Brazil as "Belle of the Ball": The Brazilian Courts' Pro-Arbitration Stance (2011-2012)

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RÉSUMÉ

L'article analyse la position pro-arbitrage des tribunaux brésiliens dans les deux dernières années. Particulièrement, l'article examine des décisions récentes du Supérieur Tribunal de Justice brésilien (« STJ »), qui a la fonction de uniformiser la jurisprudence des cours d'appel en matière d'arbitrage et la compétence pour la reconnaissance des sentences arbitrales étrangères. Dans la Deuxième Partie, les auteurs analysent l'application et l'interprétation de la Convention de New York sur la Reconnaissance et l'Exécution des Sentences Arbitrales Etrangères par le STJ. Dans les Troisième et Quatrième Parties, les auteurs examinent des décisions emblématiques du STJ sur la force exécutoire des clauses compromissoires pathologiques, les contrats d'adhésion en matière générale et en droit de la consommation, l'arbitrabilité des litiges concernant des sociétés contrôlées par l'État, les mesures provisoires, l'extension de la clause compromissoire à des non-signataires, le régime légal applicable à la représentation des parties dans l'arbitrage international, et les conflits de compétence entre des arbitres et des juges étatiques. La Neuvième Partie concerne le Précédent No. 485 du STJ sur l'application immédiate de la Loi d'Arbitrage brésilienne de 1996 aux contrats signés avant son entrée en vigueur. Finalement, la Dixième Partie analyse des décisions récentes importantes concernant les mesures contre l'arbitrage, et l'Onzième Partie examine les développements législatifs futurs en matière d'arbitrage au Brésil.

ABSTRACT

The article looks at the Brazilian courts' pro-arbitration stance in the past two years. In particular, the article examines recent decisions by the Superior Court of

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Justice ("STJ"), which has been called upon to uniformise case decisions from lower courts on arbitration-related matters and has jurisdiction to rule upon the recognition of foreign arbitral awards. In part II, the authors consider the application and interpretation by the STJ of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In turn, parts III to VIII examine recent landmark decisions by the STJ on the enforceability of pathological arbitration agreements, general and consumer adhesion contracts, arbitrability of disputes involving mixed-capital companies, interim measures, the extension of the arbitration agreement to non-signatory parties and the legal regime applicable to representation in international arbitration and conflicts of jurisdiction between arbitrators and judges. Further, part IX concerns Precedential Rule n. 485 on the direct application of the Brazilian Arbitration Law to contracts executed before its entry into force. Finally, part X of the article analyses Brazilian leading cases on anti-suit injunctions related to arbitration, while part XI takes note of future legislative developments concerning arbitration in Brazil.

I. Introduction

1. There has been a large expansion of the Brazilian economy and trade openness during this period, in the context of globalisation and increasing complexity of economic life.

2. This has been associated with the four foundations of arbitration in Brazil: (i) the enactment of Law n. 9,307 in 1996 (***"Arbitration Law"***; (ii) the confirmation of its constitutionality by the Federal Supreme Court (***"STF"*** in 2001 [1]; (iii) the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (***"New York Convention"***) in 2002 [2]; and (iv) the courts' decisions and, in particular judgments by the Superior Court of Justice (***"STJ"***).

3. It is no surprise the significant development of arbitration in Brazil over the last 11 years following confirmation by the STF of the constitutionality of the Arbitration Law in 2001. To be sure, it corresponds to the evolution achieved by other countries in more than a half century.

4. The pro-arbitration stance by law practitioners, academics, judges, public administration officers and federal and state representatives is particularly rewarding in view of Professor Emmanuel Gaillard's reference to Brazil as taking an arbitration approach similar to that of Pakistan back in 2005 [3]. Professor Albert Jan van den Berg's

1. STF, Agravo Regimental em Sentença Estrangeira 5206/EP, MBV Commercial and Export Management Establishment v. Resil Indústria e Comércio Ltda., Full Court, Rep. Justice Sepúlveda Pertence, 12 December 2001, 190 Revista Trimestral de Jurisprudência 908 (2004).

2. The New York Convention was internalised through Decree n. 4.311 of 23 July 2002. See, in this regard Arnoldo Wald, *La ratification de la Convention de New York par le Brésil*, Revue de l'Arbitrage 91 (2003).

3. E. Gaillard, *Introduction*, In: Anti-suit injunctions in International Arbitration (ed. E. Gaillard), IAI Series on International Arbitration n. 2, Bern: Juris Publishing, 2005, pp. 1-2.

speech before the STJ in 2012 illustrates such change, where he praised Brazilian courts for their application of the New York Convention and for the quality of their decisions [4].

5. Brazil can now boast some 130 published books and hundreds of articles on arbitration and three specialised journals [5]. It is also home to some 100 arbitration institutions, including 6 of international stature. In 2010, 2011 and 2012, the caseload of commercial arbitrations handled by the principal domestic institutions was double that of 2008 and totalled some 200 cases. These numbers are expected to continue increasing. Brazil's most established arbitration institutions saw the number of cases increase significantly between 2008 and 2012 – those of the Brazil-Canada Chamber of Commerce and the CIESP/FIESP by more than 100 %.

6. The discovery of the pre-salt oil reserves, the hosting of the 2014 Soccer World Cup and the 2016 Olympic Games, and the implementation of the Program for the Acceleration of Growth (known as ***"PAC"***) aiming at the development of infrastructure have generated a massive need for investments and the creation of joint ventures. In light of these developments, the flow of inward direct and indirect foreign capitals tends to grow. On the other hand, outward investments from Brazil have also increased over the last years. These factors will certainly be a source for an even greater development of arbitration in Brazil over the years to come [6].

7. In particular, this article looks at the decidedly pro-arbitration stance taken by the Brazilian courts and, in particular, the STJ. The Court has been called upon to uniformise case decisions from lower courts on arbitration-related matters. Further, following the transfer of competence from the STF to the STJ on the basis of the Constitutional Amendment n. 45 of 8 December 2004, the STJ has jurisdiction to rule upon recognition proceedings of foreign arbitral awards.

