

# **INTERNATIONAL JUDICIAL COOPERATION IN BRAZIL: RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS AT THE SUPERIOR COURT OF JUSTICE<sup>1</sup>**

## **NADIA DE ARAUJO**

Doutora em Direito Internacional pela USP. Mestre em Direito Comparado pela George Washington University. Professora de Direito Internacional Privado da PUC-RJ. Procuradora de Justiça aposentada. Advogada.

Doctoral's Degree in International Law, University of São Paulo Law School, Sao Paulo/SP, Brazil. Master of Comparative Law, George Washington University, Washington/DC, USA. Professor of Law, Pontifical University of Rio de Janeiro (PUC-Rio), Rio de Janeiro/RJ, Brazil. Retired Public Prosecutor for Courts of Rio de Janeiro/RJ, Brazil. Lawyer.

## **FREDERICO DO VALLE MAGALHAES MARQUES**

Doutor em Direito Internacional pela UFRGS. Mestre em Direito Internacional pela UERJ. Advogado. Doctoral's Degree in International Law, Federal University of Rio Grande do Sul, Porto Alegre/RS, Brazil. Master of International Law, State University of Rio de Janeiro (UERJ), Rio de Janeiro/RJ, Brazil. Lawyer.

*"The scale of that activity which forms the subject matter of this book, international co-operation in civil and criminal matters, has grown quite dramatically in very recent years. It increasingly engages the attention of lawyers in private practice, in the offices of corporate legal counsel and in government service."*

*David McLean*

## **1. INTRODUCTION**

International relations have been diversifying and increasing in importance throughout the world. As a matter of fact, more and more people travel, work, have commercial exchanges and interact internationally. The world is experiencing a new international era, where national frontiers are easily transposed by people and goods and international transactions exponentially increase, setting the stage for an upsurge of transnational jurisdictional problems. In this new world era, international judicial cooperation is paramount. Accordingly, States are forced to cooperate with each other, accepting orders and decisions rendered in a foreign jurisdiction as if they were issued

---

<sup>1</sup> ARAUJO, N. ; MARQUES, F. V. M. . International judicial cooperation in Brazil: recognition and enforcement of foreign decisions at the Superior Court of Justice. Revista de Arbitragem e Mediação, v. 40, p. 337-349, 2014.

and held in its own country. These judicial acts that travel from one country to another are present both in civil and criminal matters.

Brazil has a long tradition of international cooperation and its first regulation dates from 1847, when *Aviso Circular n.1* set forth rules for execution of rogatory letters. Nevertheless, this influx of cooperation has grown steadily since the late 90's and it is still increasing in this century. Today there are large numbers of Brazilian nationals living abroad who need to use judicial cooperation for their routine problems, such as the recognition and enforcement of a foreign divorce decision. Also, in the criminal field, as money travels electronically, investigators must turn to other countries for measures in order to continue its tracking.

Since 1934 until 2004, the Supreme Court (*Supremo Tribunal Federal*) had exclusive jurisdiction to recognize foreign judgments, arbitral awards and all foreign orders to be executed in Brazil. Constitutional Amendment n. 45 transferred to the Superior Court of Justice (*Superior Tribunal de Justiça – STJ*)<sup>2</sup> the recognition and enforcement of foreign decisions. This change was part of the judicial reform implemented in Brazil in 2004, which sought to contain the overload of cases before the Supreme Court so that it could focus on constitutional matters only. Therefore, international judicial cooperation has since been in the hands of the Superior Court of Justice, which is also in charge of the application and interpretation of federal legislation.

