SPECIAL APPEAL No. 892.456 - RJ (2006/0216382-0)

REP-JUDGE	**: MINISTER HERMAN BENJAMIN**
APPELLANT	: NATIONAL HEALTH SURVEILLANCE AGENCY - ANVISA,
ATTORNEY	: FÁBIO ESTEVES GOMES AND OTHER(S)
APPELLEE	: SOUZA CRUZ S.A.
ATTORNEY	: EDUARDO ANTONIO LUCHO FERRÃO AND OTHER(S)

SUMMARY

CIVIL PROCEDURE. WRIT OF MANDAMUS. EQUIPMENT FOR SMOKERS IN THE RIO DE JANEIRO INTERNATIONAL AIRPORT – *SMOKING POINTS*. TERM OF PROHIBITION – ANVISA. PROTECTION OF PUBLIC HEALTH. VIOLATION OF ART. 535 of the CPC INCIDENT.

1. Event in which the Court *a quo*, in amending the denial of injunction, removed the prohibition issued by ANVISA and recognized the complete technical effectiveness of equipment for smokers (*Smoking Points*) located at the Rio de Janeiro/Galeão International Airport, due to the signed contract between INFRAERO and the petitioner.

2. Special Appeal that sustains violation of Art. 535 of the CPC, due to obscurity (lack of clarity in the reasons for the judgment, having a material or formal defect in the term of the prohibition) and omission (not evaluating the provisions of Art. 2 of Law 9,294/96). Alternately, if the allegation of omission is removed, it indicates a violation of Art. 2 of Law 9,294/96.

3. Having seen and acknowledged the obscurity in the judgment under appeal, the Court *a quo* rejected the opposing motion for clarification, failing to give sufficient reasons for the judgment of the appeal.

4. Though it acknowledged an omission in the judgment under appeal in that it generically dismissed the federal legislation relied upon by the health authority, without a basis in reasons, that omission prejudiced knowledge of the appellant's alternative claim concerning the violation of Art. 2 of Law 9,294/1996.

5. Special Appeal provided.

JUDGEMENT

Having seen, reported and discussed the court records in which the parties above are involved, the Ministers of the Second Panel of the Superior Court of Justice agree: "The Panel unanimously upheld the appeal to annul the judgment which dismissed the motion for clarification, in accordance with the vote of the Minister-Reporting Judge." The Ministers Eliana Calmon, João Otávio de Noronha, Castro Meira and Humberto Martins voted with the. Reporting-Judge Minister.

Dr. CAMILLA LACERDA DA NATIVIDADE MARQUES (Federal Attorney

- with legal standing for ANVISA's defense)

, on behalf of: APPELLANT: NATIONAL HEALTH SURVEILLANCE AGENCY (ANVISA)

Dr. NELSON NERY, on behalf of: APPELLEE: SOUZA CRUZ S.A.

Brazil, March 20, 2007 (date of the judgement).

MINISTER HERMAN BENJAMIN
Reporting Judge

SPECIAL APPEAL No. 892.456 - RJ (2006/0216382-0)

APPELLANT: NATIONAL HEALTH SURVEILLANCE AGENCY (ANVISA), ATTORNEY: FÁBIO ESTEVES GOMES AND OTHERS
APPELLEE: SOUZA CRUZ S.A.
ATTORNEY: EDUARDO ANTONIO LUCHO FERRÃO AND OTHER(S)

REPORT

HIS EXCELLENCY MR. MINISTER HERMAN BENJAMIN (Reporting Judge): Concerning

A writ of mandamus filed against the director-president of the National Health Surveillance Agency (ANVISA), on account of "an act of manifestly illegal prohibition of equipment called *smoking points*, installed in the domestic and international boarding gates of the International Airport of Rio de Janeiro/Galeão - Antonio Carlos Jobim" (p. 2)

It was subsequently identified, by amendment to the initial petition, as the enforcement authority or Coordinator of Health Surveillance of Ports, Airports and Borders of the State of Rio de Janeiro (p. 227).

The petitioner explains that the equipment called *smoking points* "consists of special areas reserved for smokers, properly ventilated and integrated by powerful exhaust fans and special filters, which allow harmonious coexistence between smokers and nonsmokers in the airport's boarding areas, fully in accordance with the relevant legislation and with the very pluralism of the democratic rule of law" (p. 2).

