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Recognition and Enforcement of Foreign Judgments in Brazil

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I. Brazil

A foreign decision, in order to be enforced in Brazil, has to be homologated by the Superior Court of Justice (*Superior Tribunal de Justiça* – STJ). Until 2005, it was upon the competence of the Federal Supreme Court (*Superior Tribunal Federal* – STF).

Foreign decisions subject to homologation include any judgment, considered as such, even if not rendered by a judicial or administrative court, materially and formally, in the original Country. Decisions of arbitration courts are also included in such concept.

The homologation process is not necessary if the decision is fulfilled voluntarily by the debtor. In the event the debtor refuses to accept the decision, the creditor has then no option besides filing the homologation proceeding.

The first step for enforcing a foreign judgment in Brazil is to verify if the Country where the decision was rendered entered into any interjudicial cooperation agreement with Brazil.

Brazil is a state-party to several agreements, being the most relevant the *Protocol of Judicial Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters* signed in *Las Leñas* on June 27, 1992[1] – regarding the

[1] Ratifying parties: Brazil; Argentina; Paraguay and Uruguay.

Mercosur (south common market); the *Interamerican Convention on Extraterritorial Efficacy of Foreign Arbitral Awards* signed in *Montevideo* on May 8, 1979[2]; and the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed in 1971. There are, in addition, bilateral agreements signed by Brazil and other countries.[3]

The *Montevideo Convention* asserts that judicial and arbitral awards originated from a State Party shall have extraterritorial effectiveness in the other State Parties, provided they fulfill the conditions established therein. In its turn, *Las Leñas Protocol* establishes that the requests for enforcement of an arbitral or judicial judgment among the State Parties shall be made by way of *letter rogatory*.

In case there is no agreement between Brazil and the Country of the decision, the enforcement shall comply with the procedures specified in the Brazilian law.

The Internal Regulations of the Superior Justice Court provide that the following requirements are essential for the effectiveness and enforceability of foreign judgments: (i) the judgment must have been rendered by a court with international jurisdiction on the matter; (ii) the defendant must have been duly served or the default judgment against the defendant must have been rendered according to due process; (iii) the judgment must be a "final judgment"; (iv) the judgment must be certified by a consular official and accompanied by an official translation or a sworn translation.[4]

The requirements of regular service of process or legally valid default is based on the principle of due process of law, embraced by the Brazilian Constitution in article

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[2] Ratifying parties: Argentina; Bolivia; Brazil; Colombia; Equator; México; Paraguay; Peru; Uruguay and Venezuela.

[3] Ex.: (i) Convention on Judicial Cooperation in Civil Matters between Brazil and Spain (Madrid, 1989); (ii) Treaty of Judicial Cooperation and Recognition and Enforcement of Civil Judgments, between Brazil and Italy (Rome, 1989) and (iii) Convention on Judicial Cooperation in Civil, Commercial, Labor and Administrative Matters, between Brazil and France (Paris, 1996).

[4] In accordance to article 5 of the Resolution no. 9/2005, STJ.

xx. It must be evidenced that the defendant has been given full opportunity of a regular and effective defense.

It is important to mention that Brazilian jurisprudence has established that, in case the defendant is domiciled in Brazil, he must have had been duly served by *letter rogatory* for the homologation of the foreign judgment, since this is the only valid manner of service provided by the Brazilian rules of procedure.

STF used to deny homologation to foreign judgments if the Brazilian domiciled defendant was adjudged by default, having been served by mail or through diplomatic or consular channel, or by means of affidavit. The letter rogatory demands the commencement of a less complex proceeding also before the STJ.

In addition to this requirement, Brazilian jurisprudence also established that the defendant domiciled in Brazil must have had submitted himself to the foreign authority.??)

From the STF's standpoint, carrying on a normal business in a foreign country was equivalent to an implicit submission to the corresponding foreign authority, since such businesses are likely to originate judicial or arbitral demands in the country where they are conducted.

Brazilian law is based on the Italian *giudizio di delibazione* (juízo de delibação) system. Accordingly, the homologation court only analyses conformity with certain extrinsic requirements (the formal requirements listed in article 5 of the Resolution no. 9/2005, STJ) and the minimum intrinsic requirements (substantial analysis), namely, the lack of offense to public policy, national sovereignty and social mores.

This means the STJ does not re-examine the merits of the dispute. However, it will not homologate a foreign decision that conflicts with the Brazilian principles and acts. STJ does not carry out the *révision de fond,* and it can homologate partially the foreign award.

A few examples of violation to public policy are the following:

(i) foreign judgments establishing punitive damages shall not be homologated, since under the Brazilian Legal System compensation for damages must correspond to the actual loss incurred or, at the most, to the loss of profits, both subject to evidence thereof;

(ii) the foreign judgment shall be duly substantiated in order to be homologated, considering it is a constitutional provision that all trials shall be public and all judgments shall be substantiated, under penalty of nullity (Brazilian Federal Constitution, article 93, IX).

STJ shall analyze, however, if Brazil had exclusive international competence to judge the case, such as in: (i) conflicts involving real estate located in Brazil and (ii) inventories and apportionments regarding assets (real estate and movable assets) located in Brazil; according to article 89 of the Brazilian Code of Civil Procedure. Foreign judgments concerning such matters shall not be homologated.

