Enforcement of arbitral awards in Brazil: overview

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ENFORCEMENT OF ARBITRAL AWARDS
Definitions and preliminary proceedings

1. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

Although it is not defined, an "arbitral award" is a decision given by an arbitrator or an arbitral tribunal in the course of arbitration proceedings through which the arbitrator or arbitral tribunal decides on the dispute, partially or completely. Among other requirements established in Articles 26 and 27 of the Brazilian Arbitration Law (Federal Law No. 9,307/96), arbitral awards given in Brazil must be in writing.

However, contrary to the United Nations Commission on International Trade Law (UNCITRAL) Model Law, the Brazilian Arbitration Law adopts a monist approach (that is, it does not distinguish between domestic and international arbitration). Brazil has opted instead to regulate how a foreign arbitral decision is to be recognised and enforced in Brazil after the due process of ratification (homologation) before the Superior Court of Justice, which is the highest court for non-constitutional matters. Therefore, the law only differentiates foreign and national awards based on the place where they were given in accordance with the provisions of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

2. Are decisions in preliminary/provisional proceedings recognised and enforceable?

Domestic arbitral decisions

Preliminary, provisional or precautionary arbitral decisions, including partial or interim awards, given by arbitrators or arbitral tribunals within the Brazilian jurisdiction are enforceable before the courts. The Brazilian Arbitration Law also admits the possibility of preliminary, provisional or precautionary decisions being given by the courts before the commencement of the arbitration (Articles 22-A and 22-B, Brazilian Arbitration Law).

Foreign arbitral decisions

The Brazilian Arbitration Law establishes that the Superior Court of Justice is the competent court for the recognition and enforcement of foreign arbitral awards or decisions. The law also sets out that recognition and enforcement must be performed according to the applicable international treaties and, only in the absence of those, according to the provisions contained in the Brazilian Arbitration Law and in the Superior Court of Justice's Rules of Procedure.

Uncertainty remains regarding the possibility of preliminary, provisional or precautionary arbitral decisions being recognised and enforced, especially because one of the requirements set out by the law is that these decisions or awards must be final and no longer appealable (res judicata) (Article 216-D, III, Superior Court of Justice's Rules of Procedure). However, there is a consensus among scholars that partial arbitral awards are final on the matters decided under them and that interim decisions can be recognised and enforced if they are at the moment enforceable in the jurisdiction where they were given.

Applicable conventions

3. What conventions is your jurisdiction a contracting party to?

There are four treaties in force that consolidate the most important regulations on the recognition and enforcement of arbitral awards:

- OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) was approved on 6 June 1995 (Legislative Order No. 90) and ordered to be executed on 9 May 1996 (Decree No. 1.902).
- OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979 was approved on 20 June 1995 (Legislative Order No. 93) and ordered to be executed on 2 December 1997 (Decree No. 2.411).
- UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) was approved on 25 April 2002 (Legislative Order No. 52) and ordered to be executed on 23 June 2002 (Decree No. 4.311).
- The Mercosur Accord on International Commercial Arbitration-Buenos Aires Convention was signed on 23 July 1998, approved on 29 December 2000 (Legislative Order No. 265) and ordered to be executed on 4 June 2003 (Decree No. 4.719).

Enforcing awards

4. What is the applicable statutory framework for enforcement of awards?

The legal framework for arbitration consists of the Brazilian Arbitration Law and the arbitration-related provisions contained in the Brazilian Code of Civil Procedure. Brazil has recently enacted a new Code of Civil Procedure (to enter into effect as of March 2016), which brings about important improvements in the legal framework for arbitration.

Regarding the international conventions that Brazil is a party to, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) are the main applicable treaties (see Question 3).
5. **What are the grounds for refusing enforcement?**

**Domestic awards**

The courts can set aside a domestic arbitral award if the (Article 32, Brazilian Arbitration Law):

- Arbitration agreement on which the arbitral proceedings were based is null.
- Arbitral award was given by a person or persons who could not act as an arbitrator or arbitrators.
- Arbitral award lacks any of the requirements set out in Article 26 of the Brazilian Arbitration Law, which are:
  - a report with a synthesis of the dispute and the names of the parties;
  - the grounds and foundations on which the award was based;
  - a provision excerpt containing a decision on the matter;
  - the date and place where it was given; and
  - the signature of the arbitrator(s).
- Content of the award exceeds the limits of the arbitration agreement.
- Giving of the decision was affected by acts of malfeasance, graft or corruption.
- Award was given in an untimely way.
- Award derives from proceedings on which the principles of adversary, parties' equality, arbitrator's impartiality and free persuasion were not duly observed.