Further according to the petitioner, the Brazilian Airport Infrastructure Company (INFRAERO) identified that the most frequent complaint from airport users was the lack of adequate space for smokers and that "it lacked the necessary resources to construct appropriate places for smokers. As a result of this, it suggested a solution to the petitioner that would not burden INFRAERO, not cause the loss of too much space, create inconveniences for nonsmokers, disregard smoking laws, and deal with the air quality in air-conditioned environments. The petitioner then initiated specific studies on the subject, and over

a period of about two years, developed a prototype of the *smoking point* even more effective than the traditional room for smokers" (p. 3).

Regarding the efficacy of the equipment, the petitioner refers to the "attached copy of the respective report issued by the Laboratory of Occupational Toxicology & Industrial Hygiene of the CESI Center for Environmental Technology (CTA), in which it notes that in all measurements, the volume of pollutants was far below those supported by the legislation. (...) It is worth adding that the apparatus was exhaustively analyzed by the Laboratory of Occupational Toxicology & Industrial [sic] of the CESI Center for Environmental Technology (CTA), which recommended the installation of the equipment at the actual site--the airport--***for monitoring and conclusion of the evaluation***" (p. 4, my emphasis added).

He maintains that "up to now, the apparatuses have received almost unanimous approval from airport users, both smokers and nonsmokers. In fact, according to the attached report of a survey carried out between the 9th and 15th of this month, about 97.5% of the smokers and 94.5% of the non-smokers expressed favorable views about the smoking point, with about of 97% of total respondents expressing favorable opinions regarding its expansion to other airports" (p. 4).

Regarding the contested act, the petitioner reports that, "the ANVISA's inspection, submitted to the enforcement authority, was carried out with incredible imprecision, incompleteness and impertinence, and the prohibition of said place, under the arguments, according to the respective term of prohibition, that, (i) the system would not be in accordance with the listed legislation, and (ii) the Agency had not been previously informed of its specifications and operation. It is evident that the prohibition of the petitioner's apparatus constitutes an illegal act, both for formal questions related to the imprecision of the term of the prohibition, which makes it impossible to exercise the right to defense, and because the apparatuses are even more stringent than what is required by the relevant legislation, and, there is still no legal or regulatory provision that imposes prior authorization of this scope"(p. 5).

On merit, the petitioner points out **formal and material defects** that would imply nullification of the term of prohibition.

There would be **formal defects** due to violation of the principles of full defense and due legal process for the following reasons:

a) justification of the term of prohibition in non-existent law (Law 1,508, of February 22, 1960 - p. 9);

b) lack of a legal basis for one of the irregularities indicated in the term of prohibition, i.e., not communicating to ANVISA about the operation and technical specifications of the mechanism (p. 10);

c) Failure to comply with legal requirements for adoption of a precautionary measure, pursuant to Art. 45 of Law 9,784/99, "because the prohibition was imposed by the responsible authority without the prior defense of INFRAERO or the petitioner, which would only be allowed in a very exceptional situation of risk to life or property" (p. 11); *and*

d) the absence of a technical basis, since *"the motivation of the act should have unequivocal elements of fact and law simultaneously consigned to its consummation, including the* ***technical reasons*** *that would justify the alleged non-compliance of the* smoking points *with the applicable legal provisions"* (italics in original - p. 12).

There would also be **material defects**, as follows:

a) conformity of the *smoking points* with the requirements of the legislation, i.e., Art. 2 of Law 9,294/96 and Art. 3 of Decree 2,018/96, because "the *smoking points* are equipment with the most advanced technology, which has been widely analyzed by one of the most recognized institutions with technical expertise in the field. It stands out that it achieves air quality results much higher than those required by the health legislation" (p. 14); and

b) the absence of a legal basis to require prior communication with ANVISA, since "as the omission itself on the term of prohibition reveals, there is no legal or regulatory provision that imposes the obligation of prior communication regarding the creation of places for smokers" (p. 16); and

Finally, the petitioner asks for the grant of an injunction and confirmation of the sentence,

"recognizing the clear, legal right of the petitioner to maintain the equipment under

consideration in operation, rather than fully in accordance with the legislation in force" (p. 17).

The injunction was upheld by the judge of origin (p. 212).

The respondent authority provided **information**, maintaining the validity of the prohibition on its merits and form.

