

# Fifty Years in Five? The Brazilian Approach to the New York Convention

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## Abstract

Despite Brazil's adoption of the New York Convention in 2002, national judges have not yet embraced it, applying instead the 1996 Arbitration Act when adjudicating enforcement claims of foreign arbitral awards.

This practice raises doubts about the extent to which Brazilian courts are undertaking a universal approach to the interpretation of the transnational standards governing recognition of foreign awards in the country.

While the basic underpinning of the Convention has in fact been adopted by Brazilian judges, they have failed to give due consideration to the legal principles and doctrine amassed in the five decades of the New York Convention. Judges have applied domestic provisions that necessarily interface with international standards, such as those related to public policy and the validity of the arbitration

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agreement, in a mostly isolated fashion. Accordingly, the substantive application of the Convention could bridge the gap between domestic practice and the body of knowledge built around the Convention, helping Brazilian case law to align itself with the transnational approach to the enforcement of foreign arbitral awards.

## 1 Introduction

During the second half of the Fifties, the slogan “fifty years in five” became the uppermost symbol of the political and economic environment in Brazil. President Juscelino Kubitschek adopted this slogan to designate the central aim of his administration: bring the country to a period of continuous development and economic prosperity, fast enough to attain in five years what would typically take fifty to be accomplished.

Coincidentally, in 2008, when the 50th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention, or Convention) was celebrated,<sup>2</sup> practitioners also witnessed the fifth year of the legal framework that currently governs the recognition of foreign awards in Brazil, crafted after that Convention’s late adoption in the country.<sup>3</sup>

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<sup>2</sup> The convention was adopted by diplomatic conference on 10 June 1958.

<sup>3</sup> The final milestone in that framework took place in 2004, when exclusive jurisdiction to hear recognition claims was attributed to the Superior Court of Justice (*Superior Tribunal de Justiça*).

In fact, as a result of a traditional prejudice against private dispute resolution systems, Brazil only ratified the New York Convention in June 2002, becoming one of the most recent countries where that treaty entered into force.<sup>4</sup>

Nonetheless, the use of arbitration as a means of resolving international conflicts had been rapidly expanding among Brazilian companies since 1996, when Congress passed a new law with the purpose of fostering arbitration in the country (Arbitration Act - no. 9.307/1996). One of the objectives of the 1996 Arbitration Act was precisely to overcome the hurdles in putting the New York Convention into force. With that in mind, the legislator reproduced in the Act (Art. 37-39) the basic provisions of the Convention regarding the recognition and enforcement of foreign arbitral decisions. Thus, since 1996, domestic rules that are very similar to some of the Convention's main clauses have governed the enforcement of foreign awards in Brazil.

Still, the ultimate goal of strengthening arbitration – especially international commercial arbitration – could not have been achieved until the leading benchmark Convention in the field (van den Berg 1981), came into operation in the country.

After the New York Convention's promulgation in 2002, one would have expected that judicial opinions would turn their attention to the Convention. Due to unclear reasons, however, judges continue to make reference solely to the Arbitration Act instead of the Convention. This is the scenario in which the case law emerged and presently develops in the country.

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<sup>4</sup> The Convention's status is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/](http://www.uncitral.org/uncitral/en/uncitral_texts/)

The purpose of this paper is to examine the extent to which Brazilian judges are coping with the supranational standards embedded in the New York Convention, even though these standards have only been indirectly applied via the national Arbitration Act. Are the judges managing to take a universal approach to the interpretation of this national law when enforcing foreign arbitral awards? Do their methods and arguments meet the particular demands of international practices related to commercial arbitration? To what degree does the Brazilian practice as to enforcement of foreign awards fall within the general interpretive trends of the New York Convention, or contribute to its transnational harmonization?

In analyzing this issue, the paper will scrutinize the most important precedents issued so far on the enforcement of foreign arbitral awards. Even though Brazilian case law is still incipient with regard to many important questions raised by the Convention, this analysis will show, preliminarily, that the Superior Court of Justice seems to have adopted the main general policies underlying the New York Convention. A narrow interpretation of the exhaustive grounds for refusal of recognition, together with the avoidance of reassessing the merits of the arbitral decision, are some factors that are giving rise to a *pro-arbitration bias*.

Nevertheless, the analysis will also demonstrate that the case law is still finding its way in dealing with standards and matters particularly susceptible to supranational commercial and arbitral practices, of which the public policy exception is an example. The answers given so far to debates such as these involving the

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[arbitration/NYConvention\\_status.html](#).

lack of reasons for the award, written form and tacit acceptance of the arbitration agreement, are not entirely cohesive or satisfactory.

This paper then aims to show that the direct application of the New York Convention, as opposed to the national law, could help the case law to align with transnational best practices, by enriching the domestic decisions with the body of principles, precedents and methods that have been developed in the international commercial arbitration setting over the last fifty years.

## **2 Overcoming the traditional resistance in bringing the New York Convention into force: task accomplished?**

With the purpose of better understanding the domestic legal culture surrounding the recognition and enforcement of foreign arbitral awards in Brazil, it is important to briefly examine the context in which the New York Convention's adoption took place in the country.

There is no doubt that the Convention has encountered severe obstacles on its way to becoming operative in Brazil, the first evidence of which are the forty-four years lying between its conclusion and its adoption by the federal government. From the outset, legal counsels at the Ministry of Foreign Affairs opposed the nation's adherence to the document. In particular, one legal counsel, also a well known scholar, issued opinions in June and August 1958 recommending that Brazil not take part in the Convention. His main argument was that do-

mestic legislation only permitted the enforcement of foreign decisions issued by state authorities, i.e., public judges, thus banning the possibility of enforcing arbitral awards. Arbitral awards could only be recognizable in the territory if and when confirmed by a judicial decision in the country where rendered (Medeiros 2001).<sup>5</sup>

This reasoning had two long lasting consequences for arbitration in Brazil. First, it reinforced the burdensome system of the so-called *double exequatur*, whereby the parties had to obtain prior leave for enforcement from a court of the state where the arbitral award was made before seeking its recognition in the territory. Second, it prevented the ratification of the New York Convention in the country for more than four decades.

Nonetheless, in 1996, after a long period of time during which international arbitration – and arbitration in general – virtually stagnated in Brazil, Congress undertook its most successful attempt to promote the development of arbitration in the country by passing the Arbitration Act (no. 9.307/96).

The new Act abolished the requirement of *double exequatur* by granting arbitral awards the same authority as court decisions (Art. 18 and 31) and subjecting awards issued abroad only to enforcement proceedings in Brazil (Art. 35).<sup>6</sup> It thus removed an additional barrier to the enforcement of arbitral awards and made conflict resolution less lengthy and costly to the party interested in enforcing a foreign decision in the country.

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<sup>5</sup> The opinions relied upon an interpretation of Art. 15 of the Civil Code's Introductory Law.

Moreover, the Act roughly reproduced the basic provisions of the New York Convention regarding the recognition and enforcement of foreign arbitral awards, with the manifest purpose of circumventing resistance to the Convention. Indeed, the draft bill that later became the Arbitration Act was inspired by the New York Convention, as well as the UNCITRAL Model Law on International Commercial Arbitration and the Panama Convention of 1975 (Carmona 2004). As a result, Articles 38 and 39 of the Act restate in substance the grounds for refusal provided by Art. V(1) and (2) of the New York Convention.

