Enforcing Foreign Arbitration Awards in Brazil: The Concept of Public Policy

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Abstract. This paper discusses two crucial topics in global arbitration: the implementation of foreign awards and the notion of public policy in Brazil. Brazil signed the 1958 New York Convention, and the Brazilian Arbitration Act mimics the Convention's policies regarding the acknowledgment of foreign awards. The Brazilian Superior Court (STJ), the highest Brazilian Court for non-constitutional matters, is responsible for recognizing foreign arbitration awards (since Constitutional Amendment nº 45 of 2004) and, therefore, is the Court that sets the public policy frame within the country for this matter. In that way, to define what public policy is, or better define what it is not, the STJ's current jurisprudence is analyzed.

Keywords: International Arbitration, Brazil, Foreign Arbitration Award, New York Convention, Public Policy, Brazilian Superior Court of Justice (STJ).

1 Introduction

International arbitration has been a successful outcome of the post-World War II era, primarily due to the three key cornerstones: These essential elements have helped establish a framework for international arbitration that has enabled businesses, entrepreneurs, and governments to resolve cross-border disputes in a more predictable, efficient, and impartial manner. The New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) of 1958, the UNCITRAL Arbitration Rules of 1976, and the UNCITRAL Model Law of 1985. UNCITRAL was established by the UN in 1966, following the NY Convention, and has been instrumental in harmonizing international arbitration law.

Domestic legislation based on the Model Law is adopted in 85 States in a total of 118 jurisdictions [1]. The UNCITRAL Arbitration Rules guarantee, if agreed by the parties, that the international arbitration proceedings will follow the most fundamental arbitration principles such as due process, reasonable opportunity to present the case,

M. K. bin Abdullah et al. (eds.), *Proceedings of the International Seminar on Border Region (INTSOB 2023)*,
Advances in Social Science, Education and Humanities Research 823,
https://doi.org/10.2991/978-2-38476-208-8_8

and respect to party autonomy, especially in Ad Hoc arbitrations. Even if the arbitration is institutional, the providers authorize the use of the UNCITRAL Arbitration Rules if the arbitration is international. That means that the parties can use their autonomy to reject the institutional arbitration rules and choose the UNCITRAL rules.

Arbitration is an adjudicatory heteronomous procedure. Thus, a private judge chosen by the parties will render a final and, as a rule, binding award. The main difference between this private judge (the arbitrator) and a State Judge? The arbitrator must respect the parties' will, whereas the State Judge must observe the state legal frame. The parties will choose the legal arbitration scope (language, applicable law, procedural rules, etc.).

This paper examines two crucial matters in international arbitration: the enforcement of foreign awards and the concept of public policy in Brazil. Brazil signed the 1958 New York Convention, and the 1996 Brazilian Arbitration Act adheres to the Convention's model for recognizing foreign awards.

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2 The Brazilian Arbitration Act and the Foreign Arbitration Award

Before enacting the Brazilian Arbitration Act in 1996, the arbitration award required confirmation by the Judiciary. It became an enforceable judicial title only after ratification that would be the object of appeal if rejected or accepted (Article

1.101 of the 1973 Brazilian Civil Procedure Code). Let's see the terms of article 1.097 of the 1973 CPC, let's see: Article *1.097 - The arbitration award, after its confirmation, produces between the parties and their successors the same effects as the court decision; once the party has been convicted, the confirmation confers it the effectiveness of an enforceable title* (article 584, number III of the Brazilian Civil Procedure Code of 1973) [2].

The 1996 Brazilian Arbitration Act revoked Chapter XIV (On Arbitration Courts) of the 1973 Civil Procedure Code and, consequently, Articles 1,072 to 1,102. Therefore, the final or partial arbitral award, according to articles 18 and 31 of the Arbitration Act and article 515, VII of the current Brazilian Civil Procedure Code from 2015, constitutes an enforceable judicial title. That is, it must be considered as a final and unappealable court decision. In case of non-compliance, it is enforced by the State Courts since the arbitrator lacks coercion power.

The Brazilian legislator opted to adopt an objective definition for a foreign arbitration award, assuming the geographic criterion (Article. 34) [3]. That is, a foreign arbitration award is an award rendered outside the Brazilian national territory.