By upholding the prohibition on its **merits** and indicating the **absence of a clear, legal right**, the authority claims:

a) ANVISA has a legal responsibility to inspect the s*moking points* in question, under the terms of Art. 196 of the Federal Constitution, arts. 6, § 1, and 16, III, "d", of Law 8,080/90 and arts. 1 and 8, § 6, of Law 9,782/99 (pp. 271-273);

b) the equipment is ineffective, disregarding the requirements of Art. 2 of Law 9,294/96 and its regulatory decree (Art. 3 of Decree 2,018/96), since "in a quick analysis of the technical studies commissioned and presented by the petitioner, they are not conclusive in several relevant aspects related to air filtration. The same studies also show that the filters used are not capable of preventing the transference of certain impurities originating from concentrated cigarette smoke. It is sufficient to verify that **in the tests carried out with four lit cigarettes, there was a variation of smoke filtration between 70-95%, which implies discharge into the environment (i.e., the indoor air where non-smokers are present) of about 5-25% of the smoke.** According to the same study, ***the retention of nicotine would be close to 80%, with the remaining 20% expelled into the same environment*** (it should be remembered that nicotine is a type of drug and causes dependency). **The initial tests were still inconclusive with respect to formaldehyde, nitrous oxide and respirable dust"** (emphasis in original, p. 275);

c) "Contrary to what the petitioner alleges, there is a health standard imposing communication with ANVISA before carrying out projects such as the one now being questioned. This is Resolution RDC/ANVISA No. 02, dated January 8, 2003" (p. 276);

d) "Likewise, no rule or principle is identified in the country's legal system that grants 'carte blanche' to the petitioner to carry out tests involving the health of

others, with apparatuses known to be ineffective, without any kind of interference or control by the health authority" (p. 280);

e) "In fact, **there is a need to carry out expert and other studies on the equipment, aiming at ascertaining the effectiveness or confirming the inefficacy of the equipment. These provisions, as is well known, necessarily result in delays for evidence, which is not allowed for in the quick and abbreviated process of the writ of mandamus"** (p. 281, my emphasis added).

The respondent authority also maintains it has a **formal process** in the term of prohibition, and that there is no prejudice to the defense of the interested parties, since:

a) "First, it should be made clear that the term of prohibition was drawn up for INFRAERO, and not the petitioner. This is because, according to the specific health legislation (Resolution RDC No. 02/2003), it was incumbent upon the aforementioned public company to communicate about the project to the health authorities prior to installing the '*smoking points*,' as analyzed previously. Thus, the term of prohibition was issued for INFRAERO only, since only it, according to the specific health legislation, would respond administratively to ANVISA **for the health irregularities in the airport facilities and buildings that it manages.** *Thus, after the prohibition, the respective Notice of Health Violation (number 67/03 - document 2) was also drafted against INFRAERO, with a detailed description of the irregularities found, the norms violated (including Law 9,294/96 and its RDC Regulatory Decree No. 02/2003), with the respective classification and, also, with the express granting of the term of 15 (fifteen) days to the defendant (INFRAERO) for the presentation of the defense"* (italics in the original, pp. 282-283).

b) "At the same time, the petitioner (Souza Cruz S/A) was also cited, by yet another internal unit of ANVISA, namely the Management of Tobacco-Derived Products, which has, according to the internal regulations of the Agency, the precise responsibility of conducting inspections of the smoking industry and its products, besides its respective publicity, among other aspects. Thus, (2) health infraction notices against the petitioner were filed (No. 117/2003 and 118/2003 - GPDTA, Documents 03), where there is also a description of the imputed irregularities and the respective rules violated, among

other aspects. Now in these administrative proceedings, the petitioner was given an opportunity to defend itself, and it presented its administrative defenses (docs. 03)." (p. 283); and

c) the reference to the incorrect law (Law 1,508/60) does not prejudice the term of prohibition, since "in addition to that citation, the term of prohibition contains the **main citation** of Law 9,294/96 and its Regulatory Decree" (p. 284);

The Federal Public Prosecutor's Office offers an opinion, in the first instance, about the denial of the writ. Alleging:

a) "... the impossibility of analyzing questions concerning the conformity of the *smoking points* with the legal norms, since they require delays for evidence, incompatible with the process of this action" (p. 314);

b) observance of constitutional guarantees and full defense, since "the irregularities that gave rise to the act now challenged, as well as the norms violated, were described in two infraction notices" (pp. 314-315);

c) "... it appears that the authority did not adopt this measure in an arbitrary way, but it was supported by a technical report provided on pp. 296/303, which indicated the need for immediate prohibition of the *smoking point*. It should be emphasized that the criterion adopted to evaluate the need to prohibit the equipment deserves expert analysis, incompatible with the process chosen by the petitioner "(p. 315);

d) resolution RDC 02/2003 establishes the obligation for prior approval of the equipment by ANVISA (p. 315).

