RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS IN LATIN AMERICA: PRACTICAL GUIDE AND LEADING CASES: BRASIL[1]

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1. INTRODUCTION

Arbitration in Brazil gained momentum in the last seventeen years, upon the enactment of Law No. 9,307 on September 23, 1996 (Brazilian Arbitration Statute, hereinafter "1996 Law"). The Judiciary has since developed a clear and favorable attitude towards arbitration and there has been a growing preference for arbitration clauses in business contractual practice. As a result, Brazil has developed a vibrant arbitration community amongst both practitioners and academics, and now plays a leading role in Latin America as regards to international arbitration.

Foreign judgments are traditionally recognized and enforced in Brazil as per the so-called *giudizio di delibazione* system, where reciprocity is not required and the final decision is brought before the Brazilian competent judicial authority and accepted into internal juridical order, provided it fulfills certain formal requirements and is not contrary to public policy (*ordre public*), national sovereignty or social mores. There are no re-judgment of any aspect whatsoever of the underlying dispute, nor are there any inquiries on the law applied, or inquiries on the procedure followed by the adjudicating court, unless basic principles of Brazilian law are violated.

These main aspects of the procedure for recognition of foreign court judgments are also applicable, in general, to the recognition of foreign arbitral awards, with the supplement of the requirements of specific law, which will be addressed herein below.

All foreign court judgments and arbitral awards must be presented to the Superior Court of Justice (STJ) for recognition and enforcement; otherwise they cannot have legal effect or acknowledgement in Brazil. Such procedure is a "lawsuit" in the procedural law sense and is called "*homologação*" (from Latin "*homologare*" and ancient Greek "*homologein*", which mean "*to confirm or approve*").

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[1] ARAUJO, N. ; ALMEIDA, R. . Recognition and Enforcement of International Commercial Arbitral Awards in Latin America. 1a. ed. Nova Iorque: Brill Nijhoff, 2015. v. 1. 450p.

The STJ is a judicial body that sits in the nation's capital, Brasília, and is formed by thirty-three judges nominated by the President of the Republic, according to certain requisites set forth in the Constitution. It is the second highest Court in Brazil, secondary to the Supreme Federal Court (STF), and is the highest Court as concerning non-constitutional matters.

The homologation process in general is apparently quite simple and should be expeditious. Nonetheless, since 2005, when the STJ became responsible for such procedure, and although it has set a standard in favor of homologation of foreign arbitral awards (in numbers, out of 52 cases, only 8 were denied and 4 were extinguished),[2] the duration of the actions has been very lengthy, varying from 3 to 6 years to reach a final decision.

This article will discuss the Brazilian law applicable to the procedure for homologation and enforcement of foreign arbitral awards; and will also review and comment on the recognizable trends in scholarly writings and Court judgments.

II. INTERNATIONAL CONVENTIONS

Brazil has participated in negotiations and signed significant international treaties on the recognition of foreign arbitral awards. It should be noted that Brazilian law adopts a dualist system, as concerning the interrelation between their national and international law. This means that an international treaty, signed or even ratified, does not have immediate effect with regards to the internal juridical order, although it may originate international obligations for Brazil before foreign counterparts, as a matter of public international law.

The procedure for "internalization" of a treaty, i.e., the process of acquiring legal applicability and enforceability, inevitably takes considerable time for approval and sanction by the competent governmental bodies, creating a gap between the time of ratification and the time of entry into force. Basically, any treaty Brazil enters into must be approved by Congress (by legislative decree) and subsequently promulgated by the President of the Republic (by presidential decree), in order to become legally effective.

The following list includes the treaties relevant to international arbitration which are in force in Brazil:

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"): Brazil acceded to the NY Convention on June 7, 2002.[3] The Convention was internalized in Brazil through the enactment of Decree 4,311 of July 23, 2002.[4]

[2] As per Exhibit I attached hereto.
[3] United Nations, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited on Feb. 24, 2014).
[4] Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 4311 of Jul. 23, 2002 (Promulgates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/2002/D4311.htm (last visited on Feb. 26, 2014).

- Inter-American Convention on International Commercial Arbitration ("1975 Panama Convention"): Brazil signed the Convention on January 30, 1975; ratified it on August 31, 1995; deposited the instrument of ratification on November 27, 1995;[5] and internalized it through the enactment of Decree 1,902 of May 9, 1996.[6]

- The Inter-American Convention on Extraterritorial Validity of Foreign Judgment and Arbitral Awards ("1979 Montevideo Convention"): Brazil signed this Convention on May 8, 1979, with reservation to letter d) of Article 2;[7] ratified it on August 31, 1995; deposited the instrument of ratification on November 27, 1995;[8] and internalized it through the enactment of Decree 2,411 of December 2, 1997.[9]

- International Commercial Arbitration Agreement of Mercosur: Brazil signed this treaty on July 23, 1998;[10] internalized it through the enactment of Decree 4,719 of June 4, 2003;[11] and deposited its instrument of ratification on October 9, 2003.