As mentioned above, in 2002 the Convention was, at long last, approved and promulgated in Brazil.<sup>7</sup> The Convention entered into force in the midst of numerous structural reforms that were taking place in the country with the goal of modernizing the state and enhancing its openness to international trade and business.<sup>8</sup> Also, the long-standing resistance to the Convention's adoption had eroded after the end of the *double exequatur* requirement.

In 2004, an amendment to the Brazilian Constitution (no. 45/2004) shifted the original and exclusive jurisdiction to hear enforcement actions from the Federal Supreme Court to the Superior Court of Justice. The transfer aimed at increasing the speed of recognition proceedings (Gama Jr. 2005), by removing them from a court that has a massive workload as to constitutional matters. As a

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<sup>6</sup> The leading case recognizing the end of the *double exequatur* requirement is *MBV Commercial and Export Management Establishment v. Resil Indústria e Comércio Ltda.* (S.T.F., SE-AgR No. 5206, Relator: Sepúlveda Pertence, 30.04.2004, S.T.F.J.).

<sup>7</sup> See the Legislative Decree no. 52/2002 and the Executive Decree no. 4311/2002.

<sup>8</sup> See, e.g., the Federal laws no. 8884/1994 and 10149/2000 (antitrust), 8987/1995 (public concessions), no. 9279/1996 (intellectual property), no. 9472/1997 (telecommunications), no.

result, since 2004 the Superior Court of Justice has been the locus where Brazilian modern case law concerning the enforcement of foreign arbitral awards emerges and develops.

Despite the Convention's entry into force, however, Brazilian judges continued to solely apply the domestic legislation on arbitration. In fact, local judges have made virtually no reference to the New York Convention so far. Even though parties invoke its provisions quite often, claims have been decided exclusively on the basis of the national Arbitration Act.

The reasons for that omission are uncertain, but some conjecture is possible. First and foremost, as abovementioned, the grounds for refusal of enforcement provided by the Arbitration Act and the New York Convention are very similar. This removes incentives for judges to make use of the latter, especially considering that the Convention entered into force after the Act was enacted.

In addition, and more generally, one could argue that it is more convenient for national courts to apply local law than transnational provisions. Ascertaining the binding effect of a federal statute is more straightforward than an international agreement, subject to several cumulative steps to enter in effect in the territory (i.e., signature or accession, legislative approval, ratification, and executive promulgation).

Further, and perhaps most importantly, judges may feel more comfortable in dealing with rules that originated in and belong to their own cultural environment. It is easier to employ purposive and systemic interpretation; judges are

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9478/1997 and 10433/2002 (energy policy), no. 9610/1998 (copyright), no. 101/2000 (public fi-

chiefly trained to maneuver domestic legal materials; and interpretation tools such as precedents, doctrines and scholarly books and articles are more readily available. All in all, the result is that local judges seem to perceive national legal provisions as more binding (hard law) and having a stronger persuasive effect in judicial opinions than the supranational law (soft law).

There are several examples that illustrate the above analysis, within the field of international arbitration. Apart from the non-application of the New York Convention, Brazilian courts have never invoked the Inter-American Conventions on International Commercial Arbitration (Panama, 1975) and on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, 1979), despite the fact that they were promulgated as long ago as 1996 and 1997, respectively.<sup>9</sup> Also, the Las Leñas Protocol of 1992 for the MERCOSUL has barely been applied to the recognition of foreign decisions thus far, the same being true as for many valid bilateral treaties on the subject.<sup>10</sup>

The fact that Brazilian judges have remained silent about the New York Convention raises some questions: is it sufficient to apply only the Arbitration Act to the recognition of foreign arbitral awards falling under the Convention? How has the exclusive employment of domestic legal materials affected the enforcement of foreign awards in Brazil? Are the boundaries of the national legal system able to cope with the transnational standards and practices embedded in the Convention, and in international commercial arbitration in general?

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nance), no. 10233/2001 (transportation).

<sup>9</sup> See the Executive Decrees no. 1902/96 and 2411/97.

Any answers to these questions presuppose a survey of the existent national case law, to which this article turns next. Even though the precedents on the enforcement of foreign arbitral decisions are not abundant, they allow one to access the court's current vision on some crucial issues for the efficacy of international commercial arbitration, as well as for the uniform implementation of the New York Convention. The review of case law shows that the Brazilian practice would benefit from a different approach to the Convention, by broadening its argumentative repertory to encompass the debates, precedents and principles that surround the New York Convention's application in the international arena.

### **3 The current judicial approach to the recognition and enforcement of foreign awards**

The investigation of Brazilian case law will proceed as follows. First, the general policies and principles underlying the recognition of foreign arbitral awards in Brazil will be considered. Then, the article will focus on some specific controversial themes regarding the public policy provision and the written form requirement of the arbitration agreement.

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<sup>10</sup> See, e.g., the bilateral treaties signed by Brazil and Uruguay (executive decree no. 1850/1996), Argentina (no. 1560/1995), Spain (no. 166/1991), and France (no. 91.207/1985).

### ***3.1 The basic framework***

As recognized by courts and scholars worldwide, the New York Convention's main purpose was to facilitate the recognition and enforcement of foreign arbitral awards and arbitration agreements in the signatory countries (van den Berg 1981). Underlying the Convention there is a strong policy in favor of arbitral dispute resolution, as asserted by the U.S. Supreme Court in the landmark *Mitsubishi Motors* case.<sup>11</sup> A corollary of this policy is that the treaty's provisions set up a clear presumption for the enforceability of arbitral awards (Born 1999).

Three main features of the Convention's clauses regarding the recognition of foreign awards convey this favorable approach towards arbitration, the so-called *pro-enforcement bias*.<sup>12</sup> First, the text provides a small and limited number of grounds under which a court can deny enforcement to an award (Art. V(1)(a-e) and (2)(a-b)). Second, none of the grounds for refusal give room to a review of the arbitration's merits. More generally, these provisions are to be construed narrowly by the interpreter. Third, the party opposing recognition of an award has the burden to prove that the case falls into one of the circumstances of Art. V – except for the public policy defense, which the court can invoke on its own motion (Art. V, 2) (van den Berg 2003).

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<sup>11</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974).

<sup>12</sup> See *Parsons & Whitmore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier*, 744 F.2d 1482; 1984 U.S. App. LEXIS 17332.

The precedents rendered so far by the Superior Court of Justice signal that a general policy in favor of international arbitration has been embraced. Since 2004, the vast majority of enforcement claims brought to the Court have been granted.<sup>13</sup> The acknowledgment that there can be no re-examination of the merits at the enforcement proceedings has appeared within the decisions to the point of becoming commonplace.<sup>14</sup> By that same token, the Court has constantly stated that the analysis should be restricted to the provisions of Articles 38-39 of the Arbitration Act (corresponding to Art. V of the Convention). As a result, judges have rejected defendants' objections to enforcement not enumerated in that list, such as previous breaches of contract (see Sect. 3.2), general errors of fact or law,<sup>15</sup> violation of Brazilian consumer law, non-translation of the applicable arbitration law, frustration of purpose (impossibility-of-performance doctrine),<sup>16</sup> and fines not provided as remedy for breach of contract.<sup>17</sup> And as mentioned above (see Chap.

