BRAZILIAN ARBITRATION: THE BOOMING YEARS

A collection of articles about the development of arbitration in Brazil from 2007 to 2014
Very common outside Brazil, particularly in common law countries, arbitration became the preferred dispute resolution mechanism for foreign investors that engage in corporate deals, the supply of goods and services and the financing of infrastructure projects in this country.

Brazilian courts have been instrumental in this process by routinely enforcing agreements to arbitrate, aiding arbitrators throughout proceedings and giving proper deference to arbitral awards.

Lawyers have specialized in the field, law schools are now teaching the subject and the business community now use arbitration to resolve disputes whose complexity only increases as the Brazilian economy becomes more sophisticated.

The growth of arbitration in Brazil is outlined in the following articles, which reflect the experience of the arbitration group of TozziniFreire Advogados in issues that range from writing effective arbitration clauses to confirming foreign awards.

Like our own economy the road leading to the consolidation of arbitration in Brazil has not been without its “ups and downs” and there are still challenges ahead. However, we are happy to report that the state of Brazilian arbitration is strong!

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- A number of articles in national and international publications, such as International Law Office, Latin Lawyer, World Law Group (WLG), Dispute Resolution Journal and Brasil Econômico.
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Not so long ago, the general perception within the Brazilian legal community was that the number of seminars, symposia and congress about arbitration far outnumbered the actual cases submitted to this alternative means of dispute resolution. Although the subject remains a hot topic in these events (as it should be), the reality shows an explosion in the number of proceedings that serve to put to rest, once and for all, the initial skepticism of some practitioners towards arbitration.
The number of cases administered by Brazilian arbitral institutions has soared in the past years and the country has held a prominent spot in the annual statistics published by the ICC. The Brazilian arbitration bar has grown more diverse and specialized, with many practitioners engaging in academic studies abroad followed by internships at respected law firms and international arbitral institutions.

The Brazilian Arbitration Committee (CBAr) continues to fulfill its mission to serve as a conduit between arbitration and the business community. Quality scholarly works are being published by respected authors and rising stars and law schools are finally offering courses specifically designed to train students in alternative means of dispute resolution.

However, all the hype around arbitration in Brazil would not be possible without the pivotal role played by the Judiciary. The early resistance to the Brazilian Arbitration Act has been replaced by reasoned decisions enforcing arbitration clauses, granting injunctions in aid of arbitration and refusing to set aside arbitral awards based on groundless arguments\(^1\). The track record of the Superior Court of Justice (STJ) in confirming the vast majority of foreign arbitral awards is a testament to the Judiciary’s commitment to arbitration\(^2\).

Despite our genuine enthusiasm, there will always be room for improvement of arbitration in this country. Perhaps the success of arbitration is also the main threat to its development in Brazil. As the number of disputes increase, so does the need to continue to educate lawyers and judges about the particularities of arbitration. Lawyers must understand that arbitration is not litigation, and that the tactics once used to impress judges and clients in a court of law are simply not effective in defending their client’s interests before an arbitral tribunal.

The large inventory of cases currently administered by the main local arbitral institutions requires investment in qualified personnel to ensure proper and efficient development of the proceedings. Some modification to the respective rules may be needed to foster a more engaging environment to these administrators, who should be able to share some of the responsibilities with the arbitral tribunal, particularly in the early stages of the proceedings, in the interplay with local courts and during the appointment and challenge of arbitrators.

The pool of arbitrators must be enlarged as many arbitrators are already feeling the pains of a large docket of cases. Doing away with the mandatory lists of potential arbitrators seems to be one way to address this problem, as is the need to improve their compensation to keep up with international standards.

Finally, the arbitration community must continue with its fruitful collaboration with the Judiciary, which resulted in a recent and unprecedented seminar held at the Supreme Court (STF) with the participation of leading arbitration practitioners and Justices of both the STF and STJ, who embraced the principle of judicial restraint in matters submitted to arbitration.

The challenges of arbitration in Brazil will continue to grow as the country is bound to experience its fastest economic development in the next decade. Improvements in the quality of arbitral awards, as well as in the in the process itself will require a great deal of discussions within the tireless Brazilian arbitration bar. Apparently, the early stigma mentioned above is also the solution to these booming times: let there be many more seminars, symposia and congress about arbitration!

\(^1\) See “Car Distribution Agreement: São Paulo Highest Court Upholds Arbitration”.
\(^2\) See “Foreign Arbitral Awards Submitted for Confirmation from 1996 to 2010”.

"TOZZINI FREIRE ADVOGADOS"
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I. Legal Background

Law no. 9,307/96 (“Brazilian Arbitration Act”) reflects the influence of the UNCITRAL Model Law on Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), but at the same time contains specific features that harmonise Brazil’s legislation with modern trends in arbitration.

Brazil has ratified both the New York Convention and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). Brazil is also a party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention), as well as the Geneve Protocol of 1923 on arbitration clauses.

Finally, the confirmation of foreign arbitral awards rendered in member states of MERCOSUR (Brazil, Argentina, Uruguay and Paraguay) is regulated by the Protocol on Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters, also known as the Las Leñas Protocol.

On the other hand, foreign investors doing business in Brazil do not benefit from the arbitration framework set by the 1965 Convention on Settlement of Investment Disputes between States and National of Other States (ICSID Convention). Although Brazil has entered into fourteen (14) Bilateral Investment Treaties, there is no ratification of such treaties yet, as a consequence they are not enforceable.

II. Arbitrability

The Arbitration Act allows ‘persons capable of contracting’ to ‘settle through arbitration disputes related to patrimonial rights over which they may dispose.’ The act’s broad scope of arbitrability, however, excludes from the scope of arbitration issues that cannot be contracted away, such as criminal, antitrust and patent matters.

III. Arbitral Agreements: Arbitral Clauses and Post-Dispute Submissions

Brazilian Arbitration Law provides for two types of arbitration agreements, pre dispute arbitration clauses (cláusula compromissória) and post dispute submissions to arbitration (compromisso arbitral). Both the pre-dispute arbitral clauses (cláusula compromissória) and the post-dispute submissions to arbitration (compromisso arbitral) should be agreed in written by the parties and they are enforceable pursuant to the Brazilian Arbitration Act.

It is important to note, however, that under the Brazilian Arbitration Act, compromissos are only required when the parties’ contract contains no arbitral clause at all, or when said clause is open, vague or fails to provide the details referring to applicable arbitral rules, appointment of arbitrators and so on (so-called ‘empty arbitration clauses’).

Therefore, the so-called ‘full arbitration clauses’ do not require a compromisso to set aside the jurisdiction of the courts. That is the case, for example, when the parties agree on a self-executing procedure for setting in motion the arbitral process by referring to the rules of any administering organization, or any ad hoc rules, such as the UNCITRAL Rules.

The vast majority of the Brazilian case law dispenses the compromisso if the parties have indeed agreed ahead of time on the form for instituting the arbitral procedures through a full arbitration clause.

Pre-dispute arbitral clauses (cláusulas compromissórias) are legally binding on the parties as long as they are in writing. Arbitral clauses may be inserted in the underlying agreement itself or in a separate document which makes reference to it. In adhesion contracts, on the other hand, the arbitral clause will only be enforceable if the adhering party initiates arbitral proceedings, or expressly agrees to it, as long as the clause is written in a separate document or in bold type, duly signed or initialized by the adhering party.

IV. Arbitration and Party-Autonomy

Parties are free to select the applicable law (substantive law). Although provided for in the Brazilian Arbitration Act, arbitration in equity must be expressly agreed between the parties. The parties may also agree to resolve their dispute pursuant to the ‘general principles of law’, ‘common usage and practices’ and ‘international trade rules’.

Party-autonomy is fully endorsed by the Brazilian Arbitration Act with respect to the number of arbitrators, their qualification, as well as the method of their appointment.

V. Principle of Kompetenz-Kompetenz

The kompetenz-kompetenz principle empowers arbitrators to rule on their own jurisdiction, including any objections related to the existence or validity of the arbitration agreement. Brazilian Arbitration Law recognizes the principle of kompetenz-kompetenz by which the arbitral tribunal is the only entity that has jurisdiction to analyze questions involving the nullity of an arbitral clause and the merit of the contract, including its own competence.

This principle is set out in Article 8, sole paragraph of the Brazilian Arbitration Law (Law 9,307, September 23, 1996).

VI. Third-party Intervention in Arbitration

Despite one isolated decision rendered in 2006 by the São Paulo State Court of Appeals, the trend within the Brazilian courts is to prevent non-signatories to arbitral agreements from participating in the corresponding arbitral proceedings.
In the specific scenario of a merger transaction, a recent decision rendered by the STJ enforced the arbitration agreement executed by a company that was later merged into another company. The STJ held that an arbitration agreement survives a company’s merger as the surviving company assumes all rights and obligations of the company merged into it, which includes any and all arbitration agreements executed before the merger.

VII. Arbitrators and Arbitral Institutions

Foreign arbitral institutions are not only authorised, but can regularly administer arbitrations in Brazil. The Brazilian Arbitration Act grants the parties autonomy to select the legal rules to govern the arbitral proceeding (procedural rules), which may be conducted ad hoc or under the administration of any domestic or international arbitration institution, such as the ICDR, the ICC, the LCIA or any other institution.

Arbitrators may be ‘any legally capable individual’ and the law does not carry any citizenship or qualification requirement. Therefore, arbitrators in both domestic and international proceedings may be foreigners and non-lawyers.

It must be noted, however, that the 2004 Public-Private Partnership Law (the PPP Law) and the 2005 Amendment to the Concessions Law (the Concessions Law) authorize arbitration of disputes between public entities and private parties arising from transactions executed with the federal government under both statutes. However, despite the fact that foreign arbitrators could be used in these proceedings, both the PPP Law and the Concessions Law require that the arbitration be conducted in Brazil and in Portuguese.

Pursuant to article 13, section 6 of the Brazilian Arbitration Act, arbitrators must exercise their functions with impartiality, independence, competence, diligence and discretion and must disclose any facts likely to give rise to justified doubts as to their impartiality and independence.

The Arbitration Act does not contain strict standards for what arbitrators must disclose, but the statute makes reference to the impediments/transparency standards contained in the Brazilian Code of Civil Produce. Therefore, an arbitrator (like a judge) is prevented from deciding cases in which: he or she is a party or its spouse/relative; the arbitrator has already acted as one of the parties’ advocate, expert or witness; the party’s lawyer is the arbitrator’s spouse or relative; the arbitrator is a member of one of the parties’ management or directing board. Furthermore, an arbitrator’s impartiality is compromised when: the arbitrator is close friends with or strongly dislikes any of the parties; a party is the arbitrator’s, his or her spouse’s or relative’s debtor or creditor; the arbitrator is an heir or employer of any of the parties; the arbitrator received gifts from any of the parties or provided counseling to the parties regarding the object of the arbitration; or the arbitrator has an interest that a party is favored by the outcome of the arbitration.

VIII. Arbitral Proceedings

Arbitral proceedings may be conducted in any language with the exception of the above-mentioned 2004 Public-Private Partnership Law and the 2005 Amendment to the Concessions Law, which authorize arbitration in disputes between public entities and private parties, but require the proceedings to be conducted in Portuguese.

Foreign lawyers are allowed to serve as advocates in arbitral proceedings in Brazil and, although usually implemented, there is no mandatory requirement that a local lawyer serves as co-counsel.

There is no specific provision in the Brazilian Arbitration Act regarding consolidation of multiple arbitral proceedings and thus arbitration tribunals rely on the applicable arbitration rules for guidance.

IX. Interplay between Arbitral Tribunals and Judicial Courts

The Brazilian Arbitration Act recognizes the principle of severability of the arbitration clause, under which any challenge to the validity of the underlying agreement will not interfere with the arbitral proceeding unless the challenge refers specifically to the validity of the arbitration clause itself.

The act also incorporates the principle of Kompetenz-Kompetenz by ensuring that the arbitrators are competent to decide disputes relating to ‘the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause’.

Brazilian civil procedure rules require courts to dismiss any lawsuit brought by a party in violation of an agreement to arbitrate. Normally, courts dismiss the correspondent lawsuit without the other party having to defend the merits of the lawsuit in court.

IX.1 Interim or Provisional Relief

Once duly instituted, arbitral tribunals are also empowered to grant interim or provisional relief as requested by the parties. Once the order is granted, arbitrators themselves request the court with original jurisdiction to hear the underlying dispute to enforce the measure. In some situations, however, the party that obtains the interim or provisional relief from the arbitral tribunal may file a petition directly to the court seeking an enforcement order against the recalcitrant party.

The Brazilian Arbitration Act contains a specific provision authorising the arbitrators to seek the assistance of the courts to compel a third-party witness to appear before them. The judicial court would not enter the merits of the arbitral tribunal’s decision, but rather enforce it through the use of police force or any other enforcement mechanism under law to compel compliance.
Parties are always allowed to seek interim or provisional relief from a judicial court before the formation of the arbitral tribunal. Once formed, however, the arbitral tribunal has exclusive jurisdiction to grant these measures, which may be enforced through the assistance of judicial courts, pursuant to article 22, section 4 of the Brazilian Arbitration Act. Therefore, the Arbitration Act follows the same standard set forth by article 23 of the ICC Rules of Arbitration.

