Brazil No. 11, Indutech SpA v. Algocentro Armazéns Gerais Ltda, Superior Tribunal de Justiça [Superior Court of Justice], SEC no. 978-EX, 17 December 2008

Facts

Indutech SpA (Indutech), the buyer, and Algocentro Armazéns Gerais Ltda (Algocentro), the seller, negotiated the sale and purchase of cotton in the context of an ongoing business relationship. Algocentro sent Indutech an offer; Indutech returned a signed confirmation of order, which contained a clause referring disputes to arbitration at the Liverpool Cotton Association (LCA).

A dispute arose between the parties in respect of an alleged lack of performance by Algocentro. Indutech commenced LCA arbitration proceedings. Algocentro appointed an arbitrator; eventually, a different person was appointed as sole arbitrator. On 22 October 2004, the arbitrator rendered an award in favor of Indutech. Indutech then sought enforcement of the LCA award in Brazil.

Algocentro, through its curator as it was by then in liquidation, argued in reply that the court should ascertain that the award had been rendered on the basis of a valid arbitration clause, as there appeared to be no signed document containing Algocentro's acceptance of that clause.

The Superior Court of Justice agreed with Algocentro and denied enforcement of the LCA award. It reasoned that a valid submission to arbitration requires that the parties expressly manifest their intention to refer their dispute to arbitrators and that they do so in writing; tacit or implicit acceptance does not suffice. While *page "424"* there was indeed a valid contract between the parties – since no legal principle or commercial practice requires, as alleged by Algocentro, that a confirmation of order following a valid offer be countersigned by the offeror – Algocentro had not made apparent its intention to accept the arbitration clause in the confirmation either by signing the confirmation itself or by any other written manifestation of intent. Even the appointment of an arbitrator in the LCA arbitration, made on behalf of Algocentro, was not signed or otherwise approved by Algocentro

The court referred to two of its earlier decisions and to a decision of the Federal Supreme Court reaching the same result in similar cases.

Excerpt

Author

Albert Jan van den Berg

Jurisdiction

Brazil

Court

Superior Tribunal de Justiça [Superior Court of Justice]

Case date

17 December 2008

Case number

SEC no. 978-EX

Parties

Plaintiff, Indutech SpA (nationality not indicated)
Defendant, Algocentro Armazéns Gerais Ltda (nationality not indicated)

Key words

arbitration agreement “in writing”
lack of express acceptance of arbitration agreement as ground for violation of public policy

Applicable legislation

New York Convention

[1] The court noted that Indutech supplied, together with its petition for recognition of the LCA award, the sale contract containing the arbitration agreement, a consular certification of the award and its translation by a sworn translator.

[2] The court then quoted the relevant provisions of the Brazilian Law on Arbitration, Art. 3, Art. 4 and Art. 5,(1) and continued: "Thus, [Brazilian] *page "425"* legislation provides for arbitration as a means for the settlement of disputes, but requires as a condition for its efficacy that the parties expressly manifest in writing their choice therefor. This manifestation can be either in a separate document or in the contract itself, as long as there is an express and specific agreement in respect of the arbitration clause; a tacit or implicit agreement is not admitted, since this is an exception to the rule of state [court] jurisdiction.

[3] "This said, the (non-)existence of the contract that is the subject matter of the foreign award is not to be discussed, because this goes beyond the scope of the recognition proceedings, as correctly argued by claimant. In fact, the existence of the sale contract was affirmed and recognized in the arbitral award, because

> … there is no legal principle or commercial practice deeming that countersignatures are essential for establishing a valid contractual relationship, as long as it can be determined that there were a valid offer and acceptance. In this case, taking into account in particular the negotiations between the parties and their still-continuing commercial relationship, I deem that the sellers' denial of the existence of the contract contradicts the existing evidence.

[4] "Here, however, it appears from the file that neither the arbitration clause in the contract for the supply of cotton … nor the appointment of an arbitrator in the name of the defendant … bears the signature or any form of approval [*visto*] of Algocentro; hence, there is no consent to the arbitration agreement.

[5] "As a consequence, since there is no proof in the file of the manifest autonomous declaration of the defendant's intention to waive court jurisdiction in favour of arbitration, the request [for recognition] leads to a violation of Art. 4(2) of Law no. 9.307/96, the principle of [party] autonomy and Brazilian public policy. Recognition [*homologação*] must fail in accordance with Art. 5(I) and Art. (6) of Resolution no. 9 of 4 May 2005 of the Superior Court of Justice, which reads:

> *Art. 5.* The essential requirements for the recognition of a foreign decision are:
>
> > I - that it was issued by a competent judge;….
>
> *Art. 6.* No foreign decision shall be recognized and no letter rogatory shall be granted exequatur if they violate sovereignty or public policy.