The sentence denied the writ, canceling the injunction upheld previously. I transcribe an excerpt from the lower-court decision (pp. 323-324):

> "It is concluded, therefore, that the term of prohibition and the health infraction notices generated from ANVISA's inspection were based on matters of fact and law that actually were verified. Thus, it is not possible to affirm, in the case of a writ of mandamus, that there was in effect a clear legal right of the petitioner to be protected. On the contrary, it is established as a matter in fact, as regards the operation of the equipment and the corresponding use and consumption of tobacco in the indicated places,

> that it was possible to foresee some harmful consequences to the people that were in the places next to the *smoking points.* Thus, the inspection was properly done with regard to the prohibition and drafting of the health infraction notices, including and especially with regard to the petitioner" (pp. 323-324).

The reporting judge, in the jurisdiction of the Federal Regional Court of the 2nd Region, granted a suspension of the appeal, reinstating the injunction previously granted (p. 494).

The Federal Public Prosecutor's Office, in the second instance court now, offered an opinion that the appeal be denied "since the chosen path is manifestly inadequate. *(...)* In this case, there is no way of verifying whether the apparatus called a *smoking point* complies with the provisions of the law, which could only be verified with an expert"(page 563).

The Court *a quo* upheld the appeal, according to the following summary transcript (pp. 594-595):

> "CIVIL PROCEDURE. APPEAL IN WRIT OF MANDAMUS. TERM OF PROHIBITION AND NOTICE OF INFRATION DRAFTED BY ANVISA. ABSENCE OF ABUSIVE ACT. REJECTION. APPEAL PROVIDED.
>
> - Appeal brought by SOUZA CRUZ S/A, against the R. sentence handed down by HH. The judge of the 6th Federal Court of Rio de Janeiro, who in the documents of the writ of mandamus filed against the act of the director-president of the National Health Surveillance Agency (ANVISA), dismissed the request, concluding that the term of prohibition and health infraction notices issued by ANVISA inspectors were based on factual issues, which could be delayed for evidence, and rightfully and effectively verified, based on what was found in the scope of the writ, and understanding that the clear, legal right, necessary to admit the claim in an mandamus court, in addition to acknowledging the absence in the event of an illegal or abusive act of the respondent authority, thus leading to the revocation of the injunction previously granted.
>
> - It enabled the petitioner to prove that the equipment installed at the International Airport of Rio de Janeiro was properly tested, with absolute acceptability of the air quality standards around it, thus allowing its installation.
>
> - Having given proof of pre-existing evidence of its right, the petitioner demonstrates that the procedural and legal conditions for obtaining judicial protection in a mandamus court have been established once it's clear, legal right has been proven.
>
> - Recognizing the inapplicability of the legislation invoked by the appellee, and considering the nature of the equipment and the positive

difference made for those with a smoking habit by granting them a place of their own, without interfering or bringing any duress to those who do not share the habit, or even to those who are made uncomfortable by the smoke and smell left by cigarettes.

- The order was granted to maintain the operation and installation of the so-called *"smoking points"* in the concourse of the Rio de Janeiro International Airport, upholding the injunctions previously granted by the eminent federal judge CARREIRA ALVIM."

ANVISA opposed motions for clarification alleging **obscurity and the need for pre-questioning** of Art. 2 of Law 9,294/96 and arts. 2, IV, and 3, introduction and single paragraph, of Decree 2,018 / 96.

The alleged obscurity would refer to the basis of the collegial decision against the prohibition: whether it would arise from the fact that "the apparatuses actually met the requirements of Law" (p. 616) or would be based on the "formal defect of the prohibition alone, not the material defect" (p. 617). The appellant pointed out the "*difficulty in seeing exactly what the actual basis of the judgment is,* ***taking into account the discrepancy between the reasons given in the vote and in the summary of the judgment drafted in his chambers by the reporting judge (pp. 575-592) and the considerations stated by the reporting judge himself and by the other judges, when they voted orally at the judgment session on 8/10/2005 (transcripts on pp. 598-610)"*** (italics in original, 615).

The prohibitions were rejected, according to the summary of the following transcript (p. 636):

"CIVIL PROCEDURAL LAW. MOTION FOR CLARIFICATION. ALLEGED OBSCURITY. REJECTION.

- Appeal for the change of the decision, on the grounds that it is obscure.

- Established the absence of any defect likely to be welcomed by the opposition of the request for clarification, once the *V.* appealed decision analyzed clearly and objectively the matter brought to the scrutiny of the judiciary branch.

- It was impossible to discuss again the material already examined under a motion for a declarative judgment.

- Rejection of the motions."

The reporter judge's vote in the motion for a declarative judgement, states (pp. 632-633):

> "On the other hand, it should still be pointed out that the alleged obscurity in truth did not occur in the event. Rather the formal and material defects invoked by the appellant, and alluded to in the oral votes offered in the session and in the written vote, should be considered as bases that complement each other, acting to corroborate the understanding that came to support the reasons that led the judge to conclude his reasoning by observing the principle of rational persuasion of the judge."

