

THE NEW YORK CONVENTION AND ITS APPLICATION BY BRAZILIAN COURTS

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ÁREA DO DIREITO: Arbitragem

RESUMO: O presente artigo é baseado na palestra proferida pelo Prof. Albert Jan van den Berg perante o STJ, em 20.03.2012. Por ocasião da palestra, o mais respeitado especialista na Convenção das Nações Unidas sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras, de 10.06.1958 (Convenção de Nova Iorque ou Convenção) analisou a recente experiência do Brasil na aplicação da referida Convenção, ratificada há 10 anos. Nesse contexto, o Prof. van den Berg aborda os arts. I a VII da Convenção, em conjunto com os arts. 34 a 40 da Lei de Arbitragem brasileira (Lei 9.307/1996), e avalia a jurisprudência brasileira, em especial a do STJ. Ao elogiar o posicionamento do Judiciário brasileiro, o Prof. van den Berg também ressalta as questões ainda não tão pacificadas pelo Judiciário, as quais deverão ser enfrentadas no futuro para que o Brasil con-

ABSTRACT: The present article is based on a lecture given by Prof. Albert Jan van den Berg before the Brazilian Superior Court of Justice (STJ) on 20.03.2012. During the lecture, the most respected specialist on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10.06.1958 (New York Convention or Convention) reviewed the recent Brazilian experience in the application of the Convention, which was ratified 10 years ago. In this context, Prof. van den Berg discusses arts. I through VII of the Convention, in conjunction with arts. 34 to 40 of the Brazilian Arbitration Act (Law 9.307/1996) and evaluates the Brazilian case law, particularly, that of the STJ. In praising the position of the Brazilian Judiciary, Prof. van den Berg also points out issues not yet attended to by the Judiciary, which should be addressed

tinue a ser a “menina dos olhos” da arbitragem internacional.

PALAVRAS-CHAVE: STJ – Convenção de Nova Iorque – Lei de Arbitragem brasileira – Sentença arbitral estrangeira – Homologação e execução – Jurisprudência.

in the future, so that Brazil continues to be the “*belle of the ball*” of international arbitration.

KEYWORDS: Superior Court of Justice – New York Convention – Brazilian Arbitration Act – Foreign award – Recognition and enforcement – Case law.

SUMMARY: 1. Introduction – 2. The New York Convention: interpretation – 3. Application of the New York Convention in Brazil: General Overview – 4. The New York Convention: articles I to VII: 4.1 Article I – Scope; 4.2 Article II(1)-(2) – Arbitration Agreement in Writing; 4.3 Article II(3) – Enforcement of the Arbitration Agreement; 4.4 Article III – Procedure; 4.5 Article IV – Conditions to be Fulfilled by the Petitioner; 4.6 Article V – Grounds for Refusal of Enforcement in General; 4.7 Article V(1) – Grounds for Refusal of Enforcement to be Proven by the Respondent; 4.8 Article V(1)(a) – Lack of a Valid Arbitration Agreement; 4.9 Article V(1)(b) – Violation of Due Process; 4.10 Article V(1)(c) – Excess of Authority; 4.11 Article V(1)(d) – Violation of Agreement Regarding Appointment or Procedure; 4.12 Article V(1)(c) – Award Not Binding, Suspended or Set Aside; 4.13 Article V(2) – Grounds for Refusal of Enforcement Applied by Enforcement Court on Its Own Motion; 4.14 Distinction between Domestic and International Public Policy; 4.15 V(2)(a) – Non-arbitrability; 4.16 Article V(2)(b) – Violation of Public Policy; 4.17 Article VI – Adjournment of the Decision on Enforcement; 4.18 Article VII(1) – Compatibility with order Treaties and More-Favourable Right Provisions – 5. Conclusions – 6. Appendix A – 7. Appendix B.

1. INTRODUCTION

Brazil ratified the New York Convention only in 2002,¹ that is, some 44 years after the Convention had entered into force.² Strikingly enough, even after its ratification, the Brazilian judiciary hardly refers to it and instead, applies the Brazilian Arbitration Act of 1996, which repeats only the basic provisions of the Convention. And yet, *Global Arbitration Review* has recently characterized Brazil as the “*belle of the ball*” in international arbitration.³ That is, the *belle* that has won over the countries’ performances in international

1. This article is based on the transcription of a lecture given by Prof. Albert Jan van den Berg before the Superior Court of Justice (STJ), on 20.03.2012, in Brazil. The author would like to thank Maria Athanasiou, associate at Hanotiau & van den Berg, Brussels, for her invaluable assistance in editing. Publication of this article has been authorized by the author.
2. See the Legislative Decree no. 52/2002 and the Executive Decree no. 4.311/2002.
3. Clare Bolton, Brazil – *Belle of the ball*, *Global Arbitration Review*, vol. 7, issue 3, 12.01.2012.

arbitration, particularly in the context of enforcement of foreign arbitral awards, even though it arrived at the ball of international arbitration rather late. In this regard, it is interesting to examine the approach of the Brazilian judiciary in the enforcement of foreign arbitral awards during the last 10 years and determine whether it has achieved the goal of the New York Convention in such a way, so that it may rightfully be called the “*belle of the ball*”.

As the goal of the New York Convention is to provide a uniform and consistent regulation of the enforcement of foreign arbitral awards, this article will begin with a brief discussion on the effort to achieve the Convention’s uniform judicial interpretation. Subsequently, it will examine arts. I to VII of the New York Convention in conjunction with arts. 34 to 50 of the Brazilian Arbitration Act, as well as the manner in which these provisions have been dealt with by the Brazilian judiciary. The article will conclude with an assessment as to whether the Brazilian judiciary is following an approach which meets the fundamental goals of the New York Convention.

2. THE NEW YORK CONVENTION: INTERPRETATION

The New York Convention is an international treaty. As such, its interpretation is subject to the rules of treaty interpretation and, particularly, to the rules set forth in arts. 31 and 32 of the 1969 Vienna Convention on the Law of the Treaties (Vienna Convention),⁴ ratified by Brazil in 2009.⁵ Yet, the national courts of the Convention’s 146 Contracting States do not apply arts. 31 and 33 of the Vienna Convention. Instead, the courts interpret the New York Convention as if it were a statute. This results in the inconsistent interpretation of the Convention.

In 1958, when the Convention entered into force, it was the simplicity in its text and structure that made its drafters believe that the New York Convention

4. Art. 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) provides in relevant part: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Art. 32 of the Vienna Convention provides: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a. leaves the meaning ambiguous or obscure; or b. leads to a result which is manifestly absurd or unreasonable”.

5. See the Legislative Decree no. 496/2009.

would successfully lead to the internationally uniform regulation of the enforcement of foreign arbitral awards. Unfortunately, this belief has proven to be wrong, and this is something to which I can attest through my early professional experience, which involved my collaboration with Prof. Pieter Sanders, the “founding father” of the Convention.

Prof. Pieter Sanders was appointed by the International Council of Commercial Arbitration (ICCA) as the General Editor of the Yearbook on Commercial Arbitration in the 1970s. Upon his appointment I was hired by him to assist in the preparation of the Yearbook, which involved the editing of national reports on the law and practice of arbitration and the drafting of summaries of arbitral awards. The most important and interesting assignment I had been tasked with was the preparation of excerpts of court decisions interpreting and applying the New York Convention in various Contracting States.

When preparing the excerpts, I noticed that the national courts of the Contracting States interpreted the same provisions of the Convention differently. For instance, the writing requirement applicable to arbitration agreements under art. II(2) of the Convention was interpreted differently by the United States (US) District Court for the Southern District of New York⁶ than by the Corte di Appello in Naples,⁷ although both courts applied the identical text of art. II(2). It then became clear to me that the original thought of the drafters of the Convention, that the Convention would be interpreted and applied in a uniform manner, was incorrect.

This led to the development of the idea to analyse and compare court decisions interpreting the New York Convention in the various Contracting States and to attempt to formulate a uniform judicial interpretation, as part of my doctoral thesis. That idea materialised in 1981 with the publication of my commentary on the Convention, “The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation”.

In the meantime, I took over the General Editorship of the Yearbook from Prof. Sanders and continued to report the court decisions on the New York Convention. Up to the current volume of the Yearbook – vol. XXXVI (2011)

6. See, e.g., United States (US) no. 29, *Beromun Aktiengesellschaft vs. Società Industriale Agricola ‘Tresse’ Di Dr. Domenico e Dr. Antonio Dal Ferro*, US District Court, Southern District of New York, 03.04.1979 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1981, vol. VI, Kluwer Law International, 1981, p. 243.

7. See, e.g., Italy no. 11, *Ditte Frey, Milota and others vs. Ditte F. Cuccaro e figli*, Corte D’Appello Di Napoli, 13.12.1974 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1976, vol. I (Kluwer Law International, 1976) p. 193.

– over 1,700 court decisions from more than 65 Contracting States, including 14 from Brazil, have been reported.⁸ The latest volumes show an increasing attempt by some courts in the various Contracting States to harmonise the interpretation of the Convention by referring to court decisions of other Contracting States that were reported in the Yearbook. Therefore, the project proved to be a success.

The Brazilian judiciary, as a judiciary of a Contracting State, has no legal duty to follow the interpretations of the Convention given by courts of other Contracting States. Certainly, there is no binding precedent in this context. However, the reality is that the Convention's provisions are not always clear. Moreover, the Convention's provisions contain gaps. For example, there is no definition of the field of application in respect of the referral to arbitration under art. II(3) of the Convention: a court will be searching in vain for words that show which agreements fall under it. In these circumstances, therefore, it may be a matter of judicial comity to defer to the decisions of other Contracting States.

3. APPLICATION OF THE NEW YORK CONVENTION IN BRAZIL: GENERAL OVERVIEW

As aforementioned, Brazil ratified the New York Convention only in 2002, making itself one of the last countries to arrive at the “ball” of international arbitration. Prior to the ratification of the New York Convention, the enforcement (*homologation*) of foreign arbitral awards in Brazil was governed by the Brazilian Arbitration Act of 1996, which contains provisions which are remarkably similar, but not identical, to those of the New York Convention.⁹ Yet as of 2002, approximately all of the somewhat 40 Brazilian decisions on the enforcement of foreign arbitral awards were based on arts. 34 to 40 of

8. See Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration* 2011. vol. XXXVI (Kluwer Law International, 2011) p. 260-261, reporting Brazil no. 14, *Nuovo Pignone SpA vs. Petromec Inc, et al*, STJ, Special Recourse no. 1.231.554, 24.05.2011. Although 14 Brazilian court decisions have been reported up to vol. XXXVI (2011) of the Yearbook, there are by now approximately 40 Brazilian court decisions in total on the issue.

9. See the tables in Appendices A and B which compare the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10.06.1958 (New York Convention or Convention) to the provisions of the Brazilian Arbitration Act of 1996, both in the Portuguese and in the English languages.