II. Application of the New York Convention

8. It took more than five years following the entry into force of the Arbitration Law for the internalisation of the New York Convention in Brazil. Hence, back in 1996 the drafters of the Arbitration Law decided to virtually incorporate into the Law itself the provisions on recognition and enforcement of the New York Convention.

9. That might explain why Brazilian courts and, particularly, the STF and, subsequently, the STJ, have taken so long to expressly refer to the Convention's

4. Eventos STJ, *Especialista em arbitragem diz que Justiça brasileira se tornou exemplo para o mundo*, 20 March 2012 (www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=398&tmp.texto=105097, accessed 4 March 2013).

5. For an overview, see A. Wald, L'évolution de la législation brésilienne sur l'arbitrage 1996-2001, 12(2) Bulletin de la Cour Internationale d'Arbitragem de la CCI 44 (2001); A. Wald, Arbitration in Brazil: Recent developments 2006-2012, 23(1) ICC International Court of Arbitration Bulletin 37 (2012).

6. World Bank/IFC's "Investing Across Borders" scored 84.9/100 the strength of the Brazilian Arbitration Law (http://iab.worldbank.org/Data/Explore %20Economies/Brazil#/Arbitrating-disputes, accessed on 4 March 2013).

provisions in their decisions. Nonetheless, there is a recent trend by the STJ to expressly refer to such provisions, in particular, to those referring to recognition and enforcement proceedings.

10. On the contrary, the Convention's rules on the enforcement of arbitration agreements, such as the national courts' obligation to refer the parties to arbitration where there is a valid arbitration agreement under Article II(3) of the Convention, have not been so often referred to by Brazilian courts [7], which tend to rely upon Article 267, VII, of the Code of Civil Procedure instead.

11. In any event, the introductory paragraph of Article 34 of the Arbitration Law is clear that the New York Convention – as an international treaty in force in Brazil – governs recognition and enforcement proceedings and that the provisions under the Arbitration Law apply as default provisions where the former is silent. Article 34 provides that:

> *"A foreign arbitral award shall be recognised or enforced in Brazil pursuant to international treaties effective in the national legal system, or, if non-existent, strictly in accordance with the present Law.*
> *Sole Paragraph: A foreign arbitral award is an award made outside of the national territory".*

12. Albert Jan van den Berg pointed out three possible reasons for Brazilian courts' original resistance towards referring to provisions of the Convention. First, counsel may not have pleaded the application of the Convention. Second, Brazilian courts (as the French) prefer applying their own law. And thirdly, the STJ applied the Arbitration Law as (arguably) being the most-favourable rule under Article VII(1) of the New York Convention [8].

13. It may be true that some counsel did not use to plead the application of the provisions of the Convention. On the contrary, in *Nuovo Pignone v. Petromec* [9], the *amicus curiae* brief submitted by the ICC Brazilian Committee in support of Nuovo Pignone and the latter itself referred to the Convention's provisions [10]. In this case, the

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7. Albert Jan van den Berg's speech at the STJ was given on 20 March 2012 (A. J. van den Berg, *The New York Convention and its Application by Brazilian Courts,* 36 Revista de Arbitragem e Mediação (2013 *forthcoming*). In this sense, see Alison Ross, *In praise of Brazilian enforcement,* 7(3) Global Arbitration Review (28 March 2012) (www.globalarbitrationreview.com/journal/article/30434/brasilia-praise-brazilian-enforcement/, accessed 4 March 2013).

8. Transcript of Albert Jan van den Berg's speech at the STJ on 20 March 2012 (A. J. van den Berg, *The New York Convention and its Application by Brazilian Courts,* 36 Revista de Arbitragem e Mediação (2013 *forthcoming*).

9. STJ, Recurso Especial 1,231,554/RJ, *Nuovo Pignone v. Petromec,* Rep. Justice Nancy Andrighi, 24 May 2011, 30 Revista de Arbitragem e Mediação 271 (2011). See also Medida Cautelar 17,607/RJ, Decision by Justice Nancy Andrighi, 3 February 2011, 29 Revista de Arbitragem e Mediação 366 (2011). For a case comment, see A. Wald, Nuovo Pignone v. Petromec: Amicus Curiae by the ICC Brazilian Committee, 5(3) World Arbitration and Mediation Review 339 (2011).

10. There are other proceedings before the STJ in which counsel referred to provisions of the New York Convention, e.g. (on Article II) Agravo de Instrumento 1,043,969, BNP Paribas v. Banco Fontecindam S.A., Decision by Justice Fernando Gonçalves, 18 September 2008 and Agravo de Instrumento 1,046,883, BNP Paribas v. Banco Fontecindam S.A., Decision by Justice Fernando Gonçalves, 13 October 2008; (on Article III) Sentença Estrangeira Contestada 1,305/FR, Nahuelsat S/A v. Embratel S/A, Decision by Justice Hamilton Carvalhido, 30 November 2007; (on Article IV and V) Sentença Estrangeira Contestada 831/FR, Spie Enertrans S/A v. Inepar S/A Indústrias e Contruções, Special Court, Rep. Justice Arnaldo Esteves Lima, 03 October 2007; (on Article II(2) and V(1)(a)) Sentença

STJ referred expressly to Article I(1) of the Convention which sets out the general rule on the territorial criterion establishing whether an arbitral award is domestic or foreign. The Court found that Article 34, Sole Paragraph, of the Law adopted the territorial criterion set out in the general rule of Article I(1).

14. Likewise, Brazilian courts were not familiar with the Convention's provisions either. But this is changing.

15. The STJ has consistently referred to the Convention's provisions in its most recent decisions [11]. To illustrate, the Court held that the burden of proof concerning the grounds for refusal of recognition of foreign arbitral awards under Article V(1) of the Convention and Article 38 of the Arbitration Law lies with the party who objects to recognition [12].

III. Enforceability of Pathological Arbitration Agreements *(Condomínio Civil do Cuiabá Plaza Shopping v. A.S.B. Microempresa)*

16. The STJ's decision in *Condomínio Civil do Cuiabá Plaza Shopping v. A.S.B. Microempresa* [13] represents a further step towards the consolidation of STJ's case law in favour of arbitration.