Analysis

Brazil resisted adoptation of the New York Convention for more than four decades due to a legal opinion by the General Counsel of the Ministry of Foreign Relations that considered an arbitral award to be a private matter and thus incapable of producing the same effects as those of a judicial decision.[12]

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[5] Organization of American States, Inter-American Convention on International Commercial Arbitration (Panama, 1975). Available at http://www.oas.org/juridico/english/sigs/b-35.html (last visited on Feb. 26, 2014).

[6] Presidency of the Republic Civil Cabinet Subchefia for Legal Affairs, Decree 1,902 of May 9, 1996 (Promulgates the Inter-American Convention on International Commercial Arbitration of Jan. 30, 1975) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/1996/D1902.htm (last visited on Feb. 26, 2014).

[7] Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Uruguay, 1979). Available at http://www.oas.org/juridico/english/sigs/b-41.html (last visited on Feb. 26, 2014).

[8] Id.

[9] Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 2,411 of Dec. 2, 1997 (Promulgates the Inter-American Convention on Extraterritorial Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/1997/d2411.htm (last visited on Feb. 26, 2014).

[10] Mercosur, State Treaty Ratification and Applicability Mercosur and Protocols and Associated States (Paraguay, 1991). Available in Spanish at http://www.mercosur.int/t_ligaenmarco.jsp?contentid=4823&site=1&channel=secretaria (last visited on Feb. 26, 2014).

[11] Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 4,719 of June 4, 2003 (Promulgates the Agreement on International Commercial Arbitration Mercosur I) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/2003/D4719.htm (last visited on Feb. 27, 2014).

[12] Clóvis Beviláqua, acting as a General Counsel for the Ministry of Foreign Relations, wrote a legal opinion on the proposal of the Geneva Protocol of 1923, stating that the arbitral clause would not prevent the judge from deciding the controversy. Later, in 1927, he wrote a second legal opinion on the 1927 Geneva Convention where he expressed his views that an arbitral award was no more than a private act and, therefore, unenforceable. Bevilácqua's position would be adopted by another General Counsel, Hildebrando Accioly, who expressed his opinion on the private nature of the arbitral award that it should not be treated as a judicial decision when he analysed the New York Convention. For more information on the subject, refer to Nadia de Araujo & Lidia A. Spitz, *A Convenção de Nova Iorque sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras: Análise sobre seu Âmbito de Aplicação, in*: Arnoldo Wald & Selma Ferreira Lemes, Arbitragem Comercial Internacional, 67-70 (São Paulo: Saraiva, 2011).

Prior to the enactment of the 1996 Law, the law applicable to arbitration in Brazil (basically the Civil Code and the Code of Civil Procedure) did not accept the enforceability of arbitral clauses inserted in contracts. Consequently, a specific submission to arbitration was required after the dispute had arisen between the parties. Strangely enough, arbitral clauses were considered binding, but not enforceable. Therefore, a party was entitled to simply refuse to submit to arbitration once a dispute had arisen.

Additionally, domestic arbitral awards had to be confirmed by a judicial court in order to be legally enforceable by the courts. Again, it was considered valid and could be spontaneously complied with by the parties, but the aid of the courts for enforcement purposes would be available only after the awards had been confirmed by the Judiciary. In line with this holding, foreign arbitral awards were not enforceable and could not be admitted to the procedure of homologation (then before the STF), unless they had been previously confirmed by a judicial court in the country of origin (system of *double exequatur*).

For these reasons, Brazil did not sign the 1927 Geneva Protocol on Enforcement of Arbitral Awards nor accede to the New York Convention before the enactment of the 1996 Law. Notwithstanding, a few months before the promulgation of the 1996 Law, Brazil ratified the 1975 Panama Convention.

The New York Convention was ratified a few years after the promulgation of the 1996 Law and was effectuated by Brazil only after the STF affirmed the constitutionality of the 1996 Law, on December 2001, by a majority of seven out of eleven Justices.[13]

Nonetheless no dramatic changes resulted from the ratification of the New York Convention, as compared to the legal regime instituted by the 1996 Law, as the arbitration statute was heavily inspired by the Convention, concerning foreign arbitral awards, and essentially adopted the same legal provisions with a more concise language.

It should be noted that the STF (until 2004) and the STJ (from 2005 onwards) very seldom made any reference to the New York Convention and primarily applied their respective Internal Regulations and the 1996 Law, both of which will be addressed below.[14]

III. NATIONAL LEGISLATION

As mentioned earlier, the main changes promoted by the 1996 Law, were the granting of legal enforceability to the arbitral clause, irrespective of a voluntary submission to arbitration at the moment the dispute arises; and, as regards to international arbitration, establishing clear rules for the recognition and enforcement of foreign arbitral awards, abolishing the "double exequatur" system that prevailed before.

