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The Public Policy Exception and the Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Brazil*

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SUMMARY

* List of abbreviations: AgRgSE (Interlocutory Appeal – Foreign Award); DJ (Journal of Justice); DJe (Journal of Digital Justice); (GAFTA) The Grain and Feed Trade Association); HDE (Homologação de Decisão Estrangeira); ICC (International Chamber of Commerce); LCA (Liverpool Cotton Association); SEC (Sentença Estrangeira Contestada); STF (Supreme Federal Court); STJ (Superior Court of Justice). The Grain and Feed Trade Association (GAFTA).

I. Introduction

International arbitration is an alternative method of international dispute resolution. In the words of Manuel Pereira Barrocas, it is «a private and voluntary judicial mean of dispute resolution, whether contractual or not, characterized by the existence of connection elements involving more than one state that is susceptible of being solved by arbitration […]».[1]

Arbitration, in short, is an effective method of obtaining a final and binding award, without the need of submitting it to a State court. The parties agree to submit their dispute to arbitrators or arbitral institutions, who hear, consider the facts, and make a final decision. The decision is final and binding because the parties have decided it would be, not due to a coercive power of the State.[2]

In international arbitration, the parties are free to determine the applicable law and the rules that will prevail in their contract or dispute. They can choose the law of a particular country, rules of arbitral institutions, and international instruments to govern their rights and obligations. This autonomy is positive since it allows the parties to have certain legal predictability regarding their dispute.[3]

This autonomy, however, can be restrained if it conflicts with overriding rules of international arbitration, as the public policy. Public policy aims to safeguard the basic morals of a nation and a State's most fundamental interests.[4] It includes important values of justice, morality, social, and economic safety, which inspire the content of its legal rules.

According to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, an award may be refused if it would be contrary to the public policy of the country where its recognition and enforcement is sought.[5] Along with the New York Convention, national arbitration legislations usually allow the non-recognition of foreign awards if they violate public policy.

This is the case of the Brazilian Arbitration Act, Law no. 9.307/96, in which its Article 39, II, foresees that the recognition and enforcement of foreign arbitral awards shall be denied if the Superior Court of Justice understands that the decision violates the national public policy.

1 Barrocas (2008), pp. 555-556. Translated by the author. Original text in Portuguese: «um meio jurisdicional privado e voluntário de dirimição de um litígio, de caráter contratual ou não, caracterizado pela existência de elementos de conexão envolvendo mais de um estado que é suscetível de ser resolvido pela via arbitral […]».

2 Blackaby *et alii* (2009), p. 2.

3 Lew (2018), p. 6; Lew, Mistelis & Kröll (2003), p. 415.

4 Dolinger (1997), p. 350.

5 New York Convention of 1958, Art. V(2)(b).

This Article, in the first place, attempts to define the concept of public policy and its extension. Secondly, it analyzes general aspects of the recognition of foreign arbitral awards in Brazil, according to its national legislation and international treaties to which the country is a party. Finally, it examines all requests of recognition and enforcement of international arbitral awards before the Supreme Federal Court (STF) and the Superior Court of Justice (STJ) that were refused due to violation of public policy, from 1996 to November 2019. The objective of this study is to determine the pattern and position of the Brazilian judiciary regarding allegations of public policy violation in requests of recognition and enforcement of foreign arbitral awards.

II. Definition and extent of public policy

Public policy (also known as *ordre public* in civil law traditions) is a commonly invoked term within international arbitration and private international law. Nevertheless, it is usually described as a «vague body of moral and legal precepts».[6]

Public policy is usually defined as principles of ethical, social, and economic character,[7] existent in written norms, general principles of law, customary law, court decisions, and doctrine. It includes important values of justice, morality, social and economic safety, that aim to safeguard the basic moral of a nation and a State's most fundamental interests.[8]

