The New York Convention And The Enforcement Of Foreign Arbitral Awards In Brazil

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Despite having been created 50 years ago, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") was only ratified by Brazil on July 23, 2002 with the enactment of Decree 4.311/2002.

The reasons behind Brazil's reluctance to formally adopt one of the most important documents in international arbitration fall outside the scope of this article. However, it is important to note that the Convention was indirectly internalized in Brazil by Law 9.307 of September 23, 1996 (the "Arbitration Act").

The informal adoption of the New York Convention five years before its official recognition by Decree 4.311/2002 occurred through articles 37, 38 and 39 of the Brazilian Arbitration Act, which set forth the standards for the enforcement of foreign arbitration awards, i.e. those "made outside of the national territory." These provisions clearly reflect the approach of Articles IV(1) and V of the New York Convention, as seen in the table below:

New York Convention	Brazilian Arbitration Act
1. 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.	**Article 37** 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 sworn translation.

Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.	**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; 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; III - 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; IV - 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; V - the commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause; VI - the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.
Article V 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country	**Article 39** The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court ascertains that: I - in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; II - the decision is offensive to national public policy.

Thus, under the provisions of the Brazilian Arbitration Act which mirror those of the New York Convention, 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.

Constitutional Amendment no. 45 of December 8, 2004 shifted the jurisdiction to confirm foreign arbitral awards from the Federal Supreme Court (the "STF") to the Superior Court of Justice (the "STJ"), the court of last recourse in disputes involving the interpretation of federal law (such as the Arbitration Act).

Therefore, 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 and the STJ 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 the present date, the STJ confirmed 13 of the 17 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. Information on foreign awards submitted to confirmation is contained in the two tables below: the first table covers foreign arbitral awards in the STF from 1996 – 2004, and the second table covers foreign arbitral awards in the more friendly STJ environment from 2005 – June 2008.

Confirmation Of Foreign Arbitral Awards By The Supreme Court — STF (1996-2004)

Case	Date	Summary	Holding
1. Plexus Cotton Limited v. Santana Têxtil S.A. (SEC 6.753-7)	Jul. 13, 2002	Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association)	Confirmation denied by unanimous vote; lack of written arbitral agreement – Article 37(II) of the Arbitration Act
2. MBV Comm. and Export. Mgt. v. Resil Indústria e Comércio Ltda. (SEC 5.206-7)	Dec. 12, 2001	*Ad hoc* arbitral award rendered by a sole arbitrator concerning the commissions owed by a Brazilian company (Resil) to its Swiss sales representative (MBV)	Confirmation granted by unanimous vote; leading case of the Supreme Court regarding the constitutionality of the Brazilian Arbitration Act

3. Elkem Chartering A/S v. Conan – Cia Navegação do Norte (SEC 5.828-7)	Dec. 6, 2000	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	Confirmation granted by unanimous vote; Arbitration Act shall be applied to proceedings commenced before its enactment
4. Tardivat International S/A v. B. Oliveira S/A (SEC 5.378-1)	Feb. 3, 2000	Arbitral award rendered by Havre's Coffee and Pepper Arbitration Association (France) regarding coffee purchase agreement	Confirmation denied by unanimous vote; Brazilian company (B. Oliveira) was not properly summoned to appear before the Arbitral Tribunal
5. Aiglon Dublin Limited v. Teka Tecelagem Kuenrich S.A. (SEC 5.847-1)	Dec. 1st, 1999	Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association	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")

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.

Confirmation Of Foreign Arbitral Awards By The Superior Court Of Justice — STJ (2005-June 2008)

Case	Date	Summary	Holding
1. Samsung Eletrônica da Amazônia Ltda. v. Carbografite Com. e Ind. e Part. Ltda. (SEC 1302) opinion not yet published	Jun. 6, 2008	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 agued the award will be used to defend itself against lawsuit filed by Carbografite before the Brazilian courts	Confirmation granted 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.")
2. Najuelsat S/A v. Embratel (SEC 1.305)	Nov. 30, 2007	Argentine company sought to enforce an ICC award rendered in Paris against Embratel	Confirmation granted after agreement between the parties involving the certification and notarization of arbitrators' signatures
3. Spie Enertran S/A v. Inepar S/A Indústria e Construções (SEC 831)	Oct. 3, 2007	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	Confirmation granted 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)

4. International Cotton Trading Limited v. Odil Pereira Campos Filho (SEC 1.210)	Jun. 6, 2007	Confirmation of foreign arbitral award rendered by the International Cotton Association (formerly known as Liverpool Cotton Association)	Confirmation granted 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
5. Bouvery International S/A v. Valex Exportadora de Café Ltda. (SEC 839	May 16, 2007	Arbitral award rendered by Havre's Coffee and Pepper Arbitration Association (France) regarding coffee purchase agreement	Confirmation granted by unanimous vote; kompetenz-kompetenz 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")
6. Mitsubishi Electric Corporation v. Evadin Indústrias Amazônica (SEC 349)	Mar. 21, 2007	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	Confirmation granted 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 ("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.")

