

FOURTH CIVIL CHAMBER

INTERLOCUTORY APPEAL N. 0002546-67.2010.805.0000-0

APPELLANT: FAT – FERROATLÂNTICA S.L.

ATTORNEY: EURIPEDES BRITO CUNHA AND OTHERS

APPELLEE: ZEUS MINERAÇÃO LTDA AND OTHERS

ATTORNEY: MARCO ANTONIO GUANAIS AGUIAR ROCHAEL

REPORTING JUDGE: SUMMONED JUDGE GARDENIA PEREIRA DUARTE

DECISION

(Code 817/339)

The persecuted decision is page 247 *et seq.* (rendered in February, 2010), by which the judge *a quo*, in “preparatory procedure”, recognizing the existence of an arbitration clause regarding the election of arbitration to resolution of conflicts, in the Articles of Association signed between the litigants, granted an injunction at the request of the Appellees, suspending an ongoing arbitration, conducted under the rules of Brazil-Canada’s Chamber of Commerce (“CCBC”). The lower court considered that the initial contract submitted arbitration to the ICC arbitration rules and therefore, stayed the arbitral proceeding that had already been started, until it was decided which rules should be applied to the arbitration – ICC or CCBC rules.

Preliminarily, the Appellant invokes before this Court of Appeals (i) the recognition of the autonomy of the arbitration clause and the exclusive competence of the arbitrator to decide on challenges that may arise during the arbitral proceeding and (ii) Law n. 9.307/96, that sets forth judicial courts’ lack of authority to intervene in the arbitral proceeding. Appellant highlights the fact that the logical consequence of the parties’ election for arbitration is, precisely, to submit to the arbitrator any and all conflicts derived from the contract, which does not justify the judicial courts’ interference with an issue that should be decided by the arbitrator itself. Appellant requests the annulment of the injunction, that, he alleges, infringed upon the competence of the arbitral tribunal.

Further, Appellant invokes the following arguments: “legal impossibility of the relief sought”, lack of interest in the action, absence of legal requisites for the issuance of an injunction and, finally, need for the stay of the injunction – *inaudita altera pars* – of the decision subject to appeal and recognition of this appeal as a final annulment of the decision subject to appeal.

Whereas:

In Brazil, Law n. 9.307 of September 1996 authorized the use of arbitration for the resolution of conflicts involving disposable patrimonial rights, meaning rights that parties can settle – general contracts (civil or commercial). And the awards rendered by the arbitral tribunal have the same effects as a court decision, being the main difference the maximum time of six months for the solution of the conflicts.

The election of an arbitration clause is also a cause of dismissal of the suit without analysis of the merits, in the terms of Art. 267, item VII, of the Civil Procedural Code, as it can be found in jurisprudence of National Courts. Exemplifying:

Appeal n. 606.345/Rio Grande do Sul

2nd Chamber, Reporting Judge João Otávio de Noronha, unanimous, judged May 17th, 2005

Decision: CIVIL PROCEDURAL. ARBITRAL JUDGE. ARBITRAL CLAUSE. SUIT DISMISSAL. ART. 267, ITEM VII, OF CIVIL PROCEDURAL CODE. "MIXED CAPITAL COMPANY". DISPOSABLE RIGHTS. 1. The Arbitral clause is the act whereby the contracting parties formalize their intent to submit to arbitration conflicts that may arise during the execution of the contract. Once agreed upon, which can only be done in cases involving disposable rights, the contracting parties are bound by the extrajudicial resolution of the conflict. 2. The arbitral clause is cause to dismiss the lawsuit without analysis of the merits, according to Art. 267, item VII of the Civil Procedural Code. 3. Contracts signed by "mixed capital companies", which exploit economical activity of commerce or production of goods or supply of services (Federal Constitution, Art. 173, 1st paragraph) that contain an arbitral clause submitting the resolution of conflicts to arbitration are valid and enforceable. 4. Appeal granted.

There are numerous decisions in defense of the constitutionality, effectiveness of arbitral proceedings and submission of conflicts to the Arbitration Law in cases of arbitral clauses adjusted in this sense, in contracts that involve disposable patrimonial rights, exactly the case of these files. Exemplifying:

2007.001.21338 - Appeal

JUDGE ERNANI KLAUSNER – Judged: July 31st, 2007 – 1st CIVIL COURT COLLECTION SUIT – ARBITRAL CLAUSE VALIDLY ADJUSTED IN AFFREIGHTMENT CONTRACT – PACT ADJUSTED BETWEEN PLAINTIFF AND DEFENDANT – SUIT FILED AGAINST DEBTORS – PRELIMINARY OPPOSITION BY CO-DEFENDANT OF SUBMISSION OF THE CONFLICT TO ARBITRATION LAW – CONSTITUTIONALITY OF ARBITRATION LAW ALREADY RECOGNIZED BY THE SUPREME COURT OF JUSTICE – APPEAL DENIED. Judgment Session: July 31st, 2007.