[13] SE 5,206-Espanha, judgment declared final on Dec. 12, 2001.
[14] The New York Convention was mentioned by the Superior Court of Justice in REsp Number 1,231,554 (May 24, 2011) and in SEC n. 3,709 (June 14, 2012).

In addition to that, the 1996 Law provided a modern legal framework for domestic and international arbitration in Brazil, adhering to the prevailing standards in the legislation of leading countries. The UNCITRAL Model Law was also a relevant source of inspiration for the 1996 Law. Many principles and rules established by the Model Law were adopted in Brazil, such as, the equalization of the arbitration clause and the *compromis*; the freedom of the parties to establish the legal rules applicable to both substance and procedure and to determine the number of arbitrators, the place and language of the proceedings, and the determination of alternative means of appointment of arbitrators, failing voluntary appointment by the parties, *inter alia*.

The 1996 Law also adopted the *Kompetenz-Kompetenz* principle which assigns primary competence to arbitral tribunals for adjudication over their own jurisdiction; also, the 1996 Law provided for the independence between the arbitral clause and the contract and gave authority to the tribunal to evaluate evidence through a system of free and reasoned persuasion.

An arbitral award cannot be appealed before the Judiciary and ordinarily, is only subjected to a limited recourse, before the same arbitral tribunal, for the purpose of correcting clerical errors and omissions, or clarifying obscurities or contradictions. Awards rendered in Brazil may be set aside through an independent suit, which must be brought before the Judiciary within 90 days after the rendering of the award, and is limited to a certain number of grounds that are consistent with the Model Law and international practice. All such grounds concern serious irregularities or illegalities in the conduct of the arbitration.

The 1996 Law defines objective arbitrability as per the disposability of the rights involved in the dispute. Thus any claims of an economic nature over disposable rights may be arbitrated.
The 1996 Law adopts the principle of party autonomy in its full extent, allowing parties to choose the rules applicable to the dispute, not limited to national laws, but including the prerogative of choosing international sources of law such as the *lex mercatoria* or principles of commercial law, or resorting to *ex aequo et bono* arbitration.

An innovative feature of the 1996 Law is the express disposition that limits the choice of the legal rules applicable to the merits to those that do not violate good mores and public policy.
As concerning the arbitration procedure, the parties enjoy a similar liberty to freely establish the applicable rules, or to adopt those of any institution providing arbitration services or rules. The arbitral tribunal is competent to decide any procedural matter not addressed by the parties, or to supplement the parties' provisions. Although not expressly provided for in the 1996 Law, it is generally accepted that arbitral tribunals may render preliminary injunctions or interim relief, and that the interested party may petition the Judiciary for emergency measures, but only prior to the commencement of the arbitration.

The main limit to the liberty of establishing procedural rules is the constitutional clause of *due process of law*, embodied in the 1996 Law by the expressed adoption of the principles that the parties must be given a fair opportunity to be heard; must be treated equally; and that the arbitral tribunal must act impartially.

The nationality of awards is determined by the territory where they are rendered. Therefore, an award issued by an arbitral tribunal sitting in Brazil shall be considered a domestic award and will not be subjected to the homologation procedure, even if the dispute is subjectively or objectively international. The award shall then be immediately enforceable as if it were a final domestic court decision. Only awards rendered by arbitral tribunals sitting outside of Brazil must be homologated, even if the parties involved are Brazilian and the dispute is not international.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS

A. Jurisdiction for homologation (recognition) – The STF and STJ

As previously mentioned, the homologation of foreign arbitral awards is a legal requisite for its subsequent enforcement and also for any effects it may have in Brazil – not only for enforcement purposes, but also for declaratory and constitutive effects (recognition). Enforcement of the award, after its homologation, shall be conducted by the federal court of the jurisdiction of the domicile of the party subject to enforcement.

The rules for recognition and enforcement of foreign arbitral awards are set forth in Articles 34 to 40 of the 1996 Law. As mentioned above, an arbitral award is considered foreign as long as the seat of the arbitration is outside of Brazil. This geographical connecting factor, albeit criticized, brings legal certainty to the parties.[15] The 1996 Law also considers an arbitral award as equal to a judicial decision of last resort. Thus, a foreign arbitral award is considered to be akin to a foreign judicial decision that is ready to be executed and thus is no longer subject to any appeal. Therefore, in order to be executed in Brazil, the arbitral award has to undergo the same process for recognition and enforcement as any decision held by the Judiciary of another state.