17. In that case the applicant filed a suit on the basis of Article 7 of the Arbitration Law, aiming at the conclusion of a submission agreement, on the ground that the counterparty refused to participate in the arbitral proceedings. The applicant – the claimant in the arbitration – had commenced the proceedings before an arbitral institution of its choice in light of the fact that the arbitration agreement was silent in that respect. In particular, the arbitration agreement merely provided for arbitration under the rules of a conciliation and arbitration court of the City of Cuiabá, State of Mato Grosso.

18. The respondent refused to participate in the arbitration, arguing that the arbitral institution chosen by claimant was not independent, since it belonged to a

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Estrangeira Contestada 856/GB, *L'Aiglon S.A. v. Têxtil União S.A.*, Special Court, Rep. Justice Carlos Alberto Menezes Direito, 18 May 2005; (general reference to the Convention) Embargos Declaratórios em Sentença Estrangeira Contestada 967/GB, *Plexus Cotton Limited v. Santana Têxtil S/A*, Special Court, Rep. Justice José Delgado, 18 October 2006.

11. For example, the following decisions by the STJ present direct references to the Convention:

– Direct reference to Article I(1): Recurso Especial 1,231,554, Nuovo Pignone v. Petromec, 3rd Chamber, Rep. Justice Nancy Andrighi, 24 May 2011;

– Direct reference to Article V(1)(a): Sentença Estrangeira Contestada 3,709/US, Comverse Inc. v. American Telecommunication do Brasil Ltda., Special Court, Rep. Justice Teori Albino Zavascki, 14 June 2012, 34 Revista de Arbitragem e Mediação 363 (2012).

12. STJ, Sentença Estrangeira Contestada 3,709/US, Comverse Inc. v. American Telecommunication do Brasil Ltda., Special Court, Rep. Justice Teori Albino Zavascki, 14 June 2012, 34 Revista de Arbitragem e Mediação 363 (2012), comments by A. Gerdau de Borja.

13. STJ, Recurso Especial 1,082,498/MT, *Condomínio Civil do Cuiabá Plaza Shopping v. A. S. B. Microempresa*, 4th Chamber, Rep. Justice Luis Felipe Salomão, 20 November 2012.

federation comprising various arbitral institutions, which was presided by counsel for claimant.

19. The first instance judge held that the claim was partially founded, recognising the existence and validity of the arbitration agreement. The judge determined that arbitration be conducted under the rules of another institution, providing for the appointment of an arbitrator and other fundamental requirements for the regular institution of the arbitral proceedings.

20. On appeal, the respondent sought to reverse the first instance judge's decision on the allocation of litigation costs. The Court of Appeal of the State of Mato Grosso (***"TJMT"***), however, *ex officio,* extinguished the proceedings on the ground that the parties had entered into an arbitration agreement, but affirmed the state courts' competence to refer the parties to arbitration on the basis of Article 7 of the Arbitration Law. Despite the contradictory terms of the decision, the Court of Appeal rejected the request for clarifications (*"embargos de declaração"*) by respondent.

21. On Special Appeal (*"Recurso Especial"*) filed before the STJ, the appellant (the respondent in the arbitration) stressed that it did not refuse to arbitrate; it merely sought that the proceedings be subject to the rules of another arbitral institution, on lack of independence grounds. Hence, the STJ reversed the TJMT's decision, on the ground that it was contradictory, reaffirming the state courts' powers to refer parties to arbitration on the basis of Article 7 of the Arbitration Law, particularly where the arbitration agreement lacked the necessary elements for the institution of arbitration (*"cláusula compromissória vazia"*).

22. Thereby the STJ referred the parties to arbitration by giving effect to Brazilian Constitution Article 5, XXXV, on access to justice and to Article 7 of the Arbitration Law [14].

IV. Adhesion contracts and Article 4(2) of the Arbitration Law

23. The STJ's decision [15] in *CZ6 and others v. Davidson Meira Jr* concerns, among other issues, the interpretation of Article 4(2) of the Arbitration Law, which provides that:

> *"The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the contract.*

14. It is important to note that the STJ's decision determined that the records of the proceedings be referred to the TJMT for a decision on the allocation of litigation costs. According to the STJ, the appellant (the respondent in the arbitration) was right in filing the appeal, since the first instance court granted its request that the arbitration be conducted by another independent arbitral institution.

15. STJ, Recurso Especial 1,169,841/RJ, *CZ6 Empreendimento Comerciais Ltda and others v. Davidson Roberto de Faria Meira Jr,* 3rd Chamber, Rep. Justice Nancy Andrighi, 6 November 2012.

(...) Second Paragraph: ***In adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral 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"*** [16].

24. The STJ held that the case concerned a consumer adhesion contract on the purchase and sale of real estate for the purpose of household use.

25. The Court distinguished *general adhesion contracts* to which Article 4(2) referred from *consumer adhesion contracts* subject to special statutory rules under the Consumer Law (Law n. 8,078/90) such as Article 51, VII – providing that mandatory arbitration clauses under consumer contracts are null and void. In any event, the STJ clarified that in the latter case, consumers could always give their consent at a later stage by commencing arbitration, for instance. But in *CZ6 and others v. Davidson Meira Jr* the consumer refused to arbitrate the dispute; hence, the arbitration clause was not enforceable against him.

26. As far as general adhesion contracts are concerned, in recognition proceedings of foreign arbitral awards, the STJ has rendered a few decisions some of which show some flexibility as to the requirements under Article 4(2), while others do not.

27. In one of these cases, the Court considered such elements as the parties' behavior during the proceedings and the customary resort to arbitration in the industry concerned to find that one of the parties had consented to arbitration despite not having signed the contract. [17]The STJ applied similar reasoning in another case, [18] considering that a brief reference in the parties' contract to arbitration according to the Rules of the Liverpool Cotton Association confirmed the existence of an agreement on arbitration despite the respondent's refusal to participate in the proceedings.