In Brazil, as stated in Article 493 of the Brazilian Code of Civil Procedure, all foreign decisions must undergo a procedure of recognition, known as *homologação de sentença estrangeira* (recognition of foreign decisions),<sup>3</sup> before being able to have a full legal effect in the country.<sup>4</sup> This requirement has

---

<sup>2</sup> Constitutional Amendment 45/2004. The Superior Court of Justice issued Res. STJ 9, in May 2005, which contains the legal requirements for the recognition of foreign judgments and arbitration awards in Brazil, as well as the granting of rogatory letters, and is in force until the final approval of its Internal Rules. It is important to explain that until the Constitution of 1988, the Supreme Court had jurisdiction over all matters in the so-called third instance, the right to review any threats to the Constitution and to Federal Law. Although Brazil is a federal system, all legislation in civil and criminal matters is federal (thus the system can be called national). The States' legislative power is very limited, unlike in other systems, such as Canada and the United States. The 1988 Constitution created a new Court, the Superior Court of Justice, which has taken over a part of the Supreme Court's jurisdiction for review in matters of Federal Law. Currently, with the Constitutional Amendment 45/2004, additional jurisdiction of the Supreme Court has been transferred to the Superior Court of Justice in order to lighten the Supreme Court's burden. All decisions cited in this paper can be easily accessed by their class and number directly at both courts' websites: that of the Supreme Court [[www.stf.jus.br](http://www.stf.jus.br)], and that of the Federal Superior Court [[www.stj.gov.br](http://www.stj.gov.br)]. Research through these websites is easy and reliable. The full text of all decisions is also available. The key word to research case law is *jurisprudência*. A word in the decision or the type or number of the decision will then reveal the case. For this reason, other publications for the cases will not be cited in this paper.

<sup>3</sup> A fair Portuguese translation would be "homologation process", but recognition and enforcement are more commonly used.

<sup>4</sup> In the last years one of the authors, Nadia de Araujo, has extensively studied this issue. For more detailed references, see in Portuguese Nadia de Araujo, *Direito internacional privado: teoria e prática brasileira* (2011), Nadia de Araujo (coord.), *Cooperação jurídica internacional: comentários a Resolução n. 9 do STJ*, (2010). In English, see Nadia de Araujo, Dispute resolution in Mercosul: the Protocol of Las Lenas and the case law of the Brazilian Supreme Court, 32 U. *Miami Inter-Am. L. Rev.* 25, 44 (2001).

For more information on the Brazilian system of recognition of foreign decisions, see in English, Jacob Dolinger, Brazilian international procedural law, in *A panorama of brazilian law* 349, 365-66 (Jacob Dolinger & Keith S. Rosenn eds., North-South Center & Esplanada, 1992) (1991); Daniela Trejos Vargas, Proceedings Inaugural Conference on "Legal and Policy Issues in the Americas", 13 *Fla. J. Int'l L.* 125, 127-28 (2000); Maria Angela Jardim de Santa Cruz Oliveira, Recognition and enforcement of United States money judgments in Brazil, 19 *N.Y. Int'l L. Rev.* 1 (2006). For a recent account of recognition

been applicable since Brazil was an Empire, after it became independent of Portugal, in 1822.<sup>5</sup> The Brazilian Code of Civil Procedure dates from 1939 and does not have executive rules on the procedure for the recognition of foreign decisions. In 2005, the Superior Court of Justice regulated the procedure for recognition of foreign decisions by Res. STJ 9, which has also replaced the 1971 Supreme Court regulation. Res. STJ 9 has updated many issues that case-law had settled during the time the Supreme Court was judging international judicial cooperation cases. One example of an important rule added by Res. STJ 9 is the possibility of the requesting party to obtain injunctive relief during the recognition process, which was not allowed by the Supreme Court. Nonetheless, Res. STJ 9 was enacted by the Superior Court of Justice and may be modified by such Court at any time. If this new regulation were to be converted into statutory provisions, it would secure a better framework to all parties. A new Code of Civil Procedure is now being discussed by the Brazilian Congress and we expect that this conversion take soon place. In 2010, a Commission of Experts led by Justice Luiz Fux presented the Senate with a project for a new Code of Civil Procedure. Law Project n. 166 was discussed and modified by the Senate and is now under discussion at *Câmara dos Deputados* (our House of Representatives). The project sets forth a new chapter on recognition and enforcement of foreign decisions that turns Res. STJ 9 into statutory provision. As stated above, this is a much anticipated change and will certainly contribute to the development of international cooperation in Brazil.<sup>6</sup>