Contrary to the judgment of the Court *a quo*, this special appeal was filed based on Art. 105, III, "a", of the Federal Constitution, alleging violation of Art. 535, I and II of the CPC and Art. 2, introduction, of Law 9,294/96 (p. 662).

As for Art. 535 of the CPC, the appellant asserts that, despite the opposition to the motion for clarification, it has not been clarified what would have been the basis of the judgment, since although the vote of the reporting judge, drafted in his chambers. Additionally, the summary only refers to the adequacy of the equipment vis a vis the legislation (a material defect of the term of prohibition). The oral express of the same reporting judge at the judgment session would also support the formal defect of lack of motivation. In the same way, the votes of two others judges, formulated orally and transcribed in the documents, would focus on the formal defect.

On the other hand, besides the opposition to the motion for clarification, there would have been nothing expressed regarding Art. 2 and the 9,294/96 (pp. 649 and 662).

> The appellant concludes, considering the violation of Art. 535 of the CPC (pp.

655):

> "Here then is the question which should have been clarified by the Court *a quo* during judgment of the pre-cited motions for clarification: what is the clear, legal right effectively recognized by the judgment (in the essence of the three votes)?
>
> *A)* The clear, legal right of the appellant to removal of the prohibition on equipment due to its effective and conclusive appropriateness under the relevant legislation (Law 9,294/96 and regulation), or, because this legislation does not apply to those equipment--is this a material defect of the prohibition?
>
> *OR*
>
> *B)* The clear, legal right of the petitioner to removal of the prohibition on equipment by virtue of the violation of its right to defense, arising from a prohibition lacking adequate motivation, including technically--is this a formal defect of the prohibition?
>
> Depending on the clarification that was given, ANVISA would

also evaluate whether the handling of the special appeal was appropriate or not. The case was known and provided the motions for clarification referenced and were it clarified that item B is really the basis of the judgment, it would be necessary to adjust the summary of the judgment, so as to reflect what was decided at the judgment session."

Alternately, the appellant alleges a violation of Art. 2 of Law No. 9,294/1996, which "*in prohibiting the use of smoking products in common enclosed spaces, opens an exception, i.e., that there be an area in the locale,* ***properly isolated and well ventilated****, exclusively intended for the consumption of those products*" (italics in the original, p. 658). It maintains that the technical opinion itself submitted by the respondent proves that the equipment is ineffective: 'the question is therefore merely a syllogism, to interpret the law and apply it to the uncontroversial factual data, which is the ineffectiveness of the filtering attested to in Souza Cruz's own report. And this is what the prosecutor did when he prohibited it as a precaution!" (p. 660).

The Special Appeal was admitted in the court of origin (p. 705).

The Federal Public Prosecutor's Office, in this special way, expressed its opinion to grant the appeal, because of the conflict with Art. 535, I and II of the CPC or, alternatively, for the annulment of the appealed judgment "to be integrated into the case of INFRAERO, pursuant to Art. 47 of the CPC, in accordance with the precedents of this Court transcribed in this opinion "(p. 733).

Regarding the violation of Art. 535 of the CPC, the opinion of the Federal Public Prosecutor's Office is thus sustained:

a) the judges of the original instance courts would have to adhere to the grounds established in the original petition, answering three questions raised in the documents: (a) whether or not it was necessary that ANVISA were informed by INFRAERO before the installation of the apparatuses known as *smoking points*, (b) whether ANVISA had the legitimate right to prohibit such equipment for allegedly disobeying Law 4,294 and, finally, (c) whether or not the company with the infraction was assured in the administrative process, of the right to a full defense and due process? If so, would the act of prohibition have been reasonable and proportionate to the results sought for public health?" (p. 721);

b) the court of first instance responded satisfactorily to the questions raised in the mandamus, and the Court *a quo* innovated on the basis of the right of smokers and non-smokers to live together (p. 723): "up to that time, the constitutional right to smoke was not discussed in the documents, whether it was lawful or not to seek a conciliatory solution for users of air travel who are inveterate smokers and who are subjected to long waits for flight connections in the boarding gates of the international airport in Rio de Janeiro. It is said, in favor of the respondent authority, that it does not deny the abstract right of smokers to an appropriate place in enclosed public spaces and it goes as far as to consider the *smoking point* 'an intelligent and curious project'" (724);

c) in the documents, there was no “definite conclusion as to the efficacy of these apparatuses, which was one of the main points of the writ of mandamus, since the tobacco company claimed that there had been a material defect in the prohibition of the equipment for smokers, since it would have complied to the letter with Law No, 9,294/96 (...) On the other hand, the technical opinion of ANVISA expresses a diametrically opposite view in the documents attached on pp. 296-308, concerning the *smoking points*...” (724);

