

## RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE FEDERATIVE REPUBLIC OF BRAZIL

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### Abstract

Awarding procedure is not only limited to the final decision of the court of the stipulated country, likewise the Federative Republic of Brazil but also its significant procedural aspect for enforcing the arbitral decision. Practically, parties should enforce foreign arbitration awards without exception until it crosses the country's internal and external policy.

The economic growth of a country demonstrates remarkable changing in legal behavior on enumerated country's private parties' activities as well. Trade relations among Brazilian companies have made a long way for dispute resolution. Addressing to sophisticated social approach to the legal nature of a stipulated country, it is not a surprising factor in applying the private international law demands in practice. Official government seeks a modern transparent approach to finalize and enforce foreign arbitral awards without reducing the freedom of activities of companies in the inner border and cross border transactions.

All perspectives of legal nature and enforcement procedure on foreign arbitration awards in Brazil are not very harsh at first glance since as all parties are adequately applied to New York Convention 1958 on Enforcement of Foreign Arbitration Awards, however as all stereotypes on all jurisprudences, there are several weak points while applying a procedural background.

This article analyzes and compares legal possibilities and challenges on the application of foreign arbitral awards in the Republic of Brazil. The findings figure out the stick points of procedural matters of enforcement of foreign arbitral awards and their complexity from the theoretical approach.

The goal is achieved by solving several problems:

- To research the procedure of enforcement of foreign arbitral awards in the Federative Republic of Brazil;
- To identify the problems of procedural matters while enforcing the foreign arbitral awards;
- To highlight the possible solutions and pathways for making easier the enforcement procedure of foreign arbitral awards in Brazil.

**Keywords:** International Private Law, BRICS countries, arbitration, enforcement, recognition, legislation, Brazil.

### 1 INTRODUCTION

The Federative Republic of Brazil is one of the prominent and leading countries in the region of Latin America for its economic, legal, and social perspective (Zelentsov A.B., 2017). As the primary supporter of

the New York Convention on Recognition and Enforcement of Foreign Arbitral awards, Brazil tries to make a transparent community on Arbitration and making a road to alternative ways of dispute resolution. Primary and pioneer source of arbitration refers to UNCITRAL Model Law and its provisions and in the frame of that Brazilian lawmakers formalized Brazilian Arbitration (Dudin M.N., 2017). Act (1996), which led to organizing pre-arbitration and arbitration procedures, the atmosphere in Federation. Prosperity in the arbitration field continued to demonstrate itself after the 2015 amendments' as well. Supreme Court of Justice supported this prosperous range with its commentaries, decisions, and its logic ending demonstrates itself in Brazilian's stance in the arbitration field as well-positioned.

Regarding the statistical report of the International Chamber of Commerce (ICC) on arbitration listing, the Federative Republic of Brazil is standing at third (third) place among 123 countries for its productive and sufficient work (Artemyeva Y.A., 2016). On the other hand, there is a vast number of arbitration institutions that are efficiently trying their best for the contribution arbitration sphere. Furthermore, some institutions are favorably distinguished for their support of the tendency. As an example can be taken Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), The Brazilian Centre for Mediation and Arbitration (CBMA), and Business Arbitration Chamber- Brazil (CAMARB). These instances could be a good indicator for ranking of Brazil for their sufficiency in arbitration and collaborative work of them with foreign directed arbitrations and direct foreign arbitrations.

Arbitration is most frequently used for the resolution of disputes involving: (i) construction and infrastructure projects (such as oil, gas, and electricity); (ii) commercial and financial agreements; (iii) corporate conflicts; and (iv) agricultural matters.

## **2 METHODOLOGY**

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## **3 RESULTS**

### **3.1 Legal Framework of the Proceedings in Arbitration in Federative Republic of Brazil and Legislation of Arbitration**

#### **3.2 Arbitration in the Federative Republic of Brazil**

##### *3.2.1 Legislation and Legal Instruments*

Over the years and decades brought prosperity to Brazilian legislation and legal surrounding from the perspective of arbitration (Rusakova E.P., 2018). Although the political and economic nature of the country did not grow as planned, however, the state has been interested in its economic market for foreign investment (Dudin M.N., 2016). Lack of transparency at governmental stages, economic turbulence in the last three years made a path of silence in public policy as well.