The number of cases submitted to the Superior Court of Justice for recognition has more than doubled over the last years. While the Supreme Court had ruled on roughly seven thousand cases between 1934 and 2004, the Superior Court of Justice has examined more since 2005. This article reviews the current system of recognition of foreign decisions in Brazil under the rules of Res. STJ 9, its contribution to Law Project n. 166, as well as recent cases held by the Superior Court of Justice.

## 2. CHARACTERISTICS AND REQUIREMENTS OF RECOGNITION OF FOREIGN DECISIONS

The system of recognition of foreign judgments in Brazil works as a *giudizio di delibazione*, inspired by the Italian model. This method does not evaluate the merit of the foreign decision to be recognized,<sup>7</sup> but does ensure the fulfillment of certain legal requirements and, at least tangentially, evaluates the merits of the case so as to prevent the flouting of public policy, national sovereignty

---

of foreign arbitral awards see Mauricio Gomm-Santos, Brazil's Conflicting International Arbitration Case Law: The Inepar and Renault decisions, 64 *Disp. Resol. J.* 82.

This article used and improved information that were previously published by the Authors in "Recognition of Foreign Judgments in Brazil: the Experience of the Supreme Court and the shift to the Superior Court of Justice", 1 *World Arbitration and Mediation Review*, 211 (2007). At that time, the Superior Court of Justice had just initiated deciding cases on international cooperation, while now it has a firm and established case law on the subject. New decisions have been reviewed for the current article but the main characteristics remained, and because of that some of the information already published was kept unchanged.

<sup>5</sup> Brazil was the metropolis of the Portuguese Empire from 1808 to 1821, when the King was transferred from Portugal during the war with France's Napoleon. In 1821, King João VI went back to Portugal but left his son Pedro as regent, who later declared the independence of Brazil in 1822. Brazil was an Empire from 1822 to 1889, when the Republic was declared and a Federal Presidential system implemented, inspired in the United States institutions.

<sup>6</sup> Articles 878 to 883 of the Project deal with the matter and will be mentioned when applicable throughout this work.

<sup>7</sup> See for historical comments Nadia de Araujo, note 2, p. 241.

or good customs. The core principle is to respect the decision of the foreign court, unless it is unsustainable under Brazilian public policy standards. For instance, during the time when divorce was not permitted in Brazil, foreign decisions on divorce of Brazilian nationals were considered to be against public policy. Since the implementation of a divorce regulation in 1977, however, the recognition of such foreign decisions does not raise any major issue and has thus been routinely recognized.

One has to tread carefully when analyzing the decisions held by the Superior Court of Justice on public policy as, more often than not, a claim that a foreign decision was held against Brazilian public policy actually conceals an attempt to argue on the merits of a foreign decision. In granting the recognition to all foreign decisions, the Superior Court of Justice always mentions that the decision is not against public policy as well as that all formal requirements are present. Nonetheless it is a thin line between what is a question on the merits or on public policy. In one case, the absence of proof that the clause was signed and thus entered into by the defendant was considered against public policy and the award vacated.<sup>8</sup> However, in other similar cases, foreign awards were granted recognition. It is fair to say that the Superior Court of Justice is aware of the important role it plays in guaranteeing that foreign decisions are recognized without being reviewed on the merits. Over the last years most arbitral awards have been granted recognition without serious challenge to the merits.<sup>9</sup>

