**Translation of relevant portions of the Brazilian decisions**

**SEC 611:**

**Plantiffs:** FIRST BRANDS DO BRASIL LTD. and STP DO BRASIL LTD.

**Defendants:** PETROPLUS SUL COMÉRCIO EXTERIOR S/A PSC *et. al.*

*ICC arbitration seated in Miami*

*Decision rendered in 2006*

**Relevant portions of the decision:**

RECOGNITION OF FOREIGN ARBITRAL AWARD. MERITS ISSUE. IRRELEVANCE. ARTICLE 38 OF THE BRAZILIAN ARBITRATION ACT (“BAA”, LAW N. 9.307/96).

The dispositions of article 38 of the BAA present a wider range of legal situations that may be presented as defense grounds in comparison to that provided by article 221 of RISTF (Internal Regiment of Brazil’s Superior Court of Justice), but do not go so far as to allow the invasion of the award's merits.

The existence of an annulment action in connection with the foreign arbitral award before domestic courts is not an impediment to the recognition of the award, and does not harm national sovereignty, which would require the existence of a domestic decision regarding the same matters decided by the arbitration court. The BAA, in its article 33, second paragraph, establishes that the judicial award which grants the annulment claim shall determine that the arbitrator or arbitral tribunal render a new arbitral award, which means that the judge is not allowed to issue a substitute decision to the one issued by the arbitrator or tribunal. Hence, there are no conflicting decisions. Award recognized.

**Additional relevant portion of the decision:**

With regard to the legitimacy of filing an annulment lawsuit before Brazilian Courts, in view of the provisions of Decree n. 4.311/2002 (referring to the ratification of the NY Arbitration Convention), this is a matter to be resolved by the Court before which the lawsuit was filed.

**SEC 5782:**

**Plaintiff:** EDF INTERNATIONAL S/A

**Defendants:** ENDESA LATINOAMÉRICA S/A and YPF S/A

*ICC arbitration seated in Argentina*

*Decision rendered in 2015*

**Relevant portions of the decision:**

RECOGNITION OF CONTESTED FOREIGN AWARD. ARTICLE 34 OF THE BAA. APPLICATION OF INTERNATIONAL TREATIES, WHICH HAVE EFFECT IN THE INTERNAL LEGAL SYSTEM. INITIAL APPLICATION OF THE ARBITRATION LAW UPON THEIR ABSENCE. ARBITRAL AWARD ANNULED IN THE COUNTRY OF ORIGIN, BY MEANS OF A JUDICIAL AWARD THAT PRODUCED *RES IUDICATA*. EXAMINATION OF EVIDENCE. UNREASONABLENESS OF THE EXAMINATION OF THE MERITS OF THE ARBITRAL AWARD. IMPOSSIBILITY OF ANALYZING THE FOREIGN AWARD. DISMISSAL OF THE RECOGNITION CLAIM.

Article 34 of the BAA determines that the foreign arbitral award shall be initially recognized in Brazil in accordance with international treaties that are in effect in the internal legal system; only in their absence, the provisions of the BAA will be applied.

In the case at hand, the arbitral award was judicially annulled by the Argentine judiciary, by means of a decision that is *res iudicata*.

The legislation applicable to the matter – New York Convention, Article V(1)(e) of the Decree n. 4.311/2002; Panama Convention, article 5(1)(e) of the Decree n. 1.902/1996; Brazilian arbitration law (n. 9.307/1996), Article 38, item VI; and the Las Leñas protocol, article 20(e) of the Decree n. 2.067/1996, all internalized in the Brazilian legal system – leaves no doubt as to the indispensability of the foreign award, whether arbitral or not, to have produced *res iudicata*  to be recognized by this Superior Court, with domestic scholars sharing the same understanding.

The Internal Regiment of this Court provides for the fulfillment of such requirement for the recognition of a foreign decision, whether arbitral or not, as can be seen from article 216-D.

The recognition proceeding does not add efficacy to the foreign judgment, but only releases the efficacy contained therein, internalizing its effects in our country; the recognition of foreign awards, thus, does not remove defects or gives a different interpretation to the decision of the foreign state. Precedents of this Court and the Supreme Court with the same opinion.

In the case under examination, the arbitration award is null in Argentina - because of a state court decision rendered in that country, with *res iudicata* duly proven in the records -, and thus also null in Brazil; a decision which cannot be recognized. Request of recognition of foreign award denied.

