

Recognition of Foreign Arbitral Awards in Brazil: The Abengoa Decision One Year On

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For the past few years, Brazil has gained recognition as an “arbitration-friendly” seat when it comes to the enforcement of foreign arbitral awards. However, last year, in a groundbreaking decision, the Brazilian Superior Court of Justice (in Portuguese, “Superior Tribunal de Justiça” or “STJ”) denied recognition of two US arbitral awards.

Abengoa has appealed from this decision through a motion for clarification, followed by an “Extraordinary Appeal” to the Brazilian Federal Supreme Court (in Portuguese, “Superior Tribunal Federal” or “STF”), asserting the violation of Article 105, I (i) of the Brazilian Constitution. Article 105, I (i) provides that the STJ has the power – according to Abengoa, the *sole* power – to decide on the recognition of foreign awards. Last February 2018, the STJ rejected the appeal on the ground that recognition of a foreign arbitral award is an infra-constitutional matter that cannot be tried by the STF.

In the underlying arbitral proceedings, administered by the International Court of Arbitration at the International Chamber of Commerce, claimant and buyer Abengoa sought to undo the sale of two sugar and ethanol production mills on grounds of alleged errors and omissions in the auditing and negotiation process preceding the sale. In brief, the arbitral tribunal, composed of three renowned arbitrators, rendered two unanimous decisions awarding Abengoa more than \$100 million in damages.

The awards were first presented to the US District Court for the Southern District of New York (as New York was the seat of the arbitration). In an attempt to vacate the arbitral awards on the ground of a manifest disregard of the law, the seller stressed the supposedly evident partiality of the chair of the arbitral tribunal, who allegedly failed to disclose that colleagues from his law firm were providing legal advice in a number of matters involving Abengoa.

The court upheld the arbitral tribunal’s decision and said that the chair lacked knowledge of the conflicts at the time of the issuance of the awards. This ruling was affirmed by the United States Court of Appeals for the Second Circuit, which found that “*to the extent that the lead arbitrator was careless, that carelessness does not rise to the level of willful blindness*”.

Yet, when Abengoa tried to enforce the arbitral awards in Brazil, the STJ, by eight votes to one, declined to recognize the awards on the ground that it was not bound by the decisions of the American courts and was in no way prevented from examining the arbitral awards. The majority held that there were sufficient elements to conclude that the chair was biased. The majority further reasoned that partiality on the part of a decision maker is an infringement of Brazilian constitutional

principles and guarantees, and therefore also infringes Brazil's public policy. Thus, it was open to the parties to reargue the issue of bias, and this issue could be examined by the STJ during the award recognition process.

On the other hand, Justice Felix Fischer voted for the recognition of the arbitral awards on the ground that the process before the STJ should not serve as an appeal of the decisions rendered by the American courts. According to him, the American courts are the only judicial bodies competent to decide on the impartiality of an arbitrator where an arbitration is seated in the United States, and any decision by the STJ contradicting the American courts' decisions would offend the US's sovereignty.

Likewise, the Sub-Attorney General's opinion provided that the recognition process should not serve as a new judgment. He goes on to say that the public policy concept may only be applied to repeal acts that are absolutely incompatible with the Brazilian legal system. According to him, a violation of Brazil's public policy has to be blatant or, to use his own words, it has to be "*primo ictu oculi*", in order to justify non-recognition of a foreign arbitral award.

The STJ's decision sets an important precedent because it was one of the rare times in which the STJ has refused recognition and enforcement of a foreign arbitral award. For instance, the analytical report on recognition and enforcement of foreign arbitral awards – a survey conducted by the Brazilian Arbitration Committee and published by the Brazilian Association of Arbitration Students in 2016 – showed that out of sixty-one decisions between 2008 and 2015, only eight – five in full, and three partially – were not recognized on the ground of violation of Brazil's public policy.^[1]

Among many other reasons, the rarity with which foreign arbitral awards are denied recognition in Brazilian courts can be understood as a result of the clear obligation to recognize a foreign arbitral award under the Brazilian Arbitration Act. The Act provides that recognition shall be made in accordance with effective international treaties or, in the absence of such treaties, in accordance with the Act itself. Additionally, Brazil is one of the 157 signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which aims precisely to ensure that both foreign and domestic arbitral awards will be recognized and enforced uniformly.

Not only that, but the grounds upon which the STJ may refuse recognition of an arbitral award are very limited and are essentially restricted to the analysis of the formal requirements provided by Brazilian law and a few clearly-defined scenarios. Briefly, the STJ may refuse recognition if it finds that:

- (i) the parties to the arbitration agreement were under some incapacity;
- (ii) the arbitration agreement was not valid under the law applicable to the agreement, or under the law of the country where the award was made;
- (iii) the challenging party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was somehow unable to present his case;
- (iv) the arbitral award went beyond the scope of the arbitration agreement and it was not possible to separate the offending portion from the remainder of the award;
- (v) the commencement of the arbitration proceeding was not in accordance with the arbitration agreement;
- (vi) the award has not yet become binding on the parties, has been set aside or suspended by a court in the country where the arbitral award was made;

(vii) the object of the dispute cannot be settled by arbitration, under Brazilian Law;

(viii) the decision violates national public policy.

It is clear then that the process is restricted to recognition, partial recognition or non-recognition of the foreign arbitral award. In *Abengoa*, however, the seller re-submitted his arguments on the impartiality of the chair of the arbitral tribunal before the STJ, which – contrary to the prior decisions of the American Courts –, refused recognition of the award.

This is a very complicated case, dealing with two especially sensitive issues, namely impartiality of the arbitrator and recognition of foreign arbitral awards, but for this very reason, one year later, the decision is still relevant. *Abengoa* raised a red flag for all who have witnessed the development of international arbitration in Brazil, for the truth is that the prospect of the non-recognition of foreign arbitral awards could threaten Brazil's hard-earned reputation in the arbitration community as an "arbitration-friendly" jurisdiction. Any further developments along these lines should be watched closely.

[1] Rafael Bittencourt Silva, Daniel Tavela Luís, et. Al., "6. Analytical Report – Recognition and Enforcement of Foreign Arbitral Awards", *Arbitragem e Poder Judiciário: Pesquisa CBar-ABEArb 2016 (2008-2015)*.

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