

## Supreme Court, Judgment 19 March 2009 (Ref. 5014/2009)

**Rapporteur:** Silva Salazar

**Case:** Case No. 299/09

**Jurisdiction:** Civil

*Colectânea de Jurisprudência, no. 214 Tomo I/2009 (January/April)*

### Summary

#### **FOREIGN ARBITRAL AWARD. Enforceability of Award. Law of International Conventions.**

I – Under the provisions of the New York Convention on the recognition and enforcement of foreign arbitral awards, Portugal recognises and enforces arbitral awards handed down in other contracting states under the terms of the rules adopted in the domestic legal system.

II- As the arbitral award that is subject to execution relates to private rights and was handed down by a Contracting State, in light of the principle of equivalency, the Portuguese legal system grants automatic enforceability to foreign arbitral awards without the need for review or confirmation.

C.A.

#### **Provisions applied:**

Articles **46.1**, **48.2**, **49.1** and **1094.1 CPC** (Ref. 2/1961).

#### *Supreme Court Judgment:*

On 2/2/05, S.A., with its registered office in Brussels, Belgium, began common enforcement proceedings at the Lisbon Secretariat-General for Enforcement against *B - Sociedade Nacional, S.A.*, with its registered office in Lisbon. The enforcement proceedings were based on an award of 5/2/02 handed down by the International Arbitration Tribunal of the International Chamber of Commerce in Zurich, Switzerland.

By the application on page 184 and following, the defendant sought to rely on a lack of grounds – because the arbitral award had not been previously recognised in Portugal – and as a consequence, applied for the enforcement to be rejected.

The applicant replied on pages 193 and following, arguing that the said award was valid and sufficient as grounds for enforcement.

In the decision on pages 256 to 260, the judge considered that "as the applicant had not previously obtained prior recognition of the foreign arbitral award being enforced, it is clear that the said award cannot be grounds for enforcement" and rejected the enforcement.

The request for clarification presented by the applicant was refused and the applicant then appealed the order unsuccessfully, as the Appeal Court denied the appeal by its judgment on pages 409 to 414, hence this appeal, again by the applicant, which in its allegations, sets out the following conclusions:

(...)

Having gathered the applicable legal provisions, a decision falls to be bearing in mind that the facts established

as being relevant to the decision are contained in the pleadings themselves described above.

To make a decision, as can be seen from the conclusions of the appellant's allegations, the only issue to be decided is whether a foreign arbitral award to which the New York Convention applies can serve as the grounds for enforcement proceedings in Portugal without first being subject to review and confirmation by the Portuguese courts.

First of all, it must be pointed out that a foreign arbitral award may be grounds for enforcement proceedings under article 46 (1) paragraph (a), and not paragraph (d), of the Civil Procedure Code because it does not involve any of the documents referred to in the latter paragraph, but rather an arbitral award.

On the other hand, article 49 (1) of the Civil Procedure Code provided that "judgments given by courts or arbitrators in a foreign country may only provide the basis for execution after being reviewed and confirmed by the competent Portuguese court." This means that no formality is imposed over and above review and confirmation.

Now, however, the same rule also provides that "without prejudice to what is established in treaties, conventions, EU regulations and special laws, judgments given by courts or arbitrators in a foreign country may only provide the basis for execution after being reviewed and confirmed by the competent Portuguese court."

This is, then, the current wording of that provision as introduced by Decree-Law 38/03 of 8/3, which necessarily has the objective, above all, of enshrining the due respect the Portuguese legal system should have for international treaties and conventions to which Portugal is a signatory. This means awards made by arbiters in a foreign country may only serve as a basis for execution in Portugal, not after being recognised, but after being reviewed and confirmed by the competent Portuguese court, as long as this limitation does not infringe, among others, international treaties and conventions.

It must also be understood that, under the terms of article 48 (2) of the same Code, "awards made by arbitral tribunal are enforceable under the same terms as judgments of the ordinary courts". This means that when this provision is brought up against the one referred to previously, as the decisions of the ordinary courts of the country are not subject to review and confirmation to be enforceable, then neither are the decisions of the country's arbitral tribunals, thus enshrining a principle of equivalency between them.