It is worth mentioning that foreign arbitral awards do not necessarily consist of awards issued in an international arbitration proceeding. For Brazil, a foreign award is

rendered outside the national territory, as well as, for example, established by the Spanish Arbitration Act (Act nº 60/2003 - Article 46. (1)) [4] and Portuguese Voluntary Arbitration Act (Law nº 63/2011 – Article 55) [5]. The English Arbitration Act of 1996 adopts the same criteria in its *Section* 100 (1) [6], even denominating the foreign arbitration award as the arbitration award of the New York Convention (New York Convention Awards).

Conversely, the UNCITRAL Model Law, in its article 1 (3), privileges the will of the parties allowing them to establish whether arbitration is national or international, verbatim: (3) An arbitration is considered international if either (a) The parties to the arbitration agreement had their businesses based in different states when they signed the agreement, or (b) Any of the listed locations is situated outside the state in which the parties have their business location: (i) The place of arbitration shall be determined based on (a) the specific location agreed upon in the arbitration agreement, or according to its terms, (b) the place where a significant portion of the commercial obligations were fulfilled, or the location most closely tied to the dispute, or (c) an express agreement by the parties that the dispute or arbitration agreement involves multiple states. (4) Pursuant to subsection (3) of this section, in the event that a party maintains multiple places of business, the location which bears the closest connection to the arbitration agreement will be deemed the place of business. If a party does not have a place of business, the place of usual residence shall be referenced [7]. The Singapore *International Arbitration Act (IAA)* Takes into account the Model Law and establishes, in its Section 27 [8] that a foreign arbitration award is an award rendered according to an arbitration agreement signed into in a territory that is a signatory to the New York Convention other than Singapore.

3 The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards

Brazil only ratified the NY Convention of 1958 in 2002 (Decree nº 4.311/2002) and was considered one of the few conspicuous absences (121 countries had already ratified at that moment) [9]. The main reason for this is that, despite the Brazilian Arbitration Act dating from 1996, the Brazilian Federal Supreme Court (STF) only considered it expressly constitutional in 2001 [10], precisely in a foreign award confirmation analysis.

Articles 38 and 39 [11] of the Brazilian Arbitration Act are, with minor modifications, a reproduction of article V(1) (2) of the NY Convention.

Article 39, II of the Brazilian Arbitration Act establishes, as well as article V(2) of the New York Convention, that *The request for recognition or enforcement of a foreign arbitral award will also be denied if the Federal Supreme Court determines that: II - the decision violates American public policy* [12].

The primary objective of arbitrators is to issue an enforceable award. Therefore, in international arbitration, the arbitral tribunal must only render an award while considering relevant substantive and procedural laws, rules of procedure, as well as the national laws of the parties involved to ensure compliance with local public policy. Any

award that violates national public policy is not enforceable in that jurisdiction. The process of enforcing foreign arbitral awards in Mercosur countries follows a specific procedure (Brazil Argentina, Paraguay and Uruguay), plus Bolivia and Chile, follows Las Leñas Protocol of June 27, 1992. Recognition and enforcement of court sentences and arbitration awards, in these cases, will be done through a letter rogatory under the terms of articles 18 and 19 of the Protocol [13]. In short, foreign decisions from these countries will not fall within the scope of the New York Convention.

4 The Brazilian Jurisprudence from STJ on Public Policy

There is no precise definition of public order. It is an indeterminate and open legal concept, and it is built jurisprudentially by domestic jurisdictions. For the homologation of a foreign arbitration award in Brazil, theconstruction has been carried out by the STJ. It is still necessary to highlight the distinction between the two dimensions of public order: the material public order and the public procedural order.

The first case in which the STJ analyzed the concept of public order was SEC No. 802/US of 2005, verbatim: *The concept of public order is not in the law. Art. 17 of the LICC (Decree nº 4.657 of 1942) only informs that "the laws, acts and sentences of another country, as well as any declarations of will, will not be effective in Brazil, when they offend national sovereignty, public order and good customs." In short, the authors identified below state that: a) "public order, in Private International Law, represents the spirit and thought of a people, the socio-juridical-moral philosophy of a nation." (Jacob Dolinger, in "The Evolution of Public Order in Private International Law", RJ: Luna, 1997); b) "public order is the set of rights, of a private nature, whose obedience the State imposes, so that there is harmony between the State and individuals, safeguarding the substantial interests of society" (Gama e Silva, quoted by Irineu Strenger, in "Private International Law" - general part - vol. I. SP: RT. 2000, p. 172) ; c) "public order is the set of essential norms for national coexistence; therefore, it does not include classification in internal and international public order, but only that of each State. However, there are authors, such as Despagnet, who envision three categories of public order laws, in all legislation: a) the comprehensiveness of institutes and laws that interest the legal and moral conscience of all civilized peoples, such as those alluding to marriage, to straight kinship; b) that which encompasses laws considered to be the application of true principles of morality and social organization; c) that referring to mandatory provisions in considerations of regional order (Maria Helena Diniz, in "Law of Introduction to the Brazilian Civil Code Interpreted". SP: Saraiva, 1999, 5th ed., p. 366). These concepts demonstrate the difficulties faced by doctrine in clarifying the understanding of public order. It is established, however, that the following are public order laws: a) constitutional ones; b) administrative ones; c) procedural; d) criminal; e) those of judicial organization; f) taxes; g) those of the police; h) those that protect the incapable; i) those dealing with the family organization; j) those that establish conditions and formalities for certain acts; k) those of economic organization (regarding wages, currency, the regime of goods). The list above is by Maria Helena Diniz, with the participation of Serpa Lopes (Maria Helena Diniz, ob. cit. p. 368). It*