the Brazilian Arbitration Act.¹⁰ Thus, instead of witnessing a shift from the

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10. See, e.g.: Brazil no. 2, *Thales Geosolutions Inc. (US) vs. Fonseca Almeida Representações e Comércio Ltda. – Farco (Brazil)*, STJ, SEC no. 802, 17.08.2006 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2007*, vol. XXXII (Kluwer Law International, 2007), p. 271-274; Brazil no. 3, *Espal Representações e Conta Própria Ltda. (Brazil) vs. Wilhelm Fette GmbH (Germany)*, STJ, Special Appeal no. 712.566, 18.08.2006 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2007*, vol. XXXII (Kluwer Law International, 2007), p. 275-281; Brazil no. 5, *Mitsubishi Electric Corporation (Japan) vs. Evadin Indústrias Amazônia S.A. (Brazil)*, STJ, Special Court, SEC no. 349/EX, 21.03.2007 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2008*, vol. XXXIII (Kluwer Law International, 2008), p. 381-386; Brazil no. 6, *Bouvery International S.A. (nationality not indicated) vs. Irmãos Pereira Comercial e Exportadora Ltda, (Brazil)*, STJ, SEC no. 887/EX, 06.03.2006; Brazil no. 7, *International Cotton Trading Limited – ICT vs. Odil Pereira Campos Filho*, STJ, SEC no. 1210/EX, 20.06.2007 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2008*, vol. XXXIII (Kluwer Law International, 2008), p. 390-396; Brazil no. 9, *Inepar Indústria e Construções (Brazil) vs. Itiquira Energética S.A.*, STJ, Paraná, SEC no. 428.067-1, 30.01.2008 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2008*, vol. XXXIII (Kluwer Law International, 2008), p. 404-407; Brazil no. 10, *Carlos Alberto de Oliveira Andrade (Brazil) vs. CA de Oliveira Andrade Comércio Importação e Exportação Ltda. (Brazil), Renault S.A. (France) and others*, STJ, State of São Paulo, Private Law Section, 26.02.2008 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2009*, vol. XXXIV (Kluwer Law International, 2009), p. 418-423; Brazil no. 12, *Atecs Mannesmann GmbH vs. Rodrimar S.A. Transportes Equipamentos Industriais e Armazéns Gerais*, STJ, SEC no. 3.035/EX, 19.08.2009 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2010*, vol. XXXV (Kluwer Law International, 2010), p. 330-331; Brazil no. 13, *Kanematsu USA Inc. vs. ATS – Advanced Telecommunications Systems do Brasil Ltda.*, STJ, SEC no. 885/US, 02.08.2010 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2011*, vol. XXXVI (Kluwer Law International, 2011), p. 258-259; *Plexus Cotton Limited (UK) vs. Santana Têxtil S.A. (Brazil)*, STJ, SEC no. 967/EX, 15.02.2006; *Union Européenne de Gymnastique – UEG (nationality not indicated) vs. Multipole Distribuidora de Filmes Ltda. (Brazil)*, STJ, SEC no. 874/EX, 19.04.2006; *Tremond Alloys and Metals Corporation (US) vs. Metaltubos Indústria e Comércio de Metais Ltda. (Brazil)*, STJ, SEC no. 760/EX, 19.06.2006; *Grain Partners SpA (Italy) vs. Cooperativa dos Produtores e Trabalhadores Urbanos e Rurais de Sorriso Ltda. – Coopergrão (Brazil) and Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda. (Brazil)*, STJ, SEC no. 507/EX, 18.10.2006; *First Brands do Brasil Ltda. (Brazil) and STP do Brasil Ltda. (Brazil) vs. STP – Petroplus Produtos Automotivos S.A. PPA (nationality not indicated) and Petroplus Sul Comércio Exterior S.A. PSC (nationality not indicated)*; STJ, SEC no. 611/EX, 23.11.2006; *Guidosimplex Drive Ltda. (nationality not indicated) vs. Cavenaghi Cavenaghi e Companhia Ltda. (nationality not indicated)*, STJ, SEC no. 918/IT, 26.06.2007; *Litsa Líneas de Transmisión del Litoral S.A. (Argentina) vs. SV Engenharia S.A. (nationality not indicated) and Inepar S.A. Indústria e Construções*

application of the Brazilian Arbitration Act to the application of the Convention, Brazilian courts and particularly the STJ, rarely refer to the Convention, let alone explicitly apply it.¹¹ What is more is that this situation exists, despite the fact that art. 34 of the Brazilian Arbitration Act specifically ranks an international treaty on the recognition and enforcement of awards higher than the Brazilian Arbitration Act itself:

“A foreign award shall be recognized and enforced in Brazil *pursuant to international treaties* effective in the national legal system or, *if non-existent*, strictly in accordance with the present law” (Emphasis added; English translation).

The inevitable question, therefore, is the following: Why is it the case that the Brazilian judiciary still does not directly apply the New York Convention? The examination of the Brazilian court decisions on the enforcement of foreign arbitral awards does not provide a clear-cut answer. However, one may suspect that this omission is possibly based on the following three reasons. Firstly, it may be because counsel for the parties has not invoked the New York Convention. Secondly, it appears that the Brazilian judiciary has a preference for the Brazilian Arbitration Act, being a national legislation with which it is familiar, over the New York Convention. Thirdly, it may be the case that the Brazilian courts apply

(nationality not indicated), STJ, SEC no. 894/UY, 20.08.2008; *Kia Motors Corporation (Korea) vs. Washington Armênio Lopes (nationality not indicated) et al*, STJ, SEC no. 1/EX, 19.10.2011; and *Itiquira Energética S.A. (nationality not indicated) vs. Inepar S.A. – Indústria e Construções*, STJ, 07.12.2011.

11. The cases in which the New York Convention was mentioned are: Brazil no. 1, *L'Aiglon SA (Switzerland) vs. Têxtil União S.A. (Brazil)*, STJ, 18.05.2005 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2005*, vol. XXX (Kluwer Law International, 2005), p. 437-439; Brazil no. 4, *Oleaginoso Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, STJ, Special Court, SEC no. 866/EX, 17.05.2006 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2008*, vol. XXXIII (Kluwer Law International, 2008), p. 371-380; Brazil no. 8, *Spie Enertrans S.A. (France) vs. Inepar S.A. Indústria e Construções (Brazil)*, STJ, SEC no. 831/FR, 03.10.2007 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2008*, vol. XXXIII (Kluwer Law International, 2008), p. 397-403; Brazil no. 11, *Indutech SpA vs. Algocentro Armazéns Gerais Ltda.*, STJ, SEC no. 978/EX, 17.12.2008 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2009*, vol. XXXIV (Kluwer Law International, 2009), p. 424-429; Brazil no. 14, *Nuovo Pignone SpA vs. Petromec Inc, et al*, STJ, 24.05.2011 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2011*, vol. XXXVI (Kluwer Law International, 2011), p. 260-261; and *Devcot S.A. (France) vs. Ari Giongo (Brazil)*, STJ, SEC no. 2.660/GB, 28.05.2009.

art. VII(1) of the New York Convention by implication. According to art. VII(1), the Brazilian Arbitration Act may be applied instead, if it is more favourable than the Convention (the so-called “more-favourable right provision”).¹²

However, the omission to directly apply the New York Convention and in turn, consider the decisions of other Contracting States may create uncertainty and impede the development of the enforcement of foreign arbitral awards in Brazil in the near future. This is because the Brazilian judiciary may end up adopting an approach which is inconsistent with that of judiciaries of other Contracting States, which apply the Convention, and which strive for uniformity in its interpretation.

Despite this omission, the Brazilian judiciary appears to have become an international role model for an efficient and transparent judicial system in the handling of enforcement requests. Therefore, it is important to examine whether the Brazilian judiciary actually adopts the policies underlining arts. I to VII of the New York Convention when it entertains an enforcement action pursuant to the Brazilian Arbitration Act.

4. THE NEW YORK CONVENTION: ARTICLES I TO VII

The structure of the New York Convention is straightforward. The relevant provisions on the recognition and enforcement of foreign arbitral awards by a court of a Contracting State are arts. I to VII. Arts. I and III to VII deal with the enforcement of the foreign arbitral award. Art. II(1) and (2) deals with the written form the arbitration agreement. Art. II(3) deals with the enforcement of the arbitration agreement.

4.1 *Article I – Scope*

The field of application of the Convention with regard to “foreign arbitral awards”¹³ is set forth in art. I.¹⁴ Paragraph 1 of art. I of the Convention provides

12. See Section 4.18 below for a discussion on art. VII(1) of the New York Convention.

13. The title of the New York Convention refers to the recognition and enforcement of “Foreign Arbitral Awards”.

14. Art. 1 of the New York Convention captioned “Field of Application” provides in relevant part: “1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not

for two definitions of a foreign award. According to the first definition, a foreign award is an award made in the territory of a state other than that where recognition and enforcement are sought. In Brazil, therefore, the Convention would apply to an arbitral award made, for example, in the US. According to the second definition, a foreign award is an award which is not considered as domestic in the state where recognition and enforcement is sought. The adoption of the second definition under the Convention is discretionary and permits the Contracting States to set forth their own classification criteria as to what will constitute a non-domestic award.

The territorial rule contemplated by the first definition of art. I(1) is reflected in art. 34, Sole Paragraph of the Brazilian Arbitration Act¹⁵ and confirmed by the STJ in *Nuovo Pignone vs. Petromec et al.*¹⁶ In this case, a dispute arose between the petitioner and the respondent parties, leading the parties to arbitration proceedings in Rio de Janeiro under the Arbitration Rules of the International Chamber of Commerce (ICC). The arbitration proceedings were conducted in the Portuguese language and the sole Brazilian arbitrator rendered an award in favour of the petitioner. When the petitioner sought to have the award executed before Brazilian courts, the respondent parties opposed the execution on the ground that the ICC award was an international award and, therefore, one that had to be recognised by the STJ before being executed. The case reached the STJ which reasoned that art. I of the Convention provides the Contracting States with the discretion to determine what will constitute a non-domestic award. According to the STJ, the Brazilian legislator adopted the “‘territorial’ system”¹⁷ of art. I of the Convention through art. 34 of the Brazilian Arbitration Act. The STJ, therefore, held that the fact that the request for arbitration was filed with the ICC and that the arbitration took place pursuant to the ICC Arbitration Rules did not “alter[] the nationality of th[e] award, which remain[ed] Brazilian, since it was rendered in the city of Rio de Janeiro, a place jointly chosen by the parties.”¹⁸

The reasoning of the STJ is entirely in line with the New York Convention. There is no requirement of internationality, either because of the parties

considered as domestic awards in the State where their recognition and enforcement are sought. (...).”

15. Art. 34 of the Brazilian Arbitration Act provides in the English translation: “A foreign award is an award rendered outside the national territory”.

16. Brazil no. 14, *Nuovo Pignone SpA vs. Petromec Inc, et al*, supra note 8 and 11.

17. *Id.* at 14.

18. *Id.* at 17.

concerned or because of the subject-matter of the dispute. The first definition of art. I(1) is purely territorial. In fact, it is the definition that actually plays a role in practice and Brazil was wise enough to ignore the second definition of art. I(2), which allows various theories as to what would constitute a non-domestic award. Thus, by adhering to the first definition of art. I(1) and its correct interpretation, albeit by applying art. 34 of the Brazilian Arbitration Act, Brazil has enhanced the uniform application of art. I(1) of the Convention.

4.2 Article II(1)-(2) – Arbitration Agreement in Writing

The first two paragraphs of art. II deal with the writing requirement of an arbitration agreement.

According to paragraph 1, Contracting States must recognise an agreement in writing, which includes both: (a) a submission agreement (“*compromisso arbitral*”), under which an existing dispute is referred to arbitration; and (b) an arbitration clause (“*cláusula compromissória*”), under which a future dispute will be submitted to arbitration.¹⁹ In Brazil, the possibility of having these two types of agreements capable of constituting a basis for arbitration did not exist before 1996. It was only with the enactment of the Brazilian Arbitration Act in 1996 that the Brazilian legislator decided to maintain the distinction between the two as found in the Convention.²⁰ The distinction was also confirmed by the STJ in *ICT vs. Odil* which held that “where an arbitration clause has been concluded the contracting parties are bound to settle their dispute extrajudicially”, that is, by arbitration.²¹

Pursuant to paragraph 2, the arbitration agreement, both in cases of enforcement of an arbitral award and enforcement of an arbitration agreement, must meet the following “agreement in writing” definition:

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19. Art. II(1) of the New York Convention provides: “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”.
 20. Art. 3.º of the Brazilian Arbitration Act provides in the English translation: “The parties may submit their disputes to arbitration by virtue of the arbitration agreement, which may be in the form of either an arbitration clause or a submission agreement (“*compromisso*”)”.
 21. Brazil no. 7, *International Cotton Trading Limited – ICT vs. Odil Pereira Campos Filho*, supra note 10 at 6.

“The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

The definition of an “agreement in writing” of paragraph 2 provides two alternatives. The first one is that an “agreement in writing” is an arbitration clause in a contract or a separate arbitration agreement, the contract or the separate arbitration agreement being signed by the parties. The second one is that an “agreement in writing” is an arbitration clause in a contract or a separate arbitration agreement contained in an exchange of letters or telegrams.

Paragraph 2 of art. II of the Convention is one of the most troublesome provisions of the Convention and one that had been the subject of much debate, since it excludes tacit acceptance. It led to refusals of enforcement in a number of cases. This debate has led to the development of various approaches, which seek to interpret the provision in a manner that would make it accommodate the international trade practices of today, as opposed to those existing back in 1958.

The first approach views the expression “exchange of documents” in a broad manner, which results in readily accepting that the exchange has taken place. For example, under this approach it will suffice that the party receiving the contract document containing the arbitration clause acknowledges the receipt of that contract.

The second approach interprets paragraph 2 in light of the first or second options of art. 7 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as amended in 2006 (Model Law), both captioned “Definition and form of arbitration agreement”. The first option provides:

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means

any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

The first option of art. 7 seems to make tacit acceptance possible. However, it does not address the issue that paragraph 2 of art. II requires a signed contract or an exchange in writing. Therefore, this approach may not be entirely satisfactory.

The second option of art. 7 reads:

“Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

The effect of the second option is to do away with the requirement of the written form altogether. The second option does not resolve the difficulties found in paragraph 2 of art. II of the Convention. In fact, the second option of art. 7 would have the effect of: (a) making paragraph 2 of art. II non-applicable; and (b) running counter to art. IV(1)(b) of the Convention, which requires the submission of the original or of a duly certified copy of the arbitration agreement as part of the application for recognition and enforcement of a foreign arbitral award.²²

The third approach interprets paragraph 2 in a wide manner to permit various forms of an “agreement in writing”. This approach is based on the reference “shall include” of the English text of the Convention, which may imply “shall include, but not be limited to”. As such, paragraph 2 is interpreted in a manner which permits the tacit acceptance of a contract containing an arbitration clause, if the arbitration clause is contained in a written contract or in any other form of writing. However, this approach must be viewed with caution, as the other authentic texts of the Convention provide the reference “shall mean” as opposed to “shall include”, which denotes that there is no

22. See Section 4.5 below for a discussion on art. IV of the New York Convention.

further room for interpretation, or differently, no further room for accepting other forms of an arbitration agreement.²³

Under the fourth approach, a party can rely on the “most-favourable-right provision” of the Convention, that is, on art. VII(1), if the law or treaties of the enforcing court imposes less strict conditions on the form of the arbitration agreement than paragraph 2 of art. II of the Convention.²⁴ This approach, however, would require that the enforcing forum has its own law or treaties on enforcement of foreign arbitral awards, which may not always be the case.

