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Research Article

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN BRAZIL: PRELIMINARY STUDIES ON THE PROCEDURE IN THE BRICS COUNTRIES

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Perhaps the most critical step in international litigation is effectiveness, i.e., enforcing a judgment rendered in a foreign jurisdiction. From a global perspective, the enforcement of foreign judgments is generally a complex field, governed by a variety of approaches in different jurisdictions, involving a mixture of bilateral and multilateral conventions and jurisdiction-specific procedural laws, rules and regulations. The approaches to recognition and enforcement of judgments differ widely around the world, hence the importance of analyzing the similarities and differences between foreign legal systems that will be the subject of study in comparative law. The research regarding the recognition and enforcement of foreign judgment in each of the BRICS member countries began with the speech we delivered at the Euro-Asian Law Congress, 'Ninth Session, Law and national interests in modern geopolitics – Expert Group: International and national mechanisms of dispute settlement in Euro-Asian Region', held on June 18–19, 2015, in Yekaterinburg, Russia. This article is the beginning of a larger research project where, in the end, we intend to bring a comparative picture of the system in each of the BRICS countries. In this paper we will deal with the Brazilian legal system, detailing all the steps to be faced to have a foreign decision recognized in Brazil.

Key words: *Brazil, recognition of foreign judgments, enforcement of foreign judgments, rogatory letter, BRICS*

Introduction

The enforcement of foreign judgments is of great importance for the maintenance and security of civil and commercial relations (and transactions). It has long been recognized that the judgment of a court (including arbitral awards) serves no purpose if it cannot be enforced. If the awards are ineffective, the rights and interests of the creditor will be harmed, which in turn will have a negative impact on the free exchange of goods, capital, services and people. The great majority of jurists and scholars admit that the recognition and enforcement of foreign judgments is based on social values and on improving international relations, as well as improving the flow of trade. Therefore, international society has made great efforts to ensure the effectiveness of civil and commercial judgments. Considering the relations established among the BRICS member countries (Brazil, Russia, India, China and South Africa), it seems important to us to know the procedures of recognition and enforcement of judgments in each of the BRICS countries.

Materials and methods

The article is based on publications of lawyers and scholars' writings devoted to the problem under study; in-depth legislative research (national and international), and jurisprudential research at the Brazilian Superior Court of Justice. The main research methods were: historical and legal methods, methods of analysis and synthesis, comparative legal and normative dogmatic methods.

Results

The results of the study are given in the conclusions.

Discussion

1. Overview of the Brazilian legal system

Brazil is a civil law country, and its legal system is based upon laws enacted by the National Congress, State Assemblies and Municipal Councils as per the procedures set forth in their constitution or organizational law.

The courts base their decisions on this enacted law. If, however, a case does not fall within a specific rule or law, the Introductory Law to Norms of The Brazilian Law¹ states that courts may base their decisions on case law, general principles of law, analogy, custom and use.

1.1. Sources of Law

Basically, the seven sources of law are:

Legislation. This is the main source of law. The Federal Constitution² gives Congress the power to legislate in areas such as criminal, civil, commercial, and labor law.

Case legislation. This is the interpretation of laws by the courts, throughout their hierarchy. The most important role of case law is to provide uniformity in the interpretation of laws and rules by the courts.

General principles of law. These apply general legal values to the interpretation of current laws and the making of new laws.

Analogy. The court applies prior interpretations to analogous cases that are not covered by other laws.

Personality and usage. This subsidiary source of law can only be applied if it does not contradict laws already in force. Parties in a dispute of any kind may refer to custom and usage. This is used particularly in commercial disputes.

Equity. In cases permitted by law, the court will apply principles of equity³.

Legal determination. Including legal opinions and scholars' writings, and finally,

General clauses: basic rules of civil or private law for interpreting contractual (or procedural) conduct. For example: good faith, abusive use of rights (Diniz, 2007).

1.2. International Treaties

Given the influence of the American and French Constitutions, in Brazil the Executive and the Legislature together approve, ratify and enact international treaties (Finkelstein, 2007).

Under the Federal Constitution⁴, the President has powers to sign international treaties. He or she may also delegate these powers to appointed plenipotentiaries. Except for less formal treaties known as executive agreements, all other forms of treaty, after having been signed by the Executive's representative, must go to Congress for approval. Once a treaty is approved – by Legislative Decree – the Executive will decide whether to ratify it. If it decides to ratify, the President will sign the ratification instrument and exchange it with that of the other signatory (for bilateral treaties) or forward it to the depositary mentioned in the treaty. The treaty must then be passed in Brazil by Presidential Decree and published in the 'Official Gazette' (Araujo, 2006).