should be noted that fraud against the law is also considered in the notion of public order [14].

Nevertheless, we can affirm, under the STJ's jurisprudence, what it does not consider a violation of the Brazilian public order, namely: 1. defence of non-performance of the contract [15]; 2. Compensation [16]; 3. Payment [17]; 4. Absence of joint liability [18]; 5. Arbitration award motivation's absence or error [19]; 6. Initial date of incidence of contractual default interest [20]; 7. Condemnation or indexation of obligation in foreign currency - payment of which must be made by conversion into foreign currency [21]; 8. Property issues arising from the termination of employment contract [22]; 9. Nullity or non-existence of the contract [23]; 10. Arbitrator's bias for having prejudged the case by granting an injunction in the arbitration [24]; 11. Economic lack of sufficiency of one of the parties in the arbitration [25]; 12. Injustice of the foreign award [26]; 13. Lis pendens with a proceeding in progress in another country [27]; 14. Default due to force majeure [28]; 15. Compound interest [29]; 16. Offense to the principle of prohibition of illicit enrichment [30]; 17. Non-application of the law chosen in the contract [31]; 18. Unpredictability Theory [32]; 19. Excessive burden [33]; 20. Offense to the principle of legality [34]; 21. Practice of procedural acts outside the seat of the arbitration [35]; 22. Limitation period [36]; 23. Hypothetical damage [37,38].

Therefore, the concept of public order is under constant construction in national and international jurisprudence.

In 2002, the International Law Association (ILA) released a report discussing how public policy can hinder the enforcement of international arbitration awards [39]. The report recommends that arbitral awards rendered in international arbitrations should, as a rule, be preserved. The report defines public order as Part of a State's public policy is to preclude a party from utilizing a foreign law, judgment, or award, if violated.

In October 2015, the International Bar Association (IBA) Subcommittee on Recognition and Enforcement of Arbitral Awards (IBA Subcommittee) published a "Report on the Public Policy Exception in the New York Convention" (Report). They point out in their study that in none of the analyzed jurisdictions, the law sets forth a definition of public order with two exceptions: Australia and the United Arab Emirates [40]. The report also expresses the jurisprudential meaning of public order in 29 (twenty-nine) jurisdictions [41].

5 Final Note

The present research aimed to examine whether it is possible to determine a concept of public order according to Brazilian Superior Court of Justice (STJ) jurisprudence. This study has shown that the concept of public order is an open concept forever in construction by the jurisprudence accordingly to the jurisdiction culture, moral, and legal tradition.

Suppose one of the parties of an international arbitration proceeding involving a Brazilian party needs to enforce the arbitration award in Brazil. In that case, it needs to consider that in STJ's homologation procedure, the defendant will try to find a legal

basis to argue the violation of the Brazilian public order. As it is an indeterminate concept, we can affirm it is always a fair attempt because we can only affirm for sure what public order is not according to the Brazilian Jurisprudence.

As Brazil is an arbitration-friendly country, STJ will homologate the foreign arbitration award as a rule. The defendant's public order argument attempt will only succeed if it is robust and, usually, based on precedents.