**Foreign awards**

The Superior Court of Justice can refuse to recognise foreign arbitral awards if it finds that (Articles 38 and 39, Brazilian Arbitration Law; Articles 216-D and 216-F, Superior Court of Justice's Rules of Procedure):

- According to the law, the object of the dispute cannot be arbitrated.
- The award offends national public policy.
- The award was not issued by the competent authority.
- There is not sufficient evidence that the parties were regularly served process or that a default judgment occurred lawfully.
- The award is not final in the sense that it is not enforceable in the jurisdiction where it was given.
- The award offends national sovereignty, the dignity of the human person or public policy.

6. **Is the enforcing court required to examine the refusal grounds during the enforcement proceedings ex officio?**

The Superior Court of Justice must examine the legal requirements for the enforcement request ex officio (see Question 5). This means that it is not bound to the defence arguments eventually raised by the defendant party.

7. **What is the effect of pending challenge proceedings in the foreign state where the decision is granted?**

The Superior Court of Justice can refuse to recognise and enforce a foreign arbitral award if challenge proceedings are pending in the foreign state where the decision was granted (Article 216-D, III, Superior Court of Justice's Rules of Procedure). However, the court has demonstrated an increasing acceptance towards the position of recognising and enforcing arbitral awards if they are enforceable in the jurisdiction where they were given when the recognition was requested.

8. **What types of arbitral awards are enforceable?**

**Money awards**

Money awards are enforceable.

**Awards containing injunctions ordering or prohibiting the doing of acts**

Awards ordering or prohibiting the doing of acts are enforceable in theory, if they do not violate Brazil's public policy.

**Decisions or awards by arbitral tribunals (including emergency arbitrators) granting provisional measures**

Decisions or awards granting provisional measures are enforceable in theory, if they are final on the matters decided under them and if they are enforceable in the jurisdiction where they were given when recognition was requested.

**Declaratory awards**

Declaratory awards are enforceable.

9. **Can parties seek to enforce only part of the award?**

Parties can seek to enforce only part of the award. In fact, the courts, including the Superior Court of Justice, can grant partial recognition of foreign arbitration awards, for example, where formal irregularities affect only a part of the award. For obvious reasons, a partial recognition and enforcement can also arise when the parties expressly ask for the recognition and enforcement of only part of the award.

10. **Are any class of awards excluded from recognition and enforcement? If so, what types of awards?**

The law does not provide for the exclusion from recognition and enforcement of specific classes of awards. However, to be recognised and enforced, all arbitral awards must comply with the requirements established under the law and so it must not contain any of the defined irregularities (see Question 5).

11. **Will service that does not conform to the requirements of international treaties/regulations in force automatically result in a denial of the enforcement of an award?**

Service of process is considered valid and legal if performed in accordance with the arbitration agreement or the procedural laws of the jurisdiction where the arbitral proceedings took place (Article 39, Brazilian Arbitration Law). Therefore, service of process that does not conform to the requirements of international treaties or regulations will not automatically result in a denial of the enforcement of the arbitral award.

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12. What methods of service are not acceptable against defendants domiciled in the state where enforcement is sought?

Inadmissible methods are those incompatible with the law, the arbitration agreement and the procedural rules of the jurisdiction where the arbitral proceedings took place.

Public policy

13. Which country’s public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or international award?

Any and all procedures for the enforcement of arbitral awards are performed in accordance with public policy principles. According to the law, public policy is preserved if the process was served in accordance with the arbitration agreement or with the procedural rules of the jurisdiction where the arbitral proceedings took place.

Domestic awards

With domestic arbitral awards, the conformity of the award to public policy principles is not directly analysed, as enforcement proceedings depend solely on the award given in accordance with the necessary requirements (see Question 3). A violation of public policy is not per se a ground for setting aside an arbitral award.

Foreign awards

However, with foreign awards, the conformity of the award to public policy principles is a fundamental issue. Foreign awards are expressly determined as not being recognised if their content is in any way contrary to national sovereignty, the dignity of the human person or public policy (Article 216-F, Superior Court of Justice's Rules of Procedure). It is not clear from the case law whether the Superior Court of Justice considers an international or transnational public policy when interpreting such a legal provision.

14. In which cases and against which awards has the principle of public policy generally been applied?

The notion of public policy has been applied to the violation of the defendant's right to a full defence, for example, for irregularity on the service of process. Violation of public policy has also already been recognised in cases where:

- The arbitration commitment was not signed or agreed on by one of the parties.
- Where one of the parties was not legally authorised to celebrate an arbitration agreement.
- If the matter cannot be arbitrated (for example, a person’s nationality or paternity issues).

ENFORCEMENT PROCEEDINGS

Procedure

15. What is the procedure for enforcing arbitral awards?

Domestic awards

Domestic arbitral awards have the same status as a court judgment (Article 3, Brazilian Arbitration Law; Article 475-N, IV, Brazilian Code of Civil Procedure). Therefore, these awards are immediately enforceable through the courts, regardless of any prior recognition.