Legislative instruments are taken into account from Brazilian Arbitration Law (BAL), which was enacted in 1996 and enforced in 2001 with the ratification of the Supreme Court of Justice. It was the first attempt by the Brazilian side on the road of arbitration prevalence. However, distance showed itself with five years' difference in the enactment of Law, so far it effected to legal arbitration nature of the state (Artemyeva Ju.A., 2019).

The second source for the cases which can question the arbitrability is the New York Convention on Recognition and Enforcement of Foreign arbitral awards. The globally accepted practice shows that the New York Convention comes into force in the country alongside the ratification. So far, the Federative Republic of Brazil ratified the New York Convention for making scene enforcement the foreign arbitration awards. These two attempts were leading indicators on the way of autonomy of arbitration institutions, the validity of awards.

More details of arbitration and its subparts are hidden in Brazilian Arbitration Law 1996, namely article 34 no 9.307/96, which identifies the foreign arbitral award as an award which is rendered in the country other than Brazil. On the other hand, Chapter VI of the Brazilian Civil Procedure Code (hereinafter, "BCPC") applies according to Art. 960 para. 3. Finally, the internal rules of the Superior Court of Justice ("Superior Tribunal de

Justiça') are applicable for matters not regulated in the previously mentioned statutes can be useful instruments as the legislative documents.

Furthermore, as mentioned above, the Federative Republic of Brazil is signatory party no New York Convention on Enforcement and Recognition of Foreign Arbitral Awards by 7th of June 2002, and no amendments and declarations did not make as a signatory party.

### *3.2.2 Competent Courts and Arbitration Institutions*

Court system in Brazil refers to classic civil law countries and its provisions on the point of view of arbitration. Superior Court of Justice (Superior Tribunal de Justiça) has jurisdiction over the arbitration cases, respectively, to foreign arbitral awards regarding the Brazilian Arbitration Law article 35 and article 104 (I) the Constitution of Federative Republic of Brazil. The phrasing of jurisdiction on this matter ranged as below:

"Brazilian Arbitration Law Article 35- In order to be recognized or enforced in Brazil, a foreign arbitral award is subject only 160 to homologation by the Federal Supreme Court. Brazilian Federative Constitution article 104 (I)- one-third from the judges of the Federal Regional Tribunals and one-third from the justices (desembargadores) of the Tribunals of Justice, nominated in a list of three names drawn up by the Tribunal itself.

Moreover, the federal court has also jurisdiction, which regarded as article 965 Brazilian Civil Procedural Code.

The State Court of São Paulo created arbitration court which has specialized chambers for the resolution of arbitration-related disputes, both at lower court and appellate court levels. Such chambers have jurisdiction to administer and rule upon cases in matters such as pre-arbitral interim relief, coercive measures in aid of arbitration, and lawsuits to enforce or set-aside arbitral awards.

Arbitration institutes set up their work alongside the enforcement of Brazilian Arbitration Law, which is concentrating on dispute resolution and alternative way of dispute resolution (Rusakova E.P., 2019). An example of this is the creation by the State Court of São Paulo, which has specialized chambers for the resolution of arbitration-related disputes, both at lower court and appellate court levels. Such chambers have jurisdiction to administer and rule upon cases in matters such as pre-arbitral interim relief, coercive measures in aid of arbitration, and lawsuits to enforce or set-aside arbitral awards.