Apart from the issue of a foreign decision being manifestly against public policy, the only arguments that defendants are permitted to raise in responding to a recognition request are those related to procedural legal requirements. The requirements for the recognition of foreign judgments are set forth in two domestic statutes: the Brazilian Code of Civil Procedure (*Código de Processo Civil – CPC*), and the classic Introductory Law to the Civil Code, which name has been recently changed by Decree 12.376/2010 to Introductory Law to Brazilian Law (*Lei de Introdução às Normas do Direito Brasileiro – LINDB*). The Superior Court of Justice has kept in its Res. STJ 9, Article 5, the same requirements as the Supreme Court, but added new ones in Article 4. In the current discussion of Law Project n. 166, the judicial cooperation field has gained new articles on recognition and enforcement of foreign decisions. Res. STJ 9 played a key role, as these articles were all drafted in accordance therewith.

---

<sup>8</sup> See SEC 967, STJ (2006) (where the court considered offensive to public policy the absence of proof that the defendant had chosen arbitration as a method for dispute resolution since his signature was missing in the contracts where the clause was inserted. The court asserted that the absence of unequivocal choice by one party is against the principle that arbitration may only be used if there is manifest choice to submit to it). Also in SEC 866, STJ, the contract was concluded verbally and there was no proof that arbitral clauses were ever negotiated – thus no proof of its acceptance. Public policy was the reason for denying recognition to the foreign arbitral award.

Nonetheless, in SEC 856, STJ (in which evidence of submission to the arbitral clause was also lacking), the court reached the opposite conclusion and decided that although there was no signed contract, there was proof of an understanding between the parties as both appeared before the arbitral tribunal. Thus there was no reason to vacate the award on public policy grounds.

<sup>9</sup> For an analysis of the work of the Superior Court of Justice in the recognition process of foreign arbitral awards see Nadia de Araujo, O Superior Tribunal de Justiça e a homologação dos laudos arbitrais estrangeiros, balanço positivo de quatro anos de atuação, 3 *Revista Semestral de Direito Empresarial*, 229 (2008), where the author shows that the STJ had decided on 24 cases, and only in three had recognition been denied. The numbers have grown since then but the ratio between granted and denied cases has not suffered substantial changes.

The requirements are: (a) the foreign court or authority had jurisdiction to make the decision; (b) the parties were properly served or the default judgment was legally certified, (c) there is evidence of the authenticity of the judgment or decision and of its final character (the foreign decision shall be enforceable in the country of origin); and (d) the foreign judgment or decision has been certified by the Brazilian Consulate/Embassy of the country of origin and has been translated into Portuguese by a Brazilian sworn legal translator. Law Project n. 166 also provides in its Article 881 that foreign decision should not be against public policy, setting down the Supreme Court's and the Superior Court of Justice's case law on the matter.

The first two requirements, jurisdiction of the foreign court and service of process, have raised issues. Despite their procedural nature, they are at the heart of the matter for the recognition process and have stirred long discussions in many cases. For that reason, the present Article will discuss at length these first two requirements. The third and fourth requirements, evidence that the decision is final and was duly certified and translated, albeit very common as parties do not always provide adequate certification, do not raise doctrinal discussions.

### ***2.1 Jurisdiction of the foreign court***

This first requirement compels the Superior Court of Justice to analyze the issue of jurisdiction in accordance with both Brazilian law and foreign law. In Brazil, jurisdiction (international competence) is regulated by the Code of Civil Procedure, Articles 88, 89 and 90. According to the Brazilian Constitution, provisions of Brazilian Law apply to Brazilians and foreign residents alike.

The jurisdiction of Brazilian Courts may be of two types: exclusive or concurrent. Situations where Brazilian courts have exclusive jurisdiction are those related to real estate property located in Brazil, as established in Article 89 of the Brazilian Code of Civil Procedure. Article 89 covers two situations: property rights over real estate located in Brazil and procedures related to the inheritance of real estate property located in Brazil. Thus a foreign decision concerning real estate located in Brazil will not be recognized by the Superior Court of Justice.