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<sup>13</sup> 15 out of 19 already adjudicated enforcement claims were granted by the Court, a ratio of 79%.

<sup>14</sup> See, e.g., *Bouvery International S.A. v. Valex Exportadora de Café Ltda.* (S.T.J., SEC No. 839, Relator: Cesar Asfor Rocha, 16.05.2007, S.T.J.J.), *GuidoSimplex – Società in Nome Collettivo di Giancarlo Venturini v. Cavenaghi Cavenaghi e Companhia Ltda.* (S.T.J., SEC No. 918, Relator: Cesar Asfor Rocha, 29.06.2007, S.T.J.J.), *Grain Partners SPA v. Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda.* (S.T.J., SEC No. 507, Relator: Gilson Dipp, 18.10.2006, S.T.J.J.), *First Brands do Brasil Ltda. v. STP – Petroplus Produtos Automotivos S.A. PPA* (S.T.J., SEC No. 611, Relator: João Otávio de Noronha, 11.12.2006, S.T.J.J.).

<sup>15</sup> *First Brands do Brasil Ltda. v. STP – Petroplus Produtos Automotivos S.A. PPA*, supra n. 14.

<sup>16</sup> *Union Européenne de Gymnastique v. Multipole Distribuidora de Filmes Ltda.* (S.T.J., SEC No. 874, Relator: Francisco Falcão, 19.04.2006, S.T.J.J.).

<sup>17</sup> *GuidoSimplex – Società in Nome Collettivo di Giancarlo Venturini v. Cavenaghi Cavenaghi e Companhia Ltda.*, supra n. 14.

2), obtaining a leave for enforcement in the country of origin has been consistently deemed unnecessary.<sup>18</sup>

The case law therefore endorses the exhaustive character of the grounds for denial of enforcement, as well as the narrow interpretation that ought to be given to them. In addition, judges have already recognized that the burden of proving the occurrence of any obstacle to recognition provided by Article 38 of the Arbitration Act (corresponding to Art. V(1) of the Convention) lies with the respondent.<sup>19</sup> All in all, the Court has scrutinized foreign awards with sufficient caution to ensure that they do not step outside the boundaries of Article V, nor second-guess the judgment rendered by arbitrators.

In this sense, the Brazilian and transnational judicial approaches to the New York Convention's basic framework regarding the enforcement of arbitral awards are very similar. As a general rule, both demonstrate a pro-arbitration bias and openness to foreign decisions.

### ***3.2 The public policy exception to enforcement***

Turning to specific grounds for denial of enforcement, the treatment given so far by the Superior Court of Justice to the public policy exception is par-

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<sup>18</sup> See, e.g., *Litsa Líneas de Transmisión del Litoral S.A. v. SV Engenharia S.A.* (S.T.J., SEC No. 894, Relator: Nancy Andrichi, 20.08.2008, S.T.J.J.), *Spie Enertrans S.A. v. Inepar S.A. Indústria e Construções* (S.T.J., SEC No. 831, Relator: Arnaldo Esteves Lima, 03.10.2007, S.T.J.J.).

ticularly worthy of analysis. This provision not only contains a supranational standard of crucial importance to the New York Convention system, but it also has been frequently relied upon by the parties opposing recognition of foreign awards in Brazil. It thus represents a useful tool in evaluating Brazil's acceptance of the Convention, as well as the way national case law fits into the interpretive trends of the public policy standard throughout the world.

Transnational practitioners draw a distinction between purely domestic and international public policy (*ordre public à usage international*). The former is deemed to apply to the relations established exclusively in the national setting, whereas the latter pertains to a country's international relations. Hence, the range of matters encompassed by international public policy is narrower than that belonging to the domestic one.<sup>20</sup> In foreign jurisdictions, many courts have embraced this distinction, applying the more limited international public policy test when interpreting Article V(2) of the New York Convention (Redfern and Hunter 2004; Sanders 1979; van den Berg 1981; Kleinheisterkamp 2005; Cole 1986).<sup>21</sup>

In Brazil, this distinction has not been acknowledged in the cases adjudicated so far. As a matter of fact, one of the first decisions issued by the Superior

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<sup>19</sup> *Bouvery International S.A. v. Irmãos Pereira Comercial e Exportadora Ltda.* (S.T.J., SEC No. 887, Relator: João Otávio de Noronha, 06.03.2006, S.T.J.J.).

<sup>20</sup> According to the Recommendation 1(c) of the Final Report on Public Policy of the ILA Committee on International Arbitration (Resolution 2/2002), "the expression international public policy (...) designate(s) the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy)".

<sup>21</sup> For a survey of the court decisions, see the Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards of the ILA Committee on International Arbitration (London Conference Report, 2000).

Court of Justice in an enforcement proceeding signaled that the broader meaning of public policy – the one involving domestic concerns – would be adopted.<sup>22</sup>

Nonetheless, the precedents that followed employed a restricted conception of the public policy test, even though no reference has been made to the notion of international public policy. Several cases have recognized that the situations triggering application of Article 39 of the Arbitration Act (corresponding to Art. V(2) of the Convention) are to be confined to a very limited set.

More specifically, on three occasions the Court has refused to regard as a violation of public policy the argument that the party requesting enforcement failed to comply with a contractual obligation in the first place (the so-called *exceptio non adimpleti contractus*). This exception, which the parties cannot circumvent in the domestic setting, was deemed not included among the grounds for denial of enforcement. Therefore, application of this exception would exceed the Court's powers when scrutinizing a foreign award.<sup>23</sup>

Additionally, in *Mitsubishi Electric Corporation*, the Court held that parallel proceedings on the same subject matter of the arbitration, pending before a state court at the time enforcement is sought, does not hinder the recognition of

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<sup>22</sup> In *Thales Geosolutions Inc. v. Fonseca Almeida Representações e Comércio Ltda.*, (S.T.J., SEC No. 802, Relator: José Delgado, 19.09.2005, S.T.J.J.), the Court attempted to draft a list of matters considered to belong to the public policy test, including all Constitutional, Procedural, Criminal, Administrative and Family Law, among others. Never being applied, the list has been in practice abandoned.

<sup>23</sup> See *Thales Geosolutions Inc. v. Fonseca Almeida Representações e Comércio Ltda.*, supra n. 22, *Grain Partners SPA v. Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda.*, supra n. 14, *International Cotton Trading Limited ICT v. Odil Pereira Campos Filho* (S.T.J., SEC No. 1210, Relator: Fernando Gonçalves, 20.06.2007, S.T.J.J.).

the foreign award under the public policy clause.<sup>24</sup> This ruling brought an end to an old judicial inconsistency over the question by repealing the rationale supporting the contrary precedents.<sup>25</sup> Similarly, in *First Brands do Brasil* the Court has recognized that an action to set aside an award pending in Brazil does not represent an obstacle to the enforcement of the arbitral decision.<sup>26</sup>

The Superior Court of Justice has also rejected several contentions that an award was contrary to public policy due to a violation of due process. For example, in *Spie Enertrans*, the party that entered into the arbitration agreement was later acquired by another company (Inepar S.A.), which thereby assumed the former's obligations. When a dispute arose, the successor company took part in the arbitration proceedings, but raised the question that it had not signed the arbitral convention, and an express manifestation of its willingness to be bound by the agreement was essential. The arbitral tribunal rejected the contention and issued an award in favor of the other party (Spie Enertrans).