### *3.2.3 Procedural Requirements*

Jurisdiction over the cases refers to classic civil law jurisdiction due to formation. While the party is initiating the standard arbitration procedure in Brazil, the parties have to follow the requirements:

- Regarding the Brazilian Civil Procedure Code Art. 319 BCPC, parties should meet formal requirements in order to initiate the legal procedure meanly, indicating the component court, the party information, amount of dispute, evidence according to the dispute.
- Comply with the Brazilian Civil Procedure Code Art. 524 BCPC, the parties should indicate the amount of the dispute with the dispute sheet (calculating the amount with interests, rates).
- Payment of judicial costs by initiating party regarding to the internal rules of competent courts.

Apart from the general enforcement procedure, parties can distinguish the foreign arbitral awards for enforcement regarding Article 965 of Brazilian Procedural Civil Code (BCPC) with a certified copy of award which is initiating to be enforced. Documentation is one of the equal parts of the enforcement procedure. Regarding the article 37 of Brazilian Arbitration Law (BAL) and article of IV of New York Convention, documentation on the road of success as follows:

Article 37 of Brazilian Arbitration Law: "The request for homologation of a foreign arbitral award shall be submitted by an interested party; this written motion shall comply with the procedural law requisites of Article 282 of the Code of Civil Procedure, and must be accompanied by: I - the original arbitral award or a duly certified copy, authenticated by a Brazilian Consulate, as well as a sworn translation; II - the original or a duly certified copy of the arbitration agreement, as well as a translation."

Article IV of New York Convention: "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the

award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

### **3.2.4 Costs and Fees of Enforcement Procedure**

On the contrary to arbitration understanding in civil law countries, Brazil is one of the unique opportunities for starting enforcement procedure. Arbitration costs in Brazil do not reflect and depend on the amount of dispute since the state has regulated it within the legal procedure. The generally accepted practice shows that the amount of cost is counted as R\$ 179,37 as of 28 May 2018 (which converts to approximately EUR 40 to EUR 50 as of today). Costs of arbitration should be paid upon filing the case for starting the enforcement procedure. Referring to the statistics of the Brazilian government, the amount of arbitration cost can be effected by the inflation, which as the fact supported by the official resolution STJ/GP No 2 by 1st of February.

After affording the costs and expenses party is free to call for the case for enforcement procedure, which should be accompanied by official summon for making aware the correspondent party (Dudin M.N., 2017). According to the BCPC, a party must be summoned personally or through its legal representative. The summon can be submitted by the court clerk directed to another party, via electronic devices, official newspaper. If a party is outside of the Brazilian jurisdiction, the summons in a judicial procedure will be performed through a letter of regulatory to the jurisdiction in which the respective party is located.

### **3.2.5 Grounds for Refusal of Foreign Arbitral Awards in Brazil**

As recognition and enforcement of foreign awards, refusal is also one of the possibilities before the Brazilian jurisdiction. Regarding comparative law, it is a common understanding that all awards can be applied until they do not cross with the exclusivity principle. The grounds for refusal in Brazilian arbitration law and New York convention crossing and the same sounds for a common sense of parts. Taking into account parts of the New York convention and Brazilian main arbitration act, there is no surprising fact that Brazill entirely refers to unilateral convention. The grounds for refusal as following regarding the Brazilian Arbitration Law article 38:

- The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that: I - the parties to the agreement lacked capacity;
- 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;
- It was not given proper notice of the appointment of the arbitrator or of the arbitral procedure, or in the cases of violation of the adversary proceeding principle rendering its full defense impossible;
- The arbitral award has exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration
- The commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause
- The arbitral award is not yet binding on the parties, or has been set aside or has been 174 suspended by a court of the country in which the arbitral award has been made

Following numerous countries' internal and external policies, foreign awards also can be effected by the public policy principle respected to stipulated cases (Dudin M.N., 2017).

## **4 FINDINGS**

Despite the growth of the legislative instruments the Federative Republic of Brazil, they still did not achieve their goal on enforcement and recognition of foreign arbitral awards due to factorial reasons likewise morality, crossing on state sovereignty, crossing on internal jurisdiction of them, etc. Furthermore, there are some other problematic barriers that should be taken into account as political, economic, socio-cultural situations in the enumerated state (Burkaltseva D.D., 2017).

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