¹ Art. 4th of the Introductory Law to Norms of the Brazilian Law (Decree-Law No. 4.657/1942 – Convention on Private International Law – Bustamante Code). Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm [Accessed: 01 June 2020].

² Federal Constitution, 1988. Available at: [Constituiçõ \(planalto.gov.br\)](http://www.planalto.gov.br) [Accessed: 25 October 2021].

³ Art. 140 of the Brazilian Code of Civil Procedure.

⁴ Federal Constitution, 1988. Available at: [Constituiçõ \(planalto.gov.br\)](http://www.planalto.gov.br) [Accessed: 25 October 2021].

There have always been discussions in Brazil as to whether international treaties are binding over domestic legislation (Tenyrio, 1976). The Federal Supreme Court (STF) has ruled that treaties incorporated into the Brazilian legal system have the same force as ordinary laws. Therefore, if a treaty conflicts with a domestic law on the same subject, the most recent in time will prevail. The exception is in tax matters: the Brazilian National Tax Code expressly establishes that treaties rank over ordinary laws. Moreover, treaties on human rights may have the same status of a constitutional amendment depending on the congressional approval ‘quorum’⁵.

2. Foreign decisions

The economic globalization brought as a result the major interdependency between the countries⁶.

Currently, in the face of numerous international transactions and contracts, we are realizing more and more the need to enforce a Brazilian court decision in foreign countries (Correia, 1989; Castro, 1996).

On the other hand, we have noticed an increase in decisions handed down in foreign countries that intend to be enforced in Brazil.

In this article, the term ‘decisions’ will refer to: foreign (final) judicial decisions⁷; arbitral awards; non-judicial decisions that, under Brazilian law, have a jurisdictional nature, or interlocutory decisions⁸.

3. Preliminary Notes

Foreign judgements may be recognized and enforced in Brazil, irrespective of the existence of reciprocity from the part of the country from which such judgement is originated or a specific international treaty or convention between the country of origin of the judgement and Brazil. The foreign decision undoubtedly has effects: (i) of the foreign act as a decision (decisional effectiveness – after homologation) and of the legal fact materialized in the foreign official document (evidential effectiveness – which is not dependent on homologation).

The distinction between these effects lies in the effectiveness of the decision and of the evidence, which are found in the mechanism adopted by the Brazilian legal system: the homologation of the foreign decision (Theodoro, 2009).

That is to say: in order to be enforceable in Brazil, a judicial award rendered in other country shall depend on confirmation by the Brazilian Judiciary.

4. Applicable Law

4.1. International Conventions, bilateral and/or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments in Brazil

When the protection of Brazilian public policy and national sovereignty are preserved, Brazil has no significant reservations on entering into of agreements or treaties (Dolinger, 2001).

However, in order to be considered effective and enforceable in Brazil, all bilateral or multilateral treaties must first be approved by the National Congress and enacted by a presidential decree ().

The most important ones are:

Introductory Law to Norms of The Brazilian Law (Decree-Law # 4.657/1942 – Convention on Private International Law – Bustamante Code)⁹,

Convention Abolishing the Requirement of Legalization for Foreign Public Documents – 1961 (the Apostille Convention), facilitating the submission of requests for the recognition and enforcement of foreign judgments¹⁰,

Convention on Obtaining Evidence Abroad in Civil or Commercial Matters 1970 (the Hague Evidence Convention)¹¹,

⁵ The Legal and Tax Committee of the BRITCHAM in Brazil.

⁶ See generally Friedman, W. (1978) *The Changing Structure of International Law*; and Domke, M. & Glossner, O. (1973) *The Present State of the Law Regarding International Commercial Arbitration*. In: Bos, M. (ed.) *The Present State of International Law*. The foreign judgments cannot be confused with the international judgments, which don't need recognition and are rendered by the international courts or international organizations.

⁷ For purposes of Brazilian Law, judgement is the decision of a civil, commercial or criminal nature rendered by a judge or a court, abiding by the due process of law, and which is not subject to any further appeal.

⁸ Should the defendant be domiciled in Brazil, service of process shall have been made by means of a rogatory letter. This interlocutory decision to be enforceable in Brazil has also been recognized by the Superior Court of Justice.

⁹ Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm [Accessed: 01 June 2021].