The fifth approach advocates for the use of the enforcing court’s discretionary power to grant enforcement, regardless of the fact that the requirements of paragraph 2 of art. II have not been met. However, this approach can be used only in cases such as waiver and estoppel.

The sixth and final approach holds that the requirements of paragraph 2 do not apply at the enforcement stage. Again, one must be cautious with this approach as well. This is because art. V(1)(a) of the Convention, which constitutes a ground for refusing enforcement, explicitly refers to “the agreement referred to in article II”.²⁵ Furthermore, this approach may create an inconsistency, as it would imply that the requirements of paragraph 2 would apply in the cases of enforcement of the arbitration agreement under art. II(3) which refers to “an agreement within the meaning of this article”,²⁶ but not in the cases of enforcement of a foreign arbitral award under art. V of the Convention.²⁷

The aforementioned approaches offer various solutions, albeit not satisfactory ones. The UNCITRAL Working Group II issued a recommendation that art. II(2) be interpreted “recognizing that the circumstances described therein are not exhaustive”, and that art. VII(1) is 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 arbitration agreement”.²⁸ This means

23. For example, the French and Spanish texts of the New York Convention, which are equally authentic by virtue of art. XVI of the Convention, provide “On entend par ‘convention écrite’” and “La expresión ‘acuerdo por escrito’ denotará”, respectively.

24. See Section 4.18 below for a discussion on art. VII(1) of the New York Convention.

25. See Section 4.8 below for a discussion on art. V(1)(a) of the New York Convention.

26. See Section 4.3 below for a discussion on art. II(3) of the New York Convention.

27. See Section 4.6 below for a discussion on art. V of the New York Convention.

28. Recommendation Regarding the Interpretation of art. II, paragraph 2, and art. VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign

that the circumstances in paragraph 2 of art. II of the Convention are not exhaustive and that, therefore, the written form requirement of that paragraph is a maximum requirement and not a minimum requirement. Yet, this is only a recommendation and this is why the need for a serious effort by the courts of the various Contracting States to achieve a uniform interpretation of paragraph 2 of art. II of the Convention becomes important.

The STJ referred to art. II(2) of the New York Convention once.²⁹ This may lead one to believe that the STJ is free from encountering the difficulties surrounding this provision. This belief, however, is erroneous. Indeed, the form of the arbitration agreement is a troubling requirement before the STJ as well.

The STJ relies on art. 4.º of the Brazilian Arbitration Act, which reads as follows:

“An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.

§ 1.º The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.

§ 2.º In adhesion contracts, the arbitration clause will only be valid if the adhering party takes the initiative to initiate arbitration proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type” (English translation).

Art. 4.º of the Brazilian Arbitration Act is different from art. II(2) of the Convention, in the sense that the latter is more demanding and its text excludes tacit acceptance. Indeed in *LAiglon S.A. vs. Têxtil União*, the STJ held that under the Brazilian Arbitration Act, an acceptance can be made tacitly when a party participates in the arbitration in such a manner that such party “indicates an unequivocal acceptance of the existence of the arbitration clause”.³⁰ Absent

Arbitral Awards, done in New York, 10.06.1958, adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 07.07.2006 at its Thirty-Ninth Session, Issued in *Official Records of the General Assembly, Sixty-first Session, Supplement no. 17 (1/61/17)*, Annex II.

29. See Brazil no. 4, *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11 at 7 (The STJ stated that “art. II(2) of [the New York Convention], [is] incorporated into the Brazilian legal system by Decree 4.311/2002”).

30. Brazil no. 1, *LAiglon SA (Switzerland) vs. Têxtil União S.A. (Brazil)*, supra note 11 at 7 (“The defendant’s participation in the arbitration, by presenting arguments

an uncontested participation in the arbitration, the STJ will not accept the existence of an arbitration agreement if the signature requirement has not been complied with,³¹ or differently, if there is no written arbitration agreement or “written manifestation of [the] intent” to arbitrate.³² What is more, in such cases the STJ has held that the lack of a valid arbitration agreement would also run counter to public policy.³³ It is at this point where the STJ takes a slightly narrower approach than that of the New York Convention. Firstly, it takes a narrower approach than that offered by paragraph 2 of art. II of the New York Convention, which does not require signature in cases where the arbitration agreement is contained in an unsigned exchange of documents. Secondly, it includes the invalidity of an arbitration clause within the public policy ground for refusing enforcement, something which the Convention does not do.

For example, in *Plexus Cotton vs. Santana Têxtil*, the parties had concluded sale and purchase agreements that contained a clause providing for arbitration at the Liverpool Cotton Association (LCA). When a dispute arose between the parties, *Santana Têxtil* refused to participate in the LCA arbitration on account that the sale and purchase agreements had not been signed by both parties, thereby making the arbitration clause invalid. Subsequently, *Plexus Cotton* obtained an award in its favour and sought to enforce it before the Brazilian judiciary. When enforcement proceedings reached the STJ, the STJ found that the parties had not entered into a valid arbitration agreement, because the written form requirement of art. 4.º of the Brazilian Arbitration Act was missing, and because there was no evidence that *Santana Têxtil* had orally accepted the arbitration agreement. For the STJ, “the lack of a written manifestation of intent by the defendant to accept the arbitration clause” amounted to a breach of public policy.³⁴

Similarly, in *Kanematsu vs. Advanced Telecommunications Systems*, the STJ refused to enforce an award rendered in favour of Kanematsu in an arbitration

and stating the express intention to appoint an arbitrator, indicates an unequivocal acceptance of the existence of the arbitration clause”).

31. *Plexus Cotton Limited (UK) vs. Santana Têxtil S.A. (Brazil)*, supra note 10; Brazil no. 13, *Kanematsu USA Inc. vs. ATS – Advanced Telecommunications Systems do Brasil Ltda.*, supra note 10.
32. *Plexus Cotton Limited (UK) v. Santana Têxtil S.A. (Brazil)*, supra note 10 at 9.
33. Id.; Brazil no. 4, *Oleaginoso Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11.
34. *Plexus Cotton Limited (UK) vs. Santana Têxtil S.A. (Brazil)*, supra note 10 at 9.

in the US under the American Arbitration Association Rules (AAA), because the contract between the parties containing the arbitration clause was unsigned. The STJ held that in the case before it, there was no evidence of an “explicit and manifest intention” of the parties to arbitrate as required by art. 4.º of the Brazilian Arbitration Act. For the STJ, it was not sufficient that the AAA award made reference to the submission agreement entered into between the parties.³⁵

In *Oleaginosa Moreno vs. Moinho Paulista*, the STJ stated that pursuant to the first paragraph of art. 4.º of the Brazilian Arbitration Act, the arbitration clause must “be stipulated in writing in the contract” or “contained in a separate document that refers to the contract”.³⁶ The STJ added that the fact that the contracts between the parties were made orally did not affect the arbitration clause if such clause “was expressly agreed in writing in another document referring to the original contract or in an [exchange of] correspondence”.³⁷ Although in the case before it there were telex exchanges containing the arbitration clause, there is no evidence that *Moinho Paulista* had agreed to arbitration, as the telex exchange did not take place between the parties themselves. The STJ added that it would recognise the existence of a valid arbitration agreement if the respondent party had taken part in the arbitration without contesting the tribunal’s jurisdiction. Since that was not the case before it, the STJ denied enforcement again on public policy grounds.

The study of Brazilian case law on the written form of the arbitration agreement shows that the Brazilian judiciary may benefit from adopting a more flexible approach on what constitutes a valid arbitration agreement and, therefore, dispense with the stringent requirement of signature. Moreover, the Brazilian judiciary may benefit from doing away with the inclusion of public policy into this area, as this results in an application of the Convention, which is at odds with that of courts of other Contracting States. While the Brazilian judiciary takes a progressive step by endorsing tacit acceptance, the adoption of the aforementioned flexibility will assist it in becoming a leader of the Convention’s Contracting States when it comes to the “writing” requirement of the Convention.

35. Brazil no. 13, *Kanematsu USA Inc. vs. ATS – Advanced Telecommunications Systems do Brasil Ltda.*, supra note 10 at 12-13.

36. Brazil no. 4, *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11 at 7.

37. Id.

4.3 Article II(3) – Enforcement of the Arbitration Agreement

The title of the New York Convention, as well as the majority of its provisions, may mislead one in believing that the Convention only deals with the enforcement of foreign awards. Yet, somewhere in its text there exists a provision, art. II(3), which makes the Convention applicable to the enforcement of arbitration agreements as well. Art. II(3) of the Convention provides that when a court of a Contracting State is seized of a dispute in respect of which the parties have agreed to arbitrate, the court must refer the parties to arbitration if one of the parties requests such referral, unless the court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”.³⁸ The Convention, however, does not define its scope of application with respect to art. II(3), that is, which arbitration agreements would be subject to enforcement under art. II(3). One possible interpretation to address this gap, is to interpret art. II(3) by reference to art. I of the Convention. This means that courts apply art. II(3) to arbitration agreements providing for arbitration in another Contracting State or providing for arbitration that is considered as non-domestic.

In the case of Brazil, comparable, but not identical, provisions to art. II(3) can be found in: (a) art. 7 of the Brazilian Arbitration Act, which provides the claimant party the opportunity to enforce its right to arbitration before the Brazilian judiciary in circumstances where the respondent party opposes arbitration;³⁹ (b) art. 267, VII of the Brazilian Code of Civil Procedure (Law no. 5.869/1973), as amended by the Brazilian Arbitration Act, which provides that an action pertaining a dispute subject to an arbitration agreement will not be admissible;⁴⁰ and (c) art. 301, IX of the Brazilian Code of Civil Procedure as

38. Art. II(3) of the New York Convention reads: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

39. Art. 7.º of the Brazilian Arbitration Act provides in the English translation: “Where there is an arbitration clause but one of the parties shows resistance as to the commencement of arbitration, the interested party may request the court to summon the other party to appear in court so that the submission agreement (“compromisso”) may be signed; the judge shall designate a special hearing for this purpose. (...) § 7.º The judge’s decision granting the motion shall be deemed to be the submission agreement (“compromisso”) itself”.

40. Art. 267, VII. of the Brazilian Code of Civil Procedure, as amended by the Brazilian Arbitration Act provides in the English translation: “The proceedings shall be

amended, which provides that the court shall dismiss the case if there is a valid arbitration agreement and refer the parties to arbitration.⁴¹

Almost 50% of the approximately 1,700 cases reported in the Yearbook concern art. II(3) of the Convention. Yet, there is only one reported case in Brazil concerning the court's referral to arbitration. *CAOA vs. Renault* concerned the validity of an ICC arbitration in New York, which was subject to several actions before Brazilian state courts. When the action went before the Court of Justice of São Paulo, the Court of Justice held that in the presence of a valid arbitration clause, a state court is prevented from adjudicating the case. Specifically, the Court confirmed that there is no need for a state court to interfere with the arbitral proceedings for the purposes of signing or not a submission agreement (“*compromisso arbitral*”) under art. 7.º of the Brazilian Arbitration Act, when a “full” arbitration clause, that is, one that refers for example to applicable arbitration rules, was concluded between the parties.⁴²

CAOA vs. Renault shows that the Brazilian judiciary endorses, albeit through one case only, the underlining policy of the hidden provision of the Convention – that is, that courts of the Contracting States must enforce a validly entered into arbitration agreement without interfering with the arbitration proceedings. However, the aforementioned case raises an issue, which should become food for thought for the Brazilian legislator. This case demonstrates that in Brazil there is a distinction between the system of enforcement of arbitration agreements and that of awards. For example, for the latter, the Brazilian legislator centralised the enforcement before a single court, namely the STJ, under art. 35 of the Brazilian Arbitration Act, as amended in 2004 by way of Amendment no. 45.⁴³ This has made proceedings on enforcement of awards in Brazil a one-shot procedure before its highest court, which is more efficient and a development to be applauded and followed suit by other Contracting States. Nonetheless, the same system does not exist for proceedings on the

dismissed, without decision on the merits: (...) VII – by the arbitration agreement”.