From 1934 to 2004, the Supreme Court (*Supremo Tribunal Federal*) had exclusive jurisdiction to confirm foreign judgments, arbitral awards and all foreign judicial requests to be executed in Brazil. Constitutional Amendment Number 45 transferred such competence to the Superior Court of Justice (*Superior Tribunal de Justiça*).[16] This change was part of a judicial reform

[15] This understanding was confirmed in the judgment of Special Recourse ("Recurso Especial") Number 1,231,554 by the Superior Court of Justice, on May 24, 2011, where it was decided that "*in Brazilian law, the geographical criterion (jus soli) was adopted, for determining the nationality of arbitral awards, based exclusively on the place where the decision was rendered. In the instant case, the fact that the arbitration was initiated by means of a request before the International Court of Arbitration of the International Chamber of Commerce does not have the effect of altering the nationality of the award, which remains Brazilian.*"

[16] The Superior Court of Justice issued Resolution Number 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 letters rogatory. 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, including the right to review any violations of the Constitution and federal law. Although Brazil is a federal system, all legislation in civil and criminal matters is federal (thus the system is all encompassing). The States' legislative power is very limited, in contrast to other systems, such as Canada and the United States. The 1988 Constitution created a new Court, the Superior Court of Justice, that took over some of the jurisdiction from the Supreme Court for review of matters of federal law. With the 2004 Amendment, additional jurisdiction of the Supreme Court was transferred to the Superior Court of Justice in order to lighten the Supreme Court's workload. The aim was that the Supreme Court would finally become a true Constitutional Court, dealing only with constitutional issues. All decisions cited in this work are easily accessible by their class and number directly through both the Courts' websites: that of the Supreme Court is www.stf.gov.br and that of the Federal

implemented in Brazil in 2004 due to the overload of cases before the STF and the result of which allowed the Supreme Court to focus its attention on constitutional matters. Therefore, international judicial cooperation in general was transferred to the STJ, which is primarily in charge of unifying the interpretation of federal legislation made by the appellate courts of both the States and the Federal Justice.

The requirement that all foreign decisions and foreign arbitral awards be previously recognized ("homologated"), before enforcement and as a condition for producing legal effects in the country, is established by Article 483 of the Brazilian Code of Civil Procedure.[17] This requirement has been applicable, since Brazil established a legislation of its own after independence from Portugal, in 1822.[18] Neither the first Unified Brazilian Code of Civil Procedure, dated 1939, or the current Code, dated 1973, established any specific rules on the procedure for the recognition of foreign decisions, as such matter is delegated to the internal regulations of the competent court.

In 2005, the STJ regulated the procedure for recognition of foreign decisions by Resolution Number 9, replacing the 1971 STF regulation. Resolution Number 9 confirmed and updated many issues that the STF case-law had settled and introduced some innovations. One example of a modernizing rule added by Resolution Number 9 is the possibility of obtaining injunctive relief during the recognition process, which was not previously allowed by the STF. Nonetheless, Resolution Number 9 is subject to modification at any time by the STJ. Therefore, if this regulation were to be converted to statutory provisions, it would provide more legal certainly to the parties.

A new Code of Civil Procedure is currently under discussion by the Brazilian Congress and it is expected that this Code will pass review. In 2010, a Commission of Experts led by STF Justice Luiz Fux submitted a bill for a new Code of Civil Procedure to the Senate. This bill (Number 166) was discussed and modified by the Senate and is now under discussion at the

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Superior Court is http://www.stj.jus.br/portal_stj/publicacao/engine.wsp. Research through these websites is easy and reliable. The full texts of all decisions are also available.

[17] For more detailed references, see in Portuguese Nadia de Araujo, *Direito Internacional Privado: Teoria e Prática Brasileira* (N. 5ª ed. Rio de Janeiro, 2011), Nadia de Araujo & Lidia Spitz, Cooperação Jurídica Internacional no Superior Tribunal de Justiça - Comentários a Resolução n. 9 do STJ, (Rio de Janeiro: Renovar, 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., 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 Brazi*l, 19 N.Y. INT'L L. REV. 1 (2006). For a recent account of recognition of foreign arbitral awards see Mauricio Gomm-Santos, *Brazil's Conflicting International Arbitration Case Law: The Inepar and Renault Decisions*, 64 J. DISP. RESOL. 82. This article used and expanded upon information that was previously published in the article by Nadia de Araujo & Frederico de Valle Magalhaes Marques, *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 the process of presiding over cases on international co-operation, while now it has a firm and established case law on the subject.

[18] Brazil became the capital of the Portuguese empire from 1808 to 1821, when King João VI transferred his residence from Portugal to its largest and most distant colony, in order to escape from Napoleon's invasion. In 1821, King João VI returned to Portugal but left his heir Pedro as regent, who on September 7, 1822 declared Brazil independent from Portugal and was crowned Emperor Pedro I of Brazil. Brazil remained a monarchy from 1822 to 1889, when a military coup dethroned the aged Emperor Pedro II and instituted the Republic. A Federal Presidential system was then implemented, very much inspired by the American Constitution.

House of Representatives (*Câmara dos Deputados*). The bill contains a new chapter on the recognition and enforcement of foreign decisions that gives statutory rank to the rules of Resolution Number 9. As stated above, this is a much anticipated change to advance international cooperation in Brazil as it will give parties more certainty as to the applicable legislation for foreign decisions.