Nonetheless, over the years, case law has applied an interpretation that has encompassed a broader view of this matter, such as accepting divorce decisions including real estate property, as long as there was no dispute on the matter. The Superior Court of Justice has been careful in cases where real estate in Brazil is transmitted through inheritance. In SE 755 although the real estate property was in Brazil, thus a clear case of exclusive jurisdiction, the decision was recognized because the distribution of the estate was done in accordance with Brazilian rules.<sup>10</sup> In another judgment (SEC 3.532),<sup>11</sup> a Swiss court decision by means of which a different person than the heir was granted the estate was not recognized because this was not possible under Brazilian law and, as the property was located in Brazil, only a Brazilian court could decide the case, according to Article 89, II of the Code of Civil Procedure.

---

<sup>10</sup> SE 755, STJ, published in 2005. Despite exclusive jurisdiction of Brazilian courts, the foreign decision respected Brazilian law and distributed the property according to it.

<sup>11</sup> SEC 3.532, STJ (2011).

The issue of concurrent jurisdiction is a different matter and the Superior Court of Justice has acknowledged foreign jurisdiction more easily if the case falls within the three categories stated in Article 88. In these situations, although Brazilian courts have concurrent jurisdiction to hear the case, the Superior Court of Justice will recognize a foreign decision as well. A party may file a law suit both in Brazil or elsewhere whenever: I. The defendant, whatever his nationality, is domiciled in Brazil; II. The obligation must be performed in Brazil; III. The case is based on an incident that took place, or arises from an action taken in Brazil. Therefore, when the lawsuit is brought at a foreign court, jurisdiction is asserted and the plaintiff cannot subsequently claim a lack of jurisdiction of the foreign court in order to frustrate the Brazilian recognition process. If the case falls under Article 88, and the party was present in the proceedings, the Supreme Court had always recognized the foreign decision without delay. Since 2005, the Superior Court of Justice has followed this path and has continued to recognize foreign decisions in similar cases. Law Project n. 166 sets down the matter in Article 23, stating that a suit brought in Brazil does not preclude the recognition of a foreign decision or arbitral award.

Brazilian law repudiates the hypotheses of international *lis pendens*. Thus, recognition will be granted even if there is an action pending before Brazilian courts. If two lawsuits are brought in different jurisdictions and the Brazilian case is decided first and becomes final (not subject to any appeals), then the foreign decision will not be recognized in the future. The reverse is also true, and if the foreign decision is recognized first, it will preempt the Brazilian lawsuit, as the foreign decision will have *res judicata*. In a recent case, the Superior Court of Justice confirmed this ruling when it decided to follow through with the recognition process of a foreign decision while the Brazilian judgment was still pending.<sup>12</sup>

It is irrelevant to a Brazilian judge if there is an identical case pending abroad; this fact alone will not be enough to prevent him from having jurisdiction over the case. A case initiated in Brazil will follow its normal course and may only be interrupted if a final foreign decision is recognized by the Superior Court of Justice. Only after the recognition process is finished will the foreign judgment be enforceable in Brazil. In the same way, if a case brought before a Brazilian judge reaches a final decision first, the pending recognition process before the Superior Court of Justice becomes inapplicable. In this case, the foreign decision will not be recognized. Law Project n. 166 maintains this rule in Article 23.

## ***2.2 Process Serving and the Due Process Clause***

Process serving and due process are the second requirement under Brazilian law for a foreign decision to be recognized. The Superior Court of Justice will examine if the parties have been regularly notified and that notice was duly served even if the party did not appear before the

---

<sup>12</sup> AG SEC 854. STJ, (2011). This case was a motion to modify a prior decision that had stayed the recognition process on the grounds that there was a pending suit in Brazil. The Superior Court of Justice decided that there could be no stay of the recognition process and that it should continue up to judgment. The case concerned the request for recognition of a foreign arbitral award, while the Brazilian case tried to discuss the validity of the arbitral clause. As it was not a matter of exclusive jurisdiction, the Superior Court of Justice found it could not discuss the validity of the clause in the recognition process of the arbitral award, where only requirements of Res. STJ 9 could come into play.

foreign court. Res. STJ 9 expressly mandates that this requirement be reviewed by the Superior Court of Justice, so that due process of law is confirmed to have been followed.

