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A Road Worth Taking: Brazil's Tortuous but Ultimately Encouraging Path towards the Implementation of the New York Convention

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Arbitration in Brazil has come a long way since the passing of the Brazilian Arbitration Act in 1996 (the "BAA"). The BAA has its origins in the UNCITRAL Model Law and even though it preceded Brazil's ratification of the New York Convention by six years, the BAA is consistent with the New York Convention, at least partly because of its UNCITRAL origins. In these almost twenty years since the passing of the BAA and the ratification of the New York Convention, Brazil is slowly garnering a perception to be an arbitration-friendly jurisdiction. Despite or may be because of the success of arbitration in Brazil, the Brazilian Congress recently enacted an amendment to the BAA (Law No. 13129/2015) with a view to make punctual modifications to domestic aspects of the law. For example, the amendment confirms the ability of governmental entities to participate in arbitrations, the ability of companies and their shareholders to opt for arbitration in their bylaws, and expressly grants powers to arbitrators to issue interim relief. The amendment does not materially modify any aspect of proceedings to confirm foreign arbitral awards.

With the renewed interest in Brazilian arbitration that the new amendment has brought, it is timely to review the Brazilian jurisprudence on confirmation of foreign arbitral awards in these past 10 years.

Foreign arbitral awards [1)] are subject only to a summary confirmation proceeding in the Brazilian Superior Tribunal of Justice ("STJ"). Merit inquiries (with the exception of sovereignty, public order and human dignity) are not permitted. *See*, e.g., ***Paladin PM Holmes Brazil Investors LLC v. Molnar Construtora e Incorporadora Ltda., SEC 8847 (2012/0244916-3)***.

STJ's role is limited to the determination whether STJ's requirements are met (STJ'S Internal Regulations), and whether any grounds for refusal to enforce exist (BAA, Articles 38 and 39). Articles 216-C and 216-D of STJ's Amendment to its Internal Rules No.18/2014 lay out the procedural requirements for confirmation proceedings. The confirmation petition must establish (1) tribunal's competence to hear the dispute; (2) valid service or validly obtained default award/ judgment; (3) *res judicata*; (4) sworn translation or consularization of the foreign arbitral award and of other necessary documents. In the event the petition lacks these requirements or is otherwise defective, the petitioner has an opportunity to cure the defect within a time period. If it fails to do so, the petition is archived (equivalent to a dismissal without *res judicata* effect). Pursuant to

Article 216-F, the STJ will not enforce a foreign arbitral award that violates Brazil's sovereignty, Brazil's public policy or human dignity.

Pursuant to Articles 38 and 39 of the BAA, the following are grounds for non-confirmation: (1) minors or incapacitated parties; (2) invalid arbitral agreement under the chosen law or under the laws of the seat; (3) resisting party was not notified of the arbitral appointment, proceeding or due process is otherwise violated; (4) the arbitral award issued beyond the scope of the arbitral clause and it is impossible to separate that part of the decision from the rest of the award; (5) arbitral institution not chosen by the parties; (6) arbitral award did not have *res judicata* effect or the award had been suspended or annulled at a court of the seat; (7) subject matter of the arbitration cannot be arbitrated under Brazilian law or the arbitral award violates Brazilian public order.

We reviewed approximately forty confirmation decisions by the STJ since 2005. In only seven cases the STJ refused to enforce the foreign arbitral award or at least part of the foreign arbitral award. Five of these seven cases were decided in 2005, the first year in which the STJ became responsible for confirmation proceedings. The last time confirmation denied in toto was in 2007. Since 2005 the STJ has had a chance to reconsider most of the issues that were once grounds for refusal and it has expressly rejected most of them in recent cases. Below is a brief account of how the jurisprudence has evolved in these 10 or so years.

Lack of Standing

Gottwald Port Technology GMBH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais, SEC 968 (2005/ 0053918-3). In *Gottwald*, the STJ refused to confirm the foreign arbitral award by reason of petitioner's lack of standing. Petitioner had acquired the right to collect the proceeds of an arbitral award through assignment between it and the original claimant in the arbitration. The STJ's decision was without *res judicata* effect and the Petitioner was ultimately successful in ***ATECS Mannesmann GMBH v. Rodrimar S/A*, SEC 3035 (2008/0044435-0)** (confirming the foreign arbitral award and finding standing where the rights under the arbitration agreement had been succeeded by virtue of succession by merger).

Lack of Consent

Plexus Cotton Limited v. Santana Textil S/A, SEC 967 (2005/0053998-0); Indutech SPA v. Algocentro Armazéns Gerais Ltda., SEC 978 (200560173771-1); Kanematsu USA Inc. v. ATS Advanced Telecommunications Systems do Brasil Ltda., SEC 885 (2005/0034898-7), Oleaginosa Industrial Financeira Imobiliária Y Agropecuaria v. Moinho Paulista Ltda., SEC 866 (2005/0034926-5). In these four 2005 cases, the STJ refused to confirm the foreign arbitral awards on lack of consent grounds, specifically lack of signature, which was then considered a requirement in order to express consent. Recent cases have adopted a view that an agreement in writing, not signature is necessary to establish consent. *See* ***L'Aiglon S.A. v. Textil União S/A, SEC 856 (2005/0031430-2)***.