The number of cases submitted to the STJ for recognition has more than doubled over the last few years. While the STF had ruled on roughly seven thousand cases between 1934 and 2004, the STJ has examined more since 2005. Most of the cases refer to judicial decisions with a great majority concerning family law disputes. This is also true for foreign arbitral awards: while the STF had dealt with roughly twenty cases through the years, the STJ has received more than forty over the last nine years.

B. Requirements for recognition of foreign judgements and arbitral awards, as per Resolution Number 9.

The most important feature of the homologation process is the discussion of public policy issues, as this is the only point that touch upon the merits of the case, albeit indirectly. Defendants frequently attempt to rehash the merits of a foreign decision on the basis of alleged public policy violations. The boundaries of what is a question on the merits, or what is a question on public policy grounds are not clearly established, although the STJ has demonstrated that it is more inclined to dismiss such allegations and unwilling to allow room for public policy challenges.

In two cases, the absence of proof that the arbitral clause was signed and thus accepted by the defendant was considered illustrative of a sensitive issue to public policy – in spite of the technical inaccurateness of such reasoning – and thus the award was not confirmed.[19] Nonetheless, in similar cases the awards were granted recognition. It is fair to say that the STJ is aware of its important role in guaranteeing that foreign decisions are recognized without a review on the merits. Over the last nine years most arbitral awards have been granted recognition without serious – if any – exploration of the merits.[20]

As per STJ's Resolution Number 9, in addition to the allegation that a foreign decision is manifestly against public policy, the only arguments defendants are permitted to proffer in response to a recognition request are those related to procedural formalities. The

[19] See Superior Court of Justice, SEC 967, (2006), where the Court concluded that the absence of proof that the defendant had chosen arbitration as the exclusive method of resolution of disputes because his signature was missing in the contracts where the clause was inserted was an offence to public policy. The Court asserted that the absence of an unequivocal choice by one party for arbitration is against the principle that arbitration can only prevail where there is a manifest choice to submit to it. Also, in Superior Court of Justice, SEC 866, (2005) the contract was concluded verbally and there was no proof that an arbitral clause was negotiated, thus no proof of its acceptance and public policy was invoked for denying recognition to the arbitral award. Nonetheless, in Superior Court of Justice, SEC 856, (2005) (where there were also no proof of the signing of the arbitral clause), the court reasoned that although there was no signed contract, it was established that there was an understanding between the parties, and both appeared before the arbitral tribunal.

[20] See Nadia de Araujo, *O Superior Tribunal de Justiça e a homologação dos laudos arbitrais estrangeiros, balanço positivo de quarto anos de atuação*, 3 Revista Semestral de Direito Empresarial, 229 (2008), where the author shows that the STJ had deliberated, (at that time) on 24 cases, and only three had been denied. The numbers have since grown, but the ratio between cases granted and denied has remained unchanged.

requirements for the recognition of foreign judgments were originally set forth in the Introductory Law to the Civil Code, which has been recently changed by Decree Number 12,376, 2010 to Introductory Law to Brazilian Law (*Lei de Introdução às Normas do Direito Brasileiro*). The STJ has kept the same requirements in Resolution Number 9, Article 5, and added new ones in Article 4. In the discussion of the bill for a new Code of Civil Procedure, the judicial cooperation section sets forth provisions on the recognition and enforcement of foreign decisions, which are in accordance with Resolution Number 9, including its new requirements.

The requirements are: (i) the foreign court or authority has jurisdiction to issue the decision; (ii) the parties were properly served or default was legally verified, (iii) there is evidence of the authenticity of the judgment or decision, and that it is final and not subject to appeal; and (iv) 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.

The fulfillment of the requirement of authentication and translation fall within the obligations of the requesting party to present evidence to prove that the award is authentic and issued by a competent arbitral tribunal. The Brazilian Court also requires a translated version that can be trusted.

Resolution Number 9 adds that the authenticity of the foreign judgment must be certified by the Brazilian Consulate/Embassy at its place of origin. Therefore, the foreign arbitral award and other documents presented with the request for recognition shall be authenticated by the Brazilian consular authority in the country of origin of the award before arriving in Brazil. This is justified by the fact that Brazilian consuls abroad carry out notarial functions, enabling them to certify the authenticity of documents that will be presented before public authorities in Brazil.[21]

The translation into Portuguese by a sworn translator (*tradutor juramentado*) is another requirement that cannot be circumvented. The lack of a proper translation will result in the denial of the recognition request. The STF has ruled that the translation needs to be performed by a sworn translator because it is automatically certified for its authenticity. Since 2005, the STJ has decided several cases in the same direction. If a sworn translator of the original language of the decision cannot be found, the parties can resort to an *ad hoc* translator or use an interpreter who is registered with the competent organ 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. The Code of Civil Procedure bill has maintained this rule.
Also, the translated arbitration agreement (the submission to arbitration or the contract containing the arbitral clause) must be submitted in original or duly certified copy.