41. Art. 301, IX, of the Brazilian Code of Civil Procedure, as amended by the Brazilian Arbitration Act provides in the English translation: “The defendant shall, however, before discussing the merits, allege: (...) IX – the arbitration agreement”.
42. Brazil no. 10, *Carlos Alberto de Oliveira Andrade (Brazil) vs. CA de Oliveira Andrade Comércio Importação e Exportação Ltda. (Brazil), Renault S.A. (France) and others*, supra note 10 at 4-5.
43. Art. 35 of the Brazilian Arbitration Act provides in the English translation: “To be recognized or enforced in Brazil, the foreign arbitral award is subject only to homologation by the [STJ]”.

enforcement of an arbitration agreement, which is subject to decisions by lower courts. Therefore, the centralisation of these proceedings will be a desirable development that the Brazilian legislator may wish to have in mind.

4.4 Article III – Procedure

Art. III contains the basic obligation for the courts of the Contracting States to: (a) recognise foreign awards as binding; and (b) enforce them in accordance with the conditions set forth in the subsequent articles of the Convention (mainly arts. IV and V), on the basis of the procedure of the country where recognition and enforcement are sought.⁴⁴ In the case of Brazil, the relevant procedure is set forth in: (a) art. 35 of the Brazilian Arbitration Act, which provides that the Federal Supreme Court – and as aforementioned since 2004, the STJ is the sole court vested with jurisdiction to decide on the homologation of a foreign award;⁴⁵ (b) art. 36 which provides the applicable provisions of the Brazilian Arbitration Act on the issue;⁴⁶ and (c) art. 5 of the Supreme Court Resolution no. 9/2005 setting forth additional requirements for the homologation of a foreign decision.⁴⁷ The most important provision on

44. Art. III of the New York Convention reads: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.

45. See *supra* note 43.

46. Art. 36 of the Brazilian Arbitration Act provides in the English translation: “The provisions of articles 483 and 484 of the Code Civil Procedure shall apply, to the extent possible, to the request for homologation of foreign arbitral award”. Art. 483 of the Brazilian Code of Civil Procedure provides in the English translation: “A judgment issued by a foreign Court will only become enforceable in Brazil after being homologated by the [STJ]. Sole paragraph. The homologation procedure will follow the norms of the [STJ]’s Internal Regulation”. Art. 484 of the Brazilian Code of Civil Procedure provides in the English translation: “The enforcement procedure will be based on a certified copy of the judgment resulting from the homologation procedure, and shall observe the rules established for the enforcement of a national judgment of the same nature”. Art. 282 of the Brazilian Code of Civil Procedure sets forth the contents of the petition for enforcement of the foreign judgment.

47. For example, art. 5(I) of the Supreme Court Resolution no. 9/2005 provides that the jurisdiction of the foreign judge is an essential requirement for the homologation of the foreign decision.

this issue is art. 35, because as discussed above in Section 4.3, it transformed the homologation procedure in Brazil into an efficient one and placed Brazil at the forefront in comparison to the rest of the Contracting States in this respect.

4.5 *Article IV – Conditions to be Fulfilled by the Petitioner*

Art. IV of the Convention sets forth the documents that the party seeking enforcement must submit together with its application for enforcement.⁴⁸ In the spirit of facilitating enforcement, those documents are kept to a minimum: (a) the duly authenticated original arbitral award or a duly certified copy thereof; and (b) the original arbitration agreement or a duly certified copy thereof. Once the party seeking enforcement has complied with the requirements of art. IV, that party is entitled to enforcement of the award, unless: (a) the respondent party asserts and proves one of the grounds for refusal of enforcement listed in art. V(1); or (b) the enforcement court finds on its own motion that enforcement would violate its country's public policy under art. V(2).⁴⁹ A comparable provision is set forth in art. 37 of the Brazilian Arbitration Act.⁵⁰

Regarding the submission of the original or a duly certified copy of the arbitration agreement, art. 37 of the Brazilian Arbitration Act is, like art. IV of the Convention, simple and straightforward. However, when one reads art. 37 together with art. 5(1) of the Supreme Court Resolution no. 9/2005, one cannot help but question whether the jurisdiction of the arbitral tribunal is

48. Art. IV of the New York Convention provides: "1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent".

49. See Sections 4.6 to 4.16 below.

50. Art. 37 of the Brazilian Arbitration Act provides in the English translation: "The request for homologation of a foreign award shall be submitted by the interested party; this written motion shall meet the requirements of article 282 of the Code of Civil Procedure, and must be accompanied by: I – the original of the arbitral award or duly certified copy authenticated by the Brazilian consulate, accompanied by a sworn translation; II – the original arbitration agreement or a duly certified copy, accompanied by a sworn translation".

a requirement that must be proven by the party seeking the homologation of a foreign award at the point of filing its petition for homologation. Art. 5(1) of the Supreme Court Resolution no. 9/2005 provides that the homologation of a foreign decision requires “that [the decision] was rendered by a judge having jurisdiction”.⁵¹ This requirement does not exist under art. IV of the Convention.⁵² Instead, this requirement comes up in art. V(1)(a) of the Convention as a ground for refusal of enforcement, which must be proven by the respondent party. The Brazilian judiciary, therefore, may benefit from clarifying whether the burden of proof of the jurisdiction of the arbitral tribunal rests with the party seeking enforcement or with the respondent party, if the latter raises the lack of jurisdiction defence set forth in art. 38(I) and (II) of the Brazilian Arbitration Act, which mirrors art. V(1)(a) of the Convention.⁵³

Art. 37 goes one step further than the Convention and sets forth the procedural contents of a petition for enforcement, by making reference to art. 282 of the Brazilian Code of Civil Procedure.⁵⁴

4.6 Article V – Grounds for Refusal of Enforcement in General

The grounds for refusal of enforcement are listed in art. V of the Convention.⁵⁵ These grounds are reflected in arts. 38 and 39 of the Brazilian

51. See also Brazil no. 7, *International Cotton Trading Limited – ICT vs. Odil Pereira Campos Filho*, supra note 10, where the STJ stated at 1: “The rules for the homologation of a foreign arbitral award are set out in Law no. 9.307/1996, more specifically in its Chapter VI, and in Supreme Court Resolution no. 9/2005. In order to effectively investigate the matter, it must be verified that the parties did conclude an arbitration agreement, so that it can be ascertained that there was jurisdiction in the arbitration proceedings. [Jurisdiction is] an essential requirement for the homologation of the foreign award (Art. 5(I) Supreme Court Resolution no. 9/2005)” (Emphasis added).

52. See Section 4.8 below.

53. *Id.*

54. Art. 282 of the Brazilian Code of Civil Procedure reads in the English translation: “The initial petition must indicate: I – the Judge or Tribunal to whom it is addressed; II – the surnames, names, marital status, profession, domicile and residence of the claimant and the defendant; III – the facts and juridical grounds of the request; IV – duly specified claims; V – the value of the dispute; VI – the evidence with which the claimant intends to demonstrate the veracity of alleged facts; VII – the request for summons presentation to the defendant”.

55. Art. V of the New York Convention provides in relevant part: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition

Arbitration Act.⁵⁶ There are three general principles which apply to the grounds for refusal of enforcement under art. V, which are also echoed in arts. 38 and 39 of the Brazilian Arbitration Act and almost all of which have been invariably affirmed by the STJ. The first principle is that these grounds are exhaustive and, therefore, a court may not invent additional grounds.⁵⁷ The second principle is that there is no review of the merits at the enforcement phase.⁵⁸ The third principle is that the grounds for refusal of enforcement are interpreted by the courts in the Contracting States in a narrow sense.⁵⁹

Under art. V there are two groups of grounds for refusal of enforcement. The first group is set out in art. V(1) which contains grounds that must be raised by the respondent party, or differently, by the party against whom enforcement

and enforcement is sought, proof that: (...). 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (...).”

56. Art. 38 of the Brazilian Arbitration Act provides in the English translation: “The request for recognition or enforcement of an arbitral award may be denied only if the defendant furnishes proof that: (...)”. Art. 39 of the Brazilian Arbitration Act provides in the English translation: “The request for recognition or enforcement of a foreign award shall also be denied if the [STJ] finds that: (...).”
57. This principle has been affirmed by the STJ in: Brazil no. 6, *Bouvery International S.A. (nationality not indicated) vs. Irmãos Pereira Comercial e Exportadora Ltda. (Brazil)*, supra note 10 at 3; *Grain Partners SpA (Italy) vs. Cooperativa dos Produtores e Trabalhadores Urbanos e Rurais de Sorriso Ltda. – Coopergrão (Brazil) and Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda. (Brazil)*, supra note 10 at 4 (noting “that judicial control over the homologation of an arbitral award is limited to the aspects listed in arts. 38 and 39 of Law no. 9.307/1996”); and *First Brands do Brasil Ltda. (Brazil) and STP do Brasil Ltda. (Brazil) vs. STP – Petroplus Produtos Automotivos S.A. PPA (nationality not indicated) and Petroplus Sul Comércio Exterior S.A. PSC (nationality not indicated)*, supra note 10 at 5.
58. This principle has been affirmed by the STJ in: Brazil no. 4, *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11 at 1 and 15 (noting that “judicial control over a foreign arbitral award is limited to its formal aspects and there is no review of the merits”); Brazil no. 6, *Bouvery International S.A. (nationality not indicated) vs. Irmãos Pereira Comercial e Exportadora Ltda. (Brazil)*, supra note 10 at 5; Brazil no. 7, *International Cotton Trading Limited – ICT vs. Odil Pereira Campos Filho*, supra note 10 at 9; and Brazil no. 12, *Atecs Mannesmann GmbH vs. Rodrimar S.A. Transportes Equipamentos Industriais e Armazéns Gerais*, supra note 10 at 7-8.
59. The practice of the STJ shows that, in the majority of the cases, the STJ construes the grounds for refusal of enforcement of foreign arbitral awards in a narrow manner.

is sought. A similar group is set forth in art. 38 of the Brazilian Arbitration Act which provides that it is the respondent party which must furnish proof of the existence of any of the grounds. The second group is set out in art. V(2) and contains public policy grounds that can be raised by the enforcing court *ex officio*. This group is reflected in art. 39 of the Brazilian Arbitration Act.

4.7 *Article V(1) – Grounds for Refusal of Enforcement to be Proven by the Respondent*

The grounds of refusal of enforcement listed in art. V(1) of the Convention are:

- (a) the lack of a valid arbitration agreement;
- (b) the violation of due process;
- (c) the excess of an arbitrator's authority;
- (d) the irregularity in the composition of the arbitral tribunal or the arbitral procedure (a ground that is missing in the Brazilian Arbitration Act); and
- (e) the fact that the arbitral award is not binding on the parties, has been set aside or has been suspended in the country where it was rendered.

4.8 *Article V(1)(a) – Lack of a Valid Arbitration Agreement*

Art. V(1)(a) provides for the refusal of enforcement on the ground that the arbitration agreement “referred to in article II” is invalid.⁶⁰ The reference to art. II of the Convention implies that the non-compliance with the form requirements of the arbitration agreement set forth in that article, will constitute a ground for refusal of enforcement of an arbitral award under art. V(1)(a). It is, therefore, at this point on which the interpretation of the writing requirement of art. II(2) by the courts of the Contracting States becomes important and is relevant as to the possibility of a respondent party to succeed when raising the defence of art. V(1)(a). The comparable provision in the Brazilian Arbitration Act is art. 38(I) and (II), which resembles to art. V(1)(a), albeit it does not

60. Art. V(1)(a) of the New York Convention provides: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

refer to any provisions of the Act regarding the validity requirements of an arbitration agreement.⁶¹

In dealing with this defence, the STJ has relied on art. 4.º of the Brazilian Arbitration Act. The STJ has held that this defence is unsuccessful when one of the parties does not accept the arbitration clause, but nevertheless participates in the arbitration, defends its case and “indicates an unequivocal acceptance of the existence of the arbitration clause”.⁶²

On one occasion, however, the STJ refused to enforce an arbitral award, because the contract had been orally concluded between the parties’ brokers *and* the arbitration clause was not “expressly agreed in writing in another document referring to the original contract or in an [exchange of] correspondence” by the parties themselves.⁶³ This approach shows that the STJ construes the ground of the non-validity of an arbitration agreement in a rather broad manner. For example, it does not seem to take into account the fact that it is common in today’s trade transactions for negotiations to be held via the parties’ brokers and for the actual parties not to become involved in the express agreement of the arbitration clause.

On another occasion, the STJ rejected the defence based on the effectiveness of the underlying contract containing the arbitration clause.⁶⁴ According to the STJ, the validity of the contract related to the merits of the award, which had been decided by the arbitrators and which could not be reviewed by the

61. Art. 38, I and II, of the Brazilian Arbitration Act provides in the English translation: “The request for recognition or enforcement of an arbitral award may be denied only if the defendant furnishes proof that: I – the parties to the agreement lacked capacity; II – the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

62. Brazil no. 1, *L’Aiglon SA (Switzerland) vs. Têxtil União S.A. (Brazil)*, supra note 11 at 7. Similarly, the STJ has held that this defence is successful when the parties had not validly concluded a written arbitration agreement and when the respondent party had objected the jurisdiction of the arbitral tribunal during the arbitration proceedings. See, e.g., Brazil no. 4, *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11 at 15.