IX.2 Anti-Arbitration Injunctions
The Copel case remains Brazil’s most famous (or infamous) anti-arbitration precedent. This isolated case ultimately settled, but a decision rendered by the STJ in AES v CEEE demonstrates that the highest authority on federal law issues (such as the Arbitration Act) is not amenable to anti-arbitration suits filed by mixed-capital companies that freely execute arbitration agreements.

Furthermore, a decision of the São Paulo State Court of Appeals in the CAOA v Renault saga, an attempt by the former distributor of Renault vehicles in Brazil to circumvent an unfavourable foreign arbitral award, clearly demonstrates the hostility of the Brazilian courts towards injunctions enjoining arbitral proceedings from going forward. These precedents have clearly positioned Brazil as an arbitration-friendly jurisdiction.

X. Domestic Arbitral Awards
All awards issued within the Brazilian territory are considered to be domestic awards irrespective of whether the underlying dispute has an international flavor. According to the Brazilian Arbitration Act, the domestic arbitral award is enforced irrespective of its judicial recognition by the Brazilian courts. In this sense, an arbitral award represents a judicially executable title (título executivo judicial) and is not subject to review on its merits.

X.1 Challenging Domestic Arbitral Awards
It is important to note, however, that article 32 of the Arbitration Act provides for the situations in which an award rendered in Brazil may be annulled. That is the case when: the arbitration agreement is null and void; the arbitrators lacked capacity; the award fails to provide the grounds for the decision or comply with certain other formal requirements; the award exceeds the scope of the arbitration agreement; the award fails to decide the whole dispute submitted to arbitration; the award was rendered through unfaithfulness, extortion, or corruption; the award was made after any time limit required by the submission to arbitration; or partiality in the arbitrators or failure to guarantee certain minimum procedural protections. The annulment action must be filed within 90 days after official notification of the arbitral award.

Brazil lacks consistent case law reflecting the annulment of domestic arbitral awards arising from international disputes. Most of the international arbitral proceedings (ie, those disputes involving at least one non-Brazilian party) result in awards rendered outside the Brazilian territory and thus subject to confirmation proceedings by the STJ. As further explained below, foreign arbitral awards might be challenged under different grounds than domestic arbitral awards.

XI. Confirmation and Enforcement of Foreign Arbitral Awards
The Brazilian Arbitration Act defines ‘foreign arbitral awards’ as those rendered outside Brazilian territory. The Brazilian Arbitration Act establishes that for a foreign arbitral award to be recognised and enforced in Brazil, it shall only be subject to the confirmation proceeding before the Superior Court of Justice (STJ). The award does not have to be recognised by the foreign state’s judicial courts before being submitted to the STJ.

The Application for Confirmation should contain the original foreign arbitral award or a certified copy thereof, duly notarized by the Brazilian consulate and translated into Portuguese by a sworn translator in Brazil, and the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator.

The standards regarding the enforcement of a foreign arbitral award in Brazil are consistent with article V of the New York Convention. According to the Brazilian Arbitration Act, the enforcement of a foreign arbitral award can be denied only if: the parties to the arbitration agreement lack capacity; the arbitration agreement is invalid under the law to which the parties agreed or the law of the place where the award was rendered; the respondent was not given proper notice of the appointment of the arbitrator or of the arbitral proceeding or was otherwise unable to present his or her case and was unable to exercise his or her right of defense; the award exceeds the limits of the arbitration agreement; the commencement of the arbitral proceeding was not in accordance with the arbitration agreement; the arbitral award is not yet binding on the parties or has been annulled or suspended by a court of the place of arbitration; the object of the dispute is not susceptible to arbitration as a matter of Brazilian law; or the award violates Brazilian public policy.

The STJ’s internal rules authorize the court to issue preliminary injunctions during the confirmation proceedings, such as freezing assets while an application for confirmation is pending, and to grant partial recognition of foreign arbitral awards.

Once the foreign arbitral award is confirmed by the STJ, the judgment creditor is entitled to enforce the now ‘nationalized’ award in the same way as a domestic award, that is, before a competent first instance judicial court. Although merits-review continues to be prohibited at
XI.1 Timeframe

Confirmation proceedings before the STJ usually take from two to 14 months, depending on whether the respondent challenges the foreign arbitral award based on the limited grounds established by the Brazilian Arbitration Act. However, as mentioned above, measures can be taken (such as the freezing of assets) during confirmation proceedings to safeguard the judgment creditor’s rights until the foreign arbitral award is finally nationalized by the STJ.

It is difficult to assess the duration of the enforcement proceedings of the now ‘nationalized’ award before a first instance judicial court (foreclosure procedure), as it depends on many factors, such as on the court’s backlog and particularly on the good faith of the judgment debtor (i.e., procrastination through the filing of several groundless appeals).

However, it is reasonable to assume that this phase may take approximately two years until the attached property is finally sold and the proceeds are made available to the judgment creditor. On the other hand, a typical commercial dispute litigated entirely before the Brazilian judicial courts might take from five to 10 years to be ultimately decided by all instances of the Brazilian courts.

XI.2 Key Decisions on Confirmation Proceedings

Recent arbitration cases decided by the STJ show significant improvements in both the timeframe and quality of the confirmation proceedings, which can be summarized as follows:

• Proceedings usually take from two to 14 months. However, as mentioned above, measures can be taken during this time to safeguard the judgment creditor’s rights until a final decision on the merits of the confirmation is rendered (i.e., freezing of assets);

• Most of the STJ justices are committed to the modernization of arbitration in Brazil and a track record that is clearly biased in favor of arbitration has already been formed;

• A very recent decision upheld an arbitration agreement even though it was executed prior to the enactment of the 1996 Brazilian Arbitration Act. In this particular case, the STJ confirmed a French ICC arbitral award against a Brazilian company for breach of contract regarding the construction of power lines in Ethiopia;

• There has been no merits-review of the arbitral awards as the STJ repeatedly ruled out the judgment debtor’s attempt to relitigate the merits of the awards by invoking ‘public policy’ grounds;

• The only three confirmation denials were based on either the lack of an arbitration agreement duly executed between the parties, or the lack of proper summons to appear before the foreign arbitration tribunal.

Fortunately, the STJ has repeatedly ruled out the judgment debtor’s attempt to relitigate the merits of the awards by invoking ‘public order’ grounds. Other cases also illustrate the STJ’s pro-arbitration stance:

• In International Cotton Trading Limited v Odil Pereira Campos Filho the STJ refused to review the merits of a foreign arbitral award issued by the International Cotton Association, holding that confirmation proceedings shall verify only whether formal requirements have been met under the Arbitration Act and the court’s internal regulation;

• Bouvery International S/A v Valex Exportadora de Café Ltda is another precedent by the STJ rejecting the merits-review of a foreign arbitral award;

• Grain Partners v Coopergrão was another attempt by a judgment-debtor to review the merits of a foreign arbitral award. The STJ again promptly dismissed the claim to interfere with the merits of the award and, at the same time, clarified the limited scope of confirmation proceedings: ‘The homologation of a foreign award shall be limited to the assessment of its formal requirements.’ The STJ also rejected the application of the Brazilian Consumer Protection Code to an agreement executed between a Brazilian importer and a foreign cotton supplier, thereby dismissing the importer’s claim that the arbitration agreement was unconscionable.

• Spie Enertran S/A v. Inepar S/A Indústrias e Construções, Confirmation of ICC Award, SEC no. 832/EX, Special Panel, Reporting Justice Arnaldo Esteves Lima, decided on Oct. 3, 2007, opinion published on Nov. 19, 2007: Landmark decision on the enforcement of an arbitration agreement executed by company that was later incorporated by another company. The STJ held that an arbitration agreement survives a company’s acquisition/takeover as the acquirer/buyer assumes all rights and obligations of the target company, which includes any and all arbitration agreements executed before the acquisition. The STJ also applied the 1996 Arbitration Act to an arbitration agreement executed prior to the enactment of the law thereby setting aside the need for double-homologation proceedings (required under the previous legislation).

publicized leading case in which the STJ upheld the arbitration agreement inherent to a power purchase agreement involving a mixed-capital company. The STJ set aside allegations that this type of “quasi-public” company would require specific legislative authorization to execute arbitration agreements.


XI.3 Foreclosure/Enforcement Proceedings

Once the foreign arbitration award is confirmed by the STJ, the judgment creditor is entitled to enforce the now “nationalized” award in the same way as a domestic award, i.e. before a competent first instance judicial court. Although merits-review continues to be prohibited at this stage, the foreign award may still be challenged on very limited grounds by the judgment debtor during the Foreclosure Procedure, as discussed below.

Important amendments to the Brazilian Civil Procedure Code were introduced by Federal Law 11,232, enacted in 2005 and effective as of June 2006, which was designed to provide a more equitable balance between debtor’s and creditor’s rights and to generally streamline the enforcement proceedings in Brazil.

Nowadays, a Foreclosure Proceeding based on a duly confirmed foreign arbitration award begins when the judgment debtor is summoned by the competent Federal Court to pay the debt within 15 days under penalty of incurring an additional 10% fine over all due amounts.

The judgment creditor has the ability to appoint which debtor’s assets should secure payment of the money judgment. These assets shall be attached should the judgment debtor fail to comply with the Court’s order in the above-mentioned deadline.

The judgment debtor may present a Motion against the Foreclosure Procedure within 15 days after attachment of the assets. It is important to note, however, that the judgment debtor has very limited grounds to challenge a Foreclosure Proceeding based on a foreign arbitration award. The Motion only deals with procedural aspects of the Foreclosure Procedure and is not intended to discuss the merits of the underlying foreign arbitration award.

Upon the Court’s decision on the Motion, the attached property will be appraised and taken to auction, where it will be legally disposed of. The proceeds of such disposal will be made available to the judgment creditor, so that its credit is finally settled and the Foreclosure Proceeding is extinguished.

It is difficult to assess the duration of a Foreclosure Proceeding as it depends on many factors, such as on the Court’s backlog and particularly on the good faith of the judgment debtor (i.e. procrastination through the filing of several groundless appeals). However, it is reasonably to assume that this phase may take approximately 2 years until the attached property is finally sold and the proceeds are made available to the judgment creditor.

XII. Conclusion

Much has been said and written about the growing importance of arbitration in Brazil, particularly after the Supreme Court’s decision upholding the 1996 Arbitration Act (2001), the adoption of the New York Convention (2002) and the booming Brazilian economy that paved the way for an unprecedented appetite of foreign companies to invest in our country and even of Brazilian multinational companies for acquisitions abroad, transactions that almost always involve arbitration agreements.

The analysis of the recent STJ decisions underscores the commitment of one of Brazil’s most important courts to arbitration as an effective means of dispute resolution, particularly in light of the refusal of its justices to allow challenges to the merits of foreign arbitral awards.

The enforcement of arbitration agreements executed by mixed-capital companies is another evidence of this (hopefully) irreversible commitment towards arbitration in our country, a trend that is likely to continue in 2008 and in years to come.

Despite a few unfortunate incidents, Brazilian courts appear to finally recognize the importance of arbitration in attracting and maintaining foreign investors in this country. This shift from the arcane reluctance in accepting party autonomy to set aside the jurisdiction of the courts has resulted in a significant body of judicial decisions, especially by the STJ, which ensures the enforceability of arbitral clauses inserted in agreements executed with Brazilian parties.
As the saying goes, “knowledge is power”, and the more Brazilian courts get acquainted with arbitration, the more effective this method becomes in Brazil.

The year of 2012 has produced yet another set of important court decisions that illustrates how knowledgeable the Judiciary has become about the validity of agreements to arbitrate, the scope of arbitration, the enforcement of foreign awards, as well as the Judiciary’s role before, during and after arbitral proceedings are instituted.

Judges and appellate courts alike contributed to this body of pro-arbitration precedents, but no court in Brazil has had a more decisive stance on promoting arbitration than the Superior Court of Justice (STJ). Entrusted by the Constitution to decide federal law issues - including cases arising from the interpretation of the Brazilian Arbitration Act - the STJ is also responsible for the confirmation of foreign arbitral awards.

Amongst the highlights of the STJ’s docket of 2012, Justice Nancy Andrighi’s opinion in *REsp 1169841/RJ* stands out as a clear and reasoned analysis of the formalities required of an arbitration clause related to adhesion contracts in general, as well as the even more restrictive regulation concerning consumer-related agreements.

In *REsp 1203430/PR* the STJ set aside a Brazilian lawsuit that discussed the exact same claims decided by a previously confirmed foreign arbitral award. Writing for the court, Justice Paulo de Tarso Sanseverino held that the “binding nature of a foreign arbitral award confirmed by this Court precludes its revision or modification by the Judiciary, pursuant to Article III of the New York Convention [on the Recognition and Enforcement of Foreign Arbitral Awards].”

