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Paul E. Mason, Antonio M. Barbuto Neto and Fernando Eduardo Serec on an Overview of Key Brazilian Arbitration Law Developments in 2007-2008

As Latin America's biggest market, Brazil is enjoying record foreign investment and business growth. Contracts for these activities often carry arbitration provisions. As Brazil is both a vital market and a relative newcomer to the international arbitration community, developments there merit close observation. Below, we briefly identify and interpret the most important cases and legislation from 2007 through early 2008 impacting Brazilian arbitration law and practice.

In this regard, there were both positive and negative legal developments with respect to Brazil's emergence as an important player in international arbitration. Based on the information available to us at the time of this Commentary's publication, it is our opinion that the positive far outweighs the negative. However, it is necessary to keep a watchful eye on both aspects.

Positive Developments

Much has been said and written about the growing importance of arbitration in Brazil, particularly after the Federal Supreme Court's 2001 decision upholding the 1996 Arbitration Act, Brazil's adoption of the New York Convention in 2002, and the booming Brazilian economy that has whetted the unprecedented appetite of foreign companies to invest in the country, as well as the desire of some large Brazilian multinationals to make acquisitions abroad - transactions that almost always involve arbitration provisions.

In addition to that, Brazil has become a pioneer in the region in its use of arbitration to resolve corporate shareholder disputes. Most of these have been domestic, although an increasing number of international joint ventures, mergers and acquisitions in Brazil carry arbitration clauses for shareholder disputes. One of the most well-known is the very large and complex multimillion dollar case of Brazil Telecom where an arbitration clause was invoked to help determine ownership rights of a domestic shareholder, Opportunity, and Italian corporate shareholders.¹

1. Although the arbitration provision was invoked, the dispute is in the process of being settled by negotiation.

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An objective way to assess the commitment of the Brazilian legal community towards arbitration is to analyze past decisions rendered by the Federal Superior Court of Justice (STJ), the highest authority on issues involving the interpretation of federal law (such as the Arbitration Act). The STJ also has exclusive jurisdiction to confirm foreign arbitration awards, *i.e.*, those awards rendered outside Brazilian territory.

In 2005, the authority to confirm foreign arbitration awards was transferred from Brazil's highest court, the Supreme Federal Tribunal (STF), to the STJ.² Prior to that time, confirmation of foreign arbitral awards in the STF was a rare event. One main obstacle was the former "double homologation" requirement under prior law and STF practice before the enactment of the Brazilian Arbitration Act of 1996, upheld in 2001. This "double homologation" required the party wishing to confirm its arbitral award to first have it confirmed in the highest court of the country where it was rendered, before bringing it to the STF in Brazil for a second confirmation. To illustrate how difficult that process was, a Justice of the STF who served in the 1990s told one of the authors of this paper that during his long tenure, he had never seen any foreign arbitral awards brought to the STF for this "double homologation."

In order to highlight last year's legal achievements in arbitration, we conducted research on all STJ decisions published in 2007 dealing with arbitration-related issues. Below is a summary of each ruling:

Landmark Decisions. In *Spie Enertran S/A v. Inepar S/A Indústria e Construções*³, the STJ issued a landmark decision on the enforcement of an arbitration agreement executed by company that was later incorporated by another company. The court held that an arbitration agreement survives a company's acquisition/takeover as the acquirer/buyer assumes all rights and obligations of the target company, which includes any and all arbitration agreements executed before the acquisition. The STJ also applied the 1996 Arbitration Act to an arbitration agreement executed prior to the enactment of the law thereby setting aside the need for double-homologation proceedings (required under the previous legislation).

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2. Constitutional Amendment 45 of December 8, 2004 [EC 452004] transferred jurisdiction to recognize foreign arbitral awards and foreign judgments from the Brazilian Federal Supreme Court (STF) to the Brazilian Superior Court of Justice (STJ), Brazil's second highest court. As amended, art. 105, I, *i*, of the Brazilian Constitution [CF88] now provides that the STJ has the power to hear and decide as a matter of original jurisdiction the recognition of foreign arbitral awards judgments and concession of requests for Letters Rogatory. See *also* Resolução n° 9, de 4 de maio de 2005, do Superior Tribunal de Justiça (STJ); Resolução n°9, de 4 de maio de 2005, do Superior Tribunal de Justiça (STJ).
 3. Confirmation of an ICC award, SEC 831/EX, Special Panel, Reporting Justice Arnaldo Esteves Lima, decided on October 3, 2007, opinion published on November 19, 2007.