During enforcement proceedings, Inepar invoked the same arguments and opposed recognition of the foreign award on public policy/due process grounds. The Court rejected the defendant's point of view, stating that Inepar had succeeded the incorporated company in all its rights and obligations – including the arbitration agreement. Thus, no breach of due process or public policy had oc-

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<sup>24</sup> *Mitsubishi Electric Corporation v. Evadin Indústrias Amazônia S.A.* (S.T.J., SEC No. 349, Relator: Eliana Calmon, 21.03.2007, S.T.J.J.).

<sup>25</sup> Prior to *Mitsubishi*, there were precedents issued on enforcement proceedings of foreign court decisions that both granted and denied recognition when parallel proceedings on the merits were pending before a Brazilian court. See, e.g., *Philipe Gallo v. Maria Augusta Gallo* (S.T.J., SEC No. 819, Relator: Humberto Gomes de Barros, 30.06.2006, S.T.J.J.); *Giuseppe Vaglio v. Daniela Montenegro Messeder* (S.T.F., SEC No. 7209, Relator: Marco Aurélio, 30.09.2004, S.T.F.J.).

curred, especially considering that Inepar had participated in the arbitral proceedings. Having amply debated the jurisdiction question as well as the merits, Inepar had been able to present his case before the arbitrators, and therefore could not allege violation to the right to a legal defense.<sup>27</sup>

By the same token, in the *Grain Partners* case the Court refused a contention that the arbitral tribunal had breached the defendant's right to counsel or to have a proper legal defense, thus being contrary to public policy. Oito Exportação argued that the arbitral proceedings were extremely costly, which impeded the party from nominating its arbitrator and later appealing against the award. The judges granted enforcement, holding that the parties not only had freely opted to enter into the arbitration agreement, but had also been informed of the proceedings' initiation and presented their defense. Hence, there was no violation to the due process clause.<sup>28</sup>

The due process/public policy challenge has been rejected not only where the defendant had actually presented his defense before the arbitral tribunal. Provided that the parties had been given proper notice of the arbitration proceedings, that is, had been granted full *opportunity* to participate in the process and present their case, albeit not making use of it, the Court has held that enforcement is to be granted to the foreign award.

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<sup>26</sup> *First Brands do Brasil Ltda. v. STP – Petroplus Produtos Automotivos S.A. PPA*, supra n. 14.

<sup>27</sup> *Spie Enertrans S.A. v. Inepar S.A. Indústria e Construções*, supra n. 18. See also *Litsa Linhas de Transmissão del Litoral S.A. v. SV Engenharia S.A.*, supra n. 18.

<sup>28</sup> *Grain Partners SPA v. Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda.*, supra n. 14.

In *Union Européenne de Gymnastique*, the arbitral tribunal entered a default judgment against the defendant, Multipole, who later opposed recognition of the award in Brazil arguing that he had not received proper notice of the arbitration. Having found evidence that the respondent had been notified when the proceedings were initiated, as well as when the hearings took place, the Court recognized the foreign award. Neither did it matter that the notice letter did not take the form required by the Brazilian law. As long as the notice enables the party to present an adequate defense before the arbitrators, it does not trigger the public policy exception, even though the party remains silent.<sup>29</sup> It should be underscored that this restriction to the public policy clause is expressly dictated by the Arbitration Act (Art. 39, §).<sup>30</sup>

In light of the foregoing precedents, it is possible to draw the conclusion that Brazilian case law favors an overall narrow interpretation of the public policy standard. The vast majority of defenses relying on this provision have been rejected by the Court as being eventual attempts to re-examine the merits of the arbitral proceedings. In particular, the due process clause has been construed so as to confine its scope to the basic principles of a fair hearing, and to avoid the domestic procedural rules and formalities playing a decisive role in enforcement proceedings.

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<sup>29</sup> *Union Européenne de Gymnastique v. Multipole Distribuidora de Filmes Ltda.*, supra n. 16. See also *International Cotton Trading Limited ICT v. Odil Pereira Campos Filho*, supra n. 23.

<sup>30</sup> “Service of a party domiciled or resident in Brazil, according to the arbitration agreement or the law of the country where the arbitration was held, shall not be considered a violation to the national public policy. Even service by mail with proof of receipt is admitted, provided that it grants the Brazilian party reasonable time to present his defense”.

Accordingly, it is fair to say that the national approach fits into the basic framework of the transnational interpretation of the Convention's Article V(2), despite the domestic indifference to the notion of international public policy. The Superior Court of Justice has not only restrained itself when handling the public policy provision, but also limited the application of the due process clause to offenses of basic standards of natural justice, as have a number of courts of foreign jurisdictions (Mantilla-Serrano 2005).<sup>31</sup> For example, it is generally accepted in the international setting that the notice of the arbitrators' appointment or of the arbitration proceedings required by Article V(1)(b) of the Convention does not have to follow the specific form required by the national law for domestic court or arbitral proceedings. Also, default has not been deemed a bar to enforcing the award, provided that the party has been properly notified (van den Berg 2003).

That being said, it does not follow that Brazilian judges have squarely rejected all defenses based on public policy grounds. The Superior Court of Justice has found a violation of this clause in two cases where enforcement was ultimately denied. Since both cases deal more closely with the issue of the form of the arbitration agreement, they will be analyzed in a separate section (see Sect. 3.3).

Apart from that, the most sensitive issue relating to the public policy exception seems to be the enforcement of foreign awards that lack sufficient reasoning.

Brazilian law, like the legislation of many other countries belonging to the Civil Law tradition, requires national judges in any case to provide the reasons

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<sup>31</sup> See, again, the survey portrayed in the ILA Interim Report on Public Policy, *supra* n. 21.

on which they base their decisions. The Federal Constitution establishes that obligation, which is seen as a fundamental right of the parties and a natural component of the due process clause (Art. 93, IX<sup>32</sup>).

Following this constitutional provision, the Code of Civil Procedure states that the reasoning and analysis of the factual and legal questions are an “essential requisite” of court judgments (Art. 458, II). Likewise, the Arbitration Act mandates arbitrators in Brazil to provide reasons for the award and also state whether the decision was *ex aequo et bono* (Art. 26, II).

For many years, this legal framework has led the Supreme Court to some uncertainty when adjudicating enforcement claims of foreign decisions that lack sufficient reasoning. The Supreme Court’s record here has been mixed, refusing to recognize some judgments on this basis but granting recognition to others.<sup>33</sup> This scenario prevented clear assessments of the case law on the issue. However, after jurisdiction to hear enforcement claims was transferred to the Superior Court of Justice, the judges had two opportunities to decide whether foreign judgments that lacked sufficient reasoning, issued by judicial courts, could be enforced in the country. In both cases, the Court held that recognition of a decision without a

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<sup>32</sup> “All judgments issued by the Judiciary Branch shall be public, and all decisions shall be given reasons, under penalty of nullity, (...)”.