In another carefully drafted opinion, Justice Nancy Andrighi clarified the interplay between courts and arbitrators with respect to granting and enforcing injunctive relief: “[u]ntil an Arbitral Tribunal is properly constituted a party may seek relief by the Judiciary through interim measures to ensure the effectiveness of arbitration.”

As to confirmation, the opinions rendered in 2012 reflect the STJ’s commitment towards the New York Convention. The Court continues to exercise restraint, refusing to enter the merits of foreign awards by dismissing groundless “public policy” claims to challenge enforceability in Brazil.

In *SEC 6.335/EX* the STJ refused to analyze the nature of the underlying contract holding that said assessment is incompatible with the limited scope of confirmation proceedings. In both *SEC 4.837/EX* and *SEC 3.709/EX*, the STJ refused to consider challenges brought for the first time during confirmation, because the respondent failed “to do so in the appropriate time” pursuant to the respective rules of arbitration and applicable law.

The decisions rendered in 2012, particularly those of the STJ, indicate that the knowledge acquired by our courts over the sixteen years of existence of the Brazilian Arbitration Act has now reached critical mass. From boilerplate agreements to complex arrangements for the construction of power plants, parties feel empowered to confidently include arbitration clauses to an increasing array of agreements. Knowledge is indeed power.
The Brazilian Senate has just established a special committee to discuss amendments to the Brazilian Arbitration Act (Law 9,307), which was enacted on September 23, 1996.

The committee is presided over by Mr. Luís Felipe Salomão, a Justice of the Superior Court of Justice (STJ), Brazil’s highest court for non-constitutional matters (including the interpretation of the Arbitration Act) and also responsible for confirmation of foreign arbitral awards. Also in the group are: a former Brazilian Supreme Court Justice; a member of the Tribunal de Contas da União (Federal Accountability Office); one of the authors the Arbitration Act, as well as many prominent members of the Brazilian arbitration community.

The committee is expected to meet regularly within the next six months and discuss topics that range from pre-arbitration injunctions to the annulment of the award, including the participation of non-signatories and public entities, the appointment and qualification of arbitrators, consumer and labor-related arbitrations and class actions.

The 1996 Act is the cornerstone of arbitration in Brazil and, for the past 16 years, national courts have properly interpreted its text and, as a result, have played a decisive role in the growth of this means of dispute resolution. We reported proudly on the strides made by the Judiciary in consolidating arbitration in Brazil, as many of our articles discuss precedents concerning the very same topics to be addressed by the committee.9

Therefore, a complete overhaul of our arbitration Magna Carta is certainly not desired. “Never change a winning team” was voiced by leading scholars and already resonates within members of the committee.

Fortunately, major changes are not expected, because the president of the committee himself has pledged his allegiance to the current legal framework. Justice Salomão assured that the committee’s work will not hinder the progress of arbitration in Brazil. Exhibit A of the Justice’s pro-arbitration stance is his recent well-reasoned opinion on the limited jurisdiction of the courts before the arbitral tribunal is appointed10.

On the other hand, Justice Salomão has also expressed the need to adjust the legal text to reflect Brazil’s dynamic economic environment and the modifications brought by the 2002 Civil Code and the 2004 reform in the Judiciary.

We certainly hope that Justice Salomão is true to his statement and that these adjustments, if any are needed at all, merely enhance the strong foundation laid by our 1996 Act, upon which the Brazilian Judiciary has successfully built a pro-arbitration setting.

In 2013 the old adage “never change a winning team” is certainly applicable to the Brazilian arbitration legal framework. As we approach the 2014 World Cup, we ask ourselves whether the same is true for our national football team...

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10 Superior Court of Justice, REsp no. 1082198/MT, Reporter Justice Felipe Salomão, Fourth Chamber, Nov 11 2012 (highlighting the court’s obligation to set arbitration in motion when parties fail to agree – in the respective clause - on the method to appoint arbitrators).
On June 20, 2013 the Institute for Transnational Arbitration (ITA) held its 25th Anniversary Workshop in Dallas, whose theme was “International Arbitration from the Arbitrator’s Perspective”.

In one of the panels leading arbitrators addressed the qualities of an effective arbitration counsel. The lively discussion between the panelists and the audience – many top arbitrators themselves - provided a valuable window into the minds of these decision-makers, particularly as to the role of lawyers before arbitral tribunals.

The list below summarizes our view regarding the top ten qualities of effective counsel, which is largely based on the discussions held at the ITA Workshop:

1. Define, as soon as possible, what is at issue and what is your position
2. Have a quiet and authoritative presence throughout the hearings
3. Be completely grounded in the facts of case
4. Be relevant (don’t waist anybody’s time)
5. Use storytelling to lay out your case (chronological order is almost always the preferred method to do so)
They all seem intuitive, almost obvious behaviors expected from any lawyers. However, these qualities are easily neglected, either because of counsel excessive combativeness (a trait shared by litigators, especially in Civil Law jurisdictions), either because of the client’s pressure to “get even” with the other side (and placate client’s thirst for vengeance).

However, arbitrators were unanimous to point out that cooperation between lawyers and the arbitral tribunal is paramount to ensure that proceedings run smoothly and, more importantly, that the dispute is resolved in a timely fashion.

Counsel should always keep in mind his/her important role to protect the efficiency of arbitration and, as such, he/she must realize that the aggressive “pit bull” is almost never appreciated by arbitrators. As rather elegantly and objectively explained by one such arbitrator during the ITA conference, “you don’t have to demonize the other side to win the case; you only have to prove that they breached the contract.”

#6
Strong character is desirable (not be confused with being aggressive, which is not)

#7
Be concise, objective and, if possible, entertaining

#8
Save your slides for pictures, maps and timelines (never use them to project your arguments in bullets)

#9
Avoid strong argumentative words (or use them sparingly and always after you deliver your strong fact-base position)

#10
Avoid demonizing the other party
Two recent decisions by important Brazilian appellate courts appear to have cleared the somewhat muddy waters regarding the use of arbitration by companies undergoing insolvency proceedings. Both cases deal with the enforceability of arbitration agreements executed by companies that were subsequently subjected to bankruptcy or administrative winding-up proceedings.

In *Interclínicas v. Saúde ABC*[^11] the Superior Court of Justice (STJ) denied an attempt by Interclínicas, a company under administrative winding-up proceedings (a measure applicable to troubled companies in certain regulated industries), to enjoin an arbitration commenced by Saúde ABC, a health care provider that had acquired Interclínicas’ entire client portfolio before the company became insolvent.

The STJ – the highest Brazilian court in federal law issues and also responsible for confirmation of foreign arbitral awards – held that the arbitral clause in the underlying portfolio purchase agreement was valid and enforceable, because the clause had been agreed between the parties before Interclínicas underwent winding-up proceedings.

In its decision, the STJ emphasized that the participation of the company in the arbitration did not represent a risk to any public interest related to the winding-up proceedings, especially because the rights of the liquidated estate (and consequently the interests of creditors and third parties in general) could be adequately protected during the arbitration.

Furthermore, the STJ invoked the *kompetenz-kompetenz* principle stated in Article 8 of the Brazilian Arbitration Act and noted that any decision as to the validity and scope of the arbitral clause is ultimately within the arbitrators’ jurisdiction and not the judicial courts’.

The other precedent is a decision rendered by the Court of Appeals for the State of São Paulo[^12], in which the court authorized a credit awarded by an arbitral tribunal to be included in the bankruptcy proceedings of the debtor. The dispute involved the construction of a building by Diagrama Construtora on behalf of the real estate company Jackson Empreendimentos. The real estate company was not satisfied with the building and thus filed a request for arbitration against Diagrama. The construction company, however, was declared bankrupt only two months after the arbitral proceedings had commenced.

Despite the court-appointed bankruptcy administrator’s opposition to the arbitration, the proceedings continued and the arbitral tribunal awarded Jackson Empreendimentos approximately US$ 1 million in damages for Diagrama’s failure to duly execute the construction agreement.

The first instance court rejected Jackson Empreendimentos’ claim to participate in Diagrama’s bankruptcy with the credit resulting from the arbitration award, arguing that the arbitration proceedings should have been suspended when the company was officially declared bankrupt.

The Court of Appeals reversed the decision and allowed Jackson to claim the damages awarded by the arbitral tribunal before the bankruptcy court, noting that the parties were fully capable of executing arbitration agreements at the time the underlying construction contract was signed. The Court held that supervening facts – such as the company’s bankruptcy – cannot retroactively annul a validly executed and legally enforceable arbitral clause.

Although both precedents are not binding on other cases currently pending before the STJ and the São Paulo Court of Appeals, they clearly demonstrate a trend within two of Brazil’s most influential courts to upheld arbitration agreements during insolvency proceedings and also to respect the arbitrators’ ability to decide on their own competence.

Recent empirical data gathered in Brazil strongly favors the use of arbitration provisions in corporate-related documents. The Catholic University of São Paulo has recently conducted a research on decisions rendered by the State Appellate Court regarding companies’ decision-making process (corporate deliberations).

Researchers analyzed more than 60 appellate court decisions published within 1997 and 2010 that specifically dealt with invalidation of corporate deliberations. Although 95% of active companies in Brazil are organized as a sociedade limitada (limited liability company), the vast majority of the decisions relate to shareholders meetings in the context of sociedades anônimas (corporations).

A purely economic reason is behind the discrepancy in the number of cases: the stakes are significantly higher in corporations, which normally results in these cases actually reaching the courts through adjudication, instead of the usual out-of-court resolution of conflicts within the context of limitadas.

The study revealed that most court cases ended up upholding corporate decisions. When the Appellate Court actually reversed a particular deliberation, the grounds for it, in more than 70% of the cases, were the lack of a particular formality under Brazilian corporations law (failure to properly commence shareholders meetings, quorum, statute of limitations). A merits-based review of the corporate decisions occurred in few cases and were normally related to the abuse of corporate power, damages to shareholders and lack of justification.

The problem, however, is not so much about the technical aspects of the decisions by the Brazilian Judiciary. Precedents are consistent in these matters and some states, such as Rio de Janeiro, even created specialized courts to specifically hear corporate disputes, which improved the quality of the judgments. Furthermore, going though corporate cases, one can infer a form of “business judgment rule” adopted by the courts in this country, which seems to discourage judges from interfering with the merits of corporate decisions.

The main problem, which has been unveiled by this recent research, is the timeframe involved in deciding all of these cases: only 22% of cases were resolved by the third anniversary of filing, with as much as half of them taking up to six years to be finally decided by the appellate court.

As the saying goes, delayed justice is no justice at all. That is particularly true for corporate cases, where a reliable and streamlined dispute resolution process may literally become a matter of life and death for corporations when it comes to conflicts arising from M&A transactions, structural changes, capital increases etc.

Therefore, the recent empirical data strongly favors the use of arbitration in the context of corporate disputes. However, to ensure a swift resolution of shareholders disputes through arbitration, one must always pay attention to the underlying arbitral clauses, which must be consistent throughout the corporate documents, whether the articles of incorporation, the bylaws, or a shareholders agreement.
After a series of consumer-related measures to jump-start the economy amidst the financial crisis, Brazil seems poised to finally address the severe bottlenecks in airports, roads and railways.
As the recently privatized airports undergo major expansion works, the government unveils a multi-billion program to rehabilitate the country’s frail infrastructure by transferring to private sector the construction of roads and railways. The initiative is regarded as yet another attempt to remove the barriers that seem to be slowing down the “dormant giant’s” march towards economic powerhouse status.

Naturally, Brazil counts on foreign capital to accomplish this challenging undertaking. Foreign investors are accustomed to having complex infrastructure disputes decided by a panel of neutrals outside the local Judiciary, so the government made sure to include arbitration as the mechanism to resolve controversies under the respective concession agreements.

For this reason, the concession agreements of the recently privatized airports of São Paulo, Campinas and Brasília contain arbitration clauses subjecting any and all disputes to ICC arbitration seated in Brazil and in Portuguese.

Although disputes under concession agreements are required to be held in Brazil and in Portuguese, the government’s decision to submit the airport’s privatization to a prominent international arbitral institution sends a clear pro-arbitration message to all interested foreign investors.

However, two relevant projects soon to be auctioned by the government in its effort to unplug the country’s infrastructure arteries appear to be a step back in the (until now) cordial relationship between government and arbitration, particularly concerning major infrastructure works.

The draft concession agreement of the high speed railway between São Paulo and Rio de Janeiro (TAV) provides that parties shall resort to arbitration to resolve any and all disputes “that are not related to financial/economic issues related to the Contract”,

Likewise, the draft agreement for the concession of highways is even more restrictive by removing from arbitration “discussions about the restoration of the Contract’s financial-economic equilibrium, as well as financial/economic disputes between the parties.”