Ex parte or on notice. The application must be on notice in the first instance.

Applicable court. Since domestic arbitral awards do not need recognition, they can be immediately enforced after their issuance before the competent national court.

Limitation period. The law is not clear on this matter, but it is widely accepted in jurisprudence that there are limitation periods for the enforcement of domestic arbitral awards, as with the enforcement of judicial awards. The law is extremely complex in relation to limitation periods, as these can vary widely depending on:

- The nature of the award (declaratory, condemnatory, constitutive).
- The nature of the rights and obligations discussed under the award (the law sets out different limitations for different obligations).
- The occurrence of events that could suspend or result in the limitation period restarting.

Generally, it is possible to affirm that the limitation period for the commencement of enforcement proceedings of the domestic arbitral award is the same one applicable for the commencement of the arbitral proceeding itself.

Timing. Approximately one and a half years to two and a half years, depending on the competent court and on the availability of the debtor’s assets.

Court fees. The costs of litigation depend on two key factors:

- The amount of the claim.
- The complexity of the claim.

Each court has a different method for calculating its costs, but they usually reflect a percentage of the amount under discussion. The party that initiates proceedings must bear the initial costs (usually 1% to 5% of the claim or economic benefit arising from the claim).

Recourse. A court’s decision to grant the enforcement of the domestic arbitral award can be challenged by the defendant party through different procedural instruments, such as:

- Challenge of the enforcement proceeding (impugnação ao cumprimento de sentença).
- General defence filed in the course of the enforcement proceedings.

A decision that denies enforcement can be challenged by the interested party through an appeal (apelação), which would remand the case to the competent court of appeals.

Foreign awards

The procedures for the recognition of foreign awards and the concession of exequatur are regulated by the law (Articles 216-A to 216-X, Superior Court of Justice’s Rules of Procedure). The procedure for the recognition of foreign awards consists of the following main steps:

- The applicant requests recognition and provides the necessary documents.
- The respondent is served process and must present its defence within 15 days of service.
- Where the recognition is not disputed, the case is judged by the President of the Superior Court of Justice or the Reporting Justice on his own.
- Where a defence is presented, the case is adjudicated by the Special Court of the Superior Court of Justice (consisting of 15 of the most senior Justices of the Superior Court).

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• The Public Attorney's Office is given an opportunity to present its opinion on the case.
• The Superior Court of Justice's Special Court gives its decision on the recognition of the award.

Ex parte or on notice. The valid summoning of the defendant is a legal requirement under the law for the enforcement of foreign awards. Therefore, an ex parte judgment or award cannot be accepted for ratification or enforcement.

Applicable court. The jurisdiction for ratifying the foreign decision or award is of the Superior Court of Justice. Once the exequatur is granted by the Superior Court of Justice, the creditor can then file an application for the enforcement of the award against the debtor before the competent local federal court.

Limitation period. The law is silent when it comes to limitation periods for the recognition and enforcement of foreign arbitral awards, and it is still uncertain whether limitations apply. Generally, scholars' opinions are that the recognition and enforcement of the foreign arbitral award is possible during the period through which the award is enforceable in the jurisdiction where it was given. Therefore, limitation periods can vary significantly, depending on the provisions applicable in the relevant foreign jurisdiction.

Timing. A time estimate for the superior court to ratify the foreign decision or award and grant its enforcement can vary between six months to two years, depending on the circumstances of each case and especially on whether the opponent presents any challenges to the enforcement request.

Court fees. The court's costs for the request for ratification of the foreign decision or award before the Superior Court of Justice are approximately US$70.

Recourse. For the enforcement of foreign awards, the initial decision given by the President of the Superior Court of Justice to grant or deny enforcement can be challenged through a special appeal based on the court's Rules of Procedure (agravo regimental), which remands the matter to the court's Special Court. The final decision given by the Special Court in theory is not appealable, but can be the subject of a request for clarification (embargos de declarada). If constitutional arguments are made, some argue that the final decision given by the Special Court can still be appealed before the Federal Supreme Court, which is the highest court in the country for constitutional matters.

16. Can the enforcing court review the foreign award if all formalities were complied with and if the award meets all requirements?

The enforcing court does not review the merits of the judgment or award. The Superior Court of Justice (foreign arbitral awards) and the competent courts (domestic arbitral awards) only analyse the external and formal aspects of the enforcing decision and the fulfillment of the necessary legal requirements (see Question 15).

Formalities

17. What are the documentary requirements for enforcement?

Documentary requirements
Among the documentary requirements for enforcement, the enforcing party must provide the court with the:
• Original or a certified copy of the full text of the judgment or award.
• Statement issued by the court confirming that it is final (res judicata).