When a defendant appears before the foreign court without being coerced and takes part in all procedural phases of the case, the due process clause is fulfilled. According to old decisions held by the Supreme Court – and that have been followed by Superior Court of Justice – even if there had been an irregularity in the notification, the un-coerced attendance of the party is enough to grant recognition to the foreign decision.

On the other hand, when a defendant is domiciled in Brazil the proper way to serve him is by means of a rogatory letter. Other means will not be considered valid, even if the foreign law states different ways of giving notice, such as by mail or by way of an affidavit. According to case law dating from the Supreme Court and followed by the Superior Court of Justice, such notification would violate Brazilian public policy and the request for recognition would be denied. The Superior Court of Justice has ruled on the matter many times.<sup>13</sup> Law Project n. 166 maintains this rule in Article 881, paragraph 2.

### ***2.3 Evidence that the Foreign Decision is Final, authentication and translation***

These last requirements, although relevant, are much less controversial. Their fulfillment falls within the obligation of the requesting party to present evidence that the decision constitutes a final decision in the country of its origin, that it is authentic and comes from a valid court. The Brazilian Court also needs a translated version that can be trusted.

This evidence usually comes in two forms (a) through a certificate, or express declaration, of the foreign tribunal that the decision is final; or (b) when such document does not exist, through a legal opinion issued by two lawyers, applying the rule set forth in the Bustamante Code (Articles 409-411) on the proof of foreign law. There is no specific form by means of which it should be demonstrated that the foreign judgment constitutes a final ruling. Thus, it is crucial to ensure that the judgment is final according to the laws of the jurisdiction in which the decision was originally held.

The fourth and final requirement is related to the translation and authenticity of the foreign decision submitted for recognition. Documents in a foreign language will not be accepted by the Superior Court of Justice, a rule that was inherited from the Supreme Court days. Res. STJ 9 adds that the authenticity of the foreign judgment must be evidenced by the Brazilian Consulate/Embassy at the place of origin. Therefore, the foreign decision and other documents submitted for recognition must be authenticated by the Brazilian consular authority in the country of origin before arriving in Brazil, unless transmitted via Central Authorities according to treaties to which Brazil and the foreign country in question are parties, such as the Bilateral Treaty of France

---

<sup>13</sup> As an example, see SEC 833, STJ (2006), in which there was a request to recognize a foreign arbitral award. The request was denied under the grounds of public policy because there was no proof that service of process has properly reached defendant and only a rogatory letter constitutes sufficient proof that communication was carried out according to Brazilian rules.

and Brazil for civil matters. This is justified by the fact that Brazilian consuls abroad carry out notarial functions, enabling them to issue documents that will be presented in Brazil.

The translation into Portuguese by a *tradutor juramentado* (sworn translator) is another requirement that cannot be circumvented. The lack of a proper translation will result in the rejection of the recognition request. The Supreme Court has ruled that the translation must be carried out by a sworn translator as his work is automatically considered authentic. Since 2005, the Superior Court of Justice has decided in the same direction. If a sworn translator of the original language of the decision cannot be found, the parties can nominate an *ad hoc* translator or use an interpreter who is registered with the competent body of the Brazilian Commercial Register. Recognition will be denied if the translation was performed in the country of origin, unless it was made pursuant to a specific provision in a bilateral or multilateral treaty or convention to which Brazil and the foreign country in question are parties. Law Project n. 166 maintains this rule in its Article 881, paragraph 4.