According to Rui Moura Ramos, public policy is «the set of principles which, by their special situation in a legal system, constitute the framework of all its normative building, its essential foundations».[9] The public policy, therefore, is the *ultima ratio* in a legal system, the limit beyond which the tolerance to foreign laws ceases.[10] Public policy rules include both written norms and general principles. It is manifested as written or non-written laws, but which can be apprehended by the interpreter of the law as a fundamental value of public policy.[11]

6 Murphy (1981), p. 595.

7 Barrocas (2013), p. 527.

8 Dolinger (1997), p. 350.

9 Ramos (1979), p. 216. Translated by the author. Original text in Portuguese: «reconduzindo-se esta figura (a ordem pública internacional) àquele conjunto de princípios que pela sua especial situação num ordenamento jurídico constituem como que as traves-mestras onde assenta todo o edifício normativo, os seus fundamentos essenciais, não poderiam em caso algum os seus contornos ser diferentes – antes tendo que espelhar – àquilo que na comunidade jurídica respetiva se entende formarem as raízes últimas do viver coletivo».

10 Ramos (1979), p. 216.

11 Barrocas (2013), p. 452.

Jacob Dolinger, in addition, defends that public policy is the reflection of a «sociopolitical legal philosophy in a State legal system, which represents the basic morals of a nation and protects the economic needs of the State. Public policy thus encompasses the philosophical, political, moral, and economic plans of every constituted State».[12]

Another important point to mention is that public policy can be mutable.[13] It varies from one country to another. Certain principles can be considered as public policy in one country and not be considered in another one. It also varies in time according to the values and needs felt by a certain society. This concept changes according to the evolution of social phenomena within each region in each time period.[14] Because of it, some authors consider public policy as a chameleon, an animal of many colors.[15]

Public policy is categorized by the major doctrine in three different groups: domestic (or national) public policy; international public policy; and transnational public policy.[16]

Domestic and international public policy are both related to a local legal order. Domestic public policy comes from a national legal system and aims to protect the most important interests of that society. International public policy of a certain State, in its turn, «is the expression of the national public policy of that State when confronted with the legal order of other States».[17] However, not all rules of foreign law applied to the specific case will be rejected, but only those that are contrary to the public order of the State in which the annulment or recognition of a foreign arbitration award is required, for example.

The arbitral tribunal in *World Duty-Free Co. Ltd. v. Republic of Kenya* stated, about international public policy, that «although this name suggests that it is in some way a supra-national principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State».[18]

12 Dolinger (2008), p. 394. Translated by the author. Original text in Portuguese: «(o princípio de ordem pública é o reflexo) da filosofia sociopolítico-jurídica imanente no sistema jurídico estatal, que representa a moral básica de uma nação e que protege as necessidades econômicas do Estado. A ordem pública encerra, assim, os planos filosófico, político, moral e econômico de todo Estado constituído».

13 Dolinger (1979), p. 10.

14 Dolinger (1997), p. 352.

15 Dutoit (1985).

16 Some authors also include the concept of 'regional public policy', mainly related to a public policy within the European Union. *See* Lew (2018), p. 21.

17 Barrocas (2013), p. 458. Translated by the author. Original text in Portuguese: «*é a expressão da ordem pública nacional desse Estado quando confrontada com a ordem jurídica de outros Estados*».

18 *World Duty-Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct 2006, § 138.

Owing to globalization and the interaction of diverse legal systems, the literature now includes a wider dimension of public policy: the so-called transnational (or truly international) public policy.[19] Transnational public policy reflects fundamental principles and moral rules shared by the international community. As stated in the award of *World Duty-Free Co. Ltd. v. Republic of Kenya*, this concept means «an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora».[20]

Furthermore, the ILA Committee on International Commercial Arbitration defined it as «principles of universal application» – comprising «fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'».[21]

For a value to be acknowledged as transnational public policy, it does not mean that it is recognized by every single nation in the world, but it must be widely accepted by the international community.[22] In this regard, the French Court of Appeal stated that «the security of international commercial and financial relations requires the recognition of a public policy which is, if not universal, at least common to the various legal systems».[23]

Whether it be national, international, or transnational, public policy contains values that cannot be pushed away by the will of the parties. They are limiting barriers to individual freedom in contract matters.[24] The autonomy of the parties can be restrained by public policy if the law of the contract or any element related to the arbitral proceeding shocks with principles of public police.