¹⁰ Available at: *HCCH 1961 Apostille Convention – Outline* [Accessed: 01 June 2021].

¹¹ Available at: *HCCH | Evidence Section* [Accessed: 01 October 2021].

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)¹²,

the Agreement on Legal Cooperation in Civil Matters between Brazil and Lebanon – 2002 – Decree 7.934/2013¹³,

the Cooperation Agreement on Civil Issues between Brazil and France – 1996 (Decree 3.598/2000)¹⁴,

the Convention of Judicial Cooperation on Civil Issues between Brazil and Spain – 1989¹⁵,

Treaty Between the People's Republic of China and the Federative Republic of Brazil on Judicial Assistance in Civil and Commercial Matters – 2009 (Decree 8.430/2015)¹⁶,

the Las Lenrs Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters 1992¹⁷,

Inter-American Convention on International Commercial Arbitration 1975 (the Panama Convention)¹⁸,

Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979 (the Montevideo Convention)¹⁹,

the International Commercial Arbitration Agreement of Mercosur 1998, enacted in Brazil in 2003²⁰,

the Protocol of Cooperation and Jurisdictional Aid on Civil, Commercial, Labour and Administrative Issues between the Mercado Comun del Sur (the Southern Common Market) and Bolivia and Chile – 2002²¹,

the Agreement on Judicial Cooperation on Civil, Commercial, Labour and Administrative Issues between Brazil and Uruguay – 1992 (Decree 1.850/1996)²²,

the Agreement on Judicial Cooperation on Civil, Commercial, Labour and Administrative Issues between Brazil and Argentina – 1991²³,

the Treaty relating to Judicial Cooperation and the Recognition and Execution of Decisions on Civil Issues between Brazil and Italy – 1.989 (Decree 1.476/1995)²⁴, among others.

4.2. Brazilian framework – Domestic Law Applicable

The recognition and enforcement of foreign judgments in Brazil are mainly governed by the following domestic laws and regulations:

Introductory Law to Norms of The Brazilian Law (Decree-Law # 4.657/1942 – Convention on Private International Law – Bustamante Code)²⁵ – Articles 15 to 17,

the Federal Constitution – 1988 (Articles 105(I)(i) and 109(X))²⁶,

the Brazilian Civil Procedure Code (Law No. 13.105/15 – Articles 513 to 538 and 960 to 965)²⁷,

the Brazilian Arbitration Act (Law No. 9.307/96 – Articles 34 to 40)²⁸,

the applicable international treaties duly incorporated into the Brazilian legal system, and

the internal Statute of the Superior Court of Justice (Articles 216-A to 216-N)²⁹.

¹² Available at: HCCH | #12 – Full text [Accessed: 01 October 2021].

¹³ Available at: Decreto nº 7934 (planalto.gov.br) [Accessed: 01 November 2021].

¹⁴ Available at: Decreto nº 3.598 de 12/09/2000 – Federal – LegisWeb [Accessed: 01 October 2021].

¹⁵ Available at: Portal da Câmara dos Deputados (camara.leg.br) [Accessed: 01 June 2021].

¹⁶ Available at: 1535958045476.pdf (mfa.gov.cn) [Accessed: 01 October 2021].

¹⁷ Available at: SICE – Decisions – MERCOSUR/CMC/DEC. N° 01/94 – Protocol of Buenos Aires (oas.org) [Accessed: 01 August 2021].

¹⁸ Available at: volume-1438-I-24384-English.pdf (un.org) [Accessed: 01 October 2021].

¹⁹ Available at: volume-1439-I-24392-English.pdf (un.org) [Accessed: 01 May 2021].

²⁰ Available at: MERCOSUL/CMC/DEC N° 3/98 (oas.org) [Accessed: 01 June 2021].

²¹ Available at: SICE – Decisions – MERCOSUR/CMC/DEC. N° 01/94 – Protocol of Buenos Aires (oas.org) [Accessed: 01 May 2021].

²² Available at: Portal da Câmara dos Deputados (camara.leg.br) [Accessed: 01 August 2021].

²³ Available at: Decretos (1995) – 1.560, de 18.7.95 – Vade Mecum On-line (meuvademedecumonline.com.br) [Accessed: 01 October 2021].

²⁴ Available at: D1476 (planalto.gov.br) [Accessed: 01 October 2021].

²⁵ Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm [Accessed: 01 June 2021].

²⁶ Available at: Constituição (planalto.gov.br) [Accessed: 01 November 2021].