### **3. INNOVATION ON THE RECOGNITION PROCESS BY RES. STJ 9**

Article 483 of the Code of Civil Procedure simply sets forth that no foreign decision shall be executed in Brazil unless it has been previously recognized by the Supreme Court, in accordance with the requirements provided for in its internal law. As analyzed above, since 2005, Res. STJ 9 substituted the provisions of the Supreme Court and has added new rules to the procedure of recognition of foreign decisions in the three paragraphs of Article 4.

These additions take into account the many years of case law from the Supreme Court and were a response to matters encountered by the Supreme Court to which the law did not provide an answer. This is the case of paragraph 1, which states that non-judicial decisions shall be recognized if they would have the nature of a decision if originally held in Brazil. Since the beginning of the nineteenth century, Japanese immigrants constitute a large part of the Brazilian population. Over the last thirty years the new generation has been choosing to return to the homeland. In Japan, divorce is granted by an administrative authority of the City Hall, with powers that in Brazil only a judge has. Therefore the parties that have divorced in Japan have no other decision than this one to enforce in Brazil and cannot ask a judge to grant an order not envisioned in its law. The Supreme Court, sensible to this situation, stated that the administrative decision of Japan would be considered a judicial decision pursuant to Brazilian laws and has always recognized it. Res. STJ 9 has embodied this thinking and the Superior Court of Justice Court has already had the opportunity to apply it many times.

Paragraph 2 allows for partial recognition of a foreign award. This is another example of the Supreme Court's interpretation over the years which was at last set down in the Resolution. This was a common feature in divorce cases where the Supreme Court would agree to the divorce, but not to other parts of the ruling, as for example the determination of alimony, dispositions concerning children and so forth. The question whether the foreign decision could be recognized



only partially was settled and affirmed by the Supreme Court after many years of uncertainty. With Res. STJ 9, the situation is expressly regulated and the Superior Court of Justice has already decided many times accordingly. In a recent request for recognition of a divorce decision from Texas, United States, the Superior Court of Justice did not accept the section of the decision concerning the partition of the former couple's real estate. The reason was that it was not reached through an agreement between the parties. Thus, as this partition of real estate located in Brazil could only be decided in Brazil, due to Brazilian courts' exclusive jurisdiction in the matter, the decision only was partially recognized, in what regarded the divorce.<sup>14</sup> In another case where a maintenance order was required, recognition was partially granted as far as alimony to the child of the debtor was concerned.<sup>15</sup>

Finally, paragraph 3 of Res. STJ 9 admits that during the procedure of recognition, provisional measures, as long as urgent and justified, may be granted. This is probably the biggest innovation brought by the Superior Court of Justice, especially as it differs from the Supreme Court's previous line of work. In the past, the Supreme Court has decided that until the foreign decision was recognized, no effect of any kind could be derived from it. Thus provisional measures during the proceedings were all denied. Nonetheless, in cases that challenged this position parties have argued that because the recognition process was a claim and in the course of any proceeding of a suit a provisional measure could be granted, there was no reason for the Supreme Court to automatically reject such a request. The Superior Court of Justice was sensible to this line of reasoning and Res. STJ 9 Article 4 paragraphs 3 allows for provisional measures as long as the same requirements for provisional measures in other local proceedings are satisfied. This means that parties have to prove excess of duress and the urgency of the matter. However, since 2005, while many provisional measures have been requested, very few have been granted. The Superior Court has been using a strict level of scrutiny and has been very cautious in its analysis when granting such a measure.<sup>16</sup> Many of these requests are for the granting of authorization for a new marriage before the recognition of the requested divorce is granted; for the sale of property under discussion; for the issuance of authorization for matters relating to children before the decision on guardianship has been recognized, among others.

Requests for provisional measures have also been made in cases relating to recognition of foreign arbitral awards. In Request MC 1.4795, the provisional measure to freeze assets of a company that had to pay an arbitral award was surprisingly denied on the grounds that the measure was not allowed before the proceedings of recognition were finished. Old cases of the Supreme Court were cited, in spite of the new rule under Res. STJ 9. This came as a surprise and oddly enough other decisions denying provisional measures under different arguments followed suit.<sup>17</sup> Although the

---

<sup>14</sup> SE 1.633, STJ, (2011).