<sup>33</sup> See, e.g., *Foreign Trade Organization for Chemical and Foodstuffs Geza v. Fenelon Machado S.A. Exp. Imp.* (S.T.F., SEC No. 3977, Relator: Francisco Rezek, 01.07.88, S.T.F.J.), *Ana Paula Maia Camargo v. André Boer* (S.T.F., SEC No. 5661, Relator: Marco Aurélio, 19.05.1999, S.T.F.J.).

statement of reasons would be contrary to the public policy, and denied enforcement.<sup>34</sup>

These more recent precedents of the Superior Court of Justice indicate that foreign arbitral awards lacking explicit rationale may also face obstacles to recognition in Brazil. Indeed, this was reinforced by the Court's recent decision in *Tremond Alloys and Metals Corp.*.

Tremond Alloys, an American company, and Metaltubos, a Brazilian enterprise, were parties in a sales contract of chemicals. When Metaltubos did not comply with its obligations under the agreement, arbitration proceedings were initiated under the American Arbitration Association (AAA). Despite having been notified of the proceedings, Metaltubos did not present a defense. The arbitral tribunal found that a breach of contract had occurred, and ordered Metaltubos to reimburse Tremond Alloys for the losses it had incurred, plus interest and the costs of the arbitration process.

Tremond Alloys then sought enforcement of the award in Brazil, to which Metaltubos resisted, arguing, inter alia, that the arbitral judgment was invalid because the arbitrators had not provided the reasons on which their ruling was based. The Superior Court of Justice found that the decision contained sufficient reasoning, and therefore recognized the award under scrutiny. Nevertheless, the Court also acknowledged that under Article 26 of the Arbitration Act, foreign ar-

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<sup>34</sup> See *Universal Marine Insurance Company Ltd. v. União Novo Hamburgo Seguros S.A.* (S.T.J., SEC No. 879, Relator: Luiz Fux, 02.08.2006, S.T.J.J.); *MTF v. PRF* (S.T.J., SEC No. 880, Relator: Fernando Gonçalves, 18.10.2006, S.T.J.J.).

bitral awards have to be accompanied by explicit reasons to be enforceable in the country.<sup>35</sup>

In accordance with this precedent, under the current circumstances, the Court is likely in future cases to deny enforcement to a foreign award that is not supported by sufficient reasoning. Relying on the obligation set in Article 26, II, of the Arbitration Act to national arbitral decisions, the Court seems to regard such an award to be contrary to public policy.

However, this outcome would not be desirable, and the reasoning underlying it must be criticized. Article 26, II, belongs to a chapter of the Arbitration Act applicable only to national arbitral awards, that is, those rendered in Brazilian territory (Art. 34, §). The right to be given the reasons that justified a decision is certainly of paramount importance in the domestic legal order, as shown by the set of provisions establishing it, especially the Federal Constitution. Therefore, it may constitute a public policy matter within the national boundaries. Despite that, this right does not belong to the international public policy, to the body of principles and rules recognized in Brazil that apply to its relations with foreign countries and judgments.

In the international setting, arbitral awards that lack a statement of reasons are commonly deemed valid, particularly in Common Law nations, where it is customary that such awards are rendered. Many countries do not require the arbitrators to state the grounds for the award, so long as the parties have agreed to

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<sup>35</sup> *Tremond Alloys and Metals Corp. v. Metalubos Indústria e Comércio de Metais Ltda.* (S.T.J., SEC No. 760, Relator Felix Fischer, 19.06.2006, S.T.J.J.).

dispense with reasons.<sup>36</sup> Similar provisions can be found in many arbitral institutions' rules, as well as in the UNCITRAL Model Law.<sup>37</sup> Such a requirement, therefore, does not belong to the procedural public policy in the international community. Foreign jurisdictions where arbitral awards are required under local law to contain the reasons on which the award is based have been relying precisely on the distinction between purely domestic and international public policy to enforce international arbitral awards that lack such reasoning, so long as the awards are valid under the law of the country where they were made (van den Berg 1981; Fouchard et al. 1999).<sup>38</sup>

Hence, the absence of a statement of reasons in the award is not deemed to be part of the public policy standard of Article V(2), according to the interpretation given to this standard by the courts of the signatory countries.<sup>39</sup> The Superior Court of Justice should not disregard this practice when enforcing a foreign arbi-

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<sup>36</sup> See, e.g., the English Arbitration Act (Art. 52, IV), the German Code of Civil Procedure (ZPO, Art. 1054, II), the Spanish Arbitration Act (Art. 37, IV), the Austrian Code of Civil Procedure (ZPO, Art. 606, II), the Danish Arbitration Act (Art. 31, II), the Chilean Arbitration Act (Art. 31, II).

<sup>37</sup> See, e.g., the rules of the ICDR/AAA (Art. 27, II), the London Court of International Arbitration (Art. 26, I), the Inter-American Commercial Arbitration Commission (Art. 29, c), the Commercial Arbitration and Mediation Center for the Americas (Art. 29, II). See also the UNCITRAL Model Law on International Commercial Arbitration (Art. 31, II) and its Arbitration Rules (Art. 32, III).

<sup>38</sup> See, e.g., the Belgian case *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements* (22 Y.B. COM. ARB. (1997) 643), the Dutch *Isaac Glecer v. Moses Israel Glecer* (21 Y.B. COM. ARB. (1996) 635), the French *Denis Coakley Ltd. v. Sté Michel Reverdy* (9 Y.B. COM. ARB. (1984) 400), the Italian *Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s.* (4 Y.B. COM. ARB. (1979) 289). A German court further reasoned that "in the case of foreign arbitral awards, it must be borne in mind that the deciding arbitrators come from different legal cultures and follow the customs of their procedural system when writing reasons" (reported in 31 Y.B. COM. ARB. (2006) 640).

<sup>39</sup> Lack of reasons may only constitute a bar to enforcement under Art. V(1)d of the Convention, if such a decision is invalid under the arbitration agreement or the law of the country where the arbitration took place, and this defense is invoked by the respondent. See the Spanish Case *X.S.A. v. Y.* (11 Y.B. COM. ARB. (1986) 523).

tral award, especially in light of the international nature of the dispute at issue.<sup>40</sup> Arguably, if Brazilian judges acknowledged the distinction between domestic and international public policy and employed the latter test,<sup>41</sup> they would tend to move the case law towards the same conclusion reached by the community of states members of the New York Convention. And local judges will be soon called upon to issue judgment on the matter again, since at least one enforcement claim of a foreign arbitral award without reasons is now pending before the Court.<sup>42</sup>

### ***3.3 Written form of the arbitration agreement***

As mentioned in the precedent section, the Superior Court of Justice regarded enforcing foreign arbitral awards as being contrary to public policy on two occasions (*Plexus Cotton* and *Oleaginoso Moreno*). In both, the controversy was centered on the existence and validity of the arbitration agreement. The point un-

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<sup>40</sup> According to the ILA Committee on International Commercial Arbitration, “an enforcement court should look at the practice of other courts, the writings of commentators, and other sources, to determine to what extent a principle that is submitted to be fundamental is regarded as fundamental by the international community. This should facilitate consistency in the application of the public policy test” (Final Report on Public Policy, supra n. 20).

<sup>41</sup> As recommended by the International Law Association in the Recommendation 1(b) of the Final Report on Public Policy, supra n. 20.