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Citing its own precedents, as well as decisions of the Brazilian Supreme Court (STF), in *International Cotton Trading Limited v. Odil Pereira Campos Filho*⁴, the STJ refused to review the merits of a foreign arbitration award issued by the International Cotton Association, holding that confirmation proceedings shall only verify whether formal requirements have been met under the Arbitration Act and the Court's internal regulations. These "formal requirements" are consistent with Article V of the New York Convention.

The May 16, 2007 ruling in *Bouvery International S/A v. Valex Exportadora de Café Ltda*⁵, set another precedent rejecting the review on the merits of a foreign arbitration award.

*AES Uruguaiana Empreendimentos Ltda v. Companhia Estadual de Energia Elétrica – CEEE*⁶, was a widely publicized leading case in which the STJ upheld the arbitration provision contained in a power purchase agreement involving a mixed-capital company formed with both private and public capital. The STJ set aside allegations that this type of "quasi-public" company would require specific legislative authorization to execute arbitration agreements.

In *Mitsubishi Electric Corporation v. Evadin Indústrias Amazônica*⁷, the court confirmed a Japanese arbitration award and also applied the 1996 Arbitration Act to arbitration agreements executed before its enactment.

*Grain Partners v. Coopergrão*⁸ represented an attempt by a judgment-debtor to review the merits of a foreign arbitration award. In this case, the STJ again promptly dismissed the claim to interfere with the merits of the award and, at the same time, clarified the limited scope of confirmation proceedings: "the homologation of a foreign award shall be limited to the assessment of its formal requirements." In doing so, the STJ rejected the application of the Brazilian Consumer Protection Code to an agreement executed be-

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4. Confirmation of a foreign arbitration award (International Cotton Association), SEC 1.210/EX, Special Panel, Reporting Justice Fernando Gonçalves, decided on June 20, 2007, opinion published on August 6, 2007.
 5. Confirmation of a foreign arbitration award, SEC 839/EX, Special Panel, Reporting Justice Cesar Asfor Rocha, decided on May 16, 2007, opinion published on August 13, 2007.
 6. Special Appeal (RESP) 606.345/RS, Second Panel, Reporting Justice João Otávio de Noronha, decided on May 17, 2007, opinion published on June 8, 2007.
 7. Confirmation of a foreign arbitration award, SEC 349/EX, Special Panel, Reporting Justice Eliana Calmon, decided on March 21, 2007, opinion published on May 21, 2007.
 8. Confirmation of a foreign arbitration award (International Cotton Association), SEC 507/EX, Special Panel, Reporting Justice Gilson Dipp, decided on December 6, 2006, opinion published on February 5, 2007.

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tween a Brazilian importer and a foreign cotton supplier thereby dismissing the importer's claim that the arbitration agreement was unconscionable.

To give the reader an idea of the time frame that may be involved up to the final homologation process in Brazil, only in November 2007 did the STJ homologate an ICC award rendered in Paris in the case of *Nahuelsat S/A v. Embratel*. The arbitration between Brazilian (Embratel) and Argentine (Nahuelsat) parties was initiated at the end of 1999, with ICC Terms of Reference signed in September 2000 and an award rendered one year later in September 2001. This was a dispute over fees owed by Embratel for use of satellite bandwidth for telecommunications. The parties' business agreement called for arbitration of disputes by the ICC in Paris. The ICC arbitrators were Brazilian and the case was governed by Brazilian law. In its award, the panel found Embratel liable for approximately U.S. \$4,500,000.00 in damages. Embratel had initially resisted homologation because it cast doubt on whether the arbitral award was really rendered where the contract called for, in Paris. However, after the arbitrators' signatures on the award were confirmed by a French notary, Embratel finally stopped resisting.⁹ According to the attorney for one of the parties, there were multiple reasons for the long delay in confirming the award, including: (i) Nahuelsat took over a year to commence proceedings; (ii) the Brazilian Attorney General's office – which has the right to file interventions with respect to homologation of foreign legal judgments - weighed in with an opinion which was contested by one of the parties; (iii) the case was assigned to one of the STF Justices who subsequently changed duties and became Chief Justice; (iv) responsibility for homologating foreign awards was then transferred from the STF to the STJ as noted earlier in this Commentary; and (v) the case then had to be reassigned to a Justice of the STJ.

Potentially Negative Developments

In addition, there were two developments in 2007 through early 2008 with potentially negative repercussions, one a state court case and the other a piece of proposed federal legislation.

Paraná State Court Decision. On January 30, 2008, a panel of the Paraná state Court of Appeal allowed, by a 2-1 vote, an appeal to set aside an arbitration award based on the allegation that no separate post-dispute arbitration agreement ("*compromisso*") had been signed by the parties.

