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Brazilian Court Recognizes An Unreasoned New York Arbitral Award

Henry Burnett (King & Spalding) · Monday, September 29th, 2014

On September 1, 2014, the Brazilian Superior Court of Justice ("STJ") issued an important decision recognizing, for the first time, an unreasoned arbitral award in *Newedge USA, LLC v. Manoel Fernando Garcia*. Notwithstanding challenges to the recognition and enforcement on the grounds that the New York arbitral award purported violated Brazilian public policy due to the lack of reasoning, the STJ concluded that the award complied with the legal requirements of the law of the place of arbitration and did not violate Brazilian public policy. The STJ's decision is relevant in the context of actions for recognition and enforcement of foreign awards and demonstrates a pro-enforcement approach toward foreign arbitral awards in Brazil.

Background of the dispute

Claimant Newedge USA, LLC ("Newedge") is a Delaware Limited Liability Company which offers clearing and settlement services to investors in a range of investment instruments, including exchange-traded listed derivatives and equities. Respondent Fluxo-Cane Overseas Ltd. ("Fluxo-Cane") is a British Virgin Islands corporation and Respondent Manoel Fernando Garcia ("Mr. Garcia") is the sole shareholder and president of Fluxo-Cane. Additionally, Newedge is a clearing member of ICE Futures US, Inc. (also known as Board of Trade of the City of New York ("ICE")). Fluxo-Cane is a member firm, and Garcia is a conferring member of ICE.

On February 13, 2008, Newedge filed a Notice of Arbitration with ICE seeking to recover $5,106,889.59, the deficit balance in Fluxo-Cane's account. In a brief summary, such deficit balance arose from a Customer Agreement that Fluxo-Cane and Newedge signed on March 18, 2007. Moreover, Newedge, Newedge Bank, and Fluxo-Cane entered into a Demand Loan Margin Financing Facility on April 24, 2007 ("Financing Agreement"). The Financing Agreement provided for Newedge Bank to loan funds for Fluxo-Cane to use as margin in its account with Newedge. Both the Customer Agreement and the Financing Agreement were supported by a personal guarantee executed by Mr. Garcia in favor of Newedge and Newedge Bank.

On June 13, 2008, Fluxo-Cane and Mr. Garcia attempted to stay the arbitration before the Supreme Court of New York. Justice Richard B. Lowe, III denied the petition in relation to claims under the Customer Agreement and ordered Fluxo-Cane and Mr. Garcia to arbitrate any "allowable claim" under the Customer Agreement. (*Fluxo-Cane Overseas Ltd. v Newedge USA*, LLC, 2008 NY Slip Op 31669(U) (N.Y. Sup. Ct. June 13, 2008) Accordingly, the arbitration proceeded with Fluxo-Cane and Mr. Garcia participating under protest and ultimately walking out of the hearing.

The arbitration proceeded and on December 21, 2009, the Tribunal issued an award against Fluxo-Cane in the amount of $3,209,472.08, and against Garcia in the amount of $2,924,014.62 (“Award”). Newedge moved to confirm the Award before the Supreme Court of New York, while Fluxo-Cane and Mr. Garcia cross-moved to vacate the same Award. On June 29, 2010, Justice Richard B. Lowe, III confirmed the Award and denied Fluxo-Cane and Mr. Garcia’s motion to vacate (See “Judge Lowe’s Decision and Order”).

On November 16, 2012, Newedge filed a request for recognition and enforcement of the Award before the STJ in Brazil. Initially, the recognition request was brought against both Fluxo-Cane and Mr. Garcia. Because Fluxo-Cane was in liquidation proceedings in the British Virgin Islands, however, Newedge decided to proceed only against Mr. Garcia. Mr. Garcia was duly served and filed his answer in the STJ proceedings.

The STJ ruling on the Award’s lack of reasoning

Mr. Garcia presented several challenges to recognition and enforcement of the Award to the STJ. Among these challenges, he argued that the recognition and enforcement of the Award should be refused due to purported violation of Brazilian public policy because the Award was not a reasoned award.

Recognition and enforcement of foreign arbitral awards in Brazil is governed by both the Brazilian Arbitration Act (Law no. 9.307 of 1996) and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations (“New York Convention”). The Brazilian Arbitration Act basically adopted the most relevant provisions of the New York Convention prior to Brazil ratifying the New York Convention in 2002 (*Decreto Legislativo* no. 4.311). However, while neither the Brazilian Arbitration Act nor the New York Convention has a specific provision directly regulating unreasoned foreign awards, both procedural rules have provisions whereby recognition and enforcement of foreign arbitral awards may be refused in cases where the award violates the public policy.