However, and further, article 1094 (1) of the same Code provides that, "without prejudice to what is established in treaties, conventions, EU regulations and special laws, no decision on private rights given by a foreign court or by arbiters in another country, takes effect in Portugal, whatever the nationality of the parties, without being reviewed and confirmed." This wording is equivalent to the above cited article 49 (1) and consequently must be interpreted with attention to the meaning of the former.

Now, what the appellant seeks to rely on is precisely an international convention which, in his opinion, makes review and confirmation of foreign arbitral awards between respective signatory States unnecessary: it is the New York Convention of 10 June 1958 on Recognition and Enforcement of Foreign Arbitral Awards, which Portugal signed, - thus acceding to the Convention -, formulating its decision by the deposit of the respective instrument on 18/10/94, following its approval for rectification, done by means of a Resolution of the Assembly of the Republic number 37/94, of 8/7, having come into force in our country on 16/1/95.

The provision that is essentially of interest for the decision on the issues raised in this appeal is article III of the said Convention, according to which "Each Contracting State shall recognize arbitral awards as binding and

enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

In these circumstances, we have to start from the first part of this provision, which stipulates that each contracting state must recognise the authority and allow the enforcement of the arbitral award under the terms of the procedural rules adopted in that state, reconciling this, however, with its second part in which it is determined that this recognition and enforcement may not be subject to conditions and costs that are substantially more onerous than those applied for the recognition or enforcement of domestic arbitral awards.

Now, as we have pointed out, domestic arbitral awards are not subject to review and confirmation in order to constitute grounds for enforcement.

It is certain that, faced with the provisions of the said article 1094 (1), a general principle of equivalency between foreign judgments and foreign arbitral awards in respect of private right is deemed to be enshrined as regards the need for review and confirmation for them to be recognised as a basis for enforcement. However, this is without prejudice to what is laid down, specifically, in international conventions.

And, as we have seen, in its last part the said article III of the Convention establishes equivalence – which was desired by Portugal upon becoming a signatory – in respect of the recognition of the effectiveness for enforcement purposes and the consequent enforcement, between foreign arbitral awards to which the same Convention applies and domestic arbitral awards. This means that, as the latter are not subject to review and confirmation to be enforced, then neither are the former.

It is clear that we have to bear in mind that two frameworks for establishing the effectiveness of arbitral awards in terms of enforcement are enshrined in the various legal systems. On the one hand, there are those which submit any arbitral award – whether handed down in the country of enforcement, or in a different country – to a procedure for the granting of an enforcement order, because the arbitral awards is not equivalent to a decision of the courts and can only have the same effect as the latter after being scrutinised by the country's judicial system. On the other hand, there are those that give equal treatment to arbitral awards made by arbitral tribunals in the country of enforcement and judgments handed down by the courts of this same country – the arbitral awards handed down by arbiters in a country different to the one of enforcement are submitted to the same procedures to which judgments of a foreign court are submitted.

By reading the said articles 48 (2), 49 (1) and 1094 (1) together, at least when the decisions are in respect of private rights as is the case in these proceedings, the result is that the Portuguese legal system follows this second model as a general principle. This means that while domestic arbitral awards are enforceable under the same terms as decisions of the ordinary courts, arbitral awards made by arbiters abroad are equivalent, in principle, to judgments given by foreign courts. This means they must all be submitted to review and confirmation in order to be enforced in Portugal.

However, as we have said, this is the case when such rules are not overridden by international conventions, as has been established in these proceedings. This means that, as the party that is now the appellant has met the requirements set out in article IV of the New York Convention to obtain recognition and enforcement, it is concluded that review and confirmation of the arbitral award in question or any prior independent procedure for

recognition of the effectiveness of the award for the purposes of enforcement in Portugal are unnecessary.

This is sufficient to conclude that the appellant's argument succeeds.

#### Decision

For these reasons, we agree to grant the appeal and overturn the judgment appealed and with it the order at first instance that was challenged and to determine that the enforcement should proceed.

Costs to be paid by the respondent.

Lisbon, 19 March 2009

Silva Salazar

Nuno Cameira

Sousa Leite