[21] It should be noted that such requirement may be dispensed with by bilateral cooperation treaties entered into by Brazil.

C. Rules introduced by Resolution Number 9.

Some additions of the STJ's Resolution Number 9 to the rules previously applicable to the homologation procedure have resulted from the practice of the STF, that solved issues then not foreseen by the law or its internal regulations.

For instance, Article 4(2), of Resolution Number 9 allows for partial recognition of a foreign judgement. The STF's interpretation of statutory law has allowed for partial recognition of foreign decisions many times and was acknowledged in the Resolution. This rule is applicable to foreign arbitral awards as well.[22]

It is also important to mention Article 4(3), which admits that during the procedure for recognition, provisional measures may be granted, as long as they are urgent and justified. In this respect the STJ has clearly followed a different path from the STF's previous work. In the past, the STF has decided that until the foreign decision was recognized, no effect of any kind could be derived from it. Thus, requests for provisional measures during the proceedings were all denied. Nonetheless, it was argued that the recognition process was a legal suit (in a procedural law sense) and thus, as in the course of any legal suit, provisional measures should be available, and there was no legitimate reason for the consistent denial of urgent measures by the STF. The STJ was susceptible to this line of reasoning and Resolution Number 9, in its Article 4(3) allowed for provisional measures as long as the same requisites for the granting of provisional measures in other ordinary legal suits were also fulfilled. This means that in order to gain access to provisional measures, parties have to prove a consistent *prima facie* claim (*fumus boni juris*), as well as the urgency of the relief sought (*periculum in mora*). Since 2005, while many provisional measures have been requested, very few have been granted. The STJ has been applying a strict level of scrutiny and have been very cautious in their analysis of the requirements when granting such a measure.[23] As concerning requests for provisional measures in homologation of foreign arbitral awards, only one case has been granted.[24]

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[22] In SEC Number 1, the STJ decided on Oct. 19, 2011 that a foreign arbitral award could be partially homologated (recognized), excluding a minor part of the arbitral award that had been previously decided by a final judgment issued by the Brazilian Judiciary.

[23] More than fifty requests have been reviewed, and only two have been granted.

[24] Supreme Court of Justice, SEC Number 5,692/US, Rapporteur Justice Ari Pargendler, decided on Oct. 21, 2010. Prior to that judgment, in Supreme Court of Justice, MC 14,795, (2008) a provisional measure was denied in a process for the recognition of a foreign arbitral award, on the grounds that the measure was not allowed before the proceedings for recognition were completed. This was, based on old cases of the Supreme Court that were expressly overruled by the new Resolution. In Supreme Court of Justice, SEC Number 3,861, (2008), decided in the same year by President Cesar Asfor Rocha, the requested provisional measure was denied but on the grounds that there was not a clear risk of damage in existence, or an urgent matter under the wording of Resolution Number 9, Art. 4(3). For commentary on MC 14,795, see Valeria Galindez, *Comverse Inc. v American Telecommunications Ltda: Superior Court of Justice denies interim relief to secure enforcement of foreign arbitral award pending its recognition*, 15 No. 1 IBA Arb. News 154 (2010).

V. THE PROVISIONS OF THE 1996 LAW MIRRORING THE NEW YORK CONVENTION.

The 1996 Law mirrors the New York Convention in its listing of a number of grounds which the party opposing homologation (recognition) shall allege and prove as an obstacle to the internalization of the foreign award.

Thus, where there is no applicable treaty or convention, the recognition of the foreign arbitral award will only be denied, under Article 38 of the 1996 Law, if the party proves that (a) a party to the arbitration agreement was not legally capable; (b) the arbitration agreement was not valid according to the law to which the parties submitted it or, in the absence of such choice of law, according to the law of the country where the award was made; (c) the party was not notified of the appointment of the arbitrator or of the arbitration procedure, or if the principles of ample defense and contradictory procedure were violated; (d) the arbitral award exceeded the arbitration agreement and it was not feasible to segregate the exceeding part; (e) the arbitration was initiated or the arbitrator appointed in violation of the arbitral agreement; or (f) the award is not enforceable, or was annulled, or was suspended by a judicial decision in the country where it was made.

As per Article 39 of the 1996 Law, which again mirrors the New York Convention, there are two grounds for denial which may be invoked on the Court's own initiative: (a) the subject matter of the arbitration could not be submitted to arbitration, according to Brazilian law; or (b) the arbitral award violates Brazilian public policy. The latter requirement is interpreted by legal scholars as meaning Brazilian international public policy, as opposed to mere domestic public policy, in the civil law sense.

It should be noted that Article 39 of the 1996 Law expressly authorizes that the notification of parties domiciled in Brazil be made by means other than letters rogatory (which by contrast are the only acceptable means of notification and citations in Brazil for *judicial* procedures instituted abroad), provided that it is made in accordance with the relevant arbitration agreement (or rules applicable as per the arbitration agreement), or with the law of the country where the arbitration takes place. The only requirement is that such notice provides reasonable time for the notified party to prepare its appearance before the arbitral tribunal.