By contrast, Article 26 of the Brazilian Arbitration Act sets forth that arbitral awards issued in Brazil must contain (i) a brief summary of the dispute and the name of the parties; (ii) the reasons for the decision, including legal and factual grounds; (iii) the decision itself, where the arbitrators specifically decides on the issues in dispute; (iv) the date and place of signing; and (v) the signature of all the arbitrators. Accordingly, Article 32, III of the Brazilian Arbitration Act establishes that an arbitral award that does not comply with the requirements of the Article 26 are subject of being vacated. Hence, the clear language of Articles 26 and 32 dictates that all arbitral awards issued in Brazil must contain a detailed reasoning and are subject of being vacated in case of no compliance.

In view of such scenario, it was unclear (i) how the STJ would rule when faced with an unreasoned foreign arbitral award, and (ii) whether the STJ would import rules specifically designed to arbitral awards issued in Brazil to the context of foreign awards.

In an unanimous decision, the STJ found that the Award followed the standards applicable in the place of arbitration (*i.e.*, New York) and, therefore, the conciseness of the Award cannot serve as a basis to refuse recognition and enforcement of that Award in Brazil. The STJ was straightforward in affirming that the Award did not violate Brazil’s sovereign or public policy.

In the case under analysis, a reasoned award was not required by the Federal Arbitral Act, the New

York Arbitration Act or the ICE Arbitration Rules, applicable to the arbitration. Justice Lowe's Decision and Order, in response to the motion to vacate filed by Fluxo-Cane and Mr. Garcia, does not even address any challenge premised on lack of reasoning. Additionally, the STJ was obviously influenced by the fact the Award survived a vacatur attempt before the New York courts and specifically referred to Justice Lowe's Decision and Order in support of some of its findings.

Conclusion

In conclusion, the precedent set by the STJ is extremely important in the context of actions for recognition and enforcement of foreign arbitral awards in Brazil and demonstrates a pro-enforcement approach toward such awards even where the foreign award may violate Brazilian public policy in some way, *i.e.*, unreasoned award. The STJ decision is consistent with the Brazil's increased deference to foreign awards sought to be enforced in Brazil.

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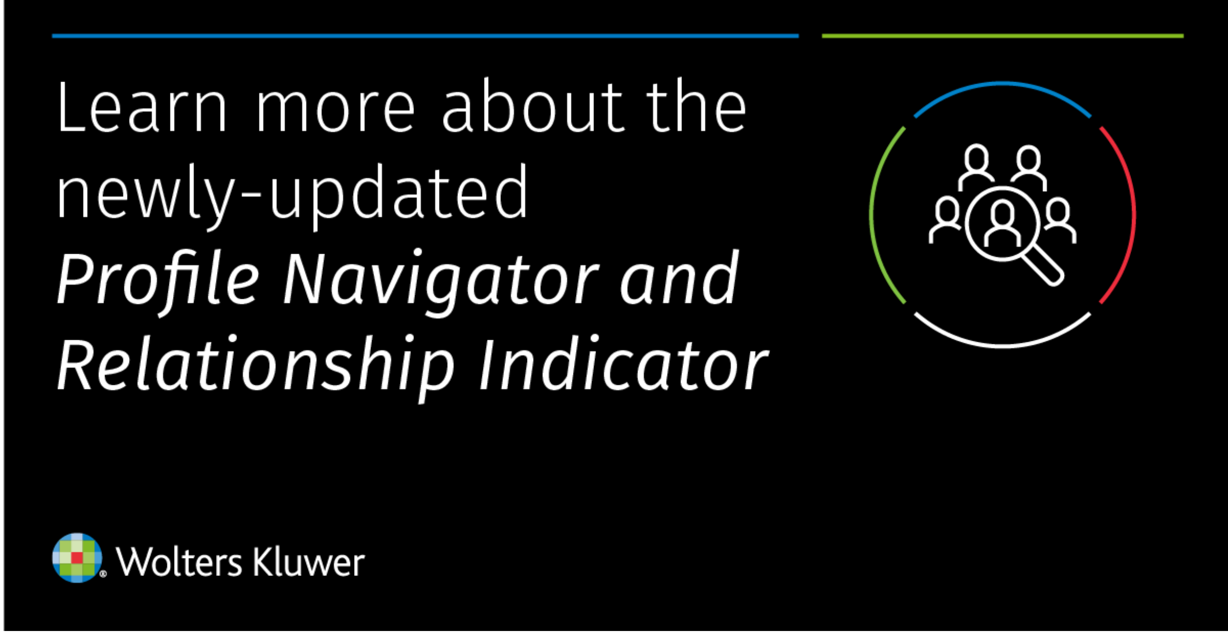

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