Recognition and Enforcement of Foreign Arbitral Awards in Brazil

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Brazil provides a friendly jurisdiction for the recognition and enforcement of foreign arbitral awards. It has ratified the 1958 New York Convention[1] and other international conventions regarding the recognition and enforcement of foreign arbitral awards such as The Inter-American Convention on International Commercial Arbitration[2], known as the Panamá Convention[3], adopted by States members of the Organization of American States ["OAS"] and The Protocol of Las Leñas[4], a convention adopted by States members of MERCOSUL[5].

A new arbitration law was adopted in 1996 [Law nº 9.307/96], which has been updated in 2015 by Law nº13.129. Under Brazilian Law, a foreign arbitral award is one made in the territory of another State. It's an award rendered outside the Brazilian territory[6].

[1] The New York Convention entered into force in Brazil on 23 July 2002.
[2] The Inter-American Convention on International Commercial Arbitration, known as the Panama Convention, was promulgated at the conclusion of the First Specialized Inter-American Conference on Private International Law sponsored by the Organization of American States ["OAS"] on 30 January 1975.
[3] The Panama Convention was ratified by Brazil on 31 August 1995.
[4] The Protocol of Las Leñas was adopted by MERCOSUL on 27 July 1992.
[5] MERCOSUL ["The Common Market of the South"] was created by the Asunción's Treaty, signed by Argentina, Brazil, Paraguay and Uruguay.
[6] Brazilian Arbitration Law, art. 34, paragraph 1

The Brazilian Superior Court of Justice, known as "STJ" (hereinafter "the *STJ")* is the competent Court for applying for the recognition and enforcement of a foreign arbitral award.

The creditor seeking the enforcement of a foreign arbitral award in Brazil shall take into consideration the legal procedures set forth in the following legal instruments: (*i)* The New York Convention, as adopted by Brazil on 23 July 2002 or other international conventions as it may apply; (*ii)* The Brazilian Arbitration Law, articles 34-40; and, (iii) The *STJ's* In house-Rule Amendment nº18 of 17 December 2014 [hereinafter "Amendment nº18"].

The Amendment nº18 sets forth the following legal requirements for the recognition and enforcement of foreign arbitral awards: *(i) a* foreign arbitral award will not be enforceable in Brazil if it violates the public policy, human rights or/and Brazilian's sovereignty [article 216-F]; (*ii*) the foreign arbitral award has to be rendered by a competent authority [article 216-D]; (*iii*) it must be proved that the parties were served of the arbitration proceedings or that the award is a judgment by default [article 216-D]; *(iv)* the arbitral award is considered *res judicata* [article 216-D]; *(vi)* the arbitral award could be recognized and enforced partially [article 216-A, 1º].

After the recognition of the foreign arbitral award, the *STJ* refers it to the competent Federal Court for its enforcement.

In 2017, up until the month of November of such year, there were 11 (eleven) requests for the recognition and enforcement of foreign arbitral awards in Brazil and there was only one case of refusal in the recognition of a foreign arbitral award: an ICC arbitral award rendered in the US [SEC nº9412/US), known as "ABENGOA case".

Grounds for the STJ's refusal for the recognition and enforcement of foreign arbitral awards

Over the years, the *STJ* has followed a consistent case-law allowing the recognition and enforcement of foreign arbitral awards in Brazil. However, the *STJ* case-law is consistent with the refusal of the recognition of a foreign arbitral award when the foreign arbitral award does not meet some basic legal requirements.

In the following paragraphs, we will discuss grounds for refusal of the recognition of foreign arbitral awards that has been decided by the *STJ.*

Violation of Brazilian public policy

The *STJ* refused the recognition and the enforcement of the foreign arbitral award rendered in New York, US, under the ICC arbitration rules ["ABENGOA case"- SEC nº9412-US], stating that the foreign arbitral award had violated de Brazilian public policy.