On a further terminological note, a few decades ago, some authors defended that there are differences in meaning between *ordre public* and *public policy.*[25] They argued, for example, that *ordre public* was used as a more general term while public policy was used in connection with specific applications

19 This terminology was created by Pierre Lalive, in Lalive (1987), p. 295; As well observed by Lew (2018), p. 22, transnational public policy is «the term used to express such universal standards and accepted norms, in the arbitration literature and comparative arbitral practice, is either transnational public policy or international public policy. However, given that the term international public policy equally denotes to those fundamental domestic norms of the State concerned, one finds the term transnational public policy more accurate».

20 *World Duty-Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct 2006, § 139.

21 International Law Association (2002).

22 Lew (2018), pp. 22-23; Fouchard *et alii* (1999), p. 853.

23 See *Comite de defense des actionnaires de la Banque ottomane et autres v. Banque ottomane et autres*, in Lalive (1987), pp. 276-277.

24 Costa & Pimenta (1999), p. 377.

25 Schwarz & Ortner (2008), p. 138.

of the principle[26] or that public policy has a «narrower meaning, not including principles of procedural justice».[27] The majority of the modern doctrine and private international law jurisprudence, however, agree that both terms can be used interchangeably.[28] Particularly in the context of international arbitration, this distinction has largely been lost. James Allsop exemplifies saying that the New York Convention has overlooked this former distinction «using the English 'public policy' as if equivalent to the French *ordre public* and Spanish *orden publico*, and proceeding on the basis that procedural requirements are inherent within reference to 'public policy' (that the two terms are interchangeable and synonymous)».[29]

About these 'principles of procedural justice', some scholars also bring the notion of 'procedural public policy', which, in sum, is the core procedural values of a certain legal community. In most countries, these procedural values comprise the principles of fairness, equality, and due process.[30] Along with the substantive face of public policy, the procedural public policy is a generally accepted ground for setting aside awards in most developed jurisdictions.[31]

Although the public policy ground in Article V, 2, (b) of the New York Convention is universally accepted to cover both substantive and procedural nature, there are other provisions in Article V implicating procedural public policy, such as Article V, 1, (b) that cover violations of due process. However, even in those cases in which a principle of procedural public policy is mentioned elsewhere in Article V, a violation of the grounds in Article V, 1, (b) has to be proven by the respondent, at the same time that the court can refuse enforcement of the award on its own motion if it finds that there was an infringement of procedural public policy under Article V, 2, (b).[32]

About the principles that can be considered part of the procedural public policy of a State, Franz T. Schwarz and Helmut Ortner affirm that:

> By way of example, courts of the enforcement state have *inter alia* considered the following issues to form part of a procedural public policy notion under Article V (2) (b) of the New York Convention: the principle that no one may be an arbitrator in his own affairs; violations of the principle of *ne bis in idem;* perverting the course of

26 Lloyd of Hampstead (1953); Husserl (1938), p. 37.

27 Schwarz & Ortner (2008), p. 138.

28 Schwarz & Ortner (2008), p. 138; Van Den Berg (1981), p. 356.

29 Allsop (2017), p. 769.

30 Schwarz & Ortner (2008), p. 144.

31 Schwarz & Ortner (2008), p. 144.

32 Schwarz & Ortner (2008), p. 145.

> justice and malicious use of process; grossly erroneous or arbitrary application of law; exclusion of a party from the process of selecting the arbitration panel; exceptional cases in which the award was based on an invalid arbitration agreement; and exceptional cases in which the parties of a purely domestic dispute move the seat of the arbitration to a foreign country merely to evade the mandatory rules of the country in which enforcement will be sought.[33]

The concept of procedural public policy is particularly relevant to this paper since in the cases further analyzed we can identify violations of procedural principles in the arbitral procedures.

