispute.

5. Request for recognition and enforcement denied.” (SEC 967/GB, Judge-Rapporteur José Delgado, DJ 20 March 2006).

See also from the Supreme Federal Court:

“FOREIGN ARBITRAL AWARD. ARBITRATION AGREEMENT. ABSENCE. JURISDICTION OF THE ARBITRAL TRIBUNAL NOT DEMONSTRATED. RECOGNITION AND ENFORCEMENT DENIED.

Unofficial English Translation

1. The request for recognition and enforcement of the foreign arbitral award must be accompanied by the arbitration agreement. Without the arbitration agreement it is not possible to assess the jurisdiction of the tribunal (Law No. 9.307/96, Article 37(II), and 39(II) and Article 217(I) of the RISTF [Institutional Rules of the Federal Supreme Court]).

2. The buyer did not sign the purchase and sale contract. The terms of the contract do not allow the conclusion that the parties agreed to the arbitration agreement. Further, there is no written document that indicates otherwise. Lack of evidence showing Respondent's explicit consent to refrain from having recourse to state courts in favor of arbitration.

3. Since the jurisdiction of the Tribunal that rendered the decision was not established, the Federal Supreme Court cannot grant recognition and enforcement. Request denied.” (SEC 6753/UK, Judge-Rapporteur Maurício Correa, DJ of 4 October 2002).

Based on the aforementioned, I deny the request for recognition and enforcement of the foreign award.

Pursuant to Article 20, paragraph 4 of the Code of Civil Procedure, attorneys' fees are hereby established in the amount of R\$ 1.000,00.

No legal costs incurred (Superior Court of Justice Resolution No. 9/2005, Article 1, sole paragraph).

THIS IS MY OPINION.