<sup>42</sup> *Kanematsu USA Inc. v. ATS - Advanced Telecommunications Systems do Brasil Ltda.* (S.T.J., SEC No. 885, Relator: Francisco Falcão).

der debate was the form requirements of the agreement to arbitrate, a subject that gives rise to controversies across the board.<sup>43</sup>

Notably, the Court dealt with this issue for the first time before those two cases were decided, and it granted enforcement to the arbitral award. In *L'Aiglon v. Têxtil União*, the Brazilian company Têxtil União S.A. entered into two agreements to purchase cotton from the Swiss company L'Aiglon S.A.. After some time during which both parties complied with the contracts, Têxtil União stopped making the payments. L'Aiglon then initiated arbitral proceedings before the Liverpool Cotton Association (now International Cotton Association Ltd.), based on arbitration clauses included in the two purchase contracts. Ultimately, an award was issued in favor of the Swiss seller.

L'Aiglon then sought enforcement of the arbitral award in Brazil. The Brazilian company opposed recognition, contending essentially that it had never agreed to submit any disputes arising from the contracts to the arbitral tribunal. It conceded that the agreements contained an arbitration clause, but argued that the parties had not signed the documents. Thus, the arbitral award could not be enforced in the country, since an explicit acceptance of the arbitral clause was a *sine qua non* of the arbitrators' jurisdiction.

The Court rejected the respondent's arguments, stating that Têxtil União had appeared before the arbitral tribunal, presenting its case. Additionally, the defendant did not question the arbitrators' jurisdiction at any time during the arbitral

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<sup>43</sup> As recognized by the UNCITRAL in its Recommendation regarding the interpretation of article II(2), and article VII(1), of the New York Convention, adopted on 7 July 2006 at its thirtieth session, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2006](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006)

proceedings. The judges further reasoned that the parties had performed under the contracts for some time, and that in the international trade arena, the common practice is to submit contractual disputes to arbitration. Specifically, conflicts arising from cotton transactions are ordinarily taken to the Liverpool Cotton Association, a traditional institution in that market. Based on these reasons, the Court held that the respondent had accepted the agreement to arbitrate, even if tacitly, and therefore granted enforcement to the foreign award.<sup>44</sup>

Several months later, the Court was called upon once again to decide whether an arbitral award rendered by the Liverpool Cotton Association could be enforced in the country, in *Plexus Cotton Limited v. Santana Têxtil Ltda.*. The parties entered into two agreements whereby Santana Têxtil would purchase Nigerian cotton from the British enterprise Plexus. Having disagreed with the goods' quality, the buyer refused to make the payments. Plexus then submitted the dispute to the Liverpool Cotton Association, where both parties nominated arbitrators and presented their cases. The arbitral tribunal found that Santana Têxtil had breached the contracts, and condemned it to indemnify Plexus. The losing party unsuccessfully appealed against the award.

Plexus first attempted to enforce the award in Brazil at the time the Supreme Court still had jurisdiction over the subject matter. The claim was dis-

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recommendation.

<sup>44</sup> *L'Aiglon S.A. v. Têxtil União S.A.* (S.T.J., SEC No. 856, Relator: Menezes Direito, 18.05.2005, S.T.J.J.).

missed because the plaintiff had not presented evidence of the arbitration agreement's existence.<sup>45</sup>

In 2005, the British company filed a second enforcement claim, now before the Superior Court of Justice. Santana Têxtil opposed, alleging first that recognition was prevented by *res judicata* resulting from the prior rejected action. Santana Têxtil also argued that it had not signed the purchase and sales agreement that supposedly contained the arbitration clause, and therefore had not agreed to take the dispute to the Liverpool Cotton Association.

The Court agreed with the defendant, stating that the parties had not entered into an arbitration agreement. First and foremost, the contracts were signed only by Plexus, and thus did not contain the buyer's signature. This was significant since under Brazilian law an essential requirement of arbitration agreement is that it be in written form (Arbitration Act, Art. 4, § 1), showing an "express and manifest" willingness of the parties to submit their conflict to the arbitrators. Even if, as asserted by the arbitral tribunal, the English law regards an arbitration agreement not signed by both parties as valid and binding, there is no similar provision in Brazilian law.

The judges added that even though Santana Têxtil had nominated an arbitrator and presented a defense on the merits, it had nonetheless formally opposed the arbitral tribunal's jurisdiction each time it appeared before the arbitrators. Thus, the defendant never agreed to submit the dispute to the Liverpool Cotton Association, even tacitly.

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<sup>45</sup> *Plexus Cotton Limited v. Santana Têxtil S.A.* (S.T.F., SEC No. 6753, Relator: Maurício Corrê-

In summary, the Court found that clear evidence of the defendant's voluntary intention to arbitrate the conflict was lacking, which prevented the award's enforcement due to a violation of public policy. Regardless of that reasoning, however, the Court decided to dismiss the case on *res judicata* grounds, due to the final judgment previously rendered by the Supreme Court on the first recognition proceedings.<sup>46</sup>

The last case on the matter, *Oleaginoso Moreno v. Moinho Paulista Ltda.*, was decided three months later. Oleaginoso Moreno sought enforcement of an arbitral award issued in the United Kingdom by the Grain And Food Trade Association (GAFTA) against Moinho Paulista Ltda. The plaintiff alleged that the defendant had breached four purchase contracts for wheat entered into by the parties, leading the Argentinean seller to initiate arbitral proceedings before the GAFTA. The arbitral tribunal rendered a decision in favor of Oleaginoso Moreno.

In its defense, Moinho Paulista made two arguments. First, that the parties had not entered into purchase and sales agreements, and that the contracts on which the award was based were made orally by a person who did not represent it. Second, Moinho Paulista argued that the arbitral tribunal lacked jurisdiction to resolve the conflict, since the parties had not entered into a written arbitration agreement, and the defendant had never consented during the arbitration to the jurisdiction of the GAFTA over the conflict.

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a, 13.06.2002, S.T.F.J.).

<sup>46</sup> *Plexus Cotton Limited v. Santana Têxtil S.A.* (S.T.J., SEC No. 967, Relator: José Delgado, 15.02.2006, S.T.J.J.).

The claimant replied to the second argument stating that the parties bound themselves to an arbitration agreement by several telex exchanges.

The Court refused to discuss the first of the defendant's arguments, holding that the issue of the lack of representation was already decided by the arbitrators and could not be re-examined by the enforcing court. Nonetheless, the judges shared the defendant's opinion as to the second argument. In the view of the Court, the fact that the main contracts were made orally posed no problem. But according to the Arbitration Act (Art. 4, § 1), the agreement to arbitrate must be in writing, either included in the purchase contract or contained in a separate document or exchange of letters referring to the main contract.<sup>47</sup> The Court acknowledged that there had been a telex exchange, but also gave weight to the fact that it took place between two brokers representing plaintiff Oleaginosa Moreno.

As a result, the Court found no evidence that a written arbitration agreement was entered into by the parties. The judges conceded that they would have conceivably recognized such an agreement, provided that Moinho Paulista had taken part in the arbitral proceedings without questioning the arbitrators' jurisdiction, thereby tacitly accepting the arbitral solution. However, the defendant appeared before the GAFTA alleging, from the outset, that the tribunal lacked jurisdiction to adjudicate the dispute. Based on that, the Court denied enforcement to the award on public policy grounds.<sup>48</sup>

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<sup>47</sup> The Court here quoted en passant Article II(2) of the New York Convention, in one of the very few occasions in which any reference was made to this treaty on enforcement proceedings.