63. Brazil no. 4, *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financiera Inmobiliaria y Agropecuaria (Argentina) vs. Moinho Paulista Ltda. (Brazil)*, supra note 11 at 7.

64. Brazil no. 6, *Bouvery International S.A. (nationality not indicated) vs. Irmãos Pereira Comercial e Exportadora Ltda. (Brazil)*, supra note 10 at 4-5.

enforcing court. In this respect, the STJ was correct. However, the STJ could have seized the opportunity and dealt with the validity arbitration clause contained in the underlying contract, by taking into consideration the doctrine of separability. Indeed, separability is provided for by art. 8.º of the Brazilian Arbitration Act⁶⁵ and perhaps also by art. V(1)(a) of the Convention and art. 38(II) of the Brazilian Arbitration Act, which contemplate the law applicable to the arbitration agreement – one that is different to the law applicable to the underlying contract.⁶⁶

4.9 Article V(1)(b) – Violation of Due Process

The ground for refusing recognition and enforcement under art. V(1)(b) is the violation of due process, that is, the fundamental principles of fair hearing and adversary proceedings.⁶⁷ The corresponding provision in the Brazilian Arbitration Act is art. 38, III.⁶⁸ It may be the case that a violation of due process would also fall under the public policy provision of art. V(2)(b), because due process is generally perceived as pertaining to public policy. Thus, a court may also on its own motion refuse enforcement of an award for violation of due process on the basis of art. V(2)(b).⁶⁹ This is also contemplated in art. 39, sole

65. Art. 8.º of the Brazilian Arbitration Act provides in the English translation: “The arbitration clause is autonomous from the contract in which it is included, meaning that the nullity of the latter does not necessarily imply the nullity of the arbitration clause. Sole paragraph. The arbitrator is competent to decide, *ex officio* or at the parties’ request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause”.

66. For the text of art. V(1)(a) of the New York Convention see supra note 60. For the text of art. 38, II, see supra note 61.

67. Art. V(1)(b) of the New York Convention provides: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (...). (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

68. Art. 38, III, of the Brazilian Arbitration Act provides in the English translation: “The request for recognition or enforcement of an arbitral award may be denied only if the defendant furnishes proof that: (...) III – it was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case”.

69. Art. V(2)(b) of the New York Convention provides: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country

paragraph of the Brazilian Arbitration Act, which is often referred to by the STJ *ex officio* in cases where a respondent party invokes the violation of due process ground.⁷⁰

For example, in *Devcot vs. Ari Giongo*, the STJ granted enforcement of a foreign arbitral award and dismissed the respondent party's argument that it was not duly informed of the arbitration. The STJ held that there is no violation of public policy if the respondent party is granted appropriate period of time to prepare its defence in the arbitration.⁷¹

4.10 Article V(1)(c) – Excess of Authority

Art. V(1)(c) of the Convention deals with the non-enforcement of an arbitral award on the account of an excess of authority by the arbitral tribunal. Specifically, an arbitral award will be refused enforcement under art. V(1)(c) if the award: (a) deals with a difference or dispute not contemplated by, or not falling within, the terms of the parties' submission to arbitration; or (b) contains decisions on matters beyond the scope of the parties' submission to arbitration.⁷² These grounds are different from the cases concerning the non-validity of the arbitration agreement, which fall under the ambit of art. V(1)(a). Instead, these grounds embody the principle that it is the arbitral tribunal itself that has the jurisdiction to decide the issues that the parties have agreed to submit to it. Furthermore, art. V(1)(c) provides the possibility for the partial enforcement of

where recognition and enforcement is sought finds that: (...). (b) The recognition and enforcement of the award would be contrary to the public policy of that country”.

70. Art. 39, sole paragraph of the Brazilian Arbitration Act provides in the English translation: “The services of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including mail with confirmation of receipt, shall not be considered as offensive to Brazilian public policy, provided the Brazilian party is granted sufficient time to exercise its right of defence”.

71. *Devcot S.A. (France) vs. Ari Giongo (Brazil)*, supra note 11 at 4-5.

72. Art. V(1)(c) of the New York Convention provides: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (...).(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced”.

an award, which contains decisions on matters which were not submitted to the arbitral tribunal for decision, that is, which is in part *ultra* or *extra petita*.

Art. V(1)(c) is murky and contains difficulties in its interpretation. Regarding the expression “submission to arbitration”, there is a difference between the equally authentic English and French texts of the provision. The English text of art. V(1)(c) provides for the non-enforcement of an award, which deals with “a difference not contemplated by or not falling within the terms of the submission to arbitration”. The French text instead, provides for the non-enforcement of an award which deals with “a difference not contemplated by the submission agreement or not falling within the terms of the arbitral clause”.⁷³ The Spanish text of art. V(1)(c) is similar to the French one.⁷⁴ Under the French text, there is arguably a reference to the arbitration clause itself. Under the English text, there is a reference to the arbitrator’s mandate instead. The latter is also supported by the fact that art. V(1)(a) refers to the arbitration agreement in general, whilst art. V(1)(c) specifically mentions the “submission to arbitration” and not the “arbitration agreement”. As such, a court of a Contracting State may have to interpret art. V(1)(c) with the meanings offered by both the English and the French texts in mind, when determining whether an arbitrator has exceeded his or her authority.

In this respect, the drafters of the Brazilian Arbitration Act are to be commended for adopting a much simpler formula. Indeed the comparable provision, art. 38, IV reads:

“The arbitral award has exceeded the terms of the arbitration agreement, and is not possible to separate the portion exceeding the terms from what has been submitted to arbitration” (English translation).

The text of art. 38, IV shows that the Brazilian legislator intended to cover both situations of excess of authority of an arbitrator: (a) the situation where the arbitrator goes beyond the mandate given to him or her by the parties; and (b) the situation in which the arbitrator decided on matters not contemplated by the arbitration agreement, that is, the arbitral clause or the submission agreement. Therefore, the Brazilian legislator avoided the difficulties that arise in interpreting either the English or the French texts of art. V(1)(c) alone. In

73. The original French text of art. V(1)(c) of the New York Convention reads: “un différend non visé dans le compromis ou n’entrant pas dans les prévisions de la clause compromissoire”.

74. The original Spanish text of art. V(1)(c) of the New York Convention reads: “una diferencia no prevista en el compromise o no comprendida en las disposiciones de la cláusula compromisoria”.

addition, art. 38, IV, like art. V(1)(c), deals solely with the excess of authority of the arbitrator and not with his or her lack of capacity on account of an invalid arbitration agreement. Instead, the latter situation would fall under art. 38, I of the Brazilian Arbitration Act.⁷⁵ Furthermore, art. 38, IV provides the Brazilian judiciary with the possibility to grant partial enforcement of an award, if it is possible to separate the part of the award that has exceeded the terms of the arbitration agreement or the terms of what has been submitted to arbitration.

4.11 Article V(1)(d) – Violation of Agreement Regarding Appointment or Procedure

Under art. V(1)(d) of the Convention, the enforcement of a foreign arbitral award can be refused if the respondent party proves that the composition of the arbitral tribunal or the arbitral procedure: (a) was not in accordance with the agreement of the parties; or (b) in the absence of such agreement, was not in accordance with the law of the place of arbitration.⁷⁶ The Brazilian Arbitration Act does not contain a comparable provision. Therefore, irregularities which may exist in the appointment process or in the arbitral procedure agreed upon by the parties would not be valid grounds for refusal of enforcement in Brazil. One may argue that the Brazilian legislator intended to cover at least one aspect of art. V(1)(d), that is, the irregularity in the composition of the arbitral tribunal, by adopting art. 38, V of the 1996 Act, which provides for non-enforcement in situations where “the commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause”. Art. 38, V, however, is not sufficient to address this important gap in the Brazilian Arbitration Act and the Brazilian judiciary may wish to address this by applying directly art. V(1)(d) of the Convention.

4.12 Article V(1)(e) – Award Not Binding, Suspended or Set Aside

Art. V(1)(e) of the New York Convention provides that the enforcement of an arbitral award can be refused if the respondent party proves that the arbitral

75. See Section 4.8 above.

76. Art. V(1)(d) of the New York Convention reads: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (...). (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place”.

award: (a) has not yet become “binding”; (b) has been suspended by a court in which, or under the law of which, the award was made; and (c) has been set aside by a court of the country in which, or under the law of which, the award was made.⁷⁷ There have hardly been any enforcement cases under the Convention on the binding nature or on the suspension of an arbitral award pursuant to art. V(1)(e). However, this is different for the ground regarding the award having been set aside in the country of origin.

In Brazil, art. V(1)(e) of the Convention is reflected in art. 38, V of the Brazilian Arbitration Act, although art. 38, V intelligently dispenses with the reference of art. V(1)(e), “under the law of which that award was made”.⁷⁸ The STJ has had occasion to entertain an enforcement action of an ICC award rendered in the US and subject to setting aside proceedings before Brazilian courts in *Brands vs. Petroplus*.⁷⁹ In this case, the STJ rightly held that the setting aside proceedings in Brazil did not prevent the enforcement of the ICC award, thereby, confirming that the exclusive jurisdiction to decide on the setting aside of an arbitral award rests with the courts in the country of origin (in this case: the US).⁸⁰

4.13 Article V(2) – Grounds for Refusal of Enforcement Applied by the Enforcement Court on Its Own Motion

The second group of grounds for refusing enforcement of an arbitral award is found in art. V(2) of the Convention.⁸¹ This is a distinct group in itself, because it contains grounds which concern the enforcing Contracting State’s

77. Art. V(1)(e) of the New York Convention reads: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (...). (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.”

78. Art. 38, V, of the Brazilian Arbitration Act reads in the English translation: “The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that: (...) V – the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made”.

79. *First Brands do Brasil Ltda. (Brazil) and STP do Brasil Ltda. (Brazil) vs. STP – Petroplus Produtos Automotivos S.A. PPA (nationality not indicated) and Petroplus Sul Comércio Exterior S.A. PSC (nationality not indicated)*, supra note 10.

80. *Id.* at 18.

81. See supra note 55.

(international) public policy and, therefore, grounds which may be invoked by the enforcing courts on their own motion or *ex officio*.

Many commentators and observers feared and still do fear that the public policy defence to arbitral awards is potentially a serious weakness of international arbitration. Their theory is that if for any reason a court does not like an arbitral award, it will resort to public policy to block its force and effect. However, this theory is not borne out by reality, as enforcing courts seldom accept such defence. Indeed, there are only a few cases under the New York Convention in which national courts of the Contracting States denied enforcement based on art. V(2) of the Convention. The main reason for this is that national courts of the Contracting States distinguish between domestic public policy and international public policy.

4.14 Distinction between Domestic and International Public Policy

National courts distinguish between domestic and international public policy because the matters of public policy in domestic relations are different to those in international relations. The latter are relatively fewer than the former, and this is because domestic and international relations have different purposes. Consequently, a defence on international public policy will be harder to succeed than a defence on domestic public policy.

Apart from some isolated cases,⁸² national courts of the Contracting States generally apply the distinction to both grounds of art. V(2) of the Convention: that is, (i) to grounds on arbitrability found in paragraph (a), which is, in my view, part of public policy;⁸³ and (ii) to grounds on public policy concerning

82. See, e.g.: Austria no. 7, *Not Indicated vs. Not Indicated*, Oberster Gerichtshof [Supreme Court], 11.05.1983 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1985, vol. X (Kluwer Law International, 1985), p. 421-423; Italy no. 29, *Bobbie Brooks Inc. vs. Lanificio Walter Banci s.a.s.*, Corte Di Appello Di Firenze, 08.10.1977 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration*, 1979, vol. IV (Kluwer Law International, 1979), p. 289-291.

83. See, e.g.: US no. 4, *Scherk vs. Alberto-Culver Co.*, 417 U.S. 506 (1974) in Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1976, vol. I (Kluwer Law International, 1976), p. 203-204, where the US Supreme Court held that securities transactions disputes are arbitrable if the contract is international. See also US no. 59, *Mitsubishi Motors vs. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) in van den Berg (ed.), *Yearbook Commercial Arbitration* 1986, vol. X (Kluwer Law International, 1986), p. 555-565 (The US Supreme Court held that that antitrust matters are arbitrable in international cases “even assuming that a contrary result would be forthcoming in a domestic context”

matters of public policy other than that of arbitrability found in paragraph (b).⁸⁴ In this respect, national courts of the Contracting States interpret art. V(2) of the Convention in a rather narrow manner.

Similarly, a number of arbitration laws, such as those of France, Portugal and Lebanon, refer to the “principles of international public policy” in connection with the enforcement of foreign arbitral awards outside the New York Convention.⁸⁵ However, the fact that other arbitration laws do not specifically refer to “international public policy”, does not mean that the enforcing courts operating under the Convention do not apply the notion. In fact, the notion of “international public policy” is a notion that has been developed through case-law, particularly in the context of the New York Convention, which does not contain the adjective “international” in conjunction with “public policy” in art. V(2).