**SEC 9412:**

**Plaintiffs:** ASA BIOENERGY HOLDING A G *et. al.*

**Defendant:** ADRIANO OMETTO AGRICOLA LTD.

*ICC arbitrations seated in NYC*

*Decision rendered in 2017*

*Prior decision by a NY Court rejecting an annulment claim*

*Justice Felix Fischer, reporting justice, voted for the recognition of the awards*

*Justice João Otávio de Noronha’s vote taken as the final decision*

**Relevant portions of the decision:**

RECOGNITION OF TWO FOREIGN AWARDS. MERITS REVIEW. IMPOSSIBILITY, EXCEPT IF AN OFFENSE TO PUBLIC POLICY IS PRESENT. ALLEGATION OF PARTIALITY OF THE ARBITRATOR. ASSUMPTION OF VALIDITY OF THE DECISION. MOTION FOR ANNULMENT BROUGHT IN THE STATE WHERE THE ARBITRATION WAS SEATED. BINDING OF THE SUPERIOR COURT OF JUSTICE TO THE DECISION OF THE AMERICAN JURISDICTION. NON-OCCURRENCE. EXISTENCE OF A CREDITOR-DEBTOR RELATIONSHIP BETWEEN THE LAW FIRM OF THE CHAIR OF THE TRIBUNAL AND THE ECONOMIC GROUP TO WHICH ONE OF THE PARTIES BELONGS TO. OBJECTIVE HYPOTHESIS CAPABLE OF COMPROMISING THE ARBITRATOR’S INDEPENDENCE AND IMPARTIALITY. BUSINESS RELATIONSHIP, WHETHER PRIOR, FUTURE OR ONGOING, DIRECT OR INDIRECT, BETWEEN THE ARBITRATOR AND A PARTY. DISCLOSURE DUTY. INOBSERVANCE. BREACH OF FIDUCIARY DUTY. SUSPECTION. AMOUNT OF COMPENSATION. FORESEEN APPLICATION OF BRAZILIAN LAW. RULING OUTSIDE THE LIMITS OF THE CONVENTION. IMPOSSIBILITY.

The recognition proceeding of a foreign award does not authorize re-examination of the merits of the decision, except in cases in which it is configured as an affront to national sovereignty or public policy. Given the indeterminate nature of such concepts, in order not to subvert the homologating role of the Superior Court, they should be interpreted in such a way as to reject only those legal acts and effects that are absolutely incompatible with the Brazilian legal system.

The prerogative of the judge’s impartiality is one of the guarantees that result from the principle of due process of law, a matter that does not preclude and is applicable to arbitration, due to its jurisdictional nature. Non-compliance with this prerogative directly offends national public policy, which is why a decision handed down by a foreign court, in light of its own legislation, does not prevent the STJ from examining the matter.

The arbitral award issued by an arbitrator who has, with the parties or with the controversy, some of the relationships that characterize the cases of impediment or suspicion of judges (arts. 14 and 32, II, of Law No. 9.307/1996) offends national public policy.

Given the contractual nature of arbitration, which emphasizes the fiduciary trust between the parties and the figure of the arbitrator, the arbitrator’s violation of the duty to disclose any circumstances that could reasonably create doubt regarding his impartiality and independence prevents the recognition of the arbitration award.

Once Brazilian law governs the claim for damages, the limits of the arbitration agreement were exceeded when the arbitral award fixed damages based on the financial evaluation of the business, instead of considering the actual loss experience. Request of recognition of foreign award denied.

**Additional relevant portions of the decision:**

Even though this debtor-creditor relationship between the company Abengoa Solar, a member of the Abengoa group, and the law firm of the chair of the tribunal were unknown to the arbitrator, it is already enough to objectively cast doubt on his independence.

**SEC 11463**

**Plaintiff:** BANCO DE CRÉDITO E INVERSIONES S.A.

**Defendants:** ALOÉS INDÚSTRIA E COMÉRCIO LTD. *et. al.*

*ICDR arbitration seated in Florida*

*Decision rendered in 2017*

**Relevant portions of the decision:**

FOREIGN ARBITRAL AWARD. FULFILLMENT OF THE NECESSARY LEGAL REQUIREMENTS. ALLEGATION OF LACK OF SERVICE OF THE RESPONDENT IN THE ARBITRATION PROCEEDING. PROOF OF SERVICE BY MAIL. RECOGNITION GRANTED.