d) because of the lack of proof of the effectiveness of the equipment, "the conclusion contained in the judgment does not cease to be surprising, because without properly demonstrating a causal link, ‘the petitioner was able to conclusively present the pre-constituted evidence of its right, demonstrating thus to have the procedural and legal conditions for obtaining judicial protection in a court of law, now that it has proved its clear, legal right.’ This statement in the judgment appears extremely contradictory: ‘the allegation that the petitioner would not have demonstrated its clear, legal right would not be convincing, since the opinion of the appellee would be inconsistent with the conclusions of the reports brought by the appellant, showing in this way the need for a delay for evidence, incompatible with a writ of mandamus made out of whole cloth' (sic, p. 587). With all due respect, the 5th Panel of the TRF of the 2nd Region forgot that if there was any doubt about the efficacy of the equipment for smokers installed in a closed system with central refrigeration at the international airport in Rio de Janeiro, there would be no way to grant the order sought in favor of the company, once the demonstration of the clear, legal right would have to be made by the petitioner, as is borne out by the retroactive statement of the judgment. *This unwarranted reversal of the burden of proof as to the alleged clear, legal right to the writ of mandamus shows a* ***contradiction*** *in the judgment under appeal, which was deserving of due clarification on the part of the adjudicating body when judging the motion for clarification.*” (italics in original, p. 725);

e) "... ANVISA is also right concerning the obscurity present in the appeal judgment, since both the allegation of material defect, which prevailed in the vote taken by the chief reporting judge (pp. 584-592), as well as a formal defect in the act of prohibiting the *smoking points*, prevailing in the oral votes of the Fifth Panel of the Court *a quo* (pp. 598-610), served as a reason for ruling on the appeal of a writ of mandamus. But contrary to the facts and questions of law challenged in the writ, without the proper demonstration of a causal link between the conclusion of the judgment and the alleged premises that would sustain it” (p. 726);

f) "... there was no response on the part of the judicial body on an important question for the clarification of the act, which involves whether or not there was a violation of Art. 2 of Law 9,294/1996, especially to allow the correct evaluation of the special appeal in this Superior Court of Justice” (p. 726);

g) "In these terms, there is the impression that the appeal was provided because the equipment installed in the concourse of the Rio de Janeiro International Airport effectively met the requirements of Law No. 9,294/1996, i.e., that they would provide effective filtering of the smoke and the proper ventilation of the environment. On the other hand, in the same vote, pp. 588-589, that reporter judge continued (...) In this passage, contrary to the previous transcript, the conclusion is that the provisions of Law 9,294/1996 would not be applicable to the present case. Hence, the filing of the appeal with the granting of the order. Asked about this manifest contradiction in the judgment, as stated in the decision on pp. 629-636, the Fifth Specialized Panel preferred to dodge the matter under the generic argument that what would matter in the judicial provision would be the delivery of a fair decision and not the legal basis or the specific legislation bearing on the case. However, it was imperative that the judging court rule, in the judgment of the motions for clarification presented by ANVISA, on whether Law No. 9,294/1996 applied or not, since, in the case of a negative answer, this question would be prejudicial to the knowledge of the special appeal filed on the basis of a negative effect of federal legislation" (p. 727)

Regarding the annulment of the judgment, due to the absence of INFRAERO as an active part of the mandamus, the Federal Public Prosecutor's Office emphasizes that the term of prohibition was not issued against Souza Cruz, but against INFRAERO. It argues that, even if the legal and economic interest of Souza Cruz, as an authorizing agent, is recognized, it will be imperative that INFRAERO participate as an appellant. Although this matter has not been previously discussed, it is a matter of public order, to be acknowledged by this Court (p. 730).

It is the **report**.

SPECIAL APPEAL No. 892.456 - RJ (2006/0216382-0)

VOTE

HIS EXCELLENCY MR. MINISTER HERMAN BENJAMIN (Reporting Judge): I know of the special appeal for the alleged violation of Art. 535 of the CPC, due to **obscurity** (lack of clarity in the reasoning of the judgment, regarding the type of defect identified--formal or material--in the term of prohibition) and omission, regarding Art. 2 of Law 9,294/96.

The analysis of the alleged omission of the Court *a quo* in relation to Art. 2 of Law No. 9,294/96 prejudices the alternative request formulated by ANVISA for an evaluation of the violation of the legal provision itself.