The law under which public policy is to be determined is almost always the law of the country before whose courts it is invoked. That is the case under the New York Convention⁸⁶ and under the UNCITRAL Model Law.⁸⁷ This will also

and referred in this context to “concerns of international comity, respect for capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes”).

84. See, e.g.: Mexico no. 1, *Presse Office S.A. vs. Centro Editorial Hoy S.A.*, Tribunal Superior de Justicia, Eighteenth Civil Court Of First Instance for The Federal District Of Mexico, 24.02.1977 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration 1979*, vol. IV (Kluwer Law International, 1979), p. 301; Mexico no. 2, *Malden Mills Inc. vs. Hilaturas Lourdes S.A.*, Tribunal Superior de Justicia, Court Of Appeals (Fifth Chamber) for The Federal District Of Mexico, 01.08.1977 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration 1979*. vol. IV (Kluwer Law International, 1979), p. 302-304.
85. See art. 1.514 of the French New Code of Civil Procedure (as amended by Decree no. 2011-48 of 13.01.2011); art. 46(3)(b)(ii) of the Portuguese Arbitration Law no. 63/2011; and arts. 814 and 817(5) of the Lebanese New Code of Civil Procedure (Decree-Law no. 90/1983).
86. Art. V(2)(b) of the New York Convention provides: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (...) (b) The recognition or enforcement of the award would be contrary to the *public policy of that country*” (Emphasis added).
87. Art. 36(1)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (Model Law) provides: “2. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (...) (b) if the court finds that: (...) (ii) the recognition or enforcement of the award would be contrary to the *public policy of this State*” (Emphasis added).

be the case with respect to “international public policy”: notwithstanding the adjective “international” it is the international public policy as perceived by the (case) law of the country where public policy is invoked.⁸⁸

In Brazil, the relevant provision on public policy as a ground for non-enforcement of foreign arbitral awards is found in art. 39, II of the Brazilian Arbitration Act. Art. 39, II reads:

“The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the [STJ] ascertains that:

(...)

II – the decision is offensive to *national public policy*” (English translation; emphasis added)

Unlike Art. V(2)(b) of the Convention, which refers “the public policy of that country”, and which leaves room for interpreting it with implying the adjective “international”, Art. 39, II of the Brazilian Arbitration Act refers to “national public policy”, that is, Brazilian public policy. The text of art. 39, II, therefore, would not seem to allow an interpretation of “national public policy” as “international public policy”. In fact, this is perhaps why the STJ has still not recognised the distinction. However, it is on this point in particular where the non-reliance on the Convention by the Brazilian judiciary may prove to be an impediment for Brazil and its emerging role as a leading country in international arbitration.

Despite the fact that the distinction has not been recognised by the STJ and, consequently, that the STJ never referred to “international public policy”, the STJ shows a preference for a narrow construction of the public policy defence and has rarely denied enforcement on such ground. For example, in *Thales Geosolutions vs. Fonseca Almeida Representações e Comércio*, the STJ held that

88. It is in exceptional cases that public policy of another country may play a role. This applies in particular to the so-called “*règles d’application immédiate*”. See, e.g., art. 7 of the EC Convention on the Law Applicable to Contractual Obligations of 19.06.1980, Official Journal L 266, 09.10.1980 P. 0001-0019, headed “Mandatory Rules”: “1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract”.

the non-compliance with a contractual obligation on the basis of the principle “*exceptio non adimpleti contractus*” did not fall within the scope of public policy and granted enforcement of the UNCITRAL award.⁸⁹ The STJ repeated this finding in *Grain Partners vs. Cooperativa dos Produtores et al.*⁹⁰ In the same case, the STJ held that the use of arbitration as a means of dispute resolution when the parties unequivocally manifest their intention to arbitrate their disputes does not violate “Brazilian public policy”.⁹¹

It is true that the STJ shows restraint when entertaining public policy defences in enforcement proceedings. Nonetheless, the STJ will benefit from directly applying the Convention on this issue and, therefore, from recognising the distinction between domestic and international public policy. It is particularly in this manner, that the Brazilian judiciary will be able to contribute towards the uniform interpretation of the Convention.

4.15 Article V(2)(a) – Non-arbitrability

Under art. V(2)(a) of the Convention, a court of a Contracting State may refuse enforcement of an award on its own motion, if the subject-matter of the dispute is not capable of being settled by arbitration under the law of the enforcement forum.⁹² The rationale behind this ground is that there is a national interest to judicially resolve a matter as opposed to arbitration.

The concept of arbitrability may be divided in two of the following ways: (a) objective arbitrability, which depends on the subject matter of the dispute; and (b) subjective arbitrability, which pertains to the ability of a party to submit the dispute to arbitration. The cases in which enforcement was refused under both objective and subjective arbitrability are rather rare, and this is mainly due to the aforementioned application of the distinction between domestic and international public policy.

89. Brazil no. 2, *Thales Geosolutions Inc. (US) vs. Fonseca Almeida Representações e Comércio Ltda. - Farco (Brazil)*, supra note 10 at 7.

90. *Grain Partners SpA (Italy) vs. Cooperativa dos Produtores e Trabalhadores Urbanos e Rurais de Sorriso Ltda. – Coopergrão (Brazil) and Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda. (Brazil)*, supra note 10 at 16.

91. *Id.* at 13-15.

92. Art. V(2)(a) of the New York Convention provides: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country”.

In Brazil, art. V(2)(a) is reproduced in art. 39, I of the Brazilian Arbitration Act.⁹³ The STJ, however, has not dealt with this provision so far and, therefore, it is still a unknown as to how the Brazilian judiciary would construe it.

4.16 Article V(2)(b) – Violation of Public Policy

Under art. V(2)(b) of the Convention, a court of a Contracting State may refuse enforcement of an arbitral award on its own motion, if the enforcement of the arbitral award would be contrary to the public policy of the country where the enforcement is sought.⁹⁴ Court decisions under this ground of the New York Convention can be subdivided in various categories, for example: (a) default of a party; (b) lack of impartiality and independence of an arbitrator; (c) lack of reasons in an award; and (iv) due process. Despite the fact that these grounds are regularly invoked, they are almost always unsuccessful. This seems also to be the case with Brazil. Although one would expect that the express reference to “national public policy” in the corresponding art. 39, II of the Brazilian Arbitration Act would result in more cases of refusals of enforcement, the Brazilian judiciary seems to appreciate, even by implication, the fact that matters pertaining to international transactions are different to those pertaining to domestic ones.

i. Default of a Party

Default of a party to arbitration may constitute a ground for refusal of enforcement of an award, only if the defaulting party has not been duly notified of the arbitration proceedings. This is a view that had been affirmed by the STJ in *Union Européenne de Gymnastique vs. Multipole Distribuidora de Filmes*. In this case, the STJ held that the award at issue which was rendered by default did not violate the public policy ground of art. 39 of the Brazilian Arbitration Act, because *Multipole* had been duly notified to participate and defend itself in the arbitration. The STJ specifically relied on the sole paragraph of art. 39 which permits the notification of the arbitration *via* mail, as opposed to a letter rogatory, if such notification enables a party to the arbitration to exercise its right of defence.⁹⁵

93. Art. 39, I, of the Brazilian Arbitration Act provides in the English translation: “The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the [STJ] ascertains that: I – in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration”.

94. For the text of art. V(2)(b) of the New York Convention see *supra* note 86.

95. *Union Européenne de Gymnastique – UEG (nationality not indicated) vs. Multipole Distribuidora de Filmes Ltda (Brazil)*, *supra* note 10 at 3-4. For the text of art. 39, sole paragraph see *supra* note 70.

ii. *Lack of Impartiality and Independence of an Arbitrator*

Lack of impartiality and independence of an arbitrator requires that an arbitrator has no personal interest in the case before him or her and that he or she is independent *vis-à-vis* the parties. This ground has not so far been an issue before the STJ in the context of enforcing a foreign arbitral award.

iii. *Lack of Reasons in an Award*

A fair number of countries consider it fundamental that an award contains the reasons on which the arbitral decision is based. This is reflected in many national arbitration laws.⁹⁶ Nevertheless, it is the case that the courts of such countries will generally enforce awards that do not contain reasons, if those awards are considered valid in the country in which they were made.⁹⁷ This approach is arguably the result of the application of the distinction between domestic and international public policy by the courts of the enforcement forum.

Brazil is one of those countries, which mandatorily requires the reasoning for an award. For example, in enforcement proceedings in *Tremond Alloys and Metals Corporation vs. Metaltubos Indústria e Comércio de Metais*, the STJ considered art. 26, I and II of the Brazilian Arbitration Act and found that the AAA award before it “contain[ed] a summary and reasons” and that it gave “sufficient reasons as to the decision of the dispute and the finding against [the] Defendant”.⁹⁸ Art. 26, I and II provides that an “award must contain (...) a summary of the dispute”, as well as “the grounds of the decision with due analysis of factual and legal issues”.⁹⁹ One can understand from this

96. See, e.g., art. 30(2) of the UNCITRAL Model Law which provides: “The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30”.

97. See, e.g., Italy no. 29, *Bobbie Brooks Inc. vs. Lanificio Walter Banci s.a.s., Corte Di Appello Di Firenze*, 08.10.1977 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1979, vol. IV (Kluwer Law International, 1979) at 7 (“[T]he fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by foreign legislative and judicial authorities. The Court of Appeal recalled that under Anglo-Saxon and U.S. law the reasoning is not required for an award. It referred also to Art. VII of the European Convention on International Commercial Arbitration of 1961 according to which the award does not necessarily have to contain reasons”).

98. *Tremond Alloys and Metals Corporation (US) vs. Metaltubos Indústria e Comércio de Metais Ltda. (Brazil)*, supra note 10 at 7.

99. Art. 26, I and II, of the Brazilian Arbitration Act provides in the English translation: “The arbitral award shall mandatorily contain: I – a report, including parties’ personal

holding that the STJ considered the elements of art. 26, I and II of the Brazilian Arbitration Act requiring reasoning as reflecting domestic public policy.

Despite the fact that the reasoning of an award is essential in determining, for example, the breach of (international) public policy, Brazil may benefit from applying the distinction between domestic and international public policy in order to enforce arbitral awards without reasons, if such awards are in conformity with the arbitration law of the place of arbitration. Alternatively, Brazil may wish to consider addressing the lack of reasoning of an arbitral award under art. V(1)(d) of the Convention, which provides that the arbitral procedure must be in accordance with the law of the place of arbitration.¹⁰⁰

iv. Due process

Due process pertaining to public policy, concerns irregularities in the arbitral proceedings and essentially requires that the parties to the arbitration have an equal opportunity to be heard. A classical example of an arbitrator who fails to observe due process is *Polytek Engineering Company Limited vs. Hebei Import & Export Corporation*, a case decided by the Court of Appeal in Hong Kong.¹⁰¹ In this case, the Court of Appeal refused to enforce the award finding that it was in violation of the public policy of Hong Kong, because the “Chief Arbitrator” (but not the two other arbitrators) and the Tribunal-appointed experts had attended a site inspection in the presence of the claimant’s staff, however, in the absence of the respondent, who had not been notified.

As already mentioned above, due process, as a ground for non-recognition and enforcement, can fall both under art. V(2)(b) and art. V(1)(b) of the Convention. The same is the case under the Brazilian Arbitration Act: due process can fall both under art. 39, II and art. 38, III.¹⁰² However, the case law of the STJ relies mostly on art. 39, II of the Brazilian Arbitration Act on public policy. For example, in *Grain Partners vs. Cooperativa dos Produtores et*

data, as well as a summary of the dispute; II – the grounds for the decision, with due analysis of factual and legal issues, including, if it is the case, a statement of the decision in equity”.

100. See Section 4.11 above.

101. Hong Kong no. 12, *Polytek Engineering Company Limited vs. Hebei Import & Export Corporation*, High Court of the Hong Kong Special Administrative Region, Court of Appeal, 116 of 1997, 16.01.1998 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 1998*, vol. XXIII (Kluwer Law International, 1998), p. 666-684.

102. See Section 4.9 above.

al, the STJ was faced with the argument that there was a violation of public policy based on a violation of due process, because the arbitration was very expensive and because it limited a party's right to defend itself.¹⁰³ The STJ rejected the defence reasoning that the parties had freely entered into the arbitration agreement, had been fully informed of the arbitration proceedings and the respondent parties had had the opportunity to defend themselves.¹⁰⁴ Similarly, the STJ rejected the public policy defence based on a due process violation in *Union Européenne de Gymnastique vs. Multipole Distribuidora de Filmes*, because, again, it found that the respondent party had been duly notified to participate and defend itself in the arbitration.¹⁰⁵

It seems, therefore, that even if the STJ relies on the “national public policy” defence of art. 39, II of the Brazilian Arbitration Act when entertaining due process violations, it follows an approach that favours a narrow construction of the defence.