[…] The documentation submitted fulfills the requirements set forth in the Brazilian Code of Civil Procedure/2015, the Internal Regiment of the Superior Court of Justice, and Law 9.307/96.

The defense is restricted to the alleged lack of service of the defendants in the present case. However, this does not constitute an obstacle to the recognition and enforcement of the foreign award, since the documents attached to the records refute such allegation.

The case under examination shapes itself with precedents of the Superior Court of Justice as to the validity of the summons when there is evidence of indisputable knowledge regarding the arbitration proceeding. Recognition request granted.

**SEC 978**

**Plaintiff:** INDUTECH SPA

**Defendant:** ALGOCENTRO ARMAZÉNS GERAIS LTDA

*Arbitration seated in England*

*Decision rendered in 2008*

**Relevant portions of the decision:**

FOREIGN ARBITRAL AWARD. RECOGNITION. ARBITRATION CLAUSE. ABSENCE OF SIGNATURE. OFFENSE TO PUBLIC POLICY. PRECEDENTS OF THE SUPERIOR COURT OF JUSTICE AND THE SUPREME COURT.

The lack of evidence of the undisputable manifestation of will of the party to submit the dispute to arbitration offends public policy, as it affronts the principle inserted in our legal system, which requires the express acceptance of the Parties for submitting the solution of conflicts arising in private contractual legal business to arbitration. (*see* SEC 967, reporting Justice José Delgado).

The lack of signature on the arbitration clause contained in the agreement, in its addendum, and in the appointment of the Defedant’s arbitrator excludes the homologation claim, as it offends article 4, paragraph 2 of the BAA, the principle of will autonomy and the Brazilian public policy. Request of recognition and enforcement of foreign court decision denied.

**SEC 833:**

**Plaintiff:** SUBWAY PARTNERS C V

**Defendant:** HTP HIGH TECHNOLOGY FOODS CORPORATION S/A

*AAA arbitration seated in the US*

*Decision rendered in 2006*

*Prior decision by a Connecticut Court confirming the award*

*Justice Eliana Calmon, reporting justice, voted for the recognition of the award*

*Justice Luiz Fux’s vote taken as the final decision*

**Relevant portions of the decision:**

CIVIL PROCEDURE. CONTESTED FOREIGN AWARD. RECOGNITION. LACK OF SUMMONS.

The recognition of the foreign award can only be accepted if the proceeding respected due process, consisting in the unequivocal summons of the party. *In casu*, the proceeding was *in absentia* and there was no unequivocal proof that the party was summoned. This Court understands that service by rogatory letter must leave no doubt that the communication has reached its destination. […]

It is common knowledge that the *res judicata* of the foreign award cannot, in Brazil, have greater strength than the *res judicata* of the domestic award, and it is certain that in our legal system, the absence of a summons contaminates the entire process, even if the defect can only be verified at the time of execution (article 741 of Brazilian Civil Procedure Code).

Indeed, in regard to the arbitration award itself, object of this recognition procedure, considering that the text presented for the is apocryphal, it is impossible to identify who agreed, on behalf of the defendant, with its terms […]

The case law of the Superior Court of Justice determines that the recognition of the foreign award requires proof of valid service of process on the respondent, whether in the territory of the decision or in Brazil, by means of a rogatory letter, according to the *ratio essendi* of art. 217, II, of the Superior Court of Justice’s Internal Regiment […]

Finally, referring to the parties, the rules of the AAA should have been shared with the parties, which was not done, adding to the reasons for a refusal to recognize the award. Vote for rejection of the recognition.

**AgRg in MC 17411**

**Plaintiff:** S/A FLUXO COMÉRCIO E ASSESSORIA INTERNACIONAL

**Defendant:** NEWEDGE USA LLC

*ICC arbitrations seated in NYC*

*Decision rendered in 2014*

**Relevant portions of the decision:**

INJUNCTION. RECOGNITION OF FOREIGN ARBITRAL AWARD. SEIZURE OF ASSETS. REVERSE PIERCING OF CORPORATE VEIL. The granting of injunctions is admissible in foreign award recognition proceedings (art. 4, § 3 of Resolution n. 09/2005, of the Superior Court of Justice). Disposal of assets that puts the debtor’s solvency at risk, confirmed by the news that the debtor’s company is in the process of judicial liquidation before the Eastern Caribbean Supreme Court. The foreign judgment, even if pending homologation, constitutes literal proof of a liquid and certain debt (art. 814 of the Code of Civil Procedure) […].