<sup>48</sup> *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Inmobiliaria y Agropecuaria v. Moinho Paulista Ltda.* (S.T.J., SEC No. 866, Relator: Felix Fischer, 17.05.2006, S.T.J.J.).

In analyzing the foregoing case law, the first point to be noted is that it does not provide a definite position of the Court as to the form requirements of the arbitration agreement when enforcement of a foreign award is sought. The three precedents issued so far are not sufficient to portray a clear judicial view of the many nuances this subject encompasses. In fact, it seems that the Court is still struggling to find a coherent solution to some of the problems posed by the forms of the agreement to arbitrate.

This is not to say that no rationale can be drawn from the existing case law. For the present, the opinions provided in the three judgments show that the Court regards the written form of the arbitration agreement as an essential requisite for enforcement. In principle, the signature of both parties to the contract is required (*Plexus Cotton*), but an exchange of correspondence between them may also evidence a written agreement to arbitrate (*Oleaginosa Moreno*). The arbitration clause may appear either in the main contract or in a subsequent document which refers to the original contract. Further, the main contract can have been made orally, as long as the arbitration agreement has been concluded in writing (*Oleaginosa Moreno*).

Finally, in the absence of a written arbitration clause, the Court also seems to permit as a valid agreement to arbitrate one that is impliedly accepted by the parties. In particular situations, the Court takes into account the parties' behavior conveying the intent to submit their dispute to arbitral resolution, even though this mutual aim has not been expressed in written form (*L'Aiglon*). In other words, the Court gives weight to a tacit acceptance of the arbitration agreement.

Nonetheless, the case law still leaves undefined the extent and requirements of the tacit acceptance doctrine outlined by the Court. In particular, it is unclear whether this doctrine refers to a situation where the proposed arbitration agreement is not explicitly accepted by one of the parties, which however performs under the container contract, or designates the case in which – regardless of what has happened before – the parties appear before the arbitrators, presenting their case without raising a jurisdictional question.

Indeed, a clearer understanding of tacit acceptance is necessary to answer very pragmatic questions. In order for the Court to apply this doctrine, does it suffice to demonstrate the prior compliance of the parties with the main contract (fact deemed relevant in *L'Aiglon*), or is it necessary that they submit themselves to arbitration by taking part in the proceedings without questioning the arbitrators' jurisdiction (as *Oleaginosa Moreno* suggests)? Is it sufficient for a party who has not expressly acceded to a written agreement to contest the jurisdiction in the arbitration proceedings so as to prevent the future enforcement of an award (*Plexus Cotton*)? If so, should a simple objection to the arbitrators' jurisdiction ban tacit acceptance altogether, even if the parties had performed under the underlying contract? It does not seem reasonable to conclude that the party has impliedly accepted all contractual terms but one (Kaplan 2006).

The case law of other signatory parties to the New York Convention have been dealing with these and other similar questions regarding the form of the arbitration agreement for a long time. Courts and commentators around the world have been debating the myriad of problems surrounding the interpretation of Arti-

cle II(2), which regard, for instance, to the means of communication employed by the parties, incorporation by reference, subsequent contract, customs of trade, third non-signatory parties,<sup>49</sup> use of brokers, and indirect and tacit acceptance (Sanders 1979; van den Berg 1981/2001; Gaja 1991; Hanotiau 2007; Harnik 1983).<sup>50</sup>

These problems stem from the complexity and constantly evolving forms of international commercial transactions. As a result, a number of national arbitration laws have adopted more liberal standards for assessing the validity of the arbitration agreement, such as the German Code of Civil Procedure (Art. 1031),<sup>51</sup> the English Arbitration Act (Art. 5), the Spanish Arbitration Act (Art. 9), the Netherlands Arbitration Act (Art. 1021), and the Swiss Private International Law Act (Art. 1781). To that end, the UNCITRAL has also amended Article 7 of its Model Law on International Commercial Arbitration, and removed the reference to an agreement “in writing” from its draft revised Arbitration Rules.<sup>52</sup>

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<sup>49</sup> With regard to this matter, it was noted in the previous section that the Court has decided in *Spie Enertrans* and *Litsa Líneas de Transmisión del Litoral S.A.*, supra n. 18, that a third party who succeeds the original signatory of a contract becomes bound to the arbitration agreement contained therein. In both of these cases, the Court deemed irrelevant the fact that the defendant had opposed the arbitrators’ jurisdiction during the arbitral proceedings.

<sup>50</sup> See also the UNCITRAL Report of the Working Group II (Arbitration and Conciliation) (thirty-sixth session, New York, 4-8 March 2002), available at <http://uncitral.org>.

<sup>51</sup> “(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement. (2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and - if no objection was raised in good time - the contents of such document are considered to be part of the contract in accordance with common usage. (3) The reference in a contract complying with the form requirements of subsection 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract”. “(6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings”.

<sup>52</sup> See the UNCITRAL Working Group II documents A/CN.9/WG.II/WP.147, para. 7, and A/CN.9/619, paras. 25-31, available at <http://uncitral.org>.

Additionally, bearing in mind the controversies and difficulties emerging from Article II(2) of the Convention, in 2006 the UNCITRAL issued a recommendation that this provision be construed “recognizing that the circumstances described therein are not exhaustive”, and that Article VII(1) be applied “to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.<sup>53</sup>

So far, Brazilian case law has not taken into account the debates held in the international arena concerning the interpretation of Article II(2) and its role in enforcement proceedings. The problem of the form requirements of the arbitration agreement has been dealt with in an insulated fashion, with no regard to developments reached abroad. The Court has also shown hesitation in bringing to the discussion the practices embedded in international commerce and arbitration: while in *L'Aiglon* it gave weight to the customary resort to the Liverpool Cotton Association to resolve international disputes within the cotton market, this very fact was deemed irrelevant in *Plexus Cotton*.

The advantages of deepening the relationship between the domestic decision-making and the international background in relation to the form of the arbitration agreement seem to be obvious. Among the grounds for refusal of enforcement prescribed by Article V, the invalidity of the arbitration agreement is one of the most sensitive to the varying practices employed by international trade players. And the broadening distance between those practices and the language employed

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<sup>53</sup> See the UNCITRAL 2006 Recommendation, *supra* n. 43.

in Article II(2) (“arbitration agreement *signed* by the parties or contained in an *exchange* of letters of telegrams”) is widely recognized and combated worldwide.

This response has been given, among others, through an expansive interpretation of Article II(2)’s language, or the application of more liberal requirements on the basis of Article VII(1).<sup>54</sup> As an example, Brazilian case law could profit from the latter, relying on the *more-favorable-right-provision* to apply the law chosen by the parties or of the country where the award was made when accessing the arbitration agreement’s validity and existence. Perhaps, it may lead a situation like the one in *Plexus Cotton* to a different outcome.

#### **4 Real adoption of the New York Convention: a step forward**

As noted in the beginning of this paper (see Chap. 2) and evidenced by the foregoing analysis (see Chap. 3), Brazilian practice as to the recognition and enforcement of foreign arbitral awards has not embraced the New York Convention so far, even though this treaty has entered into force in the country in 2002. The national case law has been developing with virtually no regard for the most important legal document in the field of international commercial arbitration.

