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Has Brazil Fully Embraced the Provisions of the New York Convention of 1958? Is it an Arbitration-Friendly Jurisdiction?

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In 1996, when the Brazilian Arbitration Act ("BAA") came into force, the New York Convention ("NYC") was still facing considerable resistance from the Brazilian Executive and Legislative branches. At that time, there were few indications that the NYC would be ratified in the near future. This is why the draftsmen of the bill (a bill which eventually became the BAA) decided to include in its text the main provisions of the NYC. By doing so, Brazil adopted the main framework of the NYC without actually becoming a Member State. Whilst this strategy was originally intended merely to circumvent the lack of political will to ratify and internalise the NYC; the practical, unintended effect has been to hinder the fully adoption by the Brazilian Judiciary of the actual provisions of the NYC, as discussed in this post.

Awards rendered outside of the Brazilian territory are only enforceable if previously recognized by the *Superior Tribunal de Justiça* ("Superior Court of Justice" or "SCJ"), which has exclusive jurisdiction to decide such applications. The multi-tiered process adopted by Brazilian law has the disadvantage of engendering delay. Nonetheless, there are two major advantages to this system. "*The first is that, since recognition applications are heard exclusively before the SCJ, all the resulting rulings are stored in a single database, readily available for public inspection through the SCJ website. The second advantage is that within the SCJ the Chief Justice has exclusive jurisdiction to hear unchallenged recognition proceedings, with contested cases being tried by the SCJ's Special Chamber, composed of the fifteen senior members of the Court. Recognition proceedings are therefore decided by specialised and experienced Justices who have specific duties to ensure that the case law on recognition is consistent and cohesive. This is significant given that in the civil lawsystem adopted by Brazil the application of binding precedents is somewhat restricted*" (See CAMPOS MELO, Leonardo de. *Recognition and Enforcement of Foreign Arbitral Awards in Brazil: a Practitioner's Guide*, Wolters Kluwer, 2015, p. 2).

Brazil ratified the NYC on June 7, 2002 and finalized its internalisation by means of Legislative Decree No. 4.311, officially promulgated by the Executive branch on July 23, 2002. Despite the fact that the BAA and the NYC have the same legal status within the Brazilian legal system – in Brazil, after being ratified and internalised, treaties are at the same level in the legal hierarchy as federal laws – and the express provision of the BAA stating that foreign arbitral awards will be recognized in Brazil pursuant to treaties effective in the national legal system, the BAA continues to be given greater attention by the SCJ than the NYC. "*As a consequence, the SCJ has in effect been denying itself the opportunity to draw on guidance from the body of court decisions, opinions,*

and commentaries of highly qualified scholars and practitioners worldwide on the New York Convention, developed over many decades" (*Idem*, p. 8).

It should be noted, however, that the SCJ, over the last few years, seems to have been made aware of this issue. On June 14, 2012, in the judgment of *Sentença Estrangeira Contestada* (challenged foreign judgment) No. 3.709/US, Justice Castro Meira, having listened to the opinion of Reporting Justice Teori Zavascki, in which there was reference to one of the provisions of the NYC, stressed the importance of the SCJ making reference in its rulings to the provisions of said treaty: "*I wish to record here to the laudable initiative taken by the Reporting Justice in referring to the New York Convention. We know that such reference is important in order for the rulings of the SCJ to have a bearing abroad*[…]" (Special Chamber, decided on June 14, 2012).

Under the framework of the NYC, Brazil should refrain from creating further requirements – in addition to those listed in the Convention – for the recognition of foreign arbitral awards. However, the Internal Rules of SCJ and its case law have regretabbly done so. Based on precedents of the SCJ, it is highly recommended that the plaintiff should attach to its request for recognition of a foreign arbitral award the following documents: (a) the award; (b) the contract and the arbitration agreement; (c) the arbitration rules; (d) proof of the arbitral tribunal's jurisdiction; (e) proof that the award is final – plaintiff would be well advised to attach to its request a certificate issued by the arbitral institution, or by thearbitral tribunal, certifying that the award is final. If possible, the plaintiff should also provide evidence that the arbitration institution officer who signed the certificate of finality of the award had full authority to do so; and (f) proof of proper notice of the commencement of the arbitration. All of these documents must be legalized by the Brazilian Consular authority of the arbitration seat, as well as translated into Portuguese by an official or sworn translator. By doing so, the interested party will guarantee that there will be no future loss of time in the proceedings due to the absence of any of these documents and formalities.

Since July 2002 – when Brazil finally became a Member State of the NYC – its Judiciary has fully refused recognition in only six cases and partially refused recognition in three others, out of aproximately sixty recognition applications decided on the merits. The last case in which recognition of a foreign arbitral award was fully refused took place in 2010. Brazil has therefore an excellent record of foreign arbitral awards recognized by its Judiciary.

Despite some hurdles, which will be overcome in the near future, such as to fully and expressly adopt the provisions of the NYC, and to refrain from making evidence requirements not provided for in said treaty, Brazil has undeniably become an arbitration-friendly jurisdiction. Most importantly, virtually all the grounds for denying the recognition of foreign arbitral awards have been narrowly construed by the SCJ, and this is why roughly ninety percent of the foreign arbitral awards brought for recognition in Brazil have been recognized.

This entry was posted on Wednesday, October 7th, 2015 at 9:03 am and is filed under Brazil, New York Convention
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