²⁷ English version Available at: (PDF) Brazilian Code of Civil Procedure (English Version) | Gustavo Silva Alves – Academia.edu [Accessed: 01 November 2021]. Original version Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm [Accessed: 01 October 2021].

²⁸ English version available at: Law No. 9.307/96 (English) ‘CBAr – Comitê Brasileiro de Arbitragem [Accessed: 01 October 2021].

²⁹ Available at: <https://www.stj.jus.br/publicacaoinstitucional/index.php/Regimento/article/view/532/3959> [Accessed: 01 October 2021].

5. Requirements for recognition and enforcement of foreign judgments in Brazil

Firstly, it is important to mention that all final judgments are generally enforceable under Brazilian Law (monetary judgments, mandatory or prohibitory orders, default judgments, judgments granting punitive damages, etc) (Barbosa Moreira, 2005)

The recognition and enforcement of foreign judgments in Brazil is regulated by federal laws, uniformly applied within the country³⁰ (Machado, 2009).

Pursuant to the Federal Constitution of 1988, Section 105, I, (i)³¹, the federal organ responsible for the analysis and decision as to the confirmation of foreign judgements is the Superior Court of Justice (STJ)³². The matter is governed by the provisions of Introduction to Brazilian Law³³ (which contains private international law interpretation rules), by the Brazilian Civil Procedure Code³⁴ and by the Internal Statute of STJ³⁵, as above mentioned.

In the process of confirmation of a foreign judgement, STJ shall only verify whether the formal procedural requisites have been fully complied with, in all instances until final judgement (Knijnik, 2008).

Provided that these basic conditions have been fulfilled, STJ shall verify the compliance by the foreign judgement with the following requisites, in pursuance of Section 216 (A-N) of the Internal Statute of STJ, ultimately based on the provisions of Introduction to Brazilian Law (art. 15 and 17) and Brazilian Civil Procedure Code (arts. 960 to 965):

(1) the foreign decision shall be rendered by a competent judge (in accordance with Section 216-D, I of the Internal Statute of STJ; art. 15, 'a' of Introduction to Brazilian Law; art. 963, I of Brazilian Civil Procedure Code).

STJ will not check the foreign judge's jurisdiction on the matter; this could result in the determination of other judge in the same country, what would mean improper interference in the country's sovereignty.

In fact, what shall be examined by STJ is whether the case, in view of Brazilian Law, falls within the exclusive jurisdiction of the Brazilian Courts (art. 964 of Brazilian Civil Procedure Code).

By way of example, confirmation of a judgement regarding a real property located in the Brazilian Territory would not be admissible, since art. 12, paragraph 1, of Introduction to Brazilian Law, provides that 'only the courts of Brazil' shall have jurisdiction over such matters;

(2) the parties must have been served proper notice of process (Section 216-D, II of the Internal Statute of STJ; art. 15, 'b' of Introduction to Brazilian Law; art. 963, II of Brazilian Civil Procedure Code).

Service of process is the act whereby a party is called to respond to a legal suit filed against it. It is fundamental for the guaranty of the right of full defense and shall have been made in accordance with the guidelines set forth by the laws of the place in which the judgement was rendered. Should the defendant be domiciled in Brazil, service of process shall have been made by means of a rogatory letter;

(3) the judgement must be final, and in proper form its execution at the place where it was rendered (Section 216-D, III of the Internal Statute of STJ; art. 15, 'c' of Introduction to Brazilian Law; art. 963, III of Brazilian Civil Procedure Code).

For the purposes of expediting enforcement proceedings, it is advisable, insofar as possible, to produce evidence that the decision is final, by means of a certification by the relevant judge, stating that no further appeal is admissible in any degree of jurisdiction;

(4) the foreign judgement must be authenticated by the nearest Brazilian consulate and must be submitted to STJ with a sworn translation thereof (in accordance with art. 15, 'd' of Introduction to Brazilian Law; art. 963, V of Brazilian Civil Procedure Code), unless otherwise stipulated in an international convention³⁶;

(5) national sovereignty, human rights and public order.

³⁰ Foreign Judgment (interlocutory on final decision), Arbitral Award or Rogatory Letter.

³¹ Federal Constitution, 1988. Available at: [Constituiç3o \(planalto.gov.br\)](http://www.planalto.gov.br) [Accessed: 25 October 2021].

³² Available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm#art105 [Accessed: 01 October 2021]. Accessed on: Oct/2021.