Thus, only after confronting the possible violation of Art. 535 of the CPC, is it possible--if it is concluded that there was no omission and, therefore, acknowledging the pre-questioning--to proceed to the analysis of the admissibility of the special appeal, regarding the alleged violation of Art. 2 of Law 9,294/96.

1. Obscurity

As for the alleged obscurity, really the reporting judge's vote and the other votes cast orally at the judgment session, despite the usual brilliance of their sentences, left relative doubts as to the basis that would have led to the filing of the appeal.

The reporting judge and the summary of the judgment refer to an "absolute acceptability of the standards of air quality around them, thus allowing their installation" (p. 586). It is not clear, therefore, whether the acceptability of such quality standards would correspond to an adequacy of the equipment vis a vis the current legislation (Law 9,294/96) or whether, simply, such an assertion would represent an equitable judgment by the Court *a quo*, a consequence of balancing the ethical-technical aspects of the legal issues in conflict: on the one hand, the public health of the non-smoking population, on

the other, the comfort of smokers and the financial interests of tobacco companies.

If the understanding of the Regional Court is in line with the fact that the equipment complies with the legislation, there would be, as the Federal Public Prosecutor maintains, a contradiction with the section by the reporting judge and the summary in which it is stated that "the legislation invoked by the appellee does not seem to be applicable to the question under discussion, given the nature of the equipment and the positive difference made for those who have a smoking habit, by granting them a place to do so without interfering with or causing any duress to those who do not have such a habit or, on the other hand, those who are made uncomfortable by the smoke and smell left by the cigarettes" (p. 589).

In any case, leaving aside the presence of a possible contradiction, which is not to be recognized in this appeal because it was not alleged by ANVISA, the reporting judge drafted his chambers, and the summary of judgment seems to support that there is a material defect in the term of prohibition, to the degree that the equipment would be appropriate for the purpose for which it is provided, which is to serve as an isolated environment for smoking, even if to reach such a conclusion would have been based on technical evidence produced unilaterally by the tobacco company.

On the other hand, the votes delivered by the judges at the judgment session refer to a formal defect in the term of prohibition, i.e., a failure to establish its basis.

Thus, Judge Vera Lucia, in her vote, maintained that "ANVISA, which made the prohibition, in my view, did not bring elements that could support the withdrawal of these apparatuses, either by a complaint from someone, by virtue of a survey, or either a given technician or a technician from the agency itself who raised some reasonable grounds to justify that it would be appropriate, or that it would be against the legislation in accordance with the index, or in accordance with the legal requirement "(p. 606).

Judge Cruz Netto, for his part, stated that "the term of prohibition also, in my view, loses for lack of legal basis and motivation, since it simply says..." (p. 608).

Thus, by the oral votes cast, it seems that the appeal was also granted on a formal defect of the term of prohibition.

Evidently, therefore, the obscurity was not well established (and understandable for the jurists), reasons that led the Court *a quo* to its decision. It is a deficiency that, obviously, makes appeal to the superior court difficult for the succumbing party.

Pressed to express its views on obscurity, the Court *a quo* rejected the motion for clarification, understanding that the judgment would be clear, whatever came of that, and in the end, it could not agree.

The learned, enlightenment reporting judge, in passing, maintains that there is no obscurity "to the extent that the formal and material defects invoked by the appellant, which is the object the allusion in the oral vote cast in session and in the written vote, must be considered as bases completed among themselves" (pp. 632-633).

The simple consideration is not sufficient to configure the correct and complete judicial provision that is expected in the event, all the more so on a topic that is of interest to the whole country.

It must be concluded for all that, that the court *a quo* has not sufficiently explained the bases for its decision, consequently impeding or hindering a clear understanding of its reasons, which is a breach of Art. 535, I, of the CPC.

2. The omission

ANVISA also alleges violation of Art. 535 of the CPC by omission, since the court of origin would not have expressed its opinion on the provisions in Art. 2 of Law 9,294/96, which I transcribe:

> "Art. 2. The use of cigarettes, cigarillos, cigars, pipes or any other smoking product, whether or not derived from tobacco, is prohibited in common, private or public space, **except in an area intended exclusively for this purpose, properly isolated and with appropriate ventilation.**
>
> *§ 1 The provisions of this article include public offices, hospitals and health posts, classrooms, libraries, common work spaces, and theater and movie houses.*

> *§ 2or the use of the products mentioned in the introduction are prohibited in aircraft and other vehicles for collective transportation"* (my emphasis added).

Returning to the reporting judge of the appealed judgment, we see that, without going deeper, the reporting judge dismissed the application of federal legislation raised by ANVISA, stating that "the legislation invoked by the appeal does not seem to be applicable to the issue under discussion" (589).

