# Kluwer Arbitration Blog

## A Brief Analysis of the Legal Background Surrounding Arbitration and the Enforcement of Foreign Arbitral Awards in Brazil

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In the past decade, the legal landscape in Brazil has changed significantly to better accommodate alternative dispute resolution methods, including mediation, conciliation, and arbitration. Brazil recently revised its Civil Procedure Code (Law 13.105/2015) and its arbitration law (Law 13.129/2015). It also enacted a mediation law (Law No. 13.140/2015). These major pieces of legislation contain provisions that encourage and legitimize the use of non-judicial procedures to resolve disputes more effectively.

The Brazilian Arbitration Law, partially based on the UNCITRAL Model Law, was enacted in 1996 and revised in 2015. The revised legislation incorporated pro-arbitration case law established by Brazilian higher courts over the years, responding to an increasing demand for arbitration to resolve disputes in Brazil. Some of the significant changes include the possibility for public entities to use arbitration in disputes relating to transferable property rights, the granting of provisional remedies before the commencement of arbitration proceedings, and the establishment of an "arbitral letter" to enable arbitrators to ask for judicial assistance to compel a party to act or refrain from specific acts. An arbitral letter can be used, for example, to subpoena a person to provide certain documents or physical evidence.

The number of arbitration cases with seats in Brazil has increased, as well as the number of international arbitration proceedings with Brazilian parties arising out of commercial transactions. The International Chamber of Commerce (ICC) listed Brazil seventh in its worldwide rankings with a total of 51 cases in 2017. In May 2017, the ICC also established a permanent case management team in Brazil in response to an expanding market and the country's strategic importance in the region. Regarding international arbitration proceedings involving Brazilian parties carried out abroad, Brazilian law requires recognition of foreign arbitral awards prior to their execution against assets situated in Brazil. Therefore, for those considering arbitration with a Brazilian party or a party with significant assets in Brazil, it is important to understand the provisions regarding the enforcement of foreign arbitral awards in the revised law.

Brazilian legislation does not distinguish between proceedings taking place nationally or internationally, but an arbitral award issued outside of Brazil is treated as a foreign judgment. Prior to the arbitration law of 1996, a foreign arbitral award needed to first be recognized at the issuing country as a pre-condition for the recognition proceeding in Brazil. This is what scholars called "double recognition." After the adoption of the arbitration law in 1996, and Brazil's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 2002, only a "simple recognition" is now required. Moreover, since the passage of a constitutional amendment in 2004, the *Superior Tribunal de Justiça* ("STJ") is the Brazilian court with original jurisdiction to recognize foreign judgments, including foreign arbitral awards. While not automatic, the recognition of foreign arbitral awards in Brazil is subject to limited conditions as detailed below and does not require prior recognition in the country of the seat of arbitration.

Article 34 of the Brazilian Arbitration Law provides that a foreign arbitral award will be recognized and enforced in accordance with legally binding international treaties. This provision refers to the New York Convention which allows each contracting state to recognize and enforce arbitral awards in accordance with their own internal rules.

Article 37 of the Brazilian Arbitration Law further establishes the initial steps for recognizing foreign arbitral awards. A party seeking recognition of a foreign arbitral award must first file a petition to the STJ with the original or a certified copy of the award and of the parties' agreement to arbitrate, together with an official translation of each. If the award is issued by a party to the Hague Apostille Convention, certification follows a streamlined process recognized in Brazil. Otherwise, the award and the arbitration agreement must be authenticated by the Brazilian Consulate located in the country of the seat of arbitration. If there is no Brazilian Consulate, the interested party may certify documents at the nearest Consulate located in the country with jurisdiction over the seat of arbitration.

Moreover, recognition of a foreign arbitral award must follow the procedural requirements under Articles 15 and 17 of the Introductory Law to Brazilian Rules (LINDB) and Articles 216-D and 216-F of the STJ's internal rules. Accordingly, the STJ will recognize a foreign award when: (a) it is issued by a competent authority, (b) it is final and not subject to appeal, (c) process is properly served on all parties, and (d) the award does not offend "sovereignty, human dignity, and public order."

It is important to note that these requirements are mostly procedural. The STJ has repeatedly stated that if the procedural requirements are met, reviewing the merits of a foreign arbitral award is not permitted under Brazilian law and the award must therefore be recognized. In *Enelpower SPA v. Inepar Energia S/A*, for example, the Court stated that "*revisiting the merits of a foreign arbitral award is incompatible with the current (recognition) proceeding*."

In addition to procedural requirements, Article 38 of the Brazilian Arbitration Law establishes the situations in which the STJ may refuse to recognize and enforce a foreign arbitral award. These provisions follow the wording of Article V of the New York Convention, including the possibility of refusal to enforce if: (a) the parties were incapacitated, (b) the arbitration agreement is not valid, (c) a given party was not given proper notice of the appointment of the arbitrator or due process was violated, (d) the award exceeds the scope of the arbitration, (e) the arbitral institution was not agreed to by the parties, or (f) the award is not yet binding or has been set aside in issuing country.

Under Article 39 of the Brazilian Arbitration Law, the STJ may refuse recognition of an arbitral award if it determines that the issue is not capable of settlement by arbitration or the award violates public policy under Brazilian law. In addition to these well-known provisions inspired by the New York Convention, the STJ's internal rules state that a foreign judgment, including a foreign arbitral award, may be refused if it violates "national sovereignty" or "human dignity." Regarding service on parties, Article 39 allows service following the terms of the arbitration agreement or according to the procedural law of the seat of arbitration. Finally, Article 40 of Brazilian Arbitration Law provides that, if the STJ denies the recognition of a foreign arbitral award, the losing party may seek recognition again after procedural mistakes have been rectified. Recently, the STJ also refused to enforce a foreign arbitral award that had been set aside at the seat, in Argentina, stating that an annulled award cannot be enforced. (*EDF International S/A v. YPF S/A*).

Brazil is moving towards a culture more conducive to extrajudicial dispute resolution, including international disputes. With modern and arbitration-friendly legislation as well as courts willing to defer to domestic and foreign arbitral awards, parties seeking to enforce an award in Brazil should be able to navigate the country's legal framework while receiving appropriate judicial support.

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