The very limited scope of both clauses renders arbitration impractical for most types of disputes arising from either concession agreement. As a matter of fact, one wonders what kind of dispute under these agreements would actually trigger arbitration.

These defective arbitration clauses, as they stand today, contradict the government’s own position in the airports privatization, as reflected by the perfectly enforceable arbitration clauses signed by the winning consortiums of three important Brazilian airport hubs.

More importantly, the exclusion of financial/economic issues from arbitration is at odds with the precedents rendered by the Superior Court of Justice (STJ), the highest authority on federal law issues, including the interpretation of the Brazilian Arbitration Act. Holding that public companies are indeed subject to arbitration, the STJ emphasized that “restoring the contract’s financial/economic equilibrium” is well within the jurisdiction of arbitrators, as this type of dispute “does not involve an inalienable right”.

The silver lining in all this is that both concession agreements are still far from being awarded. The interested parties in the bidding process still have the opportunity to comment on the draft agreements and their arbitration clauses are likely to be questioned by both companies and academia.

Hopefully, if the government is serious about arbitration, these clauses will be redrafted to ensure an alternative means of dispute resolution that is not only authorized by the law, but also routinely enforced by the nation’s highest court. There are plenty of bumps in the long and winding road to economic growth; arbitration should definitely not be one of them.

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14 Clause 43.1 of the draft concession agreement for the high speed train (TAV).
15 Clause 35.1.11) of the draft concession agreement for roads BR-040/DF/GO/MG and BR-116/MG.
16 REsp 904283PR, Reporter Ministra NANCY ANDRIGHI, 3rd Chamber, decided on Oct. 20, 2011.
A recent decision rendered by the highest Brazilian labor law court makes it easier for top executives (managers and/or directors) to challenge the enforceability of arbitral awards regarding employment related disputes.\(^\text{17}\)

The case involved a branch manager of a multinational company who participated in an arbitration that decided the amount of labor fees due to the termination of his employment agreement. The former employee argued he was forced to engage in the arbitration that formalized his termination and resulted in the release of all his labor rights.

The first instance decision dismissed the labor lawsuit in light of the arbitration award and the decision was later upheld by the intermediate appellate court (TRT). The plaintiff, however, filed an appeal to the Superior Labor Court (TST), the highest authority in labor law issues, which recently reversed the TRT’s decision, setting aside the arbitration award and remanding the case for a new judgment by the first instance labor court.

The TST held that individual employment issues are not arbitrable, as the labor rights under Brazilian law may not be “freely disposed by the parties”, as defined by article 1 of the Brazilian Arbitration Law (which defines the scope of arbitrability). The Court stated that the law governing individual employment matters falls within the “protective principle” afforded to all employees, who are not in equal footing with their employers, a situation that is only corrected through the judiciary.

The TST further argued that arbitration regarding labor law issues is only available for disputes arising within the so-called collective bargaining process, i.e. the breach of collective employment agreements, for example, as expressly authorized by the Brazilian Constitution.

Although the defendant-employer is likely to appeal to the Brazilian Supreme Court (STF), the decision was rendered by a full panel of the TST and, as a result, may have precedential force over previous decisions by the same TST, in which panels of three Justices already enforced arbitration clauses inserted in individual employment agreements.\(^\text{18}\)

The decision has already been criticized by Brazilian labor law scholars and even by some labor law judges, who argue that company’s managers and/or directors may not claim unconscionability when negotiating the terms of their employment agreements with arbitration clauses. The proponents of arbitration in labor law emphasize that the mechanism represents the most efficient manner to settle high profile management disputes, particularly those involving the higher echelons of multinational companies.

Some commentators propose that the recent TST precedent should be narrowly interpreted, as it relates to formal aspects of employment termination and not the enforceability of arbitration clauses in general.

It is important to underscore, however, that the opinion’s language rejects arbitration in the context of individual employment agreements in general. Therefore, until this issue is finally settled by the Supreme Court, or the TST reverses its own recent precedent, the use of arbitration to settle employment-related disputes, including those involving companies’ top executives, will remain an issue opened to discussions before Brazilian labor courts.

\(^{17}\) Tribunal Superior do Trabalho (TST), RR - 79500-61.2006.5.05.0028, 1st Subsection Specialized in Individual Conflicts, Reporting Justice João Batista Brito Pereira, decided on Mar. 18, 2010.

\(^{18}\) See, for example, the TST decision on AIRR - 1475/2000-193-05-00, 7th Chamber, Reporting Justice Pedro Paulo Manus, decided on Oct. 15, 2008.
The Court of Appeals for the State of São Paulo has just rejected another attempt by the former distributor of Renault vehicles in Brazil to bypass an unfavorable arbitration award rendered in New York.
In CAOA Comércio Importação e Exportação Ltda. v. Renault S.A. the Court of Appeals upheld a first instance judgment that rejected a lawsuit filed by CAOA against Renault before a Civil Court in São Paulo seeking damages in connection with the termination of CAOA’s distributorship of Renault vehicles in Brazil from March 1992 until April 1997. The unanimous decision prevents CAOA from pursuing a lawsuit against Renault before a Brazilian Judicial Court in light of an arbitration agreement previously executed between the parties regarding the termination of their commercial relationship.

This landmark decision comes against the backdrop of another Brazilian State Court of Appeal’s ruling that rattled both Brazilian and international practitioners alike because of its anti-arbitration nature. In Inepar S.A. Indústria e Construções v. Itiquira Energética the Court of Appeals for the State of Paraná set aside an arbitration award based on the allegation that no separate post-dispute arbitration agreement (“compromisso”) had been signed by the parties, even though both companies participated actively in the arbitration proceedings, without objections.

The São Paulo Court of Appeals decision, on the other hand, appears to be the final chapter in CAOA’s attempt to circumvent an unfavorable award rendered in New York by an arbitration proceeding conducted under the ICC rules. Although the arbitration panel awarded CAOA approximately R$ 6 million for services rendered while the agreement between the parties was still in effect, the arbitrators held that Brazilian distributor was the sole responsible for the termination of the distribution arrangement and therefore denied the company’s claim for damages against Renault in excess of US$ 500 million.

CAOA had already attempted to delay arbitration proceedings back in 1999 by filing a lawsuit, which basically sought a judicial order to regulate the arbitration proceedings to be instituted between the parties. The Court of Appeals upheld the first instance decision terminating this lawsuit, arguing that the arbitration agreement executed between the parties already provided for the rules of the ICC to govern the arbitration and thus no judicial intervention was necessary.

On June 6, 2002 the arbitration panel held that CAOA breached the distribution agreement executed with Renault and, as a result, denied the damages sought by the Brazilian distributor. This unfavorable decision prompted CAOA to file another lawsuit seeking to annul the arbitration award rendered in New York. The Court of Appeals, once again, denied CAOA’s request and held that the arbitration agreement permanently set aside the jurisdiction of the Brazilian Judicial Courts to hear a case between CAOA and Renault arising from the distribution agreement.

This most recent decision rendered by the Court of Appeals stems from yet another attempt of CAOA to submit to the Brazilian Judicial Courts the dispute regarding the termination of the distribution agreement with Renault. The “third challenge” against the arbitration was again decided in favor of this alternative means of dispute resolution with the Court of Appeals clearly indicating that no such attempts will be tolerated by the State of São Paulo’s highest Court.

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19 Court of Appeals for the State of São Paulo, Appeal no. 1.117.830-0/7, 25th Civil Chamber, Reporting Judge Antônio Benedito Ribeiro Pinto, decided on February 26, 2008

The enforcement of arbitration clauses in relation to non-signatories is an issue that draws attention of practitioners and the academia alike. There is a lot of good material on the subject available in books, law reviews and bylines, but two interesting precedents from Brazilian courts can serve to gauge the law of the land on this interesting (and potentially dispositive) issue.

The São Paulo State Court of Appeals Precedent in Trelleborg

In *Trelleborg v. Anel*\(^2\) the São Paulo State Court of Appeals (TJSP) extended the effects of an agreement to arbitrate to a non-signatory. Trelleborg involved an action to compel arbitration under article 7 of the Brazilian Arbitration Law (Law 9.307/96), in which the Swedish parent company (Trelleborg Industri AB) claimed it was not bound to an arbitration involving an acquisition agreement executed by its Brazilian subsidiary.

The TJSP upheld the court-supervised Terms of Reference (the byproduct of any action to compel arbitration), which included Trelleborg Industri AB as a respondent in the arbitration. The Court of Appeals found that the parent company’s “active participation”, “clear involvement” and “interest in the outcome” of the acquisition negotiations required its participation in the arbitral proceedings.
The court set aside the Swedish company’s argument that it never signed the underlying agreement by underscoring that arbitrable disputes “may or may not arise from a written contract” and that nothing in the Brazilian Arbitration Law requires “a previously signed contract by the parties” to justify arbitration. The TJSP further explained that “despite the lack of signature by the appellant ‘Trelleborg Industri AB’, it is more than evident, given the robust documentation, that there is a legal relationship between the parties, which arises from jointly held businesses, in which the active participation of appellant “Trelleborg Industri AB” is attested.”

Trelleborg, which was settled before it could reach either the Superior Court of Justice (STJ) or the Supreme Court (STF), is praised as a leading case regarding the extension of arbitration clauses to the so-called “group of companies”. One of the authors of the Brazilian Arbitration Law, Selma Lemes, when addressing the precedent 22, argued that “depending on each case’s particular circumstances, the extensive interpretation of the arbitration clause may be perfectly possible, given that the legal transactions must be analyzed under the principles of good-faith and its corollaries, i.e. the fiduciary duties, the contractual loyalty etc, which, by the way, represent the cornerstone of all legal relationships.”

The Superior Court of Justice Precedent in Chaval

In Chaval v. Liebherr 23 the Superior Court of Justice (court of last resort in federal law issues) upheld the decision by the Rio de Janeiro State Court of Appeals that dismissed a lawsuit brought in violation of an agreement to arbitrate. The court in Chaval applied the principle of “intertwined agreements” to extend the effects of an arbitration clause to non-signatory parties.

In this case, Chaval Navegação Ltda. (“Chaval”) executed a cargo ship construction agreement with EMAQ Engenharia e Máquinas S/A. This agreement was later assigned to Verolme Estaleiros Reunidos do Brasil S/A (“Verolme”), with Chavel as the “intervening-consenting party” to the assignment agreement.

Verolme, by its turn, commissioned deck cranes for the cargo ship to Liebherr Brasil Guindastes e Máquinas Operatrizes Ltda. (“Liebherr”). Both the construction agreement between Chaval and EMAQ (latter assigned to Verolme) and the ship deck cranes agreement between Verolme and Liebherr contained arbitration clauses.

Chaval claimed the deck cranes installed by Liebherr never functioned as expected, which significantly impaired its ability to use the cargo ship built by Verolme. As a result, Chaval filed a damages lawsuit directly against Liebherr before a civil court in Rio de Janeiro seeking compensation for the severe economic damages allegedly caused by the malfunctioning deck cranes.

Liebherr claimed the dispute was under the dispute resolution framework electing arbitration as the forum to resolve the disputes between all parties involved in the construction of the cargo ship. The first instance court set aside the arbitration clause, but the Rio de Janeiro State Court of Appeals 24 reversed the decision and quashed the lawsuit filed by Chaval against Liebherr holding that all agreements were “connected” and subject to arbitration.

The STJ upheld the decision and clarified that “the State of Rio de Janeiro interpreted/assessed the agreements as a whole, underscoring the importance of the symbiotic obligations amongst them”. The rationale behind the STJ’s decision was that all agreements were connected and intertwined, having a common subject matter, i.e. the construction of the cargo vessel.

This commonality of issues standard was applied by both the State Court of Appeals and the STJ in this particular precedent to extend the effects of an agreement to arbitrate to parties that had not directly signed any written agreement with this respect, but were clearly within the scope of the arbitration framework of all intertwined agreements executed with the sole purpose of assembling the cargo vessel.

Conclusion

The breach of an “unwritten covenant” by the parent company in Trelleborg and the “commonality of issues” standard of Chaval are two legal theories applied by Brazilian courts to enforce arbitration provisions against non-signatories. Although both cases ultimately resulted in favorable decisions to arbitration, the issue is far from being settled, which requires the utmost attention of practitioners when crafting arbitration clauses for complex and intertwined agreements in order to avoid disruption of the dispute resolution mechanism originally envisioned by the parties.

21 Court of Appeals for the State of São Paulo, Appeal no. 267.450.446-00, 7th Chamber of Private Law, Reporting Justice Constança Gonzaga, decided on May 24, 2006 by unanimous decision.
A recent decision by the Superior Court of Justice (STJ) - Brazil’s highest court in federal law issues and responsible for confirming foreign awards - may tip the balance in favor of Brazil as the seat of arbitrations.

The STJ has been called upon to resolve a jurisdictional dispute between an ICC arbitral tribunal seated outside Brazil and a first instance local court. The case stemmed from the termination of a distribution agreement between a foreign manufacturer and a local distributor.