VI. LEADING CASE: SEC NUMBER 6,335, INTERNATIONAL COTTON ASSOCIATION

One should bear in mind that there is no single precedent that could be pointed out as a "leading case" as concerning the recognition and enforcement of foreign arbitral awards in Brazil. The example below should be seen as merely one illustration of certain tenets of the Court's understanding of the subject matter.

The STJ has recognized (*homologated*) around 40 cases of foreign arbitral awards. Among these decisions, cases dealing with commodities are a relevant group. Cotton (10 cases),[25]

[25] SEC Number 856, SEC Number 967, SEC Number 978, SEC Number 1,210, SEC Number 3,660, SEC Number 3,661, SEC Number 4,213, SEC Number 4,415, SEC Number 6,753 and SEC Number 6,760.

grains (2 cases)[26] and coffee (2 cases)[27] are the commodities contracts that have been frequently subject to arbitration, and thus to enforcement in Brazil as the responsible party domiciled in Brazil refused to voluntarily pay the amount awarded.

Brazil is one of the world's leading cotton producers and an important competitor of the United States in Asian and European cotton markets. This situation has come about as a result of trade liberalization, structural transformation of the Brazilian economy, and the emergence of new cotton producing regions using advanced technologies and benefiting from targeted government support. Brazil's access to additional agricultural land and recent favorable cotton prices suggest the country's cotton production could increase even more than previously expected. Thus, it is not surprising that acting as an important player in this industry has made Brazilian exporter's use the main association dedicated to this trade: the International Cotton Association, formerly the Liverpool Cotton Association. One of the main features of this trade is the extensive use of arbitration clauses in the sales contract and engagement of their arbitral tribunal.

For this reason, we have chosen one of the cotton cases to discuss in this section. Foreign Decision (SEC) Number 6,335 deals with a contract for the future sale of cotton and the STJ granted the recognition (*homologation*). Nonetheless, it is interesting to discuss the issues raised by the debtor, in his attempt to evade payment. The issues were: (i) the arbitration clause was invalid because the contract was an adhesion contract; (ii) lack of proper notice of the debtor; (iii) that the foreign award was against Brazilian sovereignty; (iv) only the Brazilian judiciary had jurisdiction to decide the disputes arising out of the contract; (v) there was already an existing dispute brought before the Brazilian judiciary on the matter and thus the foreign award could not be recognized.

The Court discussed all the issues raised by the defendant and decided that the foreign arbitral award should be granted recognition. Firstly, the STJ reasoned that the contract was duly signed by the parties and contained an arbitral clause; and that its invalidity was an issue on the merit of the dispute, that only the arbitral tribunal could tackle, and thus outside the scope of its power in a recognition process. For the Court, the merits of the dispute relating to issues concerning the contract, were not part of the requisites of Articles 38 and 39 of the 1996 Law, which set forth an exclusive list of issues that can be raised during the recognition process. For this reason, the argument was not considered a matter that could prevent recognition. STJ ruled that this process is limited to the boundaries set forth by Law as only relating to certain formal requirements, except for public policy violations, which was not the case.

The second issue concerned the notification of the defendant to the arbitration. In this matter, the STJ also relied on the evidence that the notification was duly issued and the defendant had received it. As mentioned above, in arbitral proceedings the notification is simpler than in judicial cases, where a letter rogatory must be transmitted by the foreign authority to a Brazilian Court that will determine the notification. This is an important difference between the notification procedures to be followed in arbitral cases as opposed to judicial cases.

[26] SEC Number 866 and SEC Number 507.
[27] SEC Number 887 and SEC Number 839.

The defendant also alleged that the dispute had to be resolved in Brazil, because in the matter at hand, Brazilian jurisdiction was supposedly exclusive. The STJ disagreed. The question was not within the prescribed cases provided for in the 1996 Law (as per Article 89 of the Code of Civil Procedure – these are basically disputes concerning real estate located in Brazil and succession in assets located in Brazil), the only possible situations where jurisdiction is exclusive. Thus, the arbitration clause that determined the proceedings in another country was considered as not being against Brazilian jurisdictional rules.

The last argument was a discussion of *lis pendens*. According to Brazilian law, although an action is brought in a Brazilian court, there is no interference with the homologation (recognition) process as there is no *lis pendens* for international matters in the Code of Civil Procedure. Thus, the award was granted recognition.

As a conclusion, it is fair to say that this case illustrates how the STJ has dealt with the main issues in the recognition processes and highlights the reasoning behind not harkening to the arguments raised by defendants against foreign arbitral awards. In the last nine years, almost all cases have been granted, which means that the STJ is a firm supporter of international arbitration.