Now it is clear that the reporting judge of the Court *a quo* did not specifically evaluate the legal basis invoked on by the public authorities, in particular the provisions in Art. 2 of Law 9,294/96, failing to address an essential basis for ANVISA's claim.

Neither did Judge Cruz Netto provide a specific judgment regarding the federal legislation, although he cites Law 9,294/96 in a generic manner in his judicious vote (p. 608):

> "Law 9,294 provides for restrictions on the use and advertising of cigarettes, alcoholic beverages, etc., except in an area intended exclusively for that purpose, properly isolated and with adequate ventilation. That is, the law does not even require specific equipment. It just says there should be ventilation. It should be an open area, which cannot be confined. Then there is Decree 2,018, which also mentions the same thing in a single paragraph of Art. 3, which says that the use of smoking products in common, enclosed spaces is prohibited, except in an area exclusively intended for its users. (...)
>
> And then, that equipment enters into the concept of artificial ventilation, which is an apparatus that suctions smoke. There would really be no harm.
>
> The term of prohibition also, in my view, loses for lack of legal basis and motivation, in that it simply says: 'as a result of non-compliance with the specific legislation.'
>
> And it cites in this way three laws, but does not specify even what provisions of those laws would have been breached. *I think that that is an essential formality, even for purposes of the defense of a notified person or legal entity*" (my emphasis added).

Considering now the technical and juridical complexity of the matter and its social and health importance, the citation of Law 9,294/96 *in passing* does not mean, for the hermeneutical purposes needed here, an evaluation or issuing judgment on the main legislative basis invoked by ANVISA.

For full judicial provision, it is necessary to expressly confront, frontally and directly the federal issue raised. In the present case, it will be seen that the court of origin failed to analyze the adequacy of the facts reported by the parties with the legal

forethought anticipated by the health authority. In fact, I find that the Court *a quo* abstained from analyzing the adequacy of the equipment installed at the airport in light of the definition of “an area *properly* isolated and with adequate ventilation" (Art. 2 of Law 9,294/96, (my emphasis added), which is the core of the discussion raised in the documents and information provided by ANVISA.

It is therefore known as the violation of Art. 535, II of the CPC.

3. Synthesis

If the court of origin omits with respect to Art. 2 of Law 9,294/96, it removes for now the pre-questioning and, therefore, the subsidiary claim of the appellant concerning the violation of this provision of federal legislation.

For all those reasons, **I acknowledge and grant the special appeal to declare the judgment void under appeal for violation of Art. 535, I and II, of the CPC, determining the return of the documents to the distinguished court of origin to render a new judgment.**

It is like a **vote**.

CERTIFICATE OF JUDGMENT
SECOND PANEL

Registration Number: 2006/0216382-0 **REsp 892456/RJ**

Origin Number: 200351010231443

SCHEDULE: 3/20/2007 JUDGED: 3/20/2007

Reporting judge
His Excellency Mr. Minister **HERMAN BENJAMIN**

President of the Session
His Excellency Mr. Minister JOÃO OTÁVIO DE NORONHA

Deputy Attorney General of the Republic
His Excellency Mr. Dr. ANTÔNIO CARLOS FONSECA DA SILVA

Secretary
Bach. VALÉRIA ALVIM DUSI

NOTICE

APPELLANT	: NATIONAL HEALTH SURVEILLANCE AGENCY (ANVISA),
ATTORNEY	FÁBIO ESTEVES GOMES AND OTHERS
APPELLEE	: SOUZA CRUZ S.A.
ATTORNEY	: EDUARDO ANTONIO LUCHO FERRÃO AND OTHER(S)

SUBJECT MATTER: Administrative - Act - Prohibition

ORAL ARGUMENTS

Dr. CAMILLA LACERDA DA NATIVIDADE MARQUES (Federal Prosecutor - with legal standing for ANVISA's defense)
, on behalf of: APPELLANT: NATIONAL HEALTH SURVEILLANCE AGENCY (ANVISA), Dr. NELSON NERY, on behalf of: APPELLEE: SOUZA CRUZ S.A.

CERTIFICATE

I hereby certify that the distinguished SECOND PANEL, in evaluating the abovementioned case in a session held on this date, made the following decision:

"The Panel unanimously upheld the appeal to annul the judgment which dismissed the motion for clarification, in accordance with the vote of the Minister-Reporting Judge."

The Ministers Eliana Calmon, João Otávio de Noronha, Castro Meira and Humberto Martins voted with the. Minister-Reporting Judge

Brasilia, March 20, 2007

VALÉRIA ALVIM DUSI
Secretary