When faced with a termination notice, the Brazilian distributor sought a pre-arbitral injunction before the local court to maintain the agreement in force until a panel of arbitrators appointed under the auspices of the ICC could resolve the merits of the dispute.

The first instance court granted the injunction (later upheld by the state appellate court) and, as a result, the distribution agreement remained in force while the ICC tribunal heard the case. A final arbitral award was then rendered essentially terminating the parties’ contractual relationship and expressly revoking any existing pre-arbitral injunctions.

Notwithstanding the arbitrators’ decision, the first instance court refused to lift the pre-arbitral injunction thereby keeping the distribution agreement in full force and effect. The local court argued that to be valid in Brazil the ICC arbitral award must still be confirmed by the STJ. And the STJ initially sided with the local court citing its own precedents that the efficacy of foreign awards depends on their homologation by the Court25.

The case is still subject to appeal at the STJ and the manufacturer also has other procedural remedies to attempt a reversal of the situation, both at the STJ itself (a clearly pro-arbitration court) and at local court level.

However, while the case poses the interesting (and theoretical) question as to the effects of “unconfirmed” foreign awards on pre-arbitral injunctions, such standstill would not have occurred, had the parties previously elected Brazil as the venue for these proceedings.

An award rendered in Brazil - irrespectively of whether hearings occurred elsewhere or were conducted in a foreign language - dispenses STJ confirmation/homologation to be enforceable. In other words, a domestic arbitral award would immediately substitute any pending injunctions in aid of arbitration.

This type of pitfall during confirmation of foreign awards indicates that parties ought to carefully consider the venue of arbitration at the outset of any contract negotiation. If one side is Brazilian, or holds significant assets in this country, selecting Brazil as the seat of proceedings may save time (and academic discussions) during the enforcement of the final arbitral award.

25 Superior Court of Justice - STJ, Conflito de Competência no. 132.088 - SP; Reporting Justice João Otávio de Noronha, decision published on February 05 2014.
Brazilian courts are willing to embrace arbitration as the appropriate means of dispute resolution for disputes arising out of complex derivatives transactions. A recent decision rendered by a court of first instance in São Paulo evidences this view. It provides additional evidence of the important role played by Brazilian judges in enforcing pre-dispute agreements to arbitrate. But it also illustrates the problems to set in motion ad-hoc arbitrations.

The case stems from a derivatives agreement executed by an investment bank and a company specializing in poultry and processed products located in Rio Grande do Sul, Brazil’s southernmost state. The company defaulted on its obligations to the investment bank after Brazil’s currency underwent devaluation during the financial crisis of 2008. The derivatives agreement contained an arbitration clause providing for ad-hoc arbitration, which, unlike institutional arbitration, requires intense (and good faith) efforts by the parties to put the process in motion. Absent a clear indication in the arbitration clause of the entity responsible for handling the proceedings (such as the the ICDR [International Centre for Dispute Resolution, the American Arbitration Association’s international division]), the party wishing to commence arbitration must resort to the judicial courts to force a recalcitrant party to comply with the arbitration clause. That is accomplished by bringing an action to compel arbitration under Article 7 of the Brazilian Arbitration Act (BAA).

The poultry company brought an action in the court of first instance in Rio Grande do Sul to circumvent the arbitration clause. It challenged the enforceability of the clause, claiming unconscionability and arguing that the clause should have been conspicuously displayed, as the BAA requires of all adhesion contracts. The court agreed with the poultry company and issued an injunction against arbitration. However, the highest appellate body in the state of Rio Grande do Sul later reversed the decision and dismissed the entire lawsuit.

While defending the lawsuit in Rio Grande do Sul, on May 28, 2009, the investment bank filed an action to compel arbitration in São Paulo, the venue chosen by the parties in their agreement to settle arbitration-related issues.

On Oct. 8, 2010, the judge assigned to hear the case in São Paulo rendered a final decision on the merits (sentença). That decision reaffirmed the arbitrators’ exclusive jurisdiction to decide the existence and validity of the contract containing the arbitration clause (the derivatives agreement) and the obligations of the parties under that agreement. As a result, the court enforced the arbitration clause and remitted the dispute to arbitration so that the arbitrators could decide these issues.

The decision also appointed one arbitrator for each party and ordered the two party-appointed arbitrators to select a third arbitrator to serve as the chair of the arbitral tribunal.

Although the sentença was ultimately favorable to arbitration, the overwhelming crowded docket of the São Paulo courts ended up delaying the beginning of arbitral proceedings for more than one year.

Therefore, the case serves as a cautionary tale against the use of ad-hoc arbitration clauses, particularly in complex financial agreements, where the swift and impartial adjudication afforded by arbitration is paramount to ensuring the integrity of the banking system.
INSURANCE ARBITRATION:
A POLICY THAT TURNED INTO
A POLICE CASE

June 2012

There is a saying among lawyers that hard cases make bad law, and this is no less true in arbitration than it is elsewhere. In a recent decision, the State Appeals Court of São Paulo dealt with a case that is as hard as it can get: it involves rioting construction workers, a R$ 1.4 billion arbitration demand, and competing anti-suit injunctions—one punishable by fine, the other by imprisonment. The Brazilian court has just stayed an arbitration initiated in London arising from the insurance policy covering construction of one of the world’s largest hydroelectric facilities. The case is certainly hard and the standoff between Brazilian and English courts is definitely bad for arbitration.

By way of background, the covered entities under the insurance policy—consortium leaders and main contractor—are claiming coverage in excess of R$ 1.4 billion stemming from damages and delay caused by riots at the worksite. The riots were so severe that the Brazilian federal government had to send additional police forces to the area.

After the insureds sued in Brazilian courts to obtain coverage and invalidate the insurance policy’s arbitration clause, the insurers obtained an interim anti-suit injunction from the Queen’s Bench Division (Commercial Court) in the High Court of England and Wales. The English decision upheld the agreement to arbitrate disputes in London under ARIAS Arbitration Rules, and restrained the insureds from pursuing legal action in Brazil. In order to enforce the injunction, the English court held that the directors of the insureds would be imprisoned if they continued their litigation in Brazilian courts.
Meanwhile, the São Paulo appellate court, with one judge dissenting, held that the insurance companies are precluded from commencing arbitral proceedings in London until Brazilian courts decide the merits of the insureds’ challenge to the validity of the arbitration clause.27 The court enjoined the insurers from pursing arbitration under the ARIAS rules in London, and imposed a fine of R$ 400,000 per day of non-compliance, before remanding the case to a trial court in São Paulo state for further proceedings.

The source of all this drama is an ambiguous contract. The main issue in both jurisdictions is the alleged inconsistency between the insurance policy’s arbitration clause (ARIAS, London) and a clause providing that disputes under the policy are “subject to the exclusive jurisdiction of the Brazilian courts”.

The São Paulo appellate court held that the contradiction between the arbitration clause and the choice of forum provision is “perplexing” and causes an “undesired uncertainty” as to the proper mechanism of dispute resolution. The court alluded to article 4(§2) of the Brazilian Arbitration Act and a regulation of the Brazilian insurance authority (SUSEP), which requires that arbitral clauses in contracts of adhesion must be in bold face type and specifically signed (initialed) by the adhering party (i.e., the insureds). In the court’s view, the arbitration clause was limited to disputes about the amount to be paid under the policy (quantum) once coverage was decided, whereas the choice of forum provision contained a broader scope of disputes to be resolved by the Brazilian Judiciary.

The court held that the easily identifiable (prima facie) flaws in the arbitration clause required immediate court intervention. According to the opinion, such exceptional circumstances allow courts to set aside the principle of competence-competence of article 8 of the Brazilian Arbitration Act, under which arbitrators have the authority to determine their own jurisdiction.

The majority opinion inspired a lengthy dissent. According to the dissenting appellate judge, the specific requirements of article 4(§2) of the Brazilian Arbitration Act concerning adhesion contracts are not applicable in this case, where the parties have equal bargaining power and are accustomed to insurance transactions for large-scale construction projects. Particularly in this type of transaction, the insureds cannot claim that they did not consent to arbitration. Citing the importance of competence-competence for arbitration (“to ensure that parties do not evade the obligation to arbitrate” by bringing frivolous judicial challenges against arbitration clauses), the dissent saw nothing imped ing the proceedings in London.

The dissenting opinion is consistent with the English decision, which had reconciled the insurance policy’s arbitration clause with the choice of forum provision by holding that all disputes or differences must be referred to arbitration, while the exclusive jurisdiction of the Brazilian courts should be left to actions to compel arbitration, or to enforce the respective arbitral award.

The São Paulo decision reflects the court’s uncertainty about the intent of the parties and a desire to understand the meaning of the contract before enforcing its provisions. The majority opinion, however, contradicts precedents of the court itself28, as well as decisions rendered by other appellate courts29. In any event, the São Paulo decision will probably be appealed to the Superior Court of Justice (STJ), Brazil’s highest court for federal law issues. The STJ is known for its pro-arbitration track record and has recently held that arbitration clauses can coexist with choice of judicial forum provisions30.

The strong public policy in favor of arbitration that has emerged in the most recent decisions of the STJ is likely to weigh in favor of the arbitration clause in the insurance policy. Therefore, there is a strong chance that the STJ will dismiss the judicial proceedings in Brazil. However, until the superior court decides which “policy” will ultimately prevail, the police will unfortunately continue to be associated with this infrastructure project.

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28 See opinion of the State Appeals Court of São Paulo in case Apelação no. 3002839-69.2009.8.26.0060, decided on Apr. 11, 2012 (“There is no technical inferiority in any of the parties, as it is evident that both are knowledgeable in the health industry and are in equal footing in the contractual relationship.”) Free translation of: “Não se vislumbra a hipossuficiência técnica de qualquer uma das partes, sendo evidente que ambas possuem conhecimento na área da saúde e se colocam em pé de igualdade na relação contratual.”
29 See opinion of the State Appeals Court of Rio Grande do Sul in case 7004707609, decided on Jan. 26, 2012 (“The existence of a controversy concerning the validity and/or enforceability of the agreement to arbitrate must be previously submitted to a decision by the arbitral tribunal, pursuant to the sole paragraph of article 8, article 2 and §§ 1 and 2 of article 32(I) and article 33, §§ 1, 2 and 3 of Law 9307/96 [Brazilian Arbitration Act].”) Free Translation of: “A existência de controvérsia acerca da validade e/ou eficácia de cláusula compromissória deve ser submetida previamente à decisão do juiz arbitral, nos termos do parágrafo único do art. 8º, art. 20, caput, e §§ 1º e 2º, art. 32, I e art. 33, § 1º e 2º da Lei n. 9.307/96.”
30 See opinion in case RESP 904.813-PR, opinion published on Feb. 28, 2012, Reporter Justice Nancy Andrighi (“[A] choice of forum provision is not incompatible with arbitration. Amongst the several arguments (in favor of the compatibility) indicated by the doctrine, one can mention the need to have the Judiciary acting in the issuance of urgent measures; to enforce the arbitration clause; or to compel arbitration when one of the parties does not accept it voluntarily. (...) Thus, both clauses can coexist harmoniously, because the respective scopes are distinct, and there is no conflict between them.”) Free translation of “[A] referida cláusula de foro não é incompatível com o juízo arbitral. Dentre as várias razões apontadas pela doutrina, pode-se mencionar: a necessidade de atuação do Poder Judiciário para a concessão de medidas de urgência; para a execução da sentença arbitral; para a própria instituição da arbitragem quando uma das partes não a aceita de forma amigável. (...) Assim, ambas as cláusulas podem conviver harmônica, de modo que as áreas de abrangência de uma de outra são distintas, inexistindo qualquer conflito.”
Brazilian law requires arbitrators to state the reasons for their respective decisions\(^\text{31}\) and failure to do so may result in the annulment of the arbitral award\(^\text{32}\). Unsurprisingly, plaintiffs in annulment actions usually invoke “lack of reasoning” as one of the grounds in their attempt to set aside arbitral awards.

Although this type of challenge has not gained traction within the Brazilian case law, recent opinions rendered by the appellate court of São Paulo shed some light as to how much reasoning arbitrators are required to give in their awards.

These precedents show that courts are unwilling to assess the adequacy of the motives given by the arbitrators, which would otherwise represent an improper judicial interference with the merits of the arbitration.

"It is not up to this court to make a value judgment as to whether the reasoning is ‘good’ or ‘bad’ or whether the verdict is ‘good’ or ‘bad’; we are only required to verify whether grounds for annulment are present, which is not the case here."\(^\text{33}\)

"Even though plaintiffs are not satisfied with the reasoning provided by the arbitrator, one cannot say that he failed to state the motives for his decision. (...) The underlying arbitral award was properly reasoned, despite not living up to the plaintiffs’ expectations."

But the opinions also suggest that judges indeed read arbitral awards, not so much to verify whether it was the best solution to the case at hand, but at least to check whether arbitrators have actually outlined the issues of fact and law that support their conclusions.