The background of the "ABENGOA case" can be summarized as follows: the arbitration was conducted under ICC arbitration rules; the seat of arbitration was New York City, US; the parties were from Brazil and Spain, and the applicable law to the merits of the dispute was the Brazilian Law.

The *STJ* refused the recognition of the foreign arbitral award on the ground that it violated the Brazilian public policy, since it was proved the absence of impartiality of one of the member of the arbitral tribunal.

The presiding arbitrator had not disclosed a conflict of interest existing with one of the parties which had paid professional fees to the presiding arbitrator's law firm during the arbitration proceeding.

It must be said that the fees paid by the party were related to a case without any connection with the arbitration. However, the *STJ* stated that the presiding arbitrator, as a senior partner of the law firm, had been indirectly benefited when his law firm received money from one of the parties of the arbitration.

Furthermore, the *STJ* stated that the presiding arbitrator failed to disclose the existing relationship between his law firm and one the parties in the arbitration.

The *STJ* stated that under Brazilian Law the arbitrator is considered a Judge and Arbitrator and Judge's impartiality must be preserved on behalf of the due process of law. Therefore, any foreign arbitral award that disregards the due process of law, violates the Brazilian public policy and cannot be recognized and enforced in Brazil.

An award rendered out of the arbitration clause boundaries

Another ground for the refusal of the recognition of a foreign arbitral award happens when the award is rendered out of the boundaries of the arbitration agreement.

In the "ABENGOA case" the applicable law to the merits of the dispute was the Brazilian Law. Under Brazilian Law the compensation for damages must cover only the actual damages suffered by the party. However, the arbitral tribunal awarded a sum for damages considering not only the actual damages, but also the business' financial assessment as a whole in an amount that surpassed the actual damages compensation required by the Brazilian Law.

Moreover, the *STJ* understood that the value of damages awarded by the arbitral tribunal surpassed the arbitration agreement, making the award an *extra petita* decision.

The arbitral award was declared null and void by a competent authority

The *Court* refused the recognition of a foreign arbitral award that was vacated by a Court in the State of the arbitration's seat ("EDF case" - SEC nº 5.782)

In the "EDF case" the seat of arbitration was Argentina. The arbitral award was challenged before an Argentinean Court, which vacated the award. The losing party asked the recognition and enforcement of the arbitral award in the US and in Brazil, being such request refused in both jurisdictions.

The *STJ* refused the recognition of the vacated award based on the New York Convention, article V (1) (e); the Panama Convention, article 5 (1) (e); the Protocol of Las Leñas, article 20 (e); and Brazilian Arbitral Law, article 38, VI.

The "EDF case" shows the *STJ* position against the recognition and enforcement of any award vacated in the State of the seat of the arbitration.

The absence of an arbitration agreement

In two different occasions, the *STJ* refused the recognition of a foreign arbitral award due to structural flaws in the arbitration agreements.

The first case, "THYSSEN KRUPP case" (SEC nº 12.236), the recognition of the foreign arbitral award was refused because, despite the arbitration agreement requesting the arbitral tribunal to be composed by 3 (three) arbitrators, the arbitration was conducted by a sole arbitrator.

The *Court* stated that the sole arbitrator was not a competent authority on his own for conducting the arbitration because the parties had agreed to submit their disputes to arbitration with three arbitrators and not with a sole arbitrator.

Also, there is the "KANEMTSU case" (SECNº 885], where the contract between the parties did not have an arbitration agreement.

The Claimant asked for the recognition of the foreign arbitral award but failed to prove the existence of an arbitration agreement. The *STJ* understood that there was no evidence that the arbitration proceedings were based on a valid arbitration agreement. The lack of evidence of the arbitration agreement was the turning point for the refusal of the foreign arbitral award.

Conclusions

All in all, Brazil provides a friendly jurisdiction for the recognition and enforcement of foreign arbitral awards. As shown above, the *STJ* understands and applies the New York Convention, making it a safe and reliable jurisdiction for the recognition and enforcement of foreign arbitral awards if the international standards set forth by the New York Convention are observed.

São Paulo, 29 November 2017