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[6] "The jurisprudence of this Superior Court of Justice is no different; we refer on this point to the well-formulated grounds given … in case SEC [*Sentença estrangeira contestada* – Impugned

Commentary Cases

¶ 504 + ¶ 524 (lack of valid arbitration agreement)

Publication Source

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Source

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foreign award] no. 866/EX,[(2)] which was similar to the present one:

> Brazilian law does require that the arbitration clause be stipulated in writing in the contract; however, the arbitration clause can also be contained in a separate document that refers to the contract. This is the meaning of Art. 4 First Paragraph of Law no. 9.307/96 [text omitted]. Furthermore, Art. II(2) of [the 1958 New York Convention], incorporated into the Brazilian legal system by Decree no. 4.311/02, provides that "agreement in writing" shall mean an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Hence, the fact that the contracts concluded between the parties were concluded orally would not hinder by itself the stipulation of an arbitration clause, provided that this clause was expressly agreed in writing in another document referring to the original contract or in an [exchange of] correspondence.
>
> In the present case, the claimant argues that although the contracts were concluded orally, the telexes that the parties exchanged to confirm the sale and purchase transaction contain an arbitration clause referring expressly to the GAFTA arbitration rules.
>
> [However], the telexes supplied by the claimant … although they do refer to the GAFTA arbitration clause, do not contain the defendant's signature or any other form of approval of [the claimant's] proposal, as they were sent to broker Cereagro S/A by a third company, Argentinian broker Mercoplate S/A, which represented the claimant.
>
> (….)
>
> There is no sure evidence here that the defendant agreed to the arbitration clause, [thereby] waiving [its right to] court proceedings. Hence, the arbitration [tribunal] lacked jurisdiction. (in Diário da Justiça (DJ), 16 October 2006).

(….)

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[7] "See also, in the same sense, the following decision of this Superior Court of Justice:

> 1. Plexus Cotton Limited, [a UK company], seeks recognition of the foreign arbitral award rendered by the Liverpool Cotton Association (LCA), which directed Santana Têxtil Ltda to pay [a certain sum] to the claimant….
>
> 2. In the case at issue, as it appears from the file, there is neither expression nor intent of the defendant in favour of arbitration, since the contracts containing the arbitration clause do not bear its signature.
>
> 3. The equivocal manifestation of the party's intent to

adhere to and commence arbitration violates public policy, because it violates the principle, engraved in our legal system, that express acceptance of the parties is required to submit the settlement of disputes arising out of private contractual relationships to arbitration.

4. In the case at hand, there was no express manifestation by the defendant in respect of the choice of arbitration; hence, this judicial means may not be used in the present dispute.

5. The request for recognition is denied. (SEC no. 967/GB … in Diário da Justiça (DJ), 20 March 2006).

[8] "[See also the decision] of the Federal Supreme Court:

1. The request for the recognition of a foreign arbitral award must be accompanied by the arbitration agreement, without which the jurisdiction of the court rendering the decision cannot be ascertained (Law no. 9.307, Art. 37(II) and Art. 39(II);(3) RISTF, Art. 217(I)).(4)

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2. [There is here] a sale and purchase contract not signed by the buyer, whose terms do not lead to conclude that an arbitration clause was agreed on; [there are] also no other documents in writing to this aim. [Hence, there is] no proof of the manifest autonomous declaration of intent of the defendant to waive state [court] jurisdiction in favour of [arbitration].

3. Since it is not proved that the court rendering the foreign award had jurisdiction, [the award] cannot be recognized by the Federal Supreme Court.

Request denied. (SEC no. 6753/UK … Plenary Session, in Diário da Justiça (DJ), 4 October 2002).

[9] "On the above grounds, I deny the request for recognition of the present foreign award…." *page "429"*

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[1] Arts. 3, 4 and 5 of Brazilian Law no. 9.307 of 23 September 1996 read:

Article 3

"The interested parties may submit the settlement of their disputes to an arbitral tribunal by virtue of an arbitration agreement, which may be in the form of either an arbitration clause or a submission to arbitration (*acte de compromis*)."

Article 4

"The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the

contract.

First Paragraph: The arbitration clause shall be in writing contained in the contract itself or in a separate document referring thereto.

Second Paragraph: In adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral 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 parties, in the arbitration clause, select the rules of an arbitral institution or specialized entity, the arbitral proceedings shall be commenced and conducted pursuant to such rules; it being also possible that the parties determine in the arbitration clause itself, or in a separate document, the agreed procedure for instituting the arbitral proceedings."

[2] Reported in Yearbook XXXIII (2008) pp. 371-380 (Brazil no. 4).

[3] Art. 37(II) of the 1996 Law reads:

"The request for homologation of a foreign arbitral award shall be submitted by an interested party; this written motion shall comply with the procedural law requisites of Art. 282 of the Code of Civil Procedure, and must be accompanied by:

....

II - the original or a duly certified copy of the arbitration agreement, as well as a sworn translation."

Art. 39(II) of the 1996 Law reads:

"The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court ascertains that:

....

II - the decision is offensive to national public policy."

[4] Art. 217 of the Internal Rules of the Brazilian Federal Supreme Court (*Regimento Interno do Supremo Tribunal Federal* – RISTF) reads:

"The essential requirements for the recognition of a foreign arbitral award are:

I - That it was issued by a competent judge;

II - That the parties were duly summoned or that default was legally ascertained;

III - That it has become final and binding and that it complies with the necessary formalities for execution in the place where it was rendered;

IV That it is by the Brazilian consul and accompanied
- by an official translation."