2007.001.26162 - APPEAL

JUDGE PAULO MAURICIO PEREIRA – Judged: July 17th, 2007 – 9th CIVIL COURT

1) Indemnification suit. Traffic accident. Summary proceeding. Dismissal of suit, without analysis of the merits, due to extrajudicial resolution, by arbitration. Art. 267, item VII, Civil Procedural Code. 2). Possible compensation deriving from traffic accident constitutes a disposable patrimonial right, permitting the interested parties, if capable, to choose arbitration to resolve the conflict. Interpretation of Art. 1st of Arbitration Law. 3) Settlement ratified has res judicata effect between

the parties. Art. 31 of Law n. 9.307/96. 4) Non existence of abuse or evidence of defect of will that could make impossible the transaction. 4) Correct court decision. Appeal denied. Judgment session: July 17th, 2007.

2006.002.25293 – APPEAL

JUDGE CARLOS JOSE MARTINS GOMES – Judged: May 25th, 2007 – 6th CIVIL COURT

Abstract: Appeal. Moot due to submission agreement. Appeal manifestly prejudiced. Denial of continuance in accordance with Art. 557 of Civil Procedural Code. “Decision by single judge”: May 25th, 2007

2007.001.18271 - APPEAL

JUDGE LETICIA SARDAS – Judged: April 17th, 2007 – 20th CIVIL COURT
CIVIL RESPONSIBILITY. ARBITRAL JUDGE. LEGAL CLASSIFICATION.
COMPETENCE. DISPOSABLE PATRIMONIAL RIGHTS. ILICIT ACT.
INEXISTANCE.

1. Arbitration, alternative dispute resolution method, was introduced in the national juridical system by Law n. 9.307/96. Arbitration’s legal classification is jurisdictional. 3. The arbitrator has jurisdiction because the arbitrator applies the law to the case and settles the conflict that existed between the parties. 4. Indemnification for damages deriving from traffic accident is a patrimonial right and, as such, disposable capable to be settled by arbitration. 5. There is no illicit act by the Court when requiring indemnification, since acted according to Arbitration Law. 6. Appeal Denied, by act of the Reporting Judge. “Single judge decision”: April 17th, 2007.

2005.001.44039 – APPEAL

JUDGE RICARDO COUTO – Judged: February 8th, 2007 – 3rd CIVIL COURT
ARBITRAL CLAUSE IN CONTRACT – SUIT DIMISSAL – ART. 267, VII
FROM THE CIVIL PROCEDURAL CODE. Contract of supply of services that adopts arbitral clause (Art. 8, Law n. 9.307/96) for the resolution of future disputes. Valid manifestation of parties’ intent, that requires to mandate arbitration as a method of conflict resolution. The choice of arbitral clause mandatorily constitutes cause of dismissal of suit, without analysis of the merits, according to Art. 267, VII of the Civil Procedural Code. Non recognition of Appeal. Judgment session: July 31st, 2007.

Following these understandings, I conclude I must grant the Appellant’s claims, since the Caetité court itself recognized the parties’ choice, through the arbitral clause, to resolve their disputes through arbitration was indisputable.

Procedural rules systematic requires two essential pre-requisites for a stay pending an appeal, namely (i) the relevance of the request’s argumentation and (ii) the likelihood that

execution of the appealed decision will cause grave danger or irreparable harm to Appellant's rights.

In this case, I recognize the pre-requisites that permit the granting of stay pending appeal requested by the Appellant are present, namely (i) the *periculum in mora*, or likelihood of irreparable harm to Appellant's rights; and (ii) the *fumus boni iuris*, the likelihood of success of the Appellant's claim based on the documents attached to the pleadings.

Therefore, I GRANT THE STAY requested by the Appellant, suspending the appealed decision until further determination of this Court of Appeals.

Inform the lower court, communicating this decision and requiring information, in the time set forth by law.

Notify the Appellees, through their attorney to of their right to answer in 10 days, as set forth in Art. 527, item V and only paragraph of the Civil Procedural Code.
Notify. Publish.

Salvador, April 6th, 2010.
JUDGE GARDENIA PEREIRA DUARTE
REPORTING JUDGE