28. On the other hand, the STJ has refused recognition of a foreign arbitral award in a case where it considered an arbitration agreement contained in faxes exchanged between commercial agents representing one of the parties to be invalid. The STJ concluded here that there was no proof that the opposing party knew about the arbitration agreement. [19]In another case in which the parties' contract referred to arbitration under the Rules of the Liverpool Cotton Association, the STJ held that the

16. Translation available at www.kluwerarbitration.com/document.aspx?id=ipn30304&query=content%3A%22arbitratin%22, accessed 4 March 2013.

17. STJ, Sentença Estrangeira Contestada 856-EX, L'Aiglon S.A. v. Têxtil União S.A., Special Chamber, Rep. Justice C.A. Menezes Direito, 18 May 2005, 6 Revista de Arbitragem e Mediação 228 (1999).

18. STJ, Sentença Estrangeira Contestada 1,210/GB, *International Cotton Trading Ltd ICT v. Odil Pereira Campos Filho,* Special Chamber, Rep. Justice F. Gonçalves, 20 June 2007, 17 Revista de Arbitragem e Mediação 243 (2008).

19. STJ, Sentença Estrangeira Contestada SEC 866, Oleaginosa Moreno Hermanos S.A. v. Moinho Paulista Ltda, Special Chamber, Rep. Justice F. Fischer, 17 May 2006, 12 Revista de Arbitragem e Mediação 256 (2007).

requirements of the Arbitration Law for arbitration agreements in adhesion contracts had not been met and refused to recognise the award. [20]

V. Subjective and Objective Arbitrability of Disputes involving Mixed-Capital Companies (*Compagás v. Passarelli*)

29. Another recent decision by the STJ demonstrates its favourable approach to arbitration. In *Compagas v. Passarelli* [21], Compagás argued, mainly, that *(i)* the invitation to bid did not provide for arbitration and thus violated Federal Law n. 8,666 [22], *(ii)* the public interest involved was not disposable, and *(iii)* the requirements for the commencement of arbitral proceedings had not been complied with.

30. In turn, Passarelli posited that *(i)* the principles of private law applied to the contract executed between the parties, *(ii)* Compagás' condition as a mixed-capital company allowed it to participate in the arbitration, and *(iii)* the case involved strictly monetary issues – the economic and financial balance of the contract –, and was, therefore, arbitrable.

31. The Court reaffirmed previous decisions [23] concerning the subjective arbitrability of mixed-capital companies such as Compagás, which, accordingly, could be subject to arbitration. Further, the subject-matter of the dispute was arbitrable, since it related to patrimonial rights over which the parties could dispose. Finally, even though the invitation to bid did not provide for arbitration, the parties were entitled to execute a submission agreement providing for arbitration at a later stage, since arbitration was not an essential provision of the invitation to bid.

32. That conclusion evidences that, according to the Court, the arbitration agreement is an ordinary provision, not submitted to any special regime in order to be validly entered into by the parties (except where the law expressly provides otherwise, for instance, in the case of adhesion contracts).

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20. STJ, Sentença Estrangeira Contestada 978/EX, Indutech SpA v. Algocentro Armazéns Gerais Ltda., Special Chamber, Rep. Justice H. Carvalhido, 18 December 2008, 24 Revista de Arbitragem e Mediação 215 (2010).

21. STJ, Recurso Especial 904,813/PR, Companhia Paranaense de Gás Natural – Compagás v. Consórcio Carioca Passarelli, 3rd Chamber, Rep. Justice Nancy Andrighi, 20 October 2011, A. Wald, *Licitude de compromisso arbitral em contrato administrativo mesmo quando o edital não previu a arbitragem – Comentário ao Recurso Especial n. 904.813-PR*, 33 Revista de Arbitragem e Mediação 361 (2012).

22. This Law provides for the rules regarding public tenders in Brazil.

23. STJ, Recurso Especial 612,439/RS, AES Uruguaiana Empreendimentos Ltda v. Companhia Estadual de Energia Elétrica – CEEE, 2nd Chamber, Rep. Justice João Otávio de Noronha, 25 October 2005; Medida Cautelar 11,308/DF, TMC-Terminal Multimodal de Coroa Grande SPE S/A v. Ministro de Estado da Ciência e Tecnologia, 1st Chamber, Rep. Justice Luiz Fux, 9 April 2008. See also Arnoldo Wald and André Serrão, *Aspectos constitucionais e administrativos da arbitragem nas concessões*, 16 Revista de Arbitragem e Mediação 11, 20 (2008); Eros Grau, *Da arbitrabilidade de litígios envolvendo sociedades de economia mista e da interpretação de cláusula compromissória*, 18 Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem 395, 399 (2002).

VI. Interim measures and arbitration (*Itarumã v. PCBIOS*)

33. The STJ's decision in *Itarumã v. PCBIOS* [24] ruled upon one of the most debated issues regarding arbitration in Brazil in recent years.

34. The Arbitration Law is silent on the arbitrators' power to grant preliminary or interim relief. The Law merely provides that, *"if coercive or injunctive orders become necessary, the arbitrators may request them from the State Court originally competent to decide the case"* [25]. Scholars have construed this provision in different ways.

35. According to the STJ's ruling in *Itarumã v. PCBIOS*, arbitrators have jurisdiction to order interim measures; yet, because they lack coercive powers, where a party resists complying with such an order, they can request the courts' assistance for enforcement.

36. Further, the Court held in *Itarumã v. PCBIOS* that, once the arbitral tribunal is constituted, state courts no longer have jurisdiction to rule on the interim measure; where an interim order has already been issued by a state court, it remains in force, subject to review by the arbitral tribunal, which has the power to maintain, modify or set aside such court order.

VII. The Applicability of Arbitration Agreements to Non-signatory Parties and the legal regime applicable to international arbitrations (*Comverse v. American Telecommunication*)

37. The STJ discussed the applicability of the arbitration agreement to non-signatory parties and the applicable law to legal representation of the parties in international arbitrations in *Comverse v. American Telecommunication* [26].