4.17 Article VI – Adjournment of the Decision on Enforcement

Art. VI of the Convention provides the possibility to the enforcing court to adjourn its decision on enforcement if the setting aside or suspension of the award is requested in the country in which, or under the law of which, the award was made.¹⁰⁶ This provision is not replicated in the Brazilian Arbitration Act and the Act remains silent on how the STJ should react if an action for the setting aside of a foreign award before it is pending in that award's country of origin. It is, therefore, only with the direct application of the Convention by the Brazilian judiciary that the uncertainty created by this gap in the Brazilian Arbitration Act can be resolved.

103. *Grain Partners SpA (Italy) vs. Cooperativa dos Produtores e Trabalhadores Urbanos e Rurais de Sorriso Ltda. – Coopergrão (Brazil) and Oito Exportação e Importação de Cereais e Defensivos Agrícolas Ltda. (Brazil)*, supra note 10.

104. *Id.* at 11-15.

105. Discussed in Section 4.16(i) in the context of “Default of a Party” pertaining to the public policy defence.

106. Art. VI of the New York Convention reads: “If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security”.

4.18 Article VII(1) – Compatibility with other Treaties and More-Favourable Right Provisions

Art. VII(1) of the Convention contains two provisions.

The first provision is that the New York Convention does not affect the validity of other treaties concerning arbitration, the so-called “compatibility provision”. This provision would capture treaties such as the 1975 Inter-American Convention on International Arbitration.

The second provision permits a party to base its request for enforcement of an arbitral award on domestic law or other treaties concerning the enforcement of foreign arbitral awards instead of on the New York Convention, if the former are more favourable, that is, if the former make enforcement easier. This provision is often called the “more-favourable-right provision”. A German Court of Appeal expressed the rationale behind the “more favourable provision” as follows: “The rationale of this provision is to avoid depriving a party who seeks recognition of an award of more favourable possibilities under the national law of the State where enforcement is sought”.¹⁰⁷

Art. VII(1) goes to the heart of the meaning of the Convention. The Convention’s purpose is to ensure the international efficacy of an arbitral award and to that end, the Convention sets forth the minimum criteria under which a court in a Contracting State must enforce an award falling under it. Indeed, the mere existence of art. VII(1) may signify that the Convention does not contain a uniform regime for enforcement of foreign arbitral awards: a Contracting State is free to adopt a regime that is more favourable. As such, the result may be less desirable in terms of harmonisation of the legal regime governing international arbitration. For example, depending on the law of the country where enforcement is sought, a foreign award that does not comply with the Convention can or cannot be enforced.

There is no comparable provision in the Brazilian Arbitration Act. One, however, cannot help but question whether arts. 34 to 40 of the Brazilian Arbitration Act constitute the more-favourable right “regime” contemplated by art. VII(1) of the Convention, which would in turn mean that the Brazilian judiciary almost never applies the New York Convention. However, in the

107. Germany no. 14, *Danish buyer v. German (FR.) seller*, Oberlandesgericht Köln, 10.06.1976 in Pieter Sanders (ed.), *Yearbook Commercial Arbitration 1979*, vol. IV (Kluwer Law International, 1979) at 5.

majority of the cases, the Convention seems to be implicitly referred to and not regarded as being less favourable to the Brazilian Arbitration Act.

5. CONCLUSION

A review of the reported Brazilian case law concerning arts. I to VII of the Convention and arts. 34 to 40 of the Brazilian Arbitration Act, shows that the Brazilian judiciary addresses enforcement of foreign arbitral award proceedings by implementing the underlying goals of the Convention. The work of the Brazilian judiciary, as well as that of the Brazilian Committee on Arbitration (Cbar), in particular with the Portuguese translation of the Guide on the New York Convention prepared by ICCA, has brought Brazil to where it is today. In this regard, it is rightfully called the “*belle of the ball*” of the New York Convention Contracting States.

There are, however, a number of concerns which should not be disregarded by the Brazilian judiciary or by the Brazilian legislator. For example: (a) the Brazilian judiciary’s approach as to the writing requirement of the arbitration agreement is not clear-cut and can be perceived narrower to that of the New York Convention; (b) the Brazilian Arbitration Act does not provide as a ground for non-enforcement the violation of the agreement on the appointment of arbitrators or procedure (unlike art. VI(d)) and does not regulate the adjournment of the enforcement proceedings pending a setting aside action (unlike art. VI); and more importantly (c) the Brazilian Arbitration Act does not distinguish between international and domestic public policy. These are concerns which, if not addressed, may lead to the undesirable development of displacing Brazil from being the front-runner in international arbitration. What remains to be seen, therefore, is how Brazil will proceed in order to maintain the title of the “*belle of the ball*” that it now holds.

6. APPENDIX A

Comparative Table – The New York Convention and the Brazilian Arbitration Act

(In Portuguese)

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
<i>Artigo I – Âmbito de Aplicação</i>	
<p>1. A presente Convenção aplicar-se-á ao reconhecimento e à execução de sentenças arbitrais estrangeiras proferidas no território de um Estado que não o Estado em que se tencione o reconhecimento e a execução de tais sentenças, oriundas de divergências entre pessoas, sejam elas físicas ou jurídicas. A Convenção aplicar-se-á igualmente a sentenças arbitrais não consideradas como sentenças domésticas no Estado onde se tencione o seu reconhecimento e a sua execução.</p>	<p>Art. 34. A sentença arbitral estrangeira será reconhecida ou executada no Brasil de conformidade com os tratados internacionais com eficácia no ordenamento interno e, na sua ausência, estritamente de acordo com os termos desta Lei.</p> <p>Parágrafo único. Considera-se sentença arbitral estrangeira a que tenha sido proferida fora do território nacional.</p>
<p>2. Entender-se-á por "sentenças arbitrais" não só as sentenças proferidas por árbitros nomeados para cada caso mas também aquelas emitidas por órgãos arbitrais permanentes aos quais as partes se submetam.</p>	[Sem dispositivo correspondente]
<p>3. Quando da assinatura, ratificação ou adesão à presente Convenção, ou da notificação de extensão nos termos do Artigo X, qualquer Estado poderá, com base em reciprocidade, declarar que aplicará a Convenção ao reconhecimento e à execução de sentenças proferidas unicamente no território de outro Estado signatário. Poderá igualmente declarar que aplicará a Convenção somente a divergências oriundas de relacionamentos jurídicos, sejam eles contratuais ou não, que sejam considerados como comerciais nos termos da lei nacional do Estado que fizer tal declaração.</p>	[Não utilizado pelo Brasil]
<i>Art. II – Convenção de Arbitragem</i>	
<p>1. Cada Estado signatário deverá reconhecer o acordo escrito pelo qual as partes se comprometem a submeter à arbitragem todas as divergências que tenham surgido ou que possam vir a surgir entre si no que diz respeito a um relacionamento jurídico definido, seja ele contratual ou não, com relação a uma matéria passível de solução mediante arbitragem.</p>	<p>[Comparar com o art. 4.º, § 1.º:</p> <p>Art. 4.º A cláusula compromissória é a convenção através da qual as partes em um contrato comprometem-se a submeter à arbitragem os litígios que possam vir a surgir, relativamente a tal contrato.</p> <p>Art. 7.º Existindo cláusula compromissória e havendo resistência quanto à instituição da arbitragem, poderá a parte interessada requerer a citação da outra parte para comparecer em juízo a fim de lavrar-se o compromisso, designando o juiz audiência especial para tal fim.</p> <p>§§ 1.º a 6.º (...)</p>

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
	<p>§ 7.º A sentença que julgar procedente o pedido valerá como compromisso arbitral.</p> <p>Art. 9.º O compromisso arbitral é a convenção através da qual as partes submetem um litígio à arbitragem de uma ou mais pessoas, podendo ser judicial ou extrajudicial.</p> <p>§ 1.º O compromisso arbitral judicial celebrar-se-á por termo nos autos, perante o juízo ou tribunal, onde tem curso a demanda.</p> <p>§ 2.º O compromisso arbitral extrajudicial será celebrado por escrito particular, assinado por duas testemunhas, ou por instrumento público.</p> <p>Art. 10. Constará, obrigatoriamente, do compromisso arbitral: ...</p> <p>Art. 11: Poderá, ainda, o compromisso arbitral conter: ...</p> <p>Art. 12: Extingue-se o compromisso arbitral: ...]</p>
<p>2. Entender-se-á por "acordo escrito" uma cláusula arbitral inserida em contrato ou acordo de arbitragem, firmado pelas partes ou contido em troca de cartas ou telegramas.</p>	<p>[Comparar com o art. 4.º:</p> <p>§ 1.º A cláusula compromissória deve ser estipulada por escrito, podendo estar inserta no próprio contrato ou em documento apartado que a ele se refira.</p> <p>§ 2.º Nos contratos de adesão, a cláusula compromissória só terá eficácia se o aderente tomar a iniciativa de instituir a arbitragem ou concordar, expressamente, com a sua instituição, desde que por escrito em documento anexo ou em negrito, com a assinatura ou visto especialmente para essa cláusula.]</p>
<p>3. O tribunal de um Estado signatário, quando de posse de ação sobre matéria com relação à qual as partes tenham estabelecido acordo nos termos do presente artigo, a pedido de uma delas, encaminhará as partes à arbitragem, a menos que constate que tal acordo é nulo e sem efeitos, inoperante ou inexecutável.</p>	<p>[Comparar com o art. 7.º</p> <p>Art. 267, CPC. Extingue-se o processo, sem resolução de mérito</p> <p>(...)</p> <p>VII – pela convenção de arbitragem;</p> <p>(...)</p> <p>Art. 301, CPC. Compete-lhe, porém, antes de discutir o mérito, alegar:</p> <p>(...)</p> <p>IX – convenção de arbitragem;</p> <p>(...)</p> <p>[Ver art. 41]]</p>

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
<p>Art. III – Execução da Sentença Arbitral - Geral</p> <p>Cada Estado signatário reconhecerá as sentenças como obrigatórias e as executará em conformidade com as regras de procedimento do território no qual a sentença é invocada, de acordo com as condições estabelecidas nos artigos que se seguem. Para fins de reconhecimento ou de execução das sentenças arbitrais às quais a presente Convenção se aplica, não serão impostas condições substancialmente mais onerosas ou taxas ou cobranças mais altas do que as impostas para o reconhecimento ou a execução de sentenças arbitrais domésticas.</p>	<p>Art. 35. Para ser reconhecida ou executada no Brasil, a sentença arbitral estrangeira está sujeita, unicamente, à homologação do (...) [Superior Tribunal de Justiça].</p> <p>Art. 36. Aplica-se à homologação para reconhecimento ou execução de sentença arbitral estrangeira, no que couber, o disposto nos arts. 483 e 484 do Código de Processo Civil.</p> <p>Art. 483, CPC. A sentença proferida por tribunal estrangeiro não terá eficácia no Brasil senão depois de homologada pelo [Superior Tribunal de Justiça].</p> <p>Parágrafo único. A homologação obedecerá ao que dispuser o Regimento Interno do [Superior Tribunal de Justiça].</p> <p>Art. 484, CPC. A execução far-se-á por carta de sentença extraída dos autos da homologação e obedecerá às regras estabelecidas para a execução da sentença nacional da mesma natureza.</p>
<p>Art. IV. Pedido de Execução</p>	
<p>1. A fim de obter o reconhecimento e a execução mencionados no artigo precedente, a parte que solicitar o reconhecimento e a execução fornecerá, quando da solicitação:</p>	<p>Art. 37. A homologação de sentença arbitral estrangeira será requerida pela parte interessada, devendo a petição inicial conter as indicações da lei processual, conforme o art. 282 do Código de Processo Civil, e ser instruída, necessariamente, com:</p>
<p>(a) a sentença original devidamente autenticada ou uma cópia da mesma devidamente certificada;</p>	<p>I – o original da sentença arbitral ou uma cópia devidamente certificada, autenticada pelo consulado brasileiro e acompanhada de tradução oficial;</p>
<p>(b) o acordo original a que se refere o artigo II ou uma cópia do mesmo devidamente autenticada.</p>	<p>II – o original da convenção de arbitragem ou cópia devidamente certificada, acompanhada de tradução oficial.</p>
<p>2. Caso tal sentença ou tal acordo não for feito em um idioma oficial do país no qual a sentença é invocada, a parte que solicitar o reconhecimento e a execução da sentença produzirá uma tradução desses documentos para tal idioma. A tradução será certificada por um tradutor oficial ou juramentado ou por um agente diplomático ou consular.</p>	<p>[Ver Art. 37, I e II, acima]</p>