³³ Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm [Accessed: 01 October 2021].

³⁴ English version Available at: (PDF) Brazilian Code of Civil Procedure (English Version) | Gustavo Silva Alves - Academia.edu. [Accessed: 01 November 2021].

³⁵ Available at: [EF4C0F4EE535CB_RISTJ.pdf \(migalhas.com.br\)](http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm) [Accessed: 01 October 2021].

³⁶ Internal Statute of STJ establishes that the case of a foreign arbitral award, it is also necessary to demonstrate the existence of a valid arbitration agreement and its sworn translation into Portuguese.

Furthermore, the foreign judgement will not be eligible for confirmation if it is contrary to national sovereignty, human rights and/or public policy in accordance with Section 216-F of the Internal Statute of STJ; art. 17 of Introduction to Brazilian Law and art. 963, VI of Brazilian Civil Procedure Code. This is the only aspect concerning the essence of the foreign judgement which is controlled by STJ.

6. Legal Proceeding³⁷

Confirmation is obtained by means of a legal proceeding instituted by the foreign plaintiff before STJ.

STJ shall then issue an order directing notice of process to be served on defendant, who will be entitled to challenge the request of confirmation.

STJ shall only acknowledge challenges by defendant if the same are in respect of:

- 1) the authenticity of the documents produced by the plaintiff,
- 2) the construction of the foreign judgement, or
- 3) the pertinent compliance with the statutory requirements regarding confirmation or relative to the filing of the request, in accordance with Section 216 of the Internal Statute of STJ, e.g.³⁸:
 - was rendered by a competent foreign authority,
 - was preceded by a regular summons that was legally checked in absentia,
 - was effective in the country in which it was rendered,
 - violates Brazilian ‘res judicata’,
 - had no official and certified translation attached, unless stipulated differently in an international convention, and
 - violates national sovereignty, human rights or public order³⁹.

The timeframe for the recognition of a foreign judgment depends largely on the matters in dispute and if the defendant contests the decision. Regarding the enforcement of the decision, the timeframe may vary according to the situation and the counterarguments raised by the losing party.

Once confirmation of the judgement is obtained, the foreign judgement may be enforced before the relevant Brazilian lower court, Brazilian Civil Procedure Code as a domestic judgment and its enforcement follows the provisions of the Brazilian Code of Civil Procedure relative to the enforcement of judicial executive titles (Wambier, 2015; Guilherme, 2013).

³⁷ Sections: 216-C, 216-E, 216-H to 216-K of the Internal Statute of STJ.

³⁸ Brazilian law does not permit the review of the merits of a foreign judgment. The Superior Court of Justice can only approve, partially approve or disapprove the judgment; it cannot change the decision regarding the merits of a foreign judgment.

For foreign judgments concerning divorce, formal approval from the Superior Court of Justice is not required, but the enforcing judge can examine the foreign judgment’s validity.

³⁹ Professor Alvim: ‘There are a number of recent case law examples in which the Superior Court of Justice has denied the recognition of foreign judgments’.

For example, a recent case denied the recognition of a foreign judgment based on the assessment of merit. The court held as follows:

‘1. The procedure for the homologation of a foreign judgment does not authorize a review of the merits of the decision except where it offends national sovereignty or public order. Given the indeterminate nature of such concepts they should be interpreted in order to prevent only those acts and legal effects absolutely incompatible with the Brazilian legal system.

2. Court impartiality is one of the guarantees that results from due process and does not preclude and is applicable to arbitration by virtue of its jurisdiction. Failure to comply with this prerogative offends national public order, which is why the decision rendered by the foreign courts, in the light of its own legislation, does not exclude examination by the Superior Court of Justice.