38. In that case, the party objecting to recognition of the ICDR/AAA arbitral award argued that *(i)* it was not a party to the arbitration agreement, since it had not signed the contract to which the arbitration agreement referred, and *(ii)* the Chilean lawyer representing the Chilean company of the group (American Telecommunication, Inc. Chile AS) had no powers to adhere to the relevant arbitration agreement following the commencement of arbitral proceedings on behalf of its subsidiaries from Bolivia, Brazil, Ecuador and Peru, let alone to represent them in the arbitration.

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24. STJ, Recurso Especial 1,297,974/RJ, Itarumã Participações S/A v. Participações em Complexos Bioenergéticos S/A – PCBIOS, 3rd Chamber, Rep. Justice Nancy Andrighi, 12 June 2012.

25. Article 22(4) of the Arbitration Law provides that: *"With the exception of the provisions of Paragraph 2, if coercive or injunctive orders become necessary, the arbitrators may request them from the State Court originally competent to decide the case"* (translation available at www.kluwerarbitration.com/document.aspx?id=ipn30304&query=content%3A%22arbitratin%22, accessed 4 March 2013).

26. STJ, Sentença Estrangeira Contestada 3,709/US, Comverse Inc. v. American Telecommunication do Brasil Ltda., Special Court, Rep. Justice Teori Albino Zavascki, 14 June 2012, 34 Revista de Arbitragem e Mediação 363 (2012).

39. The STJ rejected those arguments, on the basis that the subsidiaries had actively participated in the performance of the contract which contained the arbitration clause, and that they had voluntarily participated and appointed a representative in the arbitration proceedings.

40. With regard to the legal representation issue, pursuant to the STJ, Article 38(II) of the Arbitration Law and Article V(1)(a) of the New York Convention govern the question of representation of parties in arbitration. Accordingly, the law applicable to representation of the parties is the law chosen by the parties and, in the parties' failure to indicate that, representation is governed by the law of the country where the award was made.

41. In that case, the arbitral award was rendered in the United States and the parties chose the ICDR/AAA Arbitration Rules. Pursuant to Article 12 of the Rules, simple communication in writing is a sufficient means in order to designate a representative in the arbitration [27]. The Court held that such requirement had been satisfied and that the party objecting to the recognition of the award failed to demonstrate otherwise.

42. In this context, the STJ highlighted the fact that legal representation in international arbitration is not necessarily subject to Brazilian rules. Such reasoning suggests that international arbitrations might be subject to a different, more flexible regime than that applicable to domestic proceedings.

43. It is expected that the constructive approach adopted by the STJ in the *Comverse v. American Telecommunication* case with regard to the effects of the arbitration agreement *vis-à-vis* non-signatories will shed some light on the issue and inspire future STJ rulings in order to settle the matter. That is important, particularly in view of the fact that local courts of appeal have approached that matter differently.

44. The Court of Appeal of the State of São Paulo ("***TJSP***") rendered a pioneering decision in 2006 in the so-called *Trelleborg* case, [28] in which it adopted a constructive approach similar to that of the STJ in the *Comverse v. American Telecommunication* case. The Court extended the effects of an arbitration agreement to a non-signatory controlling shareholder of one of the parties, on the basis that the parent company had directly participated in the negotiation and performance of the contract, and in the arbitral proceedings.

45. The TJSP recently adopted a similar reasoning in *Matlinpatterson Global Opportunities Partners II L.P. et al. v. VRG Linhas Aéreas S.A.* [29] In that case, the Court

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27. Article 12 of the ICDR Arbitration Rules provides that: *"Any party may be represented in the arbitration. The names, addresses and telephone numbers of representatives shall be communicated in writing to the other parties and to the administrator. Once the tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal".*

28. TJSP, Trelleborg do Brasil Ltda. et al. v. Anel Empreendimentos Participações e Agropecuária Ltda., Apelação Cível com Revisão n. 267.450-4/6-00, Rep. Judge Constança Gonzala, 24 May 2006, 10 Revista de Arbitragem e Mediação 243 (2006).

29. TJSP, Matlinpatterson Global Opportunities Partners II L.P. et al. v. VRG Linhas Aéreas S.A., Apelação n. 0214068-16.2010.8.26.0100, Rep. Judge Roberto Mac Cracken, 16 October 2012.

refused to set aside an ICC arbitral award which extended the effects of the arbitration agreement to the non-signatory indirect shareholders (two private equity funds) of a specific purpose company which was, in turn, a party to the underlying contract. The Court held that the controlling shareholders had actively participated in the negotiation and performance of the contract, having signed an addendum thereto whereby they undertook obligations under the contract. According to the TJSP, the contention pursuant to which they were not parties to the arbitration agreement was unfounded, on *venire contra factum proprium* grounds [30].

46. On the other hand, the Court of Appeal of the State of Rio de Janeiro (***"TJRJ"***) has adopted a more conservative approach on the issue. In *Itarumã Participações S.A. v. Petrobras* [31], the Court confirmed a first instance decision setting aside an ICC partial arbitral award on jurisdiction on the basis that two of the parties (the appellee Petrobras and a third company) had not signed the contract containing the arbitration agreement (the shareholders agreement of a specific purpose company, of which they were both indirect shareholders). The Court held that, although they had undertaken some specific obligations on the basis of the transaction, Petrobras and that third party had not signed the shareholders' agreement; thus, there was no express consent to arbitrate, which constitutes a fundamental requirement under the Brazilian Arbitration Law.

VIII. Conflicts between Arbitral Tribunals and State Courts and between Arbitral Tribunals or Arbitral Institutions

47. Before the STJ's decision in *Itarumã v. PCBIOS* [32], there have been instances in which the Arbitration Law's failure to expressly regulate jurisdiction of state courts and arbitral tribunals to grant interim measures gave rise to conflicts between arbitral tribunals and state courts.

