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Amendments to the Internal Rules of the Brazilian Superior Tribunal of Justice on Recognition of Foreign Awards

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In article 35 of the Brazilian Arbitration Law ("BAA") it states that, in order to be enforced in Brazil, a foreign arbitral award (i.e., an award issued outside Brazil's territory) must be recognized by the judiciary. This judicial recognition rests with the Superior Tribunal of Justice (Superior Tribunal de Justiça – "STJ"), which retains exclusive competence to analyse requests for recognition of foreign judgements and arbitral awards, pursuant to article 105, I, (i), of the Brazilian Constitution, as amended in 2004.

In line with its new role, in 2005 STJ issued Resolution 9/2005, setting out the procedure for cases involving recognition of foreign awards and the standards it would apply in considering such requests. On 17 December 2014, STJ amended its internal rules ("Internal Rules") to modify, among others, the provisions on recognition of awards. Resolution 9/2005 was revoked and its articles were transferred, with some modifications, to the Internal Rules, as articles 216-A to 216-X.

The most relevant amendment related to the recognition of foreign awards is the inclusion of offense to human dignity as a ground for refusing to recognize a foreign award. Article 216-F of the Internal Rules now provides that "foreign decisions that are against national sovereignty, human dignity and/or public policy shall not be recognized".

This is a brand new provision and it raises questions as to whether this amendment will make it harder to enforce a foreign arbitral award in Brazil.

First, it should be noted that this new ground is not found in either the New York Convention (ratified by Brazil in 2002) or the BAA, which are the primary legislative sources for the recognition and enforcement of foreign awards in Brazil.

Constitutionally, any amendment to the scope or content of the BAA or Brazil's application of the New York Convention must be done through the legislative process. The Internal Rules are drafted and issued internally within STJ and do not form part of that legislative process. As a result, it is highly doubtful that the Internal Rules can create a new requirement for the recognition of foreign awards

Some might also say that the addition of this ground is unnecessary. Respect for human dignity is expressly recognized by the Brazilian Constitution (article 1, III) as an essential principle for the

State. As an “essential principle”, it is arguable that there is no need for specific mention of “human dignity” in article 216-F, as such a concept should fall within Brazilian public policy.

Public policy is tricky to define. Making a long story short, it can be understood as “the group of essential moral, social and legal interests elected by the State to be protected in a certain historical moment” (Adriana Noemi Pucci, “Homologação de Sentenças Arbitrais Estrangeiras”. Arbitragem: estudos em homenagem ao Prof. Guido Fernando Silva Soares, São Paulo: Atlas, 2007, p. 350 – free translation).

It is highly arguable that, in Brazil at least, the concept of public policy would include within it the principle of human dignity, rendering express reference to it in the Internal Rules redundant.

With all that said, it is rash to assume that the inclusion of “human dignity” is superfluous. The provision was deliberately added to the Internal Rules, and, until proven otherwise, it would be wise to work on the assumption that the commission in charge of the amendments found a justifiable reason for the inclusion. However, it may well be that this language was not added specifically with arbitration in mind. The Internal Rules in articles 216-A to 216-X do not deal only with the recognition of foreign arbitral awards, but also with foreign rulings related to any matter, including human rights or family law, for example. Decisions within those fields might easily involve “human dignity” and could be the reason for the amendment, to establish clear and doubtless application (even for the purpose of strengthening fundamental rights).

Considering the short time the amendment has been in force, it has not been challenged or even discussed in judgements yet. As a result, it is not possible to precisely predict how the STJ will interpret or apply this provision. Nevertheless, the STJ has generally adopted an arbitration-friendly approach to the recognition of foreign arbitral awards, restricting the application of the public policy exception to very rare cases. It is likely that even though the human dignity exception is considered applicable to arbitral awards and autonomous from public policy, giving more room to recalcitrant parties to challenge the request for recognition, the STJ will deal with the “new requirement” in a restricted way.

The other amendments to the provisions of Resolution 9/2005 refer to the procedural aspects of actions to recognize foreign arbitral awards. Some of these make small improvements in the language without material effect, while others have brought more substantive changes.

The first of these substantial changes can be found in article 216-C of the Internal Rules. The new provision consolidated articles 3 and 5 of Resolution 9/2005 about the documents that must be presented together with the request for recognition. Among other formal requirements (such as a sworn translation of the award and the arbitration agreement), Resolution 9/2005 provided that the foreign award had to be authenticated by the Brazilian Consulate in the country of origin. According to the new article 216-C of the Internal Rules, this authentication is no longer essential. The new wording excludes the word “indispensable” and establishes that such measure is only necessary in certain cases. These exceptional cases, however, are not specified in the Internal Rules. It will be difficult for practitioners to know where to draw the line in seeking authentication and some may prefer to seek authentication “just in case” until some clarity is given.

Article 216-E of the Internal Rules also contains a provision not found in Resolution 9/2005 regarding the amendment of the request to recognize a foreign award. If the request does not comply with the requirements established by the Internal Rules or presents any irregularity or

defect that causes difficulties for the case to be judged, the requesting party must be notified to amend the request in five days. If, following notification the party does not make the necessary amendment, the case will be shelved without the analysis of the merits – in this case, considering the general procedural rules in force in Brazil, it is likely that a new request can still be filed.

In addition, while Resolution 9/2005 only determined the presentation of an answer by the defendant, article 216-J of the Internal Rules now provides that after the answer, a reply and a rejoinder can be presented, establishing the time period of five days for each one.

Finally, article 216-K gives the reporting judge assigned to the case the chance to decide on the request alone. The regular procedure is to submit the request to be analysed and judged by the judges that compose the Special Court ("Corte Especial") of the STJ. According to the new provision, the reporting judge can analyse and judge the request by him/herself when analogous cases have already been decided by the Special Court.

These amendments brought provisions that can be found in the Civil Procedure Code, so they are not new to Brazilian practitioners. The authorization for the reporting judge is particularly important. Even if the decision is challenged by the parties (as authorized by the Internal Rules), the fact is that a singular ruling by a reporting judge is usually issued faster than a judgment by a panel or larger body and can expedite the proceeding. The two other measures are in line with due process and are not likely to unduly delay the proceeding, because of the short time periods given.

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