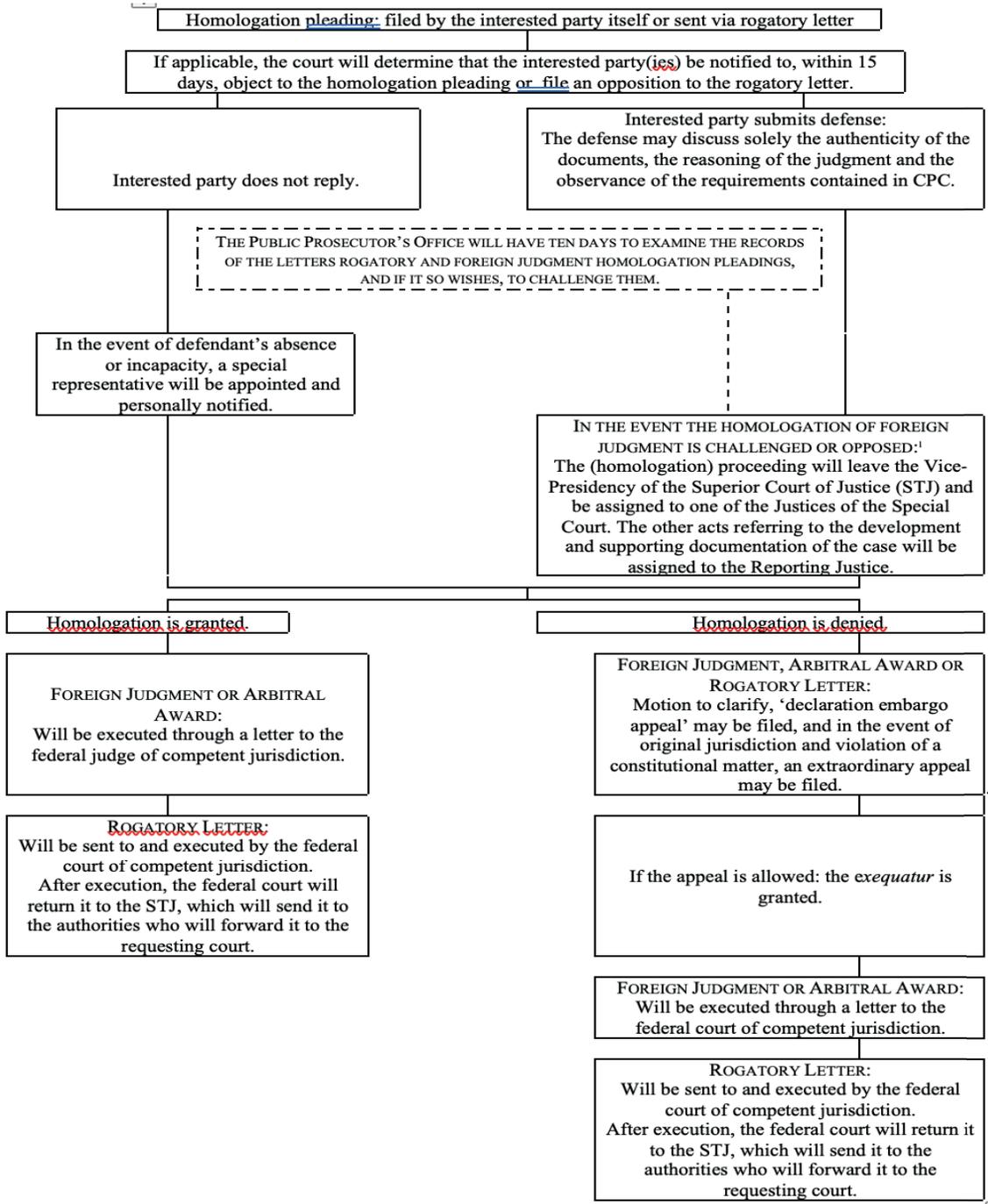
3. An arbitration award issued by an arbitrator who has relations with the parties or with the case that impedes or creates suspicion of judges, offends public order (Articles 14 and 32(II) of Law 9.307/1996).

4. Given the contractual nature of arbitration, which highlights the fiducial trust between the parties and the arbitrator, the obligation to disclose any circumstances regarding its impartiality and independence may hinder the approval of an arbitral award.

5. Establishment that the Brazilian law must apply regarding the indemnity, the arbitration award goes beyond the limits of the convention when based on the financial valuation of the business, rather than consider the extent of the damage.

6. Foreign judgments not approved’. (Superior Court of Justice, SEC 9.412/EX, Rep Justice Felix Fischer, Rep for Judgment Justice Joro Otávio de Noronha, April 19 2017.) Available at: <https://www.lexology.com/research/hubs/litigation> [Accessed: 01 January 2021].

Summary Timeline:



6.1. Partial recognition and enforcement of foreign judgments

The Superior Court of Justice may only partially recognize a foreign judgment (in accordance with Section 216-A, paragraph 2 of the Internal Statute of the STJ and art. 961, paragraph 2 of the Brazilian Code of Civil Procedure). However, when a foreign judgment is fully approved by the Superior Court of Justice, enforcement cannot execute only part of the decision.