It is relevant to mention that reciprocity is not a requirement for the homologation of foreign judgments. Meaning, Brazil shall not homologate exclusively judgments rendered by States that, in their turn, homologate Brazilian awards.

The judiciary courts of Brazil have concurrent international competence, as per article 88 of the Brazilian Code of Civil Procedure, when: (i) the defendant is domiciled in Brazil; (ii) the obligation is to be performed in Brazil; and (iii) the conflict is originated from a fact occurred, or an act performed in Brazil. The legal entities with headquarters or branch (!) located in Brazil are considered domiciled in Brazil. Homologation of foreign judgments shall not be denied due to the concurrent competence.

The homologation of a foreign judgment is a procedure of limited contentiousness, which means that in the homologation proceeding, the defendant can only indicate issues related to authenticity of documents, to the meaning(?) of the award and to the compliance with STJ requirements.

Once the homologation has been granted, federal judges (federal trial courts) are the ones with jurisdiction for enforcing the homologated foreign judgment[5]. In this final step, there isn't a new analysis by the federal judge of the decision already homologated.

[5] Their competence for such enforcement is provided by the Brazilian Constitution, article 109, X.

II. Colombia

The competence for recognition of foreign judgments is held by the Supreme Court of Justice, which shall apply the conventions ratified by Colombia and the rules of the Code of Civil Procedure on the proceedings themselves. This proceeding is known as *exequatur*.[6]

In what regards to arbitral awards, Colombia is signatory to the already mentioned New York Convention and to the Interamerican Convention for International Commercial Arbitration (Panama Convention, dated 1975). As a consequence, the recognition and enforcement of foreign arbitral awards is governed by the rules thereof.

The foreign award can not be reviewed on the merits. However, the Court may refuse enforcement, *inter alia*, if such enforcement violates public policy.

The exequatur proceeding is the same to both foreign decisions and foreign arbitral awards. The difference is that the enforcement of the former may be rejected for the causes provided for under the Code of Civil Procedure, while the enforcement of the latter may only be rejected for the grounds provided for under the New York Convention.

If the foreign award is recognized, it may be enforced before the Civil Circuit Court of the domicile of the defendant.

[6] Please note that in Brazil exequatur is the proceeding applicable to letters rogatory.

III. Mexico

In Mexico, the homologation of foreign judicial judgments is submitted to the Mexican judge that would be competent to decide the cause if the litigation should have taken place in Mexico.

The homologation procedure involves the analysis of the following aspects: (i) the judgment necessarily has to be a conclusive and definite award, with no legal recourse or remedy; (ii) the formalities of notices shall have been duly fulfilled; (iii) the judgment has to be an authentic award; and (iv) the award may not violate the public policy, national sovereignty and social mores.

The merits shall not be analyzed.

With respect to arbitral awards, Mexico ratified the referred New York and Panama Conventions, and adopted the UNCITRAL Model Law for International Commercial Arbitration in 1993.

Mexican Arbitration Law is contained under Book Five Title Four of the Mexican Commercial Code, which is applicable to all domestic and foreign arbitration procedures with Mexico as the seat of arbitration, and for the recognition and enforcement of foreign arbitral awards in Mexico.

Mexican law establishes the precise causes to set aside an arbitral award or to reject its recognition, none of them include the revision of the merits but the arbitrability and the compliance with public order.[7]

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[7] Chapter IX of the Mexican Arbitration Law establishes the following:
ARTICLE 1462.- Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only when:
I.- The party against whom the award is invoked, furnishes to the competent judge of the country where recognition or enforcement is sought proof that:

Moreover, Mexican law does not establish additional requirements for the recognition of foreign arbitral awards. It is only necessary to submit the original or certified copy of the arbitral award and if it is the case, its translation.[8]

Regarding the competent judge, Article 1422 establishes that in case judicial intervention is required, the first instance federal or state judge of the place of arbitration shall have jurisdiction; and if the place or arbitration is outside of Mexico, the competent judge for recognition and enforcement of the award shall be the first instance federal or state judge of the domicile of the person against whom enforcement is to be made. In case such domicile is unknown, the competent judge is the one with jurisdiction on the place where the goods are located.

Finally, the decision that recognized the arbitral award is subject to appeal.[9]

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a) A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
b) Such party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
e) The award has not yet become binding on the parties or has been set aside or suspended by a judge of the country in which, or under the law of which, that award was made; or
II.- The judge finds that, under Mexican law, the subject-matter of the dispute is not capable of settlement by arbitration, or the recognition or enforcement of the award are contrary to the public policy.

[8] Chapter IX of the Mexican Arbitration Law establishes the following:
ARTICLE 1461. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the judge, shall be enforced subject to the provisions of this chapter.
The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in articles 1416, section I, and 1423 or a duly certified copy thereof. If the award or agreement is not made in Spanish, the party shall supply a translation by an official expert.

[9] Chapter IX of the Mexican Arbitration Law establishes the following:
ARTICLE 1463. If an application for setting aside or suspension of an award has been made to a judge of the country in which, or under the law of which, that award was made, the judge to whom recognition or enforcement is requested may, if he considers it proper, adjourn his decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide sufficient security.
Recognition and enforcement proceedings shall be conducted in accordance with the provisions of article 360 of the Federal Code of Civil Procedure. The decision shall be subject to no appeal.