48. Challenges to the existence and validity of arbitration agreements also resulted in conflicts between arbitral tribunals and state courts, resulting in injunctions

30. It is noteworthy that the United States District Court of the Southern District of New York refused to confirm the arbitral award on the grounds that the arbitration agreement was not binding on the non-signatory shareholders as far as matters other than non-competition were concerned. Non-competition was the specific subject matter of the addendum, which was not discussed in the arbitration. (*See* VRG Linhas Aereas S.A. v. Matlinpatterson Global Opportunities Partners II L.P. et al., 19 January 2012, 34 Revista de Arbitragem e Mediação 439 (2012), with comments by A. Habib Sioufi Filho.) In his Dissenting Opinion, the co-arbitrator Pedro Batista Martins expressed views similar to that by the US court. In fact, practice shows that the effects of the arbitration agreement and its extension to non-signatories are still controversial issues among different arbitrators and arbitral tribunals.

31. TJRJ, Itarumã Participações S.A. v. Petrobras, Apelação Cível n. 0329761-15.2011.8.19.0001, 19th Chamber of Private Law, Rep. Judge Ferdinaldo Nascimento, 22 January 2013. Dissenting Opinion by Judge Denise Levy Tredler, whose reasoning is similar to those by the STJ in the Converse v. American Telecommunication case and by the TJSP in the Trelleborg and VRG cases, in view of the obligations undertaken by the non-signatories under the shareholders' agreement and their role and participation in the respective joint venture.

32. Itarumã v. PCBIOS reaffirms arbitral tribunals' competence to decide upon whether or not to grant an interim measure once the tribunal has been constituted, and to modify, cancel or maintain interim measures granted by state courts before its constitution.

by lower courts against arbitrations involving mixed-capital companies, for instance [33].

49. In order to ensure effectiveness and legal certainty, the STJ adopted a legal solution originally proposed by practitioners and supported by the Public Prosecution Service, namely, an extensive interpretation of the constitutional provision on jurisdictional conflicts between national judges (Article 105(I)(d) of the Brazilian Constitution) with respect to conflicts between arbitrators and judges. That is because the Arbitration Law itself equals arbitrators with judges and the arbitral award with a state court judgment.

50. Hence, in *CEBEL v. Schahin Engenharia* [34], the STJ ordered the relevant state court to suspend proceedings concerning CEBEL's request for an interim measure. The Court clarified that, even though enforcing an interim measure ordering the seizure of assets may involve *ius imperii*, the arbitral tribunal had jurisdiction to decide whether or not to grant it. This clarification is important, particularly where a state court orders an interim measure before the constitution of the arbitral tribunal.

51. The Interim Decision by Aldir Passarinho Jr. in *CEBEL v. Schahin Engenharia* is clearly pro-arbitration when he stresses that the role of national judges and arbitrators are complementary and that they should act within the limit of their competence as provided for by the parties.

52. The merits of the case are still pending before the STJ. Nevertheless, Justice Nancy Andrighi, Justice Luiz Felipe Salomão and Justice Paulo de Tarso Sanseverino have already rendered their opinions, in which they recognise the jurisdiction of the arbitral tribunal over the dispute [35].

53. In exceptional cases, a legal remedy may be needed to resolve conflicts between arbitral tribunals or arbitral institutions. The recent example *Fazendas Curuá v. Pecuária Santa Clara* [36] involves conflict between different arbitral institutions that set in motion two identical arbitration proceedings based on the same arbitration

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33. The STJ affirmed the arbitrability of disputes involving mixed-capital companies in several cases (see Compagás v. Passarelli and AES Uruguaiana v. CEE in Item III above).

34. STJ, Conflito de Competência 111,230/DF, Centrais Elétricas Belém S.A. – CEBEL v. Schahin Engenharia Ltda. et al., Decision by Rep. Justice Aldir Passarinho Jr., 1 July 2010, 27 Revista de Arbitragem e Mediação 333 (2010).

The first case to interpret Article 105(I)(d) in that sense was Record v. INPAR, STJ, Conflito de Competência 106,121/AL, Record Incorporações Ltda. et al. v. INPAR S.A. et al., Decision by Rep. Justice Aldir Passarinho Jr., 23 June 2009. It concerned the matter of jurisdiction to grant interim measures in the state of Alagoas, but the parties settled before the STJ could definitively rule on that matter.

35. STJ, Conflito de Competência 111,230/DF, Centrais Elétricas Belém S.A. – CEBEL v. Schahin Engenharia Ltda. et al., Opinions by Justice Nancy Andrighi (22 August 2012), Justice Luiz Felipe Salomão (22 August 2012) and Justice Paulo de Tarso Sanseverino (28 November 2012). At this point, there is one dissenting Opinion by Justice Maria Isabel Galotti (28 November 2012). On the same issue, the case Rede GUSA et al. v. Tribunal Arbitral FGV (Conflito de Competência 122,439/RJ) is also still pending before the STJ. At present, Reporting Justice Massami Uyeda and Justice Maria Isabel Galotti have already rendered Opinions dismissing the case.

36. STJ, Conflito de Competência 113,260/SP, Fazendas Reunidas Curuá Ltda. et al. v. Pecuária Unit Santa Clara Ltda., 2 Sessão, Rep. Justice João Otávio de Noronha, 8 September 2010, 30 Revista de Arbitragem e Mediação 361 (2010).

agreement. By a majority vote, the STJ decided that it did not have jurisdiction to hear the merits of the lawsuit and dismissed the case, on the ground that, in that case, there was no conflict between decisions rendered by an arbitral tribunal and a state court. However, Justice Nancy Andrighi, the original Reporting Justice, dissented, stating that she would have affirmed the STJ's jurisdiction to rule on the matter and ordered an injunction to stay both arbitral proceedings.

IX. Direct application of the BAL to contracts executed before its enactment (*STJ Precedential Rule n. 485*)

54. On 28 June 2012, the STJ issued the Precedential Rule (*Súmula*) n. 485, which states that *"[t]he Arbitration Law applies to the contracts containing an arbitral clause, even if executed before its enactment"* [37].

55. The Precedential Rule reaffirms the Court's case law [38] in the sense that the procedural character of the Arbitration Law rendered it directly applicable to contracts containing arbitration agreements irrespective of the date when they were executed.