7. First Brands do Brasil Ltda. v. STP – Petroplus Produtos Automotivos S.A. (SEC 611)	Nov. 23, 2006	Confirmation of ICC arbitral award rendered in Miami on a dispute involving the breach of joint venture agreements	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)[1]], this issue shall be resolved before the court where said action has been filed")

8. Grain Partners SPA v. Coopergrão(SEC 507)	Oct. 18, 2006	Italian company sought confirmation of arbitral award rendered by the Federation of Oils, Seeds and Fats Association Limited in London against Brazilian soy producers	Confirmation granted by unanimous vote; attempt by a judgment-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 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 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
9. Plexus Cotton Limited v. Santana Têxtil S.A. (SEC 967)	Oct. 10, 2006	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	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)
10. Subway Partners v. HTP High Technology Foods Corporation S.A. ("Subway Brasil") (SEC 833)	Aug. 16, 2006	Subway Partners sought to confirm award rendered by the American Arbitration Association (AAA) in New York against its Brazilian franchisee	Confirmation denied by majority opinion; STJ held that the Brazilian franchisee had not been properly summoned to appear before the Arbitral Tribunal

11. Gottwald Port Technology GMBH v. Rodrimar S.A. (SEC 968)	Jun. 30, 2006	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	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")
12. Tremond Alloys and Metals Corp v. Metaltubos Ind. E Com. De Metais Ltda. (SEC 760)	Jun. 19, 2006	American metal company (Tremond) sought to enforce an award rendered by the AAA against a Brazilian purchaser (Metaltubos)	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

13. Oleaginosa Moreno Hermanos v. Moinho Paulista Ltda. (SEC 866)	May 17, 2006	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	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 New York Convention,[2] 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
14. Union Europeénne de Gymnastique – UEG v. Multipole Distribuidora de Filmes Ltda. (SEC 874)	Apr. 19, 2006	European Gymnastics Association sought to confirm an award rendered by the Court of Arbitration for Sport in Switzerland regarding the breach of contract to broadcast gymnastics events	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
15. Bouvery International S/A v. Irmãos Pereira – Com. e Exp. Ltda. (SEC 887)	Mar. 6, 2006	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	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
16. Thales Geosolutions Inc. v. Fonseca Almeida Rep. E Com. Ltda. (SEC 802)	Aug. 17, 2005	American subsidiary of French company (Thales) sought confirmation of ad-hoc award (UNCITRAL) regarding the breach of geological survey agreement with Brazilian company	Confirmation granted by unanimous vote; the STJ held that the Brazilian company's attempt to raise the defense of unperformed contract (exceptio non adimpleti contractus) does not fall within the concept of "public order" as grounds for refusal to confirm a foreign arbitral award

17. L'Aiglon S/A v. Têxtil União S/A (SEC 856)	May 18, 2005	Swiss company sought to confirm award rendered by the Liverpool Cotton Association	Confirmation granted by unanimous vote; the STJ held that the Swiss company failed to produce the "agreement in writing" or the "exchange of letters" concerning the existence of an arbitral agreement, as stated in Article II(2) of the New York Convention. However, the Brazilian company actively participated in the proceedings before the LCA by appointing its arbitrator and filing an appeal against the award. Therefore, the existence of a valid arbitral agreement between the parties has been duly demonstrated for purposes of Article 37(II) of the Arbitration Act

Summary Of Federal Superior Court Of Justice (STJ) Confirmation Cases From 2005 – June 2008:

13 foreign awards confirmed, 4 denied.

All foreign awards have been confirmed or denied using the Brazilian Arbitration Act as the preponderant basis (Articles 37, 38 and 39). In three 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:

- *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 or telegrams" demonstrating their intention to submit the case to arbitration, as required by Article II(2) of the NYC.

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.

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Endnotes

1. 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."

2. Article II(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." ■