6.2. Possibility to appeal against decisions on recognition and enforcement rendered by Superior Court of Justice

In exceptional cases, the decision can be subject to appeal before the Federal Supreme Court.



If recognition of a foreign decision is granted, the decision becomes final and unappealable and the party can present an enforcement request before a federal court (Pinheiro, 2002). In addition, in divorce cases, the domestic judgment is subject to appeal before the court of appeal.

Therefore, according to arts. 1.022 to 1.026 of the Civil Procedure Code, the so-called ‘declaration embargo appeal’ can be presented to:

- clarify obscurity or eliminate contradiction in the decision,
- overturn the omission of a point or question on which the court has decided, or
- correct a material error.

If one of the above is identified, the decision can be modified by the appeal court.

7. The process for enforcing Judicial (or Arbitral) foreigner judgement after the recognition by the President of Superior Court of Justice

Once the enforcement request is filed by one of the creditors (interested party) before de lower Court, the other party (debtor or debtors) is served to comply with the decision. If payment is not made within such a period, a monetary penalty is added and, in the case of an enforcement requesting payment of damages, the enforcing party is entitled to appoint the defendant’s assets to be constrained for payment purposes. After the constriction and evaluation of the assets, the defendant is again served to file, if so desired, an opposition, which does not affect the course of the enforcement proceedings unless the judge determines otherwise. If the defendant again does not pay the debt, the attached property shall be evaluated and sold in a public auction and the values reverted to pay the creditor⁴⁰.

8. Legal protection of urgency (‘Tutelas de urgência’)

Injunctive relief is not (generally) available to defendants against the recognition or enforcement of foreign judgments in Brazil.

However, in order to guarantee the effectiveness and efficiency of the foreign decision rendered abroad and aiming at avoiding irreparable damages to the interested party, the Brazilian legal system allows the granting of ‘tutela de urgência’ (legal protection of urgency).

This injunctive relief concerns the enforcement of an interlocutory decision rendered abroad on an urgent basis, which can be enforced by means of a letter rogatory that does not require homologation by the STJ, but only ‘exequatur’⁴¹.

9. Consensual divorce abroad

For foreign judgments concerning divorce, formal approval from the Superior Court of Justice is not required, but the enforcing judge can examine the foreign judgment’s validity.

Superior Court of Justice, SEC 978/GB⁴², denied the recognition of a foreign judgment based on commitment clauses. The court held as follows:

‘1. The unequivocal demonstration of the manifestation of willingness to join the party and be the arbitral judgment offends public order, because affront the principle included in our legal system, which requires express acceptance by the parties submit the settlement of disputes arising in contractual legal transactions private arbitration’. (SEC 967/GB, Reporter Minister José Delgado, in DJ March 20 2006⁴³).

2. The lack of signature on the clause of election of the arbitration court in the purchase and sale agreement, in its addendum and the referee indicated requested name excludes the probate claim, which offends Article 4(2) of Law 9.307/96, the principle of freedom of choice and the Brazilian public order.

3. Request for approval of the foreign arbitration award denied⁴⁴.

⁴⁰ It’s important to emphasize that it is impossible to enforce a decision against a third party that was not party to the dispute. Therefore, a foreign judgment that harms third parties cannot be approved except in the case of a legal successor that is proven to be the legal successor to the debt.

⁴¹ Section 216-G of the Internal Statute of the STJ; Art. 962 of the Brazilian Code of Civil Procedure.

⁴² Superior Court of Justice SEC 978/GB, Rep Justice Hamilton Carvalhido, December 17 2008. Available at: <https://www.lexology.com/research/hubs/litigation> [Accessed: 01 January 2020]. Full Court Decision available at: <https://www.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ITA?seq=849670&tipo=0&nreg=200601737711&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=20090305&formato=PDF&salvar=false> [Accessed: 01 January 2020].

⁴³ Full Court Decision Available at: <https://www.lexml.gov.br/urn/urn:lex:br:superior.tribunal.justica:corte.especial:acordao;sec:2006-02-15;967-672189> [Accessed: 01 January 2021].

⁴⁴ Superior Court of Justice SEC 978/GB, Rep Justice Hamilton Carvalhido, December 17 2008. Available at: <https://www.lexology.com/research/hubs/litigation> [Accessed: 01 January 2020]. Full Court Decision Available at: <https://www.stj.jus.br/>

In another case, the Superior Court of Justice denied the recognition of a foreign judgment in the context of divorce proceedings, holding as follows:

‘1. Failure to comply with the requirements of articles 216-C and 216-D, III, of the Rules of Procedure of the Superior Court of Justice, regarding proof of final and unappealable decision, previous authentication by the competent Brazilian consular authority of the decision, and translation carried out by a sworn professional in Brazil, the foreign judgment cannot be homologated.