VII. CONCLUSION

The STJ has replaced the STF in the exercise of exclusive jurisdiction over all pending and future cases relating to the recognition of foreign decisions and arbitral awards. We believe that in the last nine years, the STJ has not only utilized case law developed by the STF 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 carved new rules in Resolution Number 9, allowing for partial recognitions of foreign decisions and the granting of provisional measures during the recognition procedure, by far one of its boldest ideas. Its achievements have led the way for the Bill of the Code of Civil Procedure, now pending approval at the House of Representatives (*Câmara dos Deputados*), that adopted Resolution Number 9's main features in the new legislation, 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.

In respect of arbitral awards, the STJ's nine years of activity has been very positive. The vast majority of requests were granted and the Court has adopted a clear pro-arbitration stance, in line with the purpose of the legislation, both national and international. The New York Convention has been mentioned in a few cases in the last years, but the Court still decides most cases by applying internal law (1996 Law) and the Court's regulation (Resolution Number 9). One aspect that raises concerns is the lengthy time frame required for both the homologation ("recognition") procedure before the STJ and the enforcement before the Federal Courts.

EXHIBIT I

SEC No.	Date of Filing	Date of Judgement	Status/Decision	Duration (aprox.)
1	04/01/2005	19/10/2011	Partially granted	6 years and 9 months
349	26/01/2005	21/03/2007	Granted	2 years and 2 months
507	03/02/2005	18/10/2006	Granted	1 year and 8 months
611	04/02/2005	23/11/2006	Granted	1 year and 9 months
760	18/02/2005	19/06/2006	Granted	1 year and 4 months
802	24/02/2005	17/08/2005	Granted	6 months
826	01/03/2005	15/09/2010	Denied	5 years and 6 months
831	02/03/2005	03/10/2007	Granted	2 years and 7 months
839	02/03/2005	16/05/2007	Granted	2 years and 2 months
856	04/03/2005	18/05/2005	Granted	2 months
866	04/03/2005	17/05/2006	Denied	1 year and 2 months
833	02/03/2005	16/08/2006	Denied	1 year and 5 months
874	09/03/2005	19/04/2006	Granted	1 year and 1 month
883	09/03/2005	16/08/2006	Denied	1 year and 5 months
885	09/03/2005	02/08/2010	Denied	5 years and 5 months
887	09/03/2005	06/03/2006	Granted	1 year
894	14/03/2005	20/08/2008	Granted	3 years and 5 months
918	18/03/2005	26/06/2007	Granted (still ongoing - AgRE)	2 years and 3 months
966	04/04/2005	01/12/2008	Extinguished without judgment	3 years and 8 months
967	05/04/2005	15/02/2006	Denied	10 months
968	05/04/2005	30/06/2006	Extinguished without judgment	1 year and 2 months
978	08/04/2005	17/12/2008	Denied	3 years and 8 months
1210	15/07/2005	20/06/2007	Granted	1 year and 11 months
1302	18/08/2005	18/06/2008	Granted	2 years and 10 months
SE 1305	19/08/2005	17/12/2007	Granted	2 years and 4 months
1657	01/02/2006	19/12/2007	Extinguished without judgment	1 year and 10 months
2410	01/12/2006	18/12/2013	Partially granted	7 years
SE 2654	09/04/2007	08/05/2007	Granted	1 month
2707	25/04/2007	03/12/2008	Denied	1 year and 8 months
3035	30/08/2007	19/08/2009	Granted	2 years
3660	21/05/2008	28/05/2009	Granted	1 year
3661	21/05/2008	28/05/2009	Granted	1 year
3709	09/06/2008	14/06/2012	Granted	4 years
3891	25/08/2008	02/10/2013	Granted	5 years and 1 month
4024	03/10/2008	07/08/2013	Granted	4 years and 10

			(still ongoing - AgRE)	months
4213	16/12/2008	19/06/2013	Granted	4 years and 6 months
4415	20/03/2009	29/06/2010	Granted	1 year and 3 months
4439	27/03/2009	24/11/2011	Granted	2 years and 8 months
4516	24/04/2009	16/10/2013	Granted	4 years and 6 months
2716	27/04/2009	30/11/2011	Extinguished without judgment	2 years and 7 months
4837	07/08/2009	15/08/2012	Granted	3 years
SE 4980	23/09/2009	01/06/2011	Granted	1 year and 6 months
5828	30/06/2010	19/06/2013	Granted	3 years
SE 5861	08/07/2010	10/11/2010	Granted	4 months
6335	25/11/2010	21/03/2012	Granted	1 year and 4 months
6365	02/12/2010	06/02/2013	Granted	2 years and 2 months
6753	04/04/2011	07/08/2013	Granted	2 years and 4 months
6760	05/04/2011	25/04/2013	Granted	2 years
6761	05/04/2011	02/10/2013	Granted	2 years and 6 months
SE 7591	03/11/2011	10/04/2012	Granted	5 months
SE 7629	16/11/2011	16/11/2012	Granted	1 year
8847	29/08/2012	20/11/2013	Granted	1 year and 3 months