56. The Precedential Rule puts to rest the discussion whether arbitration agreements concluded before the enactment of the Arbitration Law required the execution of a submission agreement in order to be subject to specific performance. According to the Law, arbitration agreements providing for a method of constitution of the arbitral tribunal (*"cláusula compromissória cheia"*) are as effective as a submission agreement (a *"compromisso arbitral"* signed after the dispute has arisen) [39].

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37. Free translation.

38. See, for example: STJ, Recurso Especial 712,566/RJ, Espal Representações e Conta Própria Ltda. v. Wilhelm Fette GMBH, 3rd Chamber, Rep. Justice Nancy Andrighi, 18 August 2005; Sentença Estrangeira Contestada 349/JP, Mitsubishi Electric Corporation v. Evadin Indústrias Amazônia S.A., Special Court, Rep. Justice Eliana Calmon, 21 March 2007; Sentença Estrangeira Contestada 894/UY, Litsa Líneas de Transmisión del Litoral S.A. v. SV Engenharia S.A., Special Court, Rep. Justice Nancy Andrighi, 20 August 2008; Recurso Especial 934,771/SP, Laboratório Dom Pedro II Sociedade Civil Ltda. et al. v. Fundação Nelson Líbero, 4th Chamber, Rep.Justice Luis Felipe Salomão, 25 May 2010; Recurso Especial 933,371/RJ, Itaipu Binacional v. Logos Engenharia S.A., 1st Chamber, Rep. Justice Arnaldo Esteves Lima, 02 September 2010.

39. A. Wald and A. Gerdau de Borja, *Landmark decision in Brazil: on 'full' versus 'empty' arbitration agreements and the possibility of tacit acceptance of arbitration by conduct*, 17(2) IBA Newsletter – Arbitration News 75 (2012); M. de Melo Vieira, *Homologação de sentença arbitral estrangeira. Contrato de Compra e Venda. Existência de cláusula compromissória. Análise do mérito da decisão arbitral pelo STJ. Impossibilidade. Ausência de violação à ordem pública.*, 17 Revista de Arbitragem e Mediação 243 (2008). A "full" arbitration agreement (*"cláusula compromissória cheia"*) (that is, an agreement that provides for the method of commencing arbitral proceedings by referring to the rules of an arbitral institution or a specialised entity), is fully effective (Article 5 of the Arbitration Law). On the other hand, where an arbitration agreement is "empty" (*"cláusula compromissória vazia"*) and thus does not provide for a method of commencing arbitral proceedings, a submission agreement is necessary. A party can execute it extrajudicially, or, in the event of resistance by one of the parties, execute it before a judge (Articles 6 and 7 of the Arbitration Law). Following the entry into force of the Arbitration Law, the arbitration clause (*"cláusula compromissória"*) and the submission agreement (*"compromisso"*) are considered equivalent and both can bind the parties to submit their dispute to arbitration.

X. Anti-suit injunctions

57. As a rule, Brazilian courts have recognised the competence-competence principle and refused to order anti-suit injunctions against an arbitration on grounds related to the existence, validity or effectiveness of the arbitration agreement. In addition to that rule, following the position of French courts, the Court of Appeal of Sao Paulo has recently stated that an order staying the arbitration may exceptionally be granted, where a *prima facie* examination of the arbitration agreement indicates that the latter is invalid under the applicable Brazilian Law.

58. In *Enesa et al. v Sulamérica et al.* [40], the Court of Appeal of Sao Paulo ordered an injunction to stay an arbitration seated in London, relating to the construction of a power plant in the Amazon region in Brazil. Previously, an English court had issued an order preventing Enesa et al. from resorting to Brazilian courts in order to discuss the validity of the arbitration agreement, which was subsequently affirmed on appeal [41]. According to the English Court of Appeal, English law, rather than Brazilian law, applies to the arbitration agreement, since the parties had chosen London as the seat of the arbitration.

59. It is unclear whether that legal presumption under English law is consistent with the parties' true intention, considering that the parties failed to agree specifically on the law governing the arbitration agreement. As noted by the Court of Appeal the State of Sao Paulo, *(i)* the contract was executed between Brazilian parties; *(ii)* the transaction involves the construction of a power plant in Brazil; and *(iii)* the parties chose Brazilian law as the substantive law applicable to the contract. Hence, Brazilian courts may find that the parties' true intention was to submit the arbitration agreement to Brazilian law as the law most closely connected to their legal relationship and that, according to Brazilian law, there has been no consent to arbitrate. Lack of consent to arbitration may result in refusal of recognition of the award in Brazil on public policy grounds.

60. The Court of Appeal of Sao Paulo took a different approach. The Court decided to grant an injunction to stay the arbitration until Brazilian courts reach a final decision on the validity of the arbitration agreement. The Court stressed that an order from a foreign court cannot prevent Brazilian nationals from filing a lawsuit before Brazilian courts, which is a fundamental right set out in the Brazilian Federal Constitution. Moreover, the Court held that, according to its *prima facie* examination of the arbitration agreement, it was likely that the allegation of invalidity of the arbitration agreement is well founded, which justified granting interim relief to stay the arbitration until a final decision on the issue. Finally, the Court of Appeal of Sao Paulo found that

40. Tribunal de Justiça de São Paulo, Agravo de Instrumento n. 0304979-49.2011.8.26.0000, Energia Sustentável do Brasil S.A. et al. v. Sulamérica Cia. de Seguros S.A. et al., 6th Chamber of Private Law, Rep. Judge Paulo Alcides, 19 April 2012.

41. Court of Appeal (Civil Division), Sulamérica Cia Nacional de Seguros S.A. et al. v. Enesa Engenharia S.A. et al., Case No. A3/2012/0249, 16 May 2012.

a *prima facie* examination of the arbitration agreement by state courts was consistent with the competence-competence principle, as noted by Brazilian commentators.

XI. The Next Phase of Arbitration in Brazil

61. Recently, the Brazilian Senate has appointed a Commission composed of one Justice from the STJ and five arbitration experts, which is responsible for drafting amendment proposals to the Brazilian Arbitration Law. The appointment of the Commission aims at responding to the needs and challenges which have arisen over the last 15 years since its entry into force, and to new and more complex aspects of business life in Brazil.