Res Judicata/ Parallel Proceedings

Parallel proceedings and the effect of *res judicata* have taken center stage in the recent jurisprudence of the STJ. The STJ has put to rest the notion that a party can resist confirmation on the grounds of domestic *res judicata* or parallel proceedings alone. In recent cases, the STJ has looked at the nature of the demand and the remedy sought to determine whether jurisdiction is

concurrent or if it overlaps. If there is no complete overlap between the domestic and the international cases, the court will not consider the proceedings parallel. The STJ has confirmed foreign arbitral awards in situations where parallel proceedings existed in Brazil but the Brazilian court has not rendered a decision. *See* ***First Brands do Brasil Ltda. v. STP Petroplus Produtos Automotivos S/A PPA, SEC 611 (2005/0055688-0)*** (action to annul award is not obstacle where decision has not been rendered). The STJ has also confirmed foreign arbitral awards in cases where a Brazilian decision exists but is posterior to the foreign arbitral award. *See* ***Tristao Trading (Panama) S.A. v. Naumann Gepp Comercial e Exportadora, Ltda., SEC 9714 (2013/0247110-2)***. On the other hand, the STJ has refused to enforce portions of an award covering topics that had already been decided by a Brazilian court in ***Kia Motors Corporation v. Lopes et al., SEC No. 1 EX (2007/0156979-5)***.

Invalid Service

In ***Subway Partners CV v. HTP High Technology Foods Corporation S/A, SEC 833 (2005/032212-5)***, the majority of the STJ decided to refuse to confirm the foreign arbitral award on the grounds that the petition required service by letter rogatory. This precedent seems to be an outliar.

Recent jurisprudence is in agreement that letters rogatory are not necessary when confirming foreign arbitral awards. *See* ***Al-Gharafa Sports Club v. Clemerson de Araujo Soares, SEC 11529 (2014/0136915-1)***; ***Paladin PH Holmes Brazil Investors LLC v. Molnar Construtora e Incorporadora Ltda., SEC 8847 (2012/0244916-3); SEC 6760 (2011/0197514-1).***

Public Order

In ***Ssangyong Corporation v. Eldorado Indústrias Plásticas Ltda., SEC 826 (2005/0031322-7)***, the STJ refused to enforce an award on the grounds that the petitioner had already submitted to the jurisdiction of the Brazilian courts by filing a notice of claim in the judicial restructuring of the respondent Eldorado.

Under the *res judicata* prong of the grounds, Brazil will also not confirm a foreign arbitral award that has been set aside by the court of the situs of the arbitration. In those cases, the STJ has pronounced that such award is a legal nullity and therefore has no *res judicata* effect. BAA, Article 38, VI. This does not mean that a double exequatur requirement exists. But once and if the foreign award has been set aside in the courts of the situs, the award is no longer enforceable in Brazil.

Non-Signatories

Recent cases have dealt with the binding nature of the arbitration clause in relation to third parties to the arbitration agreement. In ***Newedge USA LLC v. Manoel Fernando Garcia, SEC No. 5692 (20012/0246980-3)***, the STJ confirmed an award against a guarantor who was not party to the arbitration agreement. Noting that the guarantee made reference to the arbitration agreement as well as the fact that the award had already been "confirmed" by the courts of the situs of the arbitration (New York), the STJ rejected the argument that the enforcement of the award against a non-signatory violated Brazilian's public order of sovereignty and confirmed the award. *See* also, ***Converse Inc. v. American Telecommunication do Brasil Ltda., SEC No. 3709 (2008/0266915-8)***(confirming foreign arbitration award against parties not original signatories of the arbitration agreement but that had brought counterclaims and had consented to be bound by the

arbitration during the course of the arbitration.), ***LITSA Líneas de Transmisión del Litoral S/A v. SV Engenharia S/A, SEC 894 (2005/0203077-2)*** (confirming award against party that had succeeded the signatory of the arbitration agreement by acquiring all rights under all assumed contracts through acquisition).

Conclusion

We reviewed approximately 40 confirmation cases rendered since 2005. We identified only seven cases where the foreign arbitral award was not confirmed. Moreover, the reasoning behind most of these decisions has been rejected in more recent cases. Brazil is garnering a perception to be an arbitration-friendly jurisdiction in part based on the relative solid body of cases from the STJ confirming foreign arbitral awards.

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References

?1 Unlike U.S. law, Brazilian law does not look into the nationality of the parties to the arbitration to define whether an arbitration is domestic or international. Brazilian law looks only at the situs of the arbitration. BAA, Article 34, sole paragraph. As a result, an arbitration between two foreign parties sited in Brazil will be considered a domestic arbitration by the Brazilian judiciary, subject to broader judicial review (Article 32 of the Brazilian Arbitration Act). STJ REsp 1231554/RJ (2011/0006426-8)(June 1, 2011). By contrast, an arbitration between two Brazilian parties in a foreign situs will be considered a foreign arbitration, subject to the New York Convention grounds only.

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