"The issue revolves around the ‘grounds for the award’. The ‘reasoning’ will be integrated into the award and in it the arbitrator must analyze the arguments presented by the parties, choose a legal thesis and state whether the decision is based on law or equity. The arbitrator will assess the proceedings, weigh the evidence and state the reasons for his decision."\(^\text{35}\)

In other words, the requirement to state reasons is satisfied as long as the arbitral award makes logical sense. And arbitrators are not required to draft long documents addressing every point made during the proceedings. The appellate court of São Paulo points out that “concise reasoning is not to be mistaken with no reasoning at all”\(^\text{36}\) as “arbitrators are excused from addressing every single legal argument presented by expert opinions procured by the claimant in the proceedings.”\(^\text{37}\)

Courts of São Paulo show deference to arbitral awards when plaintiffs question the motives for the arbitrators’ decision. While making sure the award enables the reader to follow how the arbitrators went from point A to B, judges exercise caution as to whether the path pursued by their “colleagues” was the appropriate one. This type of judicial restraint is yet another good reason why Brazil is considered a pro-arbitration jurisdiction.

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\(^{31}\) Article 26 of the Brazilian Arbitration Act lists as one of the requirements of an arbitral award “II - the grounds of the decision with analysis of factual and legal issues, including, if it is the case, a statement of the decision in equity”.

\(^{32}\) Article 32 sets forth the causes for annulment of the arbitral award, which includes “III - failure to contain the requirements of Article II”.


Arbitration would have never become a viable mechanism for resolution of commercial disputes if not for the decisive role played by the Brazilian courts. Starting with the Supreme Court’s 2001 landmark ruling on the Arbitration Law’s constitutionality, and continuing with the subsequent pro-arbitration decisions rendered by the Superior Court of Justice (STJ), the Brazilian Judiciary has paved the way for the widespread use of arbitration clauses, particularly in commercial transactions.

Brazilian judges no longer view arbitration as a threat to their constitutional mission, but instead as an effective way to deliver justice pursuant to the parties’ autonomy to select their own decision-makers. More importantly, courts are increasingly aware of their importance to the proceedings—before and after the appointment of arbitrators—in ensuring proper enforcement of the respective agreements to arbitrate.

The positive attitude towards arbitration has produced a string of pro-arbitration precedents by first instance judges, appellate bodies and superior courts. And the quality of arbitration jurisprudence is likely to improve even more with the creation of a specialized chamber of the São Paulo appellate court that has exclusive jurisdiction over commercial law disputes (corporation law, unlawful competition, intellectual property, licensing/franchise agreements), including lawsuits arising from arbitration.

Thus, as of August 2011, the Câmara Reservada de Direito Empresarial is the court of last resort (at the state level) for actions in aid of arbitral proceedings—such as actions to compel arbitration, pre-arbitration injunctions, discovery orders, etc.—as well as actions to set aside or nullify domestic arbitral awards.

Despite the recent constitution of this specialized chamber, a review of its arbitration-related decisions since August already reveals a pro-arbitration view among its members. These ruling are briefly discussed below:

In defining the limits between arbitration and court intervention, the chamber held that an agreement between the parties to vacate a building could be judicially enforced irrespective of an agreement to arbitrate all other disputes stemming from the lease contract. The case illustrates the interplay between courts and arbitrators when it comes to judicially executable titles—such as promissory notes, bills of exchange, checks or settlements—which can always be directly enforced in court without having to institute arbitral proceedings.

The chamber enforced an arbitration clause included in the bylaws of a limited liability company. The appellate court noted that the clause’s failure to include an arbitral institution or the method to appoint the arbitrators could not be viewed as a waiver of arbitration.

**Rego v. Amaro**, Appeal no. 0120145-96.2011.8.26.0100, decided on September 13, 2011: The chamber rejected an attempt to challenge an arbitral award arising from the termination of a franchise agreement. The court held that a writ of mandamus (“mandado de segurança”) could not be used to challenge final arbitral awards, because the Arbitration Law provides for a specific action with that purpose (vacatur proceedings).

The driving force behind the creation of a specialized chamber is to streamline and enhance the decision-making process concerning commercial law in general and arbitration in particular. The above-mentioned decisions may serve as “exhibit 1” to demonstrate that this goal is certainly well within reach. We expect that the Brazilian Judiciary’s courtship of arbitration will blossom into a true love affair, and will continue to strengthen the confidence of businessmen in the rule of law.
The creation of specialized courts in the appellate level has proven successful in several Brazilian states. In São Paulo, the nation’s richest state, the so-called Business Law Chambers established within the State Appellate Court (“TJSP”) have produced relevant precedents that illustrate the interplay between the Judiciary and arbitration.

In one of such precedents, the TJSP’s specialized chamber analyzed the scope of pre-arbitral injunctions. The case stemmed from a contract to promote a sports brand in Brazil. The plaintiff sought interim measures (a) to enjoin the defendant from closing certain retail stores and also (b) to authorize plaintiff to engage other companies in Brazil despite the underlying contract’s exclusivity clause.

Noting the existence of an arbitration clause, the first instance judge dismissed the lawsuit thereby denying both injunctions. The Appellate Court confirmed the dismissal and referred the case to the arbitrators. The justices held that, when faced with contracts containing arbitration clauses, the Judiciary should refrain from interfering with the merits of the case, so any pre-arbitral injunction should be limited to ensuring the efficacy of arbitration without invading the jurisdiction of the arbitral tribunal.

The specialized chamber stated that a court injunction that interferes with the management of the retail stores or that disregards the contract’s exclusivity provision would be incompatible with the parties’ agreement to have these issues resolved by the arbitrators (and not by the courts). According to the opinion, these injunctions would basically render the arbitration moot, as they could anticipate (and irreversibly resolve) claims that should be dealt exclusively by the arbitral tribunal.

The Court recognized that certain pre-arbitral injunctions can (and should) be granted, always to safeguard a valid and effective outcome of arbitral proceedings. However, in this particular case, the justices felt that the type of relief sought by the plaintiff would not elicit the desired “cooperation” between courts and arbitration, but instead put both jurisdictions on a “collision course”.

Collison Course:
Pre-arbitral Injunctions v. Arbitrators’ Jurisdiction

October 2013

In the Brazilian litigation scene, derivatives disputes were the most visible byproduct of the global financial turmoil that swept the world in mid-September 2008, as many Brazilian exporters — some of them publicly traded corporations in Brazil and in the U.S. — have disclosed significant financial losses arising from derivatives operations allegedly used to hedge against currency fluctuations.

Many companies have relied on high-risk sophisticated derivatives operations to profit from a strong Brazilian Real. The losses reported by these companies associated with the deteriorating Real generated litigation both in Brazil and in the U.S. (class actions), in which plaintiffs accuse the companies, their boards and officers to overstep their authority and engage in purely speculative transactions.

The first arbitration stemming from a derivatives transaction involved the Brazilian branch of a major U.S. investment bank and a Brazilian textile company. The bank commenced arbitration proceedings before a prominent domestic institution to collect on approximately R$ 233 million in outstanding debt stemming from a derivatives agreement executed with the textile company.

The textile company attempted to enjoin arbitral proceedings by filing an anti-arbitration precautionary measure, which was dismissed by the 5th Civil Court of São Paulo. The textile company also failed to obtain an injunction to suspend arbitral proceedings before the São Paulo Court of Appeals. The arbitral tribunal was about to get instituted (selection of the tribunal’s chairman by the two party-appointed arbitrators) when the parties settled the case.

The case was the first derivatives-related dispute to reach arbitration in Brazil with the courts clearly embracing this alternative means of dispute resolution to solve complex financial disputes.

Although the arbitral tribunal never had the chance to decide the merits of the case, the arbitration clause was properly enforced before the first instance courts in São Paulo and later upheld by the State’s Court of Appeals.

Despite the textile company’s attempt to bring the dispute to the Judiciary (which would certainly delay its final resolution), the bank successfully maintained the case within the “fast-track” resolution afforded by arbitration, which resulted in a favorable settlement for the financial institution.

This clear pro-arbitration position adopted by the courts in São Paulo when faced with an arbitration clause inserted in a derivatives agreement is likely to promote the use of these clauses in financial agreements, paving the way for a quicker and more specialized resolution of complex financial controversies.
Brazilian Courts are generally amenable to the so-called pre-arbitration injunctive relief, i.e. those Precautionary Measures designed to “hold the fort” while the arbitral tribunal is not yet constituted.

Procedural rules in Brazil require litigants to file, within 30 days of obtaining an injunctive relief, the main lawsuit to which the relief refers. However, in disputes subject to arbitration, the party seeking a preliminary injunction should indicate in its brief to the court that it will initiate arbitration proceedings within the 30-day deadline, pursuant to the arbitration clause. Failure to do so will result in the reversal of the injunctive relief and the dismissal of the entire court-initiated litigation. A recent case decided by the São Paulo Court of Appeals illustrates this point.

At the beginning of 2009 the São Paulo Court of Appeals rendered a decision in Interlocutory Appeal no. 614.006-4/4/00, which should pave the way for future precedents regarding lawsuits brought in violation of agreements to arbitrate.

In that case, the Court dismissed a Precautionary Measure stating that the Plaintiffs were trying to circumvent the arbitration clause by applying for a pre-arbitration injunction before a Brazilian Court without subsequently taking the necessary steps to initiate arbitration.

The Plaintiffs initially obtained an *ex parte* injunction to enjoin the sale of real estate located in São Paulo and owned by a limited liability company, whose minority stake belongs to the Plaintiffs, with the Defendant holding the remaining shares. The Plaintiffs, however, simply neglected to inform the court of the existence of an arbitration clause in the respective Shareholders Agreement executed between Plaintiffs and Defendant regarding the administration of said limited liability company.

Pursuant to Brazilian procedural rules, pre-arbitration court injunctions should be followed by an Arbitration Request before the competent arbitral institution. Once properly instituted, the arbitral tribunal will have exclusive jurisdiction to either uphold or lift the pre-arbitration court injunction.

In this case, however, after obtaining the injunction blocking the sale of the property, the Plaintiffs filed a main dissolution lawsuit before a Brazilian Court, which prompted the Court of Appeals to overturn the first instance injunction and dismiss the main dissolution lawsuit without the Defendant having to defend the merits of the case.

In practical terms, the Court of Appeals sent the case to the Arbitral Tribunal thereby defusing the litigation strategy deployed by the Plaintiffs to bring the dispute to the Brazilian Judiciary in a clear violation of the arbitration clause.

The ruling is yet another example of the pro-arbitration view taken by the Brazilian courts in general and the São Paulo Court of Appeals in particular, which contributes to consolidate the much desired reversal of the previous bias against this mechanism of dispute resolution.
The most objective way to assess the commitment of Brazilian courts towards the New York Convention is to analyze decisions regarding the confirmation of foreign arbitral awards rendered by both the STF (from 1996 to 2004) and the STJ (from 2004 onwards) since the enactment of the Arbitration Act.
The analysis below clearly demonstrates the favorable approach taken by the highest Brazilian courts towards the recognition and enforcement of foreign arbitral awards even before the ratification of the New York Convention in Brazil.

It is important to mention that, until June 2010, the STJ - that in 2004 was entrusted with sole jurisdiction to recognize foreign awards - confirmed 17 of the 22 foreign arbitral awards submitted to it, and repeatedly refused to allow challenges to the merits of foreign arbitral awards. Confirmation has been properly denied based on the non-compliance with formal requirements under the Arbitration Act, such as the absence of an arbitral agreement, or the lack of proper summons to appear before the Arbitral Tribunal. This is undoubtedly the most noticeable indication of the STJ’s willingness to place Brazil among the leading jurisdictions concerning the recognition and enforcement of foreign arbitral awards.


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<th>Summary</th>
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<tr>
<td>1</td>
<td>Jul. 23, 2002</td>
<td>Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association)</td>
<td>Confirmation denied by unanimous vote; lack of written arbitral agreement – Article 37(II) of the Arbitration Act</td>
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<td>2</td>
<td>Dec. 12, 2001</td>
<td>Ad hoc arbitral award rendered by a sole arbitrator concerning the commissions owed by a Brazilian company (Resil) to its Swiss sales representative (MBV)</td>
<td>Confirmation granted by unanimous vote; leading case of the Supreme Court regarding the constitutionality of the Brazilian Arbitration Act</td>
</tr>
<tr>
<td>3</td>
<td>Dec. 6, 2000</td>
<td>Confirmation of an arbitral award rendered by the London Maritime Arbitration Association sought by a Norwegian company (Elkem) against a Brazilian company (Conan) for breach of a freight agreement</td>
<td>Confirmation granted by unanimous vote; Arbitration Act shall be applied to proceedings commenced before its enactment</td>
</tr>
<tr>
<td>4</td>
<td>Feb. 3, 2000</td>
<td>Arbitral award rendered by Havre’s Coffee and Pepper Arbitration Association (France) regarding coffee purchase agreement</td>
<td>Confirmation denied by unanimous vote; Brazilian company (B. Oliveira) was not properly summoned to appear before the Arbitral Tribunal</td>
</tr>
<tr>
<td>5</td>
<td>Dec. 1st, 1999</td>
<td>Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association)</td>
<td>Confirmation granted by unanimous vote; the Supreme Court refrained from delving into the merits of the arbitral award (“Pursuant to Articles 35, 38 and 38 of the Arbitration Act, this Court’s duty in confirmation proceedings is to decide whether the foreign award meets formal requirements, which render it enforceable in Brazil”); the Court also rejected the Brazilian company’s attempt to invoke the Consumer Protection Code against adhesion contracts to strike the validity of the arbitral agreement (“this issue goes into the merits of the award and thus it cannot be argued before this Court during confirmation proceedings”)</td>
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II. Summary of Federal Supreme Court confirmation cases from 1996 - 2004

Three foreign arbitral awards granted, two denied.