References

1. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, last accessed 2021/07/31.
2. https://www2.camara.leg.br/legin/fed/lei/1970-1979/lei-5869-11-janeiro-1973-357991-publicacaooriginal-1-pl.html, last accessed 2021/07/28.
3. https://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/doc.html#156, last accessed 2021/07/28.
4. https://www.boe.es/buscar/act.php?id=BOE-A-2003- 23646, last accessed 2021/08/01.
5. https://dre.pt/pesquisa/-/search/145578/details/maximized, last accessed 2021/08/01.
6. http://www.legislation.gov.uk/ukpga/1996/23/part/III, last accessed 2021/07/31.
7. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf, last accessed 2021/08/01.
8. https://sso.agc.gov.sg/Act/IAA1994#pr19-, last accessed 2021/07/28.
9. https://www.newyorkconvention.org/countries, last accessed 2021/07/28.
10. http://portal.stf.jus.br/, last accessed 2021/08/01.
11. https://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/doc.html#156, last accessed 2021/07/28.
12. https://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/doc.html#156, last accessed 2021/07/28.
13. https://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia- civil/arquivos/protocolo-las-lenhas/view, last accessed 2021/08/01.
14. STJ, CE, SEC nº 802/US, Min. Rel. José Delgado, DJe 19.09.2005. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
15. STJ, CE, SEC nº 507/EX, Rel. Min. Gilson Dipp, DJ 13.11.2006. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
16. STJ, CE, SEC nº 5.692, Rel. Min. Ari Pargendler, DJe 01.09.2014. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
17. STJ, CE, SEC nº 9.880/EX, Rel. Min. Maria Thereza de Assis Moura, DJe 27.05.2014. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
18. STJ, CE, SEC nº 11.969/EX, Rel. Min. Raul Araújo, DJe 02.02.2016. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
19. STJ, CE, SEC nº 5.692/EX, Rel. Min. Ari Pargendler, DJe 01.09.2014. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
20. STJ, CE, SEC nº 11.969/EX, Rel. Min. Raul Araújo, DJe 02.02.2016. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
21. STJ, CE, SEC nº 16.016/EX, Rel. Min. Nancy Andrighi, DJe 28.11.2017. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
22. STJ, CE, SEC nº 11.529/EX, Rel. Min. Og Fernandes, DJe, last accessed 2014/12/17.

23. STJ, CE, SEC nº 9.502/EX, Rel. Min. Maria Thereza Assis Moura, DJe 05.08.2014. See also: STJ, CE, SEC nº 6.753/EX, Rel. Min. Maria Thereza Assis Moura, DJe 19.08.2013. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
24. STJ, CE, SEC nº 12.493/EX, Rel. Min. Maria Thereza de Assis Moura, DJe 21.02.2017. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
25. STJ, CE, SEC nº 8.242/EX, Rel. Min. Maria Thereza de Assis Moura, DJe 15.03.2015. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
26. STJ, CE, SEC nº 10.643/EX, Rel. Min. Humberto Martins, DJe11.12.2014. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
27. STJ, CE, SEC nº 5.692/EX, Rel. Min. Ari Pargendler, DJe 01.09.2014. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
28. STJ, CE, SEC nº 3.891/EX, Rel. Min. Humberto Martins, DJe 16.10.2013. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
29. STJ, CE, SEC nº 4.024/EX, Rel. Min. Nancy Adrighi, DJe 13.03.2013. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
30. STJ, CE, SEC nº 16.016/EX, Rel. Min. Nancy Andrighi, DJe 28.11.2017. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
31. STJ, CE, SEC nº 3.035/FR, Rel. Min. Fernando Gonçalves, DJe 31.08.2009. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
32. STJ, CE, SEC nº 874/CH, Rel. Min. Francisco Falcão, DJ 15.05.2006. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
33. STJ, CE, SEC nº 7.009/EX, Rel. Min. Francisco Falcão, DJe 28.08.2018. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
34. STJ, CE, SEC nº 16.016/EX, Rel. Min. Nancy Andrighi, DJe 28.11.2017. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
35. STJ, CE, SEC nº 16.016/EX, Rel. Min. Nancy Andrighi, DJe 28.11.2017. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
36. STJ, CE, SEC nº 7.009/EX, Rel. Min. Francisco Falcão, DJe 28.08.2018. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
37. STJ, CE, SEC nº 14.385/EX, Rel. Min. Nancy Andrighi, DJe 21.08.2018. Retrieved from https://www.stj.jus.br/sites/portalp/Inicio, last accessed 2021/08/01.
38. Abbud, A.D.A., Levy, D., Alves, R.F.: Lei de Arbitragem Anotada. A jurisprudência do STF e do STJ. AASP. S√£o Paulo: Revista dos Tribunais, pp. 184-185, (2019).
39. https://www.ila-hq.org/, last accessed 2021/08/01.
40. https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx, last accessed 2020/03/09.
41. https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx, last accessed 2020/03/09.