62. It is expected that the Commission will work closely with the Commission in charge of drafting the bill on the New Code of Civil Procedure, which is currently under revision and comprises some provisions dealing with important aspects of arbitration, such as the recognition of foreign arbitral awards. Cooperation between both projects is essential in order to avoid any inconsistencies and assure the coherence and effectiveness of future amendments.

XII. Conclusion

63. The STJ's recent judgments demonstrate the Court's unequivocal contribution to arbitration in Brazil. Justice Castro Meira's Vote in *Comverse v. American Telecommunication* [42] illustrates STJ's vision in this regard, while stating that the Court's effort to refer to the New York Convention in its decisions is vital in order to ensure that its judgments echo internationally.

64. The STJ is still to decide upon other controversial issues such as *(i)* the possibility of recognising and enforcing in Brazil a foreign arbitral award that has been set aside in the place of the arbitration (we currently represent [43] a French multinational company in this regard); *(ii)* the arbitrability of disputes regarding competition, IP and tax law; *(iii)* the possibility of the extension of the arbitration agreement involving a group of contracts; *(iv)* the alleged violation of the due process of law where the arbitral award is grounded on an issue of law that had not been raised

42. STJ, Sentença Estrangeira Contestada 3,709/US, Comverse Inc. v. American Telecommunication do Brasil Ltda., Special Court, Justice Teori Zavascki, 14 June 2012.

43. STJ, SEC 5782, EDFI v. Endesa and YPF (pending). The Opinion on the case by the former Chief Justice of the Federal Supreme Court (STF) Ellen Gracie Northfleet has been published in 35 Revista de Arbitragem e Mediação 279 (2012). One of the main issues discussed in these proceedings concern the interpretation of Article V(1)(e) of the New York Convention.

by the parties in the arbitral proceedings (based on the principle *iura novit curia* [44]); *(v)* the validity of an arbitral award failing to provide reasons [45]; *(vi)* the possibility of enforcing partial awards; *(vii)* the scope of the arbitral tribunals' powers to decide upon a request for the production of certain evidence (e.g. expert evidence [46]), among others.

65. In any event, the analysis of the most recent decisions by the STJ shows not only the Court's clear stance in favour of arbitration, but also that the Court has taken an openly daring approach towards intricate problems concerning the matter, which is key to Brazil's economic progress and its reputation as *"belle of the ball"* [47] of international arbitration.

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44. See, for instance, TJSP, Matlinpatterson Global Opportunities Partners II L.P. et al. v. VRG Linhas Aéreas S.A., Apelação n. 0214068-16.2010.8.26.0100, 2nd Chamber of Business Law, Rep. Judge Roberto Mac Cracken, 16 October 2012, in which the Court of Appeal of the State of São Paulo held that the fact that the arbitral award was grounded on an issue of law that had not been raised by the parties in the arbitral proceedings did not constitute a due process violation, since it resulted from the legitimate application of the *iura novit curia* principle.

45. In his Dissenting opinion, Justice Massami Uyeda considered that the parties had agreed upon Arbitration Rules (ICDR/AAA) providing for the possibility of an award not providing for reasons, which was therefore not a valid ground for refusal of recognition. Yet, the prevailing vote by Rep. Justice Francisco Falcão refused to recognise the award on different grounds (i.e. the arbitration agreement did not exist). See STJ, Sentença Estrangeira Contestada 885/EX, Kanematsu USA INC v. ATS-Advanced Telecommunications Systems do Brasil Ltda, Special Court, Dissenting Vote, Justice Massami Uyeda, 18 April 2012.

46. Article 18 of the Arbitration Law provides that the arbitrator is *"the judge of facts and of law"*, conferring upon the arbitral tribunal the powers to consider and weigh evidentiary matters. Nonetheless, a couple of lower courts' decisions have not given full effect to Article 18 – which should be reversed by Brazilian higher courts in the near future. In Companhia do Metropolitano de São Paulo – Metrô v. Tribunal Arbitral do Proc. CCI 15,283/JRF, a first instance court of the São Paulo District granted an interim measure determining the production of expert evidence (on engineering) in a writ of mandamus against a decision of an arbitral tribunal which had rejected a request for expert evidence. In the interlocutory appeal against the decision by the first instance judge, the Court of Appeal of the State of São Paulo quashed that interim measure (TJSP, Companhia do Metropolitano de São Paulo – Metrô v. Tribunal Arbitral do Proc. CCI n. 15,283/JRF, Rep. Judge Maria Gabriella Pavlópoulos Spaolonzi, 10 July 2012.

In turn, the first instance proceedings were extinguished without prejudice in view of the expiry of the time limit of the statute of limitations. Further, the TJRJ affirmed a first instance decision which set aside an arbitral award, on violation of due processs grounds. According to the majority Opinion, the arbitral tribunal had prevented the relevant party from presenting its case when it decided the dispute on the basis of engineering expert evidence alone – accounting expert evidence was requested but not produced in the proceedings – and on the basis of allegedly unilateral' information by one of the parties. By doing so, the TJRJ disregarded the express terms of Article 18 of the Arbitration Law on the powers of the arbitrator to decide upon evidentiary matters. The Dissenting Opinion by Judge Pedro Raguenet, however, emphasises that the Arbitration Law prevents judges sitting in annulment proceedings from discussing the merits of the dispute submitted to arbitration, let alone the expert evidence produced in the arbitral proceedings. (TJRJ, Apelação Cível 0351390-45.2011.8.19.0001, 6th Chamber, Rep. Judge Regina Lucia Passos, 19 September 2012, see comments by M. de Melo Vieira, 36 Revista de Arbitragem e Mediação (2013 *forthcoming*).

47. See Brazil – belle of the ball, 7(3) Global Arbitration Review (12 January 2012) (www.globalarbitrationreview.com/news/article/30080/brazil-belle-ball/, accessed 18 August 2012).

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