Another point worth noting is that, before the STF held the Brazilian Arbitration Act to be constitutional in 2002, relatively few foreign arbitral awards were submitted to the STF for confirmation. This is because under pre-existing law and STF practice, all foreign arbitral awards were subject to the “double homologation” procedure, whereby they first had to be confirmed by the highest court in the country where the award was rendered. We were told by one of the Justices of the STF in 1997 that during his tenure on the Court, which lasted 12 years, he could not recall one single foreign arbitral award that was sent to the STF for confirmation.
### III. Confirmation of Foreign Arbitral Awards by the Superior Court of Justice – STJ  (2005-June 2010)

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<th>Case</th>
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<tr>
<td>1 - Atecs Mannesmann GMBH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais (SEC 3035)</td>
<td>Aug. 19, 2009</td>
<td>Confirmation of arbitral award rendered in Zurich under Swiss law arising from the purchase agreement regarding an industrial crane manufactured by a German company</td>
<td>Confirmation granted by unanimous decision; this was the second attempt to enforce the arbitral award before the STJ, as the court held plaintiff lacked standing to seek confirmation the first time (see commentary below regarding SEC 968); the STJ held that any party that is interested in the effects of the arbitral award has standing to seek its confirmation (in this case, the plaintiff was the successor of the original claimant in the arbitral proceedings, not just the mere assignee of the underlying credit); the Justices also refused to analyze the merits of the arbitral award, especially the scope of the applicable law (“when confirming foreign arbitral awards this court is precluded from deciding, on behalf of the foreign arbitrator, how Swiss law should be applied.”)</td>
</tr>
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<td>2 - Plexus Cotton Limited v. Ari Giongo (SEC 3661)</td>
<td>May 28, 2009</td>
<td>Confirmation of arbitral award rendered in Liverpool under the auspices of the International Cotton Association against Brazilian cotton producer</td>
<td>Confirmation granted by unanimous decision; the STJ denied the claim asserted by the Brazilian cotton producer that he should have been summoned by rogatory letters; the court upheld article 39 of the Brazilian Arbitration Act holding that the respondent was indeed summonsed in connection with the arbitral proceedings through courier service, which attested the delivery of the papers (delivery receipt enclosed by the claimants)</td>
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<tr>
<td>3 - Devcot S/A v. Ari Giongo (SEC 3660)</td>
<td>May 28, 2009</td>
<td>Confirmation of arbitral award rendered in Liverpool under the auspices of the International Cotton Association sought by French company against Brazilian cotton producer</td>
<td>Confirmation granted by unanimous decision; the STJ denied the claim asserted by the Brazilian cotton producer that he should have been summoned by rogatory letters; the court upheld article 39 of the Brazilian Arbitration Act holding that the respondent was indeed summonsed in connection with the arbitral proceedings through courier service, e-mail and fax</td>
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<tr>
<td>4 - Indutech SPA v. Algocesto Armazéns Gerais Ltda. (SEC 978)</td>
<td>Dec. 17, 2008</td>
<td>Confirmation of arbitral award rendered in the United Kingdom involving an Italian textile company (Indutech) and a Brazilian cotton company (Algocesto) arising from a standardized cotton purchase agreement</td>
<td>Confirmation denied by unanimous decision; the STJ held that the lack of signature in the arbitration clause inserted in a purchase agreement violates article 4(§2) of the Brazilian Arbitration Act, the principle of party autonomy, as well as the Brazilian public order. Article 4(§2) of the Brazilian Arbitration Act contains specific enforceability requirement for arbitration clauses regarding the so-called adhesion contracts, i.e. those standardized contract forms that are signed on essentially a “take it or leave it” basis, without giving the other party realistic opportunities to negotiate terms that would benefit its interests.</td>
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<td>5 - Litsa Líneas de Transmisión Del Litoral S/A v. INEPAR S/A Indústria e Construções (SEC 894)</td>
<td>Aug. 20, 2008</td>
<td>STJ confirmed an ICC arbitral award rendered in Uruguay against SV Engenharia, INEPAR and two other companies that were later incorporated by INEPAR. SV argued that INEPAR never assumed the rights and obligations of the two merged companies and, as a result, could not be held jointly liable for the ICC award</td>
<td>Confirmation granted by unanimous vote; in her vote, the Reporting Justice Nancy Andrighi held that “the position assumed by INEPAR when incorporated SVIS had impacts on the contracts and, thus, on the arbitration with respect to the assignment/transmission of the arbitration clause, as well as to the remaining obligations and credits owed to the company.” The STJ also held that the existence of an action to set aside (annul) the arbitral award in Uruguay does not preclude its enforcement in Brazil, especially when such action has already been rejected by the local courts.</td>
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<td>Case</td>
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<td>6 - Samsung Eletrônica da Amazônia Ltda. v. Carbografite Com. e Ind. e Part. Ltda. (SEC 1302)</td>
<td>Jun. 18, 2008</td>
<td>Brazilian subsidiary of Samsung (Samsung Amazônia) sought enforcement of award rendered by the Korean Commercial Arbitration Board. The case stemmed from dispute between Samsung Aerospace Industries (parent company) and its Brazilian distributor (Carbografite). Samsung Amazônia argued the award will be used to defend itself against lawsuit filed by Carbografite before the Brazilian courts</td>
<td>Confirmation <strong>granted</strong> by unanimous vote; the STJ rejected Brazilian distributor’s argument that Samsung Amazônia lacked standing to seek confirmation of the award because it did not take part in the arbitral proceedings in Korea (“an interested party is entitled to apply for confirmation, such as in the case of Samsung Amazônia, Samsung Industries’ exclusive representative in Brazil. The award might be helpful in deciding the lawsuit filed by Carbografite against Samsung Amazônia before the court in Rio de Janeiro.”)</td>
</tr>
<tr>
<td>7 - Najuelsat S/A v. Embratel (SEC 1.305)</td>
<td>Nov. 30, 2007</td>
<td>Argentine company sought to enforce an ICC award rendered in Paris against Embratel</td>
<td>Confirmation <strong>granted</strong> after agreement between the parties involving the certification and notarization of arbitrators’ signatures</td>
</tr>
<tr>
<td>8 - Spie Enertran S/A v. Inepar S/A Indústria e Construções (SEC 831)</td>
<td>Oct. 3, 2007</td>
<td>French company (Spie) sought confirmation of ICC arbitral award rendered against Inepar arising from dispute involving the consortium to supply, build and install power lines in Ethiopia</td>
<td>Confirmation <strong>granted</strong> by unanimous vote; landmark decision on the enforcement of an arbitral agreement executed by company that was later merged into another company. The STJ held that an arbitral agreement survives a company’s merger as the surviving entity assumes all rights and obligations of the target company, which includes any and all arbitral agreements executed before the acquisition. The STJ also applied the 1996 Arbitration Act to an arbitral agreement executed prior to the enactment of the law, thereby setting aside the need for double-homologation proceedings (required under prior law)</td>
</tr>
<tr>
<td>9 - International Cotton Trading Limited v. Odil Pereira Campos Filho (SEC 1.210)</td>
<td>Jun. 6, 2007</td>
<td>Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association)</td>
<td>Confirmation <strong>granted</strong> by unanimous vote; citing its own precedents, as well as decisions of the Brazilian Federal Supreme Court (STF), the STJ refused to review the merits of a foreign arbitration award issued by the International Cotton Association, holding that confirmation proceedings shall only verify whether formal requirements have been met under the Arbitration Act and the Court’s internal regulations</td>
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<tr>
<td>10 - Bouvery International S/A v. Valex Exportadora de Café Ltda. (SEC 839)</td>
<td>May 16, 2007</td>
<td>Arbitral award rendered by Havre’s Coffee and Pepper Arbitration Association (France) regarding coffee purchase agreement</td>
<td>Confirmation <strong>granted</strong> by unanimous vote; <em>kompetenz-kompetenz</em> principle: STJ rejected attempt to discuss the existence of the underlying agreement between the parties (“whether the purchase agreement has been executed or not refers to the merits of the arbitral award, which is not subject to review by this Court in confirmation proceedings”)</td>
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<tr>
<td>11 - Mitsubishi Electric Corporation v. Evadin Indústrias Amazônica (SEC 349)</td>
<td>Mar. 21, 2007</td>
<td>Japanese company sought to enforce arbitral award rendered by the Japanese Commercial Arbitration Association in connection with the termination of distribution agreement executed with its Brazilian distributor</td>
<td>Confirmation <strong>granted</strong> by majority opinion; the STJ held the Arbitration Act applies to arbitral agreements executed prior to its enactment and enforced the parties’ pre-dispute agreement to arbitrate executed in 1993; the Court also criticized Brazilian distributor’s attempt to re-litigate the dispute with the Japanese manufacturer by filing similar lawsuits before Brazilian Courts (“<em>the Judicial Branch cannot shelter Brazilians claiming their citizenship to excuse themselves from arbitral awards stemming from agreements, in which they have validly accepted the jurisdiction of an Arbitral Tribunal sitting in Japan.</em>”)</td>
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<td>12</td>
<td>Nov. 23, 2006</td>
<td>Confirmation of ICC arbitral award rendered in Miami on a dispute involving the breach of joint venture agreements</td>
<td>Confirmation granted by unanimous vote; STJ held that requisites established by Article 38 of the Arbitration Act do not provide for merits-review of the arbitral award and thus rejected Brazilian company's attempt to re-discuss the evidence produced before the Arbitral Tribunal, as well as the arbitrator's impartiality; Court also cited the New York Convention (Decree 4.311/2002) to disregard, for purposes of confirmation, the existence of an action to annul the arbitral award filed before a Brazilian Court (“As to the convenience of the annulment action filed before the Brazilian Judiciary, in light of Decree 4.311/2002 [allegedly its Article II (3) 39], this issue shall be resolved before the court where said action has been filed”)</td>
</tr>
<tr>
<td>13</td>
<td>Oct. 18, 2006</td>
<td>Italian company sought confirmation of arbitral award rendered by the Federation of Oils, Seeds and Fats Association Limited in London against Brazilian soy producers</td>
<td>Confirmation granted by unanimous vote; attempt by a debtor to review the merits of a foreign arbitral award; the STJ promptly dismissed the claim to interfere with the merits of the award and, at the same time, clarified the limited scope of confirmation proceedings (“the homologation of a foreign award shall be limited to the assessment of compliance with formal requirements.”); the Court also rejected the application of the Consumer Protection Code to an agreement executed between a Brazilian importer and a foreign cotton supplier thereby dismissing the importer’s claim that the arbitral agreement was unconscionable; finally, the Court held that discussions involving the application of the principle known as defense of unperformed contract (exceptio non adimpleti contractus) is not a matter of Brazil’s public order, nor does it impact on the country’s sovereignty</td>
</tr>
<tr>
<td>14</td>
<td>Oct. 10, 2006</td>
<td>New attempt by Plexus (see item 1 in first table above - Federal Supreme Court Decisions) to confirm foreign arbitral award rendered by the International Cotton Association arising from cotton purchase agreement</td>
<td>Confirmation denied by unanimous vote; the STJ upheld previous decision by the Federal Supreme Court (SEC 6.753-7) arguing that the English company (Plexus) failed to demonstrate the existence of an arbitral agreement duly signed by the Brazilian buyer, as required by Article 37(II) of the Arbitration Act (condition precedent for any confirmation proceeding)</td>
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<td>15</td>
<td>Aug. 16, 2006</td>
<td>Subway Partners sought to confirm award rendered by the American Arbitration Association (AAA) in New York against its Brazilian franchisee</td>
<td>Confirmation denied by majority opinion; STJ held that the Brazilian franchisee had not been properly summoned to appear before the Arbitral Tribunal</td>
</tr>
</tbody>
</table>