9. Decision of the STJ, 30 November 2007, Documento: 3581342 - Despacho / Decisão - Site certificado - DJ: 06/12/2007, decision published in February 2008.

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This was the case of *Inepar S/A Indústria e Construções v. Itiquira Energética*.¹⁰ Itiquira, a Brazilian subsidiary of U.S. NRG Energy, entered into an agreement with Inepar in 2000 for a construction of a hydroelectric power plant in the state of Mato Grosso, Brazil. A dispute arose due to alleged construction delays. The parties' contract called for *ad hoc* arbitration, in Portuguese, to be held in Curitiba, state of Paraná, Brazil but "importing" and using ICC Rules.¹¹ In 2005, Inepar commenced arbitration and Itiquira filed a counter-claim. Itiquira was awarded US\$ 70,000,000 on its counterclaim and initiated enforcement proceedings in Brazil.

Plaintiff Inepar had asked a lower court (Curitiba 19th District Court judge) to dismiss the action against it to enforce the award, citing among other objections, lack of a *compromisso*. The lower court refused. By a 2 - 1 vote, a panel of the Paraná Appeals Court accepted Inepar's argument and reversed the lower court, even though both parties participated actively in the arbitration proceedings, without objections.

The District Court cited the fact that it was plaintiff Inepar which had initiated the arbitration proceedings in the first place and determined that allowing it to void the award at this stage would be "a breach of the principles of party autonomy and good faith."¹²

By way of background, in most Latin American countries many years ago, post-dispute *compromissos* to arbitrate were required under prior legislation in order for a valid arbitration to take place. As such, it became all too easy for a party assessing its own position as inferior to simply refuse to sign the *compromisso*, blocking the arbitration process entirely. However, under the newer Brazilian Arbitration Act of 1996, *compromissos* are only required when the parties' contract contains no arbitration clause at all, or when the arbitration clause is open, vague or fails to provide the details referring to applicable arbitral rules, appointment of arbitrators, etc. (so-called "empty arbitration clauses").

Yet, as noted above, the parties' agreement in this case did contain a full provision for the application of ICC arbitral rules and for the appointment of the arbitrators. Accordingly, it is somewhat unclear why the Court of Appeal would accept Inepar's argument,

10. Interlocutory Appeal # 428.067-1- Court of Appeals, state of Paraná, Brazil, *Agravo de Instrumento No. 428.067-1*

11. For wider treatment of the problems arising from "mixing" or "importing" the rules of an arbitral institution without its corresponding case administration, see Mason, Paul E. "[Paul E. Mason on The Pitfalls and Perils of 'Mixing': Whether Arbitration Rules Should be Applied Without Administration by the Issuing Arbitral Institution.](#)" Lexis-Nexis® Expert Commentary (February 2008).

12. See "COMMENTARY: Arbitration – Brazil Swimming Against the Tide" by Mauricio Gomm-Santos, MEALEY'S International Arbitration Report Vol. 23, #2 February 2008; "Appeal Court Halts Brazil's Progress," by Mauricio Gomm-Santos, *LatinLawyer.com* (London), 4 February 2008, and *Global Arbitration Review online* (London), 11 February 2008.

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especially since Inepar had actually launched the arbitration proceedings, participated fully without objection, and signed the ICC-styled terms of reference document, accompanied by its legal counsel.

However, upon a review of this recently published opinion, the fact that the appellant had initiated the arbitration and signed the Terms of Reference without objection did not appear to bother of the majority of the court panel who voted to require the *compromisso*. The first part of their opinion is devoted to defending national court jurisdiction over all kinds of disputes except in the most narrow of circumstances. The opinion goes on to require the *compromisso* in this case for two stated reasons: (1) the majority interprets the Brazilian Arbitration Law 9.307/96 to always require both a pre-dispute arbitration clause and a post-dispute *compromisso*, unlike the somewhat comparable French arbitration legislation; and (2) the majority rejects the use of the ICC-like Terms of Reference as a substitute for the *compromisso* because the Terms of Reference in this case did not contain the formalities required under Brazilian law for a valid *compromisso* (document prepared by the parties and not by the arbitrators, all signatures bearing two witnesses, listing the addresses and professions of the arbitrators).