18. Is it required to translate the award into the language of the state where enforcement is requested?

Translations
All foreign documents must be translated into Portuguese by a sworn translator.

Other languages
In some cases, documents written in Spanish can be accepted by the court without the need for translation, although it is prudent to provide the proper translations.

Certification
The translation must be performed by a sworn translator duly registered in Brazil or by an official translator registered in the foreign country.

19. What is the format of the application for a declaration of enforceability?

The application for a declaration of enforceability is presented to the Superior Court of Justice in the form of a petition or a brief, following the requirements of a regular judicial claim, under the governing rules of the Brazilian Code of Civil Procedure.

20. What information must be included in the application regarding the award, the claim as awarded in the award, the facts and legal grounds of the case, and that the judgment is no longer appealable?

Award
The application must:
• Include a brief summary of the facts of the case.
• Indicate the parties involved.
• Identify the arbitrator or arbitral tribunal that gave the award.
• Provide the court with the decision to be enforced.

However, as the enforcing court will not review or discuss the merits of the case, it is important to focus on demonstrating the fulfillment of all formal requirements for enforcement.

Claim as awarded
The application must indicate clearly how the arbitral award resolved the dispute and what obligations and orders (if any) were imposed on each of the parties.
Facts and legal grounds
The application must present, in general terms, the facts and legal grounds of the case, so that the enforcing court can analyse its conformity to the necessary requirements and principles (see Question 9). However, it is not necessary for the interested party to provide a thorough analysis of the case, as the enforcing court only examines the formal adequacy of the award.

Appeals
With foreign arbitral awards, it is important that the interested party demonstrate that the award is no longer appealable or, at least, that it is enforceable in the jurisdiction where it was given at the time. With domestic arbitral awards, the party must demonstrate that the decision is:
- No longer appealable.
- Enforceable at the time if they are partial awards.

21. Is it possible to request the enforcing court for provisional measures pending the enforcement proceedings?
During enforcement proceedings, it is possible to seek urgent provisional measures as long as the applicant can demonstrate reasonable grounds and urgency for such a request, without which the rights or the object of the proceedings can be lost, for example, if the debtor is disposing of his assets.

22. Is it required to convert the value of the award into the local currency?
For the declaration of enforceability, there is no need to update or convert the claim amount into the local currency. However, after the Superior Court of Justice ratifies the foreign decision or award, the applicant must update and convert the final figures into Brazilian Reais to initiate the enforcement proceedings against the debtor.

23. Can the enforcing court stay the enforcement proceedings pending the outcome of proceedings to set aside the award at the seat of arbitration? If so, will the court order the party seeking the stay to provide security?
Exceptionally, the enforcing court can stay the proceedings if it understands that there are indications that the arbitral award is formally irregular and its enforcement may cause the defendant an irreparable or hardly reversible harm. In specific situations, the court can order the party seeking the stay to provide security, but this depends on the particularities of the case.

ACTUAL ENFORCEMENT

24. What is the enforcement procedure when a declaration of enforceability is granted?
After the exequer is granted by the Superior Court of Justice, the enforcement of the foreign award is performed through a letter of judgment, issued to the competent local federal court. The applicant files a formal enforcement request, pays the court costs and attaches the letter of judgment to be enforced by the competent local federal court. The federal judge then issues a new summons and payment order to the defendant, ordering him to satisfy amounts determined in the arbitration award.

When payment is involved, the summons incorporates a payment order. If the defendant does not pay, his assets are immediately attached under the applicable provisions of the Brazilian Code of Civil Procedure. Once the defendant’s assets are attached, he can still challenge the enforcement at the local federal court or can then appeal any unfavourable decision to the Federal Court of Appeals.

25. Can defendants oppose the actual enforcement procedure, and if so, on what grounds/defences?
The defendant can challenge the enforcement arguing, for example, an incorrect attachment of assets or excess of the amounts enforced or attached.

PROPOSALS FOR REFORM

26. Are any changes to the law currently under consideration or being proposed?
Brazil’s legal framework on arbitration was very recently reformed by the enactment of Law No. 13,129/2015, which significantly improved the original version of the Brazilian Arbitration Law and basically implemented positions that had already been well established by the courts. Important innovations relating to arbitration were also brought about by the new Brazilian Code of Civil Procedure, already enacted and entering into effect as of March 2016. For these reasons, there are no changes to the law under consideration or being proposed at this moment.

ONLINE RESOURCES
CBAR – Brazilian Arbitration Committee
http://cbar.org.br/site/legislacao-nacional/lei-9-30796-em-ingles

Description. There is not an official translation, but the Brazilian Arbitration Committee (CBAR) have drafted a trustworthy and regularly used translation of the Brazilian Arbitration Law into English, in addition to other arbitration-related materials (some of them also in English).
Practical Law Contributor profiles

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