39 Article II(3) of the New York Convention: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”
<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Summary</th>
<th>Holding</th>
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<tbody>
<tr>
<td>16 - Gottwald Port Technology GMBH v. Rodrimar S.A. (SEC 968)</td>
<td>Jun. 30, 2006</td>
<td>German company sought to confirm an ICC award rendered in Paris against Brazilian company for breach of purchase agreement arising from the purchase of a dock crane</td>
<td>Confirmation denied by unanimous vote; STJ held the German company (Gottwald) lacked standing to seek confirmation of the foreign award because it did not take part in arbitral proceedings; Gottwald argued the credit arising from the arbitral award had been assigned to it by Mannesmann, but the Court refused to analyze the merits of the assignment agreement (“it is not the duty of this Court to enforce agreements executed outside the scope of the arbitral award”)</td>
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<td>17 - Tremond Alloys and Metals Corp v. Metaltubos Ind. E Com. De Metais Ltda. (SEC 760)</td>
<td>Jun. 19, 2006</td>
<td>American metal company (Tremond) sought to enforce an award rendered by the AAA against a Brazilian purchaser (Metaltubos)</td>
<td>Confirmation granted by unanimous vote; the STJ rejected merits-review of the award (“the judicial oversight concerning foreign arbitral awards is limited to the assessment of compliance with formal requirements, as it is not possible to enter the merits of the arbitrators’ decision; thus, the challenges to confirmation of foreign arbitral awards should be limited to the grounds states in Articles 38 and 39 of the Arbitration Act.”); the Court acknowledged that the Brazilian company did not participate in arbitral proceedings, but held that it had properly been notified to appear before the Tribunal pursuant to the Rules of the AAA; finally, the court held that the arbitral award, although succinct, contained the report and reasoning required by Article 26(I)(II) of the Arbitration Act</td>
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<td>18 - Oleaginosa Moreno Hermanos v. Moinho Paulista Ltda. (SEC 866)</td>
<td>May 17, 2006</td>
<td>Argentine company (Oleaginosa Moreno) sought confirmation of an award rendered by the Grain and Feed Trade Association (GAFTA) in London concerning the breach of wheat purchase agreements</td>
<td>Confirmation denied by unanimous vote; lack of arbitral agreement, as required by Article 37(II) of the Arbitration Act; the Court cited Article II(2) of the NY Convention, holding the Argentine company failed to produce an “agreement in writing” or an “exchange of letters or telegrams” which could demonstrate the parties’ express desire the submit the matter to arbitration</td>
</tr>
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<td>19 - Union Européenne de Gymnastique – UEG v. Multipole Distribuidora de Filmes Ltda. (SEC 874)</td>
<td>Apr. 19, 2006</td>
<td>European Gymnastics Association sought to confirm award of the Court of Arbitration for Sport in Switzerland regarding the breach of contract to broadcast gymnastics events</td>
<td>Confirmation granted by unanimous vote; the STJ acknowledged that the Brazilian company did not participate in arbitral proceedings, but held that it had been properly notified to appear before the Tribunal pursuant to Article 39(sole §) of the Arbitration Act</td>
</tr>
<tr>
<td>20 - Bouvery International S/A v. Irmãos Pereira – Com. e Exp. Ltda. (SEC 887)</td>
<td>Mar. 6, 2006</td>
<td>Confirmation of award rendered by Le Havre’s Coffee and Pepper Arbitration Association (France) against the Brazilian company (Irmãos Pereira) for breach of coffee purchase agreement</td>
<td>Confirmation granted by unanimous vote; the STJ held the Brazilian company (Irmãos Pereira) voluntary chose not to participate in arbitral proceedings, because several notifications had been properly sent to its headquarters by telex, fax and registered mail; the Court also held that Irmãos Pereira had the burden to prove lack of proper notice regarding the arbitral proceedings, which would constitute grounds for refusal to confirm, as stated in Article 38(III) of the Arbitration Act</td>
</tr>
</tbody>
</table>

40 Article III(2) of the New York Convention: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”
IV. Summary of STJ confirmation cases from 2005 – June 2010

17 foreign awards confirmed, 5 denied.

All foreign awards have been confirmed or denied using the Brazilian Arbitration Act as the preponderant basis (Articles 37, 38 and 39). In four cases, however, the STJ cited the Brazilian Arbitration Act and the New York Convention in the opinion, but later either confirmed or denied based on the specific provisions of the Brazilian Arbitration Act. These cases are:

- **Litsa**, in which the STJ held that the existence of an action to set aside (annul) the arbitral award in the place of arbitration (Uruguay) does not preclude its enforcement in Brazil, especially when such action has already been rejected by the local courts (allegedly alluding to Article 5(1)(e) of the NYC):

- **First Brands** (no. 7), in which the STJ held that the existence of a lawsuit filed before a Brazilian court does not constitute grounds for denying confirmation (allegedly alluding to Article II(3) of the NYC);

- **Oleaginosa Moreno** (no. 13) and **L’Aiglon S/A** (no. 17), in which the STJ - when deciding whether the requirement under Article 37(II) of the Brazilian Arbitration Act had been met (original arbitration agreement, or a certified copy thereof) - held the parties failed to produce “an agreement in writing” or “an exchange of letters” demonstrating their intention to submit the case to arbitration, as required by Article II(2) of the NYC.

V. Conclusion

In conclusion, comparing the data from the STJ with the STF, we can see from both the number of foreign awards considered during equivalent time periods and from the ratio of awards confirmed to awards denied, that moving the confirmation process to the STJ was a step in the right direction in terms of making Brazil a major jurisdiction where the judiciary is open to considering and confirming foreign arbitral awards, both under the New York Convention and the Brazilian Arbitration Act.
“Violation of public order” has been a recurring argument to challenge the confirmation of arbitral awards rendered outside Brazil, particularly those arising from proceedings applying foreign law. The Superior Court of Justice (“STJ”), however, continues to uphold a more restrictive view of such an important, yet fluid concept of law.
Although not directly related to arbitration, the STJ has just confirmed a judgment rendered in New York, which serves a bellwether as to how the court should interpret the concept of public order for purposes of enforcing foreign arbitral awards. The opinion is likely to reinforce one of the cornerstones of international arbitration, i.e. the parties’ autonomy to select the applicable law to the underlying dispute (article 2 of the Brazilian Arbitration Act).

On October 6, 2011 the judicial gatekeeper of foreign judgments confirmed a decision of the NY courts that changed the name of the applicant from “Luiz Claudio Climaco II” to “Louis Claude Nakamura Katzman”, as he is commonly known in America.

The confirmation had been challenged by the Office of the Attorney General on the grounds that the American court’s decision violated Brazilian public policy, as this type of drastic name change was not expressly authorized by our Public Records Law.

Reporting Justice Felix Fischer, however, rejected the public policy objection holding that:

> The public attorney’s submission to this court implies that the alleged violation of public order and national sovereignty results from the absence, within the national legislation, of the specific justification used by the American court to grant the application for name change, namely that the applicant has always been known within his community in the U.S. as “Louis Claude Nakamura Katzman”.

> Such rationale, however, is not admissible. The foreign judgment in question was based on the legislation in force in the U.S. and is valid under said Law. Furthermore, the absence of similar provision within the Brazilian Law does not invalidate the foreign act, nor results, in the case at hand, in violation of public order or good customs.

In his opinion, unanimously approved by the STJ, the Reporting Justice so concluded:

> For these reasons, I believe the application for confirmation should be granted as it complies with the necessary requisites. Therefore, with due respect to the Public Attorney’s argument, the judgment does not violate public order or national sovereignty, because, as noted, we are not before a change of name within the Brazilian registry office, but instead the confirmation of a judgment that was legally rendered under the laws of the country where it originated, and authorized the name change requested by the applicant.
WHAT CONSTITUTES A DOMESTIC ARBITRAL AWARD?

July 2011

The Brazilian Superior Court of Justice (STJ) - the court of last resort in federal law issues - has recently rendered a decision dealing with the enforceability of arbitral awards in Brazil.

In a case stemming from the 2001 accident of an oil drill platform commissioned by the Brazilian state-owned company Petrobras, the Justices of the STJ overturned a Rio de Janeiro Court of Appeals decision that had previously denied enforceability to an arbitral award rendered under the auspices of the ICC.

The issue concerned the definition of domestic award under the Brazilian Arbitration Act. According to the law, only domestic awards can be directly enforced before a first instance court (in the same way as a judgment rendered by a magistrate). On the other hand, foreign decisions must first go through confirmation proceedings at the STJ before enforcement measures are taken.

The STJ reversed the Rio de Janeiro Appellate Court that prevented the creditor from taking attachment measures directly before a court of first instance, even though the award was actually rendered in Rio de Janeiro. The Rio de Janeiro court, by a majority vote, set aside enforcement proceedings (“execução”) citing the need for confirmation proceedings, given that the arbitral award had been rendered by an international institution, headquartered in Paris (ICC).

Citing article 34 of the Arbitration Act, the Justices held that an arbitral award shall be deemed domestic as long it has been rendered within the Brazilian territory. According to the STJ, an award signed in Brazil shall still be considered domestic even when arbitrators decide conflicts arising from international trade by applying foreign law. Confirmation is not required of domestic awards, which can be directly enforced by the court that would have original jurisdiction to hear the case.

Although the Rio de Janeiro decision added at least another year to the creditor’s ability to secure assets held by the debtor in Brazil, the STJ’s swift answer in favor of arbitration constitutes yet another evidence of the growing importance of the Brazilian Judiciary in ensuring that Arbitration remains an effective means of dispute resolution in this country.

42 Recurso Especial no. 1.231.554 - RJ, Reporting Justice Nancy Andrighi, decided on May 24, 2011.
Most foreign arbitral awards confirmed in Brazil by the Superior Court of Justice (STJ) refer to disputes arising from commodities purchase agreements, such as cotton, sugar, coffee, wheat etc. For this reason, the STJ has already confirmed awards rendered under the auspices of several commodities trade associations, such as the International Cotton Association (ICA), the Federation of Oils, Seeds and Fats Association (FOSFA), and the Grain and Feed Trade Association (GAFTA).
In these cases, arbitration is usually provided for in standardized contracts drafted by the respective commodities trade association. That is the case, for example, of the ICA online contract form, which contains the following arbitration provision:

All disputes relating to this contract will be resolved through arbitration in accordance with the bylaws of the International Cotton Association, Limited. This agreement incorporates the bylaws which set out the Association’s arbitration procedure.

The STJ has confirmed the vast majority of the arbitral awards arising from commodities-related disputes, with the Court routinely avoiding to enter the merits of these decisions. In a very recent decision, however, the STJ apparently departed from its traditional pro-arbitration approach.

In Indutech v. Algocentro, the STJ denied the confirmation of a foreign arbitration award rendered in the United Kingdom involving an Italian textile company (Indutech) and a Brazilian cotton company (Algocentro). The full content of the opinion has not yet been published, but the nature of the parties and the location of the arbitral award indicate that the case probably involves a standardized cotton purchase agreement.

The Court in Indutech held that the lack of signature in the arbitration clause inserted in a purchase agreement violates article 4(§2) of Law 9,307/96 (the “Brazilian Arbitration Act”), the principle of party autonomy, as well as the Brazilian public order.

Article 4(§2) of the Brazilian Arbitration Act contains specific enforceability requirement for arbitration clauses regarding the so-called adhesion contracts, i.e. those standardized contract forms that are signed on essentially a “take it or leave it” basis, without giving the other party realistic opportunities to negotiate terms that would benefit its interests.

Therefore, in order to be valid under Brazilian law, arbitration provisions inserted in adhesion contracts – which arguably include those model agreements offered by commodities trade associations - would have to be in boldface type and duly signed or initialized by the adhering party.

It is important to note, however, that confirmation proceedings before the STJ are not intended to re-litigate the merits of the arbitral award, but instead are designed to verify whether “formal requirements” have been met. Pursuant to Article 38(II) of the Arbitration Act, one of these formal requirements is whether the arbitration agreement is valid under the law to which the parties agreed or the law of the place where the award was rendered:

Article 38. The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that:

(II) the arbitration agreement was 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;

In this sense, assuming that the parties in Indutech did not agree on the arbitrations’ applicable law, the laws of the United Kingdom should apply. Also, if the respective arbitration clause is indeed valid under English law, then the ensuing arbitral award should be confirmed by the STJ, irrespectively of whether the arbitration clause complied with article 4(§2) of the Brazilian Arbitration Act.

In other words, the lack of a specific Brazilian law requirement concerning the validity of arbitration agreements arguably does not amount to a potential ground to refuse confirmation. If the arbitration clause is indeed 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”, confirmation should be granted by the STJ.

Even though the STJ’s recent decision in Indutech is not binding upon future confirmation proceedings, it should be taken into consideration by parties resorting to the standardized contracts of the various commodities trade associations. Therefore, to avoid potential challenges during confirmation proceedings in Brazil, it is strongly recommended to have the adhering party initialize a boldface type arbitration clause inserted in the underlying commodities purchase agreements.

43 See “Foreign Arbitral Awards Submitted for Confirmation from 1996 to 2010”.
44 SEC 1210, SEC 839, SEC 507, SEC 887, SEC 826, all discussed here.
45 SEC 978, Reporting Justice Hamilton Carvalhido, decided on December 17, 2008.