The dissenting opinion took the line which is most widely accepted in Brazil today – that no comparison to French legislation is needed because Article 5 the Brazilian Arbitration Law 9.307/96 explicitly dispenses with the need for a *compromisso* if the parties have executed a “full” arbitration clause containing all the necessary details for the arbitration to go forward (applicable rules, method for arbitrator selection, etc.). The dissent goes on to conclude that even if a *compromisso* were required, the Terms of Reference executed by the parties provide an adequate substitute. Finally, the dissent points out quite clearly that the appellant should not be allowed to benefit from its own misconduct - instituting the arbitration and only waiting until it lost on the counterclaim before lodging its appeal.

If this gray cloud has a silver lining, it is that the legal effect of this decision is not binding on any other arbitrations, and certainly no cases outside the state of Paraná. It may also be possible for Itiquira to request a full *en banc* hearing before the Paraná Court of Appeal. However, there are some procedural issues to overcome – the Court of Appeal did not rule on an appeal from a final judgment, rather only an interlocutory order, so a full *en banc* hearing may not be possible at this time. However, a Special Appeal (*Recurso Especial*) to the Federal Superior Court of Justice (STJ) would likely result in overturning this decision, based on the STJ's record of decisions described earlier in this paper.

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Proposed federal legislation to regulate the profession of arbitrator. During the last several years, a spate of “fake” arbitral tribunals has cropped up in a number of large cities in Brazil. Many of these so-called tribunals have been using the emblems and insignias of the national judiciary without any authorization, implying to uninformed parties that they have government approval to handle their disputes. In many cases, the tribunals have simply lured unsuspecting parties, taken their money and done nothing further. Some of these “tribunals” have unqualified people sitting on or administrating them. An author of this paper encountered one of these “tribunals” being owned and run by a local journalist with no experience, knowledge or training in arbitration. Most of these “tribunals” have been directed at consumers and consumer related disputes. The Prosecutor’s office in Brasília and some other cities have recently gone after these so-called “tribunals”, requiring them to drop the emblems and, in certain cases, cease operation.

Nevertheless, a member of the Brazilian Congress introduced Bill No. 4.891 of 2005 in the lower Chamber of Deputies (the so-called “Marquezelli Bill”) to formally establish the professions of arbitrator and mediator with the objective of regulating these professions.¹³ If this were to pass, it would be something unique in the world as far as we know.¹⁴ In September 2007, some nine amendments to this bill were offered in the Chamber’s Committee on Work, Administration and Public Services (CTASP).

We intend to keep close watch, along with professional organizations such as the Brazilian Arbitration Committee, a group consisting of several hundred lawyers and other professionals concerned with helping, and not impeding, the growth of arbitration in Brazil.

Outlook

On the positive side, the analysis of the 2007 STJ decisions underscores the commitment of one of Brazil’s most important courts to arbitration as an effective means of dispute resolution, particularly in light of the refusal of its Justices to allow challenges to the merits of foreign arbitration awards. The enforcement of arbitration agreements executed by mixed-capital companies is additional evidence of this hopefully irreversible commitment towards arbitration in this country, a trend that is likely to continue in 2008 and in years to come.

13. For details of the proposed legislation and amendments, see <http://www2.camara.gov.br/internet/proposicoes>

14. *BOLETIM JURÍDICO NO. 4, FEV. 2008*, JM Garcez Advogados, Rio de Janeiro, 8 February 2008.

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On the negative side, we must wait and see ultimate outcome of the Paraná Appeals Court case and the proposed legislation to regulate arbitrators. At this time, it appears that neither of these will stand. However, only time will tell.

On balance, with a few obstacles here and there we see an overall positive trend for the continuing robust growth of arbitration in Brazil.

Practice Tips

With uncertainty over the scope and impact of the *Inepar v. Itiquira* decision coming out of the Court of Appeal of the state of Paraná, it would be advisable for parties in Brazil using terms of reference or similar signed documents to identify and frame the issues for arbitration, and to also call this document a “*compromisso*” in order to help insulate themselves against the risk of having the arbitration award set aside. However, if the parties choose to do this, they need to ensure the all the formalities required under Brazilian law for execution of a *compromisso* are really met (document prepared by the parties, signatures of parties bearing two witnesses as required for all Brazilian contracts, addresses and professions of the arbitrators included, etc.). Unless, of course, the parties wish to preserve their own option to challenge an unfavorable award based on lack of a *compromisso*. This will depend on a party’s willingness to trust the arbitration process before an award is rendered, rather than retaining the option to subvert it afterwards.

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The authors also wish to acknowledge the contributions of Mauricio Gomm-Santos from Curitiba-Paraná, affiliated with Buchanan, Ingersoll & Rooney – Miami, and Prof. José M. Garcez, JM Garcez Advogados - Rio de Janeiro.