2. Request for the homologation of the foreign judgment denied’⁴⁵.

10. Preliminary research: International Conventions, bilateral and/or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments in Russia, India, China and South Africa

From the research done so far, we have noticed the following:

10.1. Russia⁴⁶

The Russian Federation is party to over 30 bilateral treaties on legal assistance in civil law matters. Some of these treaties, for example, those with Austria, China, Cyprus, Latvia, Lithuania, Estonia, Greece, Spain and so on, contain provisions on recognition of foreign judgments. Russian courts apply the provisions of these treaties in enforcing judgments rendered in these countries. Most of these cover the Commonwealth of Independent States (CIS).

The most widely known international multilateral instruments include:

HCCH Convention on Civil Procedure (1954),

Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993) (Minsk Convention),

Kiev Agreement on Settlement of Commercial Disputes (1992).

On 7 October 2002 the CIS member states, including Russia, signed another convention in Chisinau, setting out, among other things, the grounds for recognition and enforcement of judgments issued in civil, family and criminal matters, restating provisions similar to those found in the Minsk Convention and making the latter obsolete between signatory states of the Chisinau Convention. To date, Russia has not ratified the Chisinau Convention and hence the Minsk Convention remains in effect.

10.2. India⁴⁷

India is not a party to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, India has executed bilateral treaties with various countries regarding reciprocity in enforcement of judgments and decrees. Whenever any such treaty is entered into with any country, that country is declared a reciprocating territory by the Indian government by way of a notification. Currently, the United Kingdom, Aden, Fiji, the Republic of Singapore, the Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Bangladesh and the United Arab Emirates are declared as ‘reciprocating territories’.

However, India is party to the following international conventions:

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention),

Geneva Protocol on arbitration clauses of 1923,

Geneva Convention on the execution of foreign arbitral awards 1927.

websecstj/cgi/revista/REJ.cgi/ITA?seq=849670&tipo=0&nreg=200601737711&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=20090305&formato=PDF&salvar=false [Accessed: 01 January 2021].

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10.3. China⁴⁸

There are no different regimes/rules for the enforcement of judgments from EU member states and from non-EU countries, apart from the bilateral treaties with various jurisdictions as mentioned below.

China is a party to HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention), with a reservation on Articles 8, 10, 15 and 16.

China has also concluded bilateral treaties with several jurisdictions on the provision of judicial assistance. Some of those treaties include provisions on the recognition and enforcement of judgments.

Acknowledgement and enforcement of Hong Kong, Macau and Taiwan judgments are subject to the Mainland-Hong Kong Arrangement, the Mainland-Macau Arrangement and the Mainland-Taiwan Directive respectively.

In addition, China signed the HCCH Convention on Choice of Court Agreements 2005 (Hague Choice of Court Convention) in 2017. However, the Hague Choice of Court Convention will not become binding upon China until it is approved by the Chinese Parliament. According to the Convention, a judgment given by a court of a contracting state designated in an exclusive choice of court agreement will be recognized and enforced in other contracting states to the Convention.

10.4. South Africa⁴⁹

South Africa is not party to any treaty regarding the reciprocal enforcement of foreign commercial judgments.

Conclusion

Although the homologation of a foreign decision is a matter of private international law, all the issues related to the homologation action are, in fact, eminently a procedural matter. Therefore, when it comes to issues such as the effectiveness of court decisions – internal competence of the Brazilian Justice – we are facing issues pertaining to instrumental law and should be analyzed from this perspective.

The Code of Civil Procedure (in 2015) updated the subject by creating a new law that regulates the procedure for recognition and enforcement of foreign decisions.

We cannot forget that we must make use of the so-called ‘dialogue of sources’ (Tartuce, 2014) in order to harmonize Brazilian legal system and, to the extent possible, ensure that the rule of law that is most favorable to give effectiveness to foreign court decisions is adopted.

Through the studies made so far, even if in a perfunctory way, the International Conventions, bilateral and/or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments signed by each of the BRICS countries do not integrate the countries in a harmonic way, but we believe that with this preliminary research we can start an in-depth comparison of the internal legal system of each country, finding points of approach and distance to, who knows, create a judicial cooperation document on this matter.

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