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
[Sem dispositivo correspondente]	Art. 282, CPC. A petição inicial indicará: I – o juiz ou tribunal, a que é dirigida; II – os nomes, prenomes, estado civil, profissão, domicílio e residência do autor e do réu; III – o fato e os fundamentos jurídicos do pedido; IV – o pedido, com as suas especificações; V – o valor da causa; VI – as provas com que o autor pretende demonstrar a verdade dos fatos alegados; VII – o requerimento para a citação do réu.
[Sem dispositivo correspondente]	Art. 40. A denegação da homologação para reconhecimento ou execução de sentença arbitral estrangeira por vícios formais, não obsta que a parte interessada renove o pedido, uma vez sanados os vícios apresentados.
<i>Art. V. Motivos de Recusa de Execução</i>	
1. O reconhecimento e a execução de uma sentença poderão ser indeferidos, a pedido da parte contra a qual ela é invocada, unicamente se esta parte fornecer, à autoridade competente onde se tenciona o reconhecimento e a execução, prova de que:	Art. 38. Somente poderá ser negada a homologação para o reconhecimento ou execução de sentença arbitral estrangeira, quando o réu demonstrar que:
(a) as partes do acordo a que se refere o artigo II estavam, em conformidade com a lei a elas aplicável, de algum modo incapacitadas, ou que tal acordo não é válido nos termos da lei à qual as partes o submeteram, ou, na ausência de indicação sobre a matéria, nos termos da lei do país onde a sentença foi proferida; ou	I – as partes na convenção de arbitragem eram incapazes; II – a convenção de arbitragem não era válida segundo a lei à qual as partes a submeteram, ou, na falta de indicação, em virtude da lei do país onde a sentença arbitral foi proferida;
(b) a parte contra a qual a sentença é invocada não recebeu notificação apropriada acerca da designação do árbitro ou do processo de arbitragem, ou lhe foi impossível, por outras razões, apresentar seus argumentos; ou	III – não foi notificado da designação do árbitro ou do procedimento de arbitragem, ou tenha sido violado o princípio do contraditório, impossibilitando a ampla defesa; [Ver também art. 39, parágrafo único, abaixo]
(c) a sentença se refere a uma divergência que não está prevista ou que não se enquadra nos termos da cláusula de submissão à arbitragem, ou contém decisões acerca de matérias que transcendem o alcance da cláusula de submissão, contanto que, se as decisões sobre as matérias suscetíveis de arbitragem puderem ser separadas daquelas não suscetíveis, a parte da sentença que contém decisões sobre matérias suscetíveis de arbitragem possa ser reconhecida e executada; ou	IV – a sentença arbitral foi proferida fora dos limites da convenção de arbitragem, e não foi possível separar a parte excedente daquela submetida à arbitragem;

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
(d) a composição da autoridade arbitral ou o procedimento arbitral não se deu em conformidade com o acordado pelas partes, ou, na ausência de tal acordo, não se deu em conformidade com a lei do país em que a arbitragem ocorreu; ou	[Sem dispositivo correspondente]
(e) a sentença ainda não se tornou obrigatória para as partes ou foi anulada ou suspensa por autoridade competente do país em que, ou conforme a lei do qual, a sentença tenha sido proferida.	V – a instituição da arbitragem não está de acordo com o compromisso arbitral ou cláusula compromissória;
2. O reconhecimento e a execução de uma sentença arbitral também poderão ser recusados caso a autoridade competente do país em que se tenciona o reconhecimento e a execução constatar que:	VI – a sentença arbitral não se tenha, ainda, tornado obrigatória para as partes, tenha sido anulada, ou, ainda, tenha sido suspensa por órgão judicial do país onde a sentença arbitral for prolatada.
(a) segundo a lei daquele país, o objeto da divergência não é passível de solução mediante arbitragem; ou	Art. 39. Também será denegada a homologação para o reconhecimento ou execução da sentença arbitral estrangeira, se o [Superior Tribunal de Justiça] constatar que:
(b) o reconhecimento ou a execução da sentença seria contrário à ordem pública daquele país.	I – segundo a lei brasileira, o objeto do litígio não é suscetível de ser resolvido por arbitragem;
[Sem dispositivo correspondente]	II – a decisão ofende a ordem pública nacional.
<i>Art. VI. Ação de Anulação Pendente no País de Origem</i>	Parágrafo único. Não será considerada ofensa à ordem pública nacional a efetivação da citação da parte residente ou domiciliada no Brasil, nos moldes da convenção de arbitragem ou da lei processual do país onde se realizou a arbitragem, admitindo-se, inclusive, a citação postal com prova inequívoca de recebimento, desde que assegure à parte brasileira tempo hábil para o exercício do direito de defesa.
Caso a anulação ou a suspensão da sentença tenha sido solicitada à autoridade competente mencionada no artigo V, 1. (e), a autoridade perante a qual a sentença está sendo invocada poderá, se assim julgar cabível, adiar a decisão quanto a execução da sentença e poderá, igualmente, a pedido da parte que reivindica a execução da sentença, ordenar que a outra parte forneça garantias apropriadas.	[Sem dispositivo correspondente]
Art. VII(1) – Compatibilidade e “More-Favourable-Right” (o Direito Mais Favorável)	

Convenção de Nova Iorque de 1958	Lei 9.307, de 23 de setembro de 1996
<p>1. As disposições da presente Convenção não afetarão a validade de acordos multilaterais ou bilaterais relativos ao reconhecimento e à execução de sentenças arbitrais celebrados pelos Estados signatários nem privarão qualquer parte interessada de qualquer direito que ela possa ter de valer-se de uma sentença arbitral da maneira e na medida permitidas pela lei ou pelos tratados do país em que a sentença é invocada.</p>	<p>Art. 34. A sentença arbitral estrangeira será reconhecida ou executada no Brasil de conformidade com os tratados internacionais com eficácia no ordenamento interno e, na sua ausência, estritamente de acordo com os termos desta Lei.</p> <p>[Ver também art. I acima]</p>
<p>[Arts. VII(2) – XVI da Convenção não são diretamente relevantes]</p>	

7. APPENDIX B

Comparative Table – The New York Convention and the Brazilian Arbitration Act (In English)

New York Convention 1958	Brazilian Arbitration Act 1996
<p><i>Art. I – Field of Application</i></p>	
<p>1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.</p>	<p>Art. 34. A foreign award shall be recognized and enforced in Brazil in accordance with international treaties effective in the internal legal system, or, in the absence of that, strictly according to the terms of this law.</p> <p>Sole paragraph. A foreign award is an award rendered outside the national territory.</p>
<p>2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.</p>	<p>[No comparable provision]</p>
<p>3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.</p>	<p>[Not used by Brazil]</p>

New York Convention 1958	Brazilian Arbitration Act 1996
<i>Art. II – Arbitration Agreement</i>	
<p>1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.</p>	<p>[Compare art. 4.º, § 1.º:</p> <p>Art. 4.º An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract.</p> <p>Art. 7.º Where there is an arbitration clause but one of the parties shows resistance as to the commencement of arbitration, the interested party may request the court to summon the other party to appear in court so that the submission agreement ("compromisso") may be signed; the judge shall designate a special hearing for this purpose.</p> <p>§§ 1.º-6.º (...)</p> <p>§ 7.º The judge's decision granting the motion shall be deemed to be the submission agreement ("compromisso") itself.</p> <p>Art. 9.º The submission agreement ("compromisso") is the judicial or extrajudicial agreement by which the parties submit an existing dispute to arbitration by one or more persons.</p> <p>§ 1.º The judicial submission agreement ("compromisso") shall be entered into by a written deed entered in the case record before the court or tribunal where the suit is pending.</p> <p>§ 2 The extrajudicial submission agreement (compromisso) shall be entered into by private written deed, executed by two witnesses or by a public notary.</p> <p>Art. 10:</p> <p>The submission agreement (compromisso) must contain: ...</p> <p>Art. 11:</p> <p>The submission agreement (compromisso) may also contain: ...</p> <p>Art. 12:</p> <p>The submission agreement (compromisso) is terminated: ...]</p>
<p>2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.</p>	<p>[Compare art. 4.º</p> <p>§ 1.º The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers.</p>

New York Convention 1958	Brazilian Arbitration Act 1996
	<p>§ 2.º In adhesion contracts, the arbitration clause will only be valid if the adhering party takes the initiative to initiate arbitration proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type.]</p>
<p>3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed</p>	<p>[Compare Art. 7.º Art. 267, CCP. The proceedings shall be dismissed, without decision on the merits: (... VII – by the arbitration agreement; (... Art. 301, CCP. The defendant shall, however, before discussing the merits, allege: (... IX – the arbitration agreement; (... [See Art. 41]]</p>
<p><i>Art. III. Enforcement of Award – General</i></p>	
<p>Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards</p>	<p>Art. 35. To be recognized or enforced in Brazil, the foreign arbitral award is subject only to homologation by the [Superior Court of Justice].</p> <p>Art. 36. The provisions of articles 483 and 484 of the Code Civil Procedure shall apply, to the extent possible, to the request for homologation of foreign arbitral award.</p> <p>Art. 483, CCP. A judgment issued by a foreign Court will only become enforceable in Brazil after being homologated by the [Superior Court of Justice].</p> <p>Sole paragraph. The homologation procedure will follow the norms of the [Superior Court of Justice]'s Internal Regulation.</p>
	<p>Art. 484, CCP. The enforcement procedure will be based on a certified copy of the judgment resulting from the homologation procedure, and shall observe the rules established for the enforcement of a national judgment of the same nature.</p>

New York Convention 1958	Brazilian Arbitration Act 1996
<i>Art. IV. Request for Enforcement</i>	
1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:	Art. 37. The request for homologation of a foreign award shall be submitted by the interested party; this written motion shall meet the requirements of article 282 of the Code of Civil Procedure, and must be accompanied by:
(a) The duly authenticated original award or a duly certified copy thereof;	I – the original of the arbitral award or duly certified copy authenticated by the Brazilian consulate, accompanied by a sworn translation;
(b) The original agreement referred to in article II or a duly certified copy thereof.	II – the original arbitration agreement or a duly certified copy, accompanied by a sworn translation.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.	[See art. 37, I - II, above]
[No comparable provision]	Art. 282, CCP. The initial petition must indicate: I – the Judge or Tribunal to whom it is addressed; II – the surnames, names, marital status, profession, domicile and residence of the claimant and the defendant; III – the facts and juridical grounds of the request; IV – duly specified claims; V – the value of the dispute; VI – the evidence with which the claimant intends to demonstrate the veracity of alleged facts; VII – the request for summons presentation to the defendant.
[No comparable provision]	Art. 40. The denial of the request for recognition or enforcement of a foreign arbitral award based on formal defects does not prevent the interested party from renewing the request once such defects are properly cured.

New York Convention 1958	Brazilian Arbitration Act 1996
<i>Art. V. Grounds for Refusal of Enforcement</i>	
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:	Art. 38. The request for recognition or enforcement of an arbitral award may be denied only if the defendant furnishes proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or	I – the parties to the agreement lacked capacity; II – the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or	III – it was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; [See also art. 39, sole paragraph, below]
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or	IV – the arbitral award was rendered beyond the limits of the arbitration agreement and it was not possible to separate the exceeding part from what has been submitted to arbitration;
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or	[No comparable provision] V – the commencement of the arbitration proceedings was not in accordance with the submission agreement (" <i>compromisso</i> ") or the arbitration clause;
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made	VI – the arbitral award has not yet become binding on the parties or has been set aside or suspended by a Court of the country in which the arbitral award has been made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:	Art. 39. The request for recognition or enforcement of a foreign award shall also be denied if the [Superior Court of Justice] finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or	I – according to Brazilian law, the subject-matter of the dispute is not capable of settlement by arbitration

New York Convention 1958	Brazilian Arbitration Act 1996
(b) The recognition or enforcement of the award would be contrary to the public policy of that country	II – the recognition or enforcement of the award is contrary to Brazilian public policy.
[No comparable provision]	Sole paragraph. The services of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including mail with confirmation of receipt, shall not be considered as offensive to Brazilian public policy, provided the Brazilian party is granted sufficient time to exercise its right of defence.
<i>Art. VI. Action for Setting Aside Pending in Country of Origin</i>	
If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.	[No comparable provision]
<i>Art. VII(1) –Compatibility and More-Favourable-Right</i>	
1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.	Art. 34. A foreign award shall be recognized and enforced in Brazil in accordance with international treaties effective in the internal legal system, or, in the absence of that, strictly according to the terms of this law. [See also at art. I above]
[Arts. VII(2) – XVI of the Convention are not directly relevant]	

PESQUISAS DO EDITORIAL

Veja também Doutrina

- A (des?)necessidade de homologação de laudos arbitrais estrangeiros após a entrada em vigor, no Brasil, da Convenção de Nova Iorque, de Fabiane Verçosa – *RDB* 22/382;
- A Convenção de Nova Iorque: o passado, o presente e o futuro, de Arnaldo Wald – *RArb* 18/13;
- A interpretação da Convenção de Nova Iorque no direito comparado, de Arnaldo Wald – *RDB* 22/353; e
- A tardia ratificação da Convenção de Nova Iorque sobre a arbitragem: um retrocesso desnecessário e inconveniente, de José Carlos de Magalhães – *RArb* 18/24.