It is true that the Arbitration Act of 1996 reproduces the main framework of the Convention concerning the recognition of foreign awards, and that some of

the basic principles underlying that structure have been brought into play by the Court (see Sect. 3.1).

Nevertheless, the survey of domestic precedents also shows that, in many ways, Brazil has not profited from adopting a mainly insular standpoint when enforcing foreign arbitral awards. Specifically, the interpretation given so far to standards and rules that are highly linked to the international practices, such as the public policy provision and the form requirements of the arbitration agreement, lack connection to the global knowledge accumulated around the New York Convention. Also, the very Arbitration Act dictates that the international treaties of which Brazil is a member shall be given priority in governing enforcement proceedings (Art. 34).

It is important to always bear in mind the supranational nature of the judgment brought to enforcement in the domestic court. The award is the result of an international commercial arbitration process, whose effectiveness is at stake in the recognition proceedings. This means that whenever enforcing foreign arbitral decisions, the national judges are necessarily confronted with the task of construing transnational rules. In interpreting the public policy clause or assessing the validity of the arbitration agreement, the Court has to tackle issues that are not confined to the internal legal system, but follow and share basic international patterns. The problems faced abroad are analogous to those presented in the domestic setting.

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<sup>54</sup> See, e.g., the Spanish cases *Kil Management A/S v. J. García Carrión, SA* (32 Y.B. COM. ARB. (2007) 518) and *Ionian Shipping Line Co. Ltd. v. Transshipping SA* (32 Y.B. COM. ARB. (2007) 532), and the German case reported in 32 Y.B. COM. ARB. (2007) 372.

In that sense, the Brazilian practice would benefit significantly from broadening its legal interpretation to encompass the entire body of principles, policies, case law, debates, research and commentaries that encircle the New York Convention. If national judges acknowledged that the Convention governs the recognition of foreign arbitral awards in the country, and brought its provisions into operation, they would bridge the gap between the domestic reasoning and the argumentative repertory, methods of legal inquiry and set of legal materials employed in that Convention's interpretation worldwide.

In so doing, Brazilian case law would share the learning and achievements accumulated in fifty years of the New York Convention's history, as well as join the international community in the ongoing development of this treaty. This connection would be salutary not only as to issues that are to some extent settled across the board, such as narrowing the scope of Article V(2) to international public policy, or excluding the lack of reasons from this standard, but also with regard to debates that are very much alive, such as the form requirements of the arbitration agreement and tacit acceptance. Not to mention that the Court could rely on provisions not reproduced in the Arbitration Act, like Art. VI and the valuable *more-favorable-right-provision* of Art. VII(1).

In a nutshell, the change in behavior described above would finally represent the adoption of the New York Convention in Brazil not only formally, but also in substantive terms.

Needless to say, the New York Convention provisions are geared to connect the national reality of enforcement proceedings to the supranational atmos-

phere of commercial arbitration. The Brazilian strict reliance on domestic legislation and disregard for the New York Convention's transnational context, despite the similarities between the Arbitration Act and that Convention, has not been able to foster that relationship to the greatest possible and most desirable extent. The application of the Convention may turn the current domestically focused assessment into a more universal approach to the rules and standards that control recognition of foreign arbitral awards.

In addition, provided that Brazilian courts take into consideration the international experience related to the New York Convention, the chances of adhering or contributing to its uniform interpretation would increase.<sup>55</sup> The desirability of this outcome would be twofold. First, it would represent the final step in inserting Brazil in the international commercial arbitration context. Second, harmonization of the case law among the different signatory parties promotes the institutional reinforcement and the worldwide implementation of the treaty.

In fact, to be uniformly interpreted across the board is an obvious goal of a Convention that aims at favoring the international circulation of arbitral awards.<sup>56</sup> The manner in which the New York Convention is interpreted by courts

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<sup>55</sup> The ILC Committee on International Commercial Arbitration encourages courts "to look to the practice of courts in other jurisdictions in relation to the application of public policy with a view to achieving a consensus and a consistent approach" (Final Report on Public Policy, *supra* n. 20).

<sup>56</sup> In the famous words of the U.S. Supreme Court, "the goal of the Convention (...) was to encourage the recognition and enforcement of commercial arbitration agreement in international contracts and to *unify the standards* by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries" (*Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)).

is the “main source of its effectiveness” (van den Berg 1981).<sup>57</sup> This is the reason why the United Nations pointed out the “necessity for further national efforts and enhanced international cooperation to achieve universal adherence to the Convention and its uniform interpretation and effective implementation”.<sup>58</sup>

Furthermore, provided that the Brazilian Superior Court of Justice incorporates the New York Convention’s extensive background within its practice, this may contribute to reflecting on and building a strong and coherent national case law regarding the recognition of foreign arbitral awards under that treaty. This, in turn, would result in consistency and predictability, valuable features for the parties in the country and abroad.

By the same token, that incorporation would send an important positive message to the international players. It would signal that Brazil applies the international *jus commune* to enforcement proceedings rather than the generally less known domestic legislation, and therefore is fully integrated into the commercial arbitration environment. All in all, this may strengthen the development of arbitration in the country, encouraging arbitration agreements involving Brazilian parties and increasing the number of awards brought to enforcement in the territory.

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<sup>57</sup> As stated by the ILC Committee on International Commercial Arbitration in its Final Report on Public Policy, supra n. 20, “greater consistency would lead to a better ability to predict the outcome of a public policy challenge, irrespective of the court in which enforcement proceedings are brought. This, in turn, should discourage speculative challenges and facilitate the finality of arbitral awards”.

<sup>58</sup> General Assembly Resolution A/RES/62/65, 12.06.2007, following Resolution A/RES/61/33, 12.04.2006. See also Resolution 2205 (XXI), 17.12.66, which established the United Nations Commission on International Trade Law (UNCITRAL) with the objective of promoting the uniform interpretation of international conventions in the field of international trade.

Undoubtedly, there is plenty of room for that transformation, since the five-year-old case law is still embryonic with regard to a lot of issues that have been discussed for decades in the transnational setting.

## **5 Conclusion**

The celebrated late adoption of the New York Convention in Brazil did not mean that this treaty became fully operative in the country. Although some of its provisions are indirectly applied through the Arbitration Act of 1996, which roughly replicates Articles IV and V of the Convention, the domestic judges have not yet relied on this international framework in enforcement proceedings.

This situation raises questions regarding the extent to which the Superior Court of Justice has been employing the necessary universal approach to the enforcement of foreign arbitral awards, and coping with the supranational standards of the New York Convention.

The precedents issued so far show that the basic features of the Convention seem to have been embraced by the Court. Yet the case law still suffers from its disconnection with the transnational experience surrounding the Convention, for instance when interpreting the public policy provision or assessing the form requirements of the arbitration agreements.

Direct application of the New York Convention could remedy this deficiency, by enhancing the development of domestic case law with the insights de-

rived from the extensive debates, research and jurisprudence generated throughout the world. The results of such application could enable the Brazilian international arbitration practice to catch up with five decades of transnational development. At that point, perhaps, one could revive the slogan “fifty years in five” to describe the evolution of international arbitration in Brazil.

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