<sup>15</sup> SE 4.703, STJ, (2010).

<sup>16</sup> In a search for examples for the present article, more than fifty requests have been reviewed, and only two have been granted.

<sup>17</sup> See MC 14.795, STJ (2008) (in which the request for provisional measure was denied in a process of recognition of a foreign arbitral award). However, in SE 3.861, STJ (2008), decided in the same year by President Cesar Asfor Rocha, the request for provisional measure was denied but on the grounds that it did not represent a clear and current risk or an urgent matter under the wording of Res. STJ 9, Article 4 paragraph 3. For a comment on MC 14.795, see Valeria Galindez,

recognition of the award was still pending in SEC 3.709, the Public Ministry issued an opinion against the recognition because it found that there was no evidence of the defendant's acceptance of the arbitral clause, thus no consent was given to arbitration.

The two cases where provisional measures were granted are worth reviewing. In the first one, which dealt with the recognition of a decision that asserted the paternity of a minor, the mother requested an injunctive relief so that she could travel with the child while the matter was still unsettled. As the mother was using the birth certificate that had defendant as the father, both parents had to give permission for the travel arrangements.<sup>18</sup> In the second case, in which a foreign money judgment was decided in favor of the plaintiff, there was a provisional request to freeze the debtor's property in Brazil, to guarantee further payment while the recognition procedure was pending. There was risk of the debtor selling the property that would render the recognition of the foreign decision useless. The Superior Court of Justice granted the provisional measure and the sale of the property was stalled for the duration of the recognition procedure.<sup>19</sup> Law Project n. 166 maintains this rule in Article 879 paragraph 3.

#### **4. CONCLUSION**

The Superior Court of Justice has replaced the Supreme Court in the exercise of exclusive jurisdiction over all pending and future cases related to the recognition of foreign decisions. We believe that in the last years, the Superior Court of Justice has used case law developed by the Supreme Court as a solid guide but also developed and implemented its own ideas on issues like public policy and recognition of foreign arbitral awards. It has also set forth important rules in Res. STJ 9, allowing partial recognitions of foreign decisions and the granting of provisional measures during the recognition procedure, so far one of its boldest idea. In a very short time, the Superior Court of Justice has already left its own mark in the field of international judicial cooperation. Its achievements have lead the way for Law Project n. 166, now pending approval at *Câmara dos Deputados* (House of Representatives). The project adopted Res. STJ 9's main features, providing parties with more certainty in the field of recognition and enforcement of foreign decisions. Once the new Code of Civil Procedure is enacted, these provisions will assure other nations that Brazil has a comprehensive and statutory body of rules in international cooperation.

---

Comverse Inc. vs. American Telecommunications Ltda.: Superior Court of Justice denies interim relief to secure enforcement of foreign arbitral award pending its recognition, 15, n. 1 *IBA Arb. News* 154 (2010).

<sup>18</sup> See SE 6.551, STJ, (2011).

<sup>19</sup> See SE 5.717, STJ, (2011).

## PESQUISAS DO EDITORIAL/EDITORIAL RESEARCH

- A homologação de sentenças estrangeiras no Brasil e o caráter paradoxal das normas de DIP, de Fernanda Lucas Bessa – *RDPriv* 33/76 (DTR\2008\82);
- Breves considerações sobre o reconhecimento de sentenças estrangeiras, de Francisco de Barros e Silva Neto – *RePro* 228/81 (DTR\2014\321);
- Cooperação jurídica internacional e a concessão de *exequatur*, de Teori Albino Zavascki – *RePro* 183/9 e *Doutrinas Essenciais de Direito Internacional* 4/1393 (DTR\2010\199); e
- Fundamentos da cooperação jurídica internacional, de Caio Gonzalez de Babo – *RDCI* 82/335 (DTR\2013\476).