In Brazil, the subject of our research, public policy is ruled in Article 17 of the Law of Introduction to the norms of Brazilian Law, no. 4.657 of 1942, which excludes the application of foreign laws, acts and judgments, whenever they violate national sovereignty, public policy, and the good morals and, specifically in the case of arbitration, in Article 39, II of the Brazilian Arbitration Act.

The Brazilian perspective of public policy in international arbitration and in the recognition and enforcement of arbitral awards will be analyzed in the next section.

III. Public policy and the recognition and enforcement of arbitral awards in Brazil

International arbitration is governed by a set of national and international rules that includes international arbitration conventions, national arbitration laws, institutional arbitration rules, and arbitration agreements.[34]

The New York Convention of 1958, or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is the most important

33 Schwarz & Ortner (2008), p. 145; Lew, Mistelis & Kröll also add that «In 2000 and 2002 the International Law Association Committee on International Commercial Arbitration published a report and a resolution on public policy as a bar to the enforcement of foreign arbitration awards. The report offers a guidance for the classification of public policy grounds as procedural or substantive. Accordingly, possible procedural public policy grounds include fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; annulment at place of arbitration. The report further lists as substantive public policy grounds mandatory rules / *lois de police*; fundamental principles of law; actions contrary to good morals; and national interests / foreign relations. This classification although it has merit may not be universally accepted as it emerges from case law in a limited number of countries. Further, public policy has by its very nature, a dynamic character, so that any classification may crystallise public policy only at a certain period of time». Lew, Mistelis & Kröll (2003), pp. 722-723.

34 Born (2015), pp. 16-17.

contemporary convention related to international arbitration. Albert Jan van den Berg affirms that «the New York Convention can be considered as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration».[35]

As its own name states, the New York Convention regulates the recognition and enforcement of foreign arbitral awards. One of the most important changes that the Convention brought is that if an arbitral award meets the requirements of the Convention it shall be *prima facie* considered binding and enforceable.[36] Article V of the Convention, however, indicates the grounds on which an award may be refused.[37] One of these grounds is if the arbitral award is contrary to the public policy of the country where recognition and enforcement are sought.[38]

Since Brazil is a Member-State of the New York Convention, the rules regarding the recognition and enforcement of foreign arbitral awards and its exceptions are also valid in Brazil. The country ratified the New York Convention in July of 2002 and it was incorporated into its legal system through the Decree no. 4311.

This ratification did not bring greater changes in Brazilian law since the Brazilian Arbitration Act had very similar provisions to the Convention about the recognition and enforcement of foreign arbitral awards.[39] However, it is unquestionable that the ratification has increased the legal certainty for foreign parties to participate in arbitration proceedings with Brazilian parties.[40]

Besides the New York Convention, Brazil also ratified other international treaties regarding this subject. Among them, there is the Inter-American Convention on International Commercial Arbitration of 1975 (or the Panama Convention), ratified by Brazil in June of 1995, through the Legislative Decree no. 90. This Convention has similar provisions to the New York Convention but is effective only in the American continent.[41]

According to the Brazilian Arbitration Act (Article 34, single paragraph), a foreign arbitral award is the one that was rendered in a foreign country, even if

35 Van Den Berg (1981), p. 1.

36 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III.

37 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V.

38 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, 2, (b).

39 Stetner & Pitombo (2004), p. 308.

40 Stetner & Pitombo (2004), p. 309.

41 Stetner & Pitombo (2004), p. 309.

involves Brazilian parties. This is similar to the concept brought by Article I of the New York Convention.[42]

If an award is foreign, in order to be recognized and enforced in Brazil, it needs to be homologated by the Superior Court of Justice (STJ), one of the highest courts in the country, according to Article 105, I, (i), of the Brazilian Federal Constitution.[43] It is important to mention that before the Constitutional Amendment no. 45 of 2004, foreign awards were homologated by the Supreme Federal Court (STF), according to Article 102, I, (h) of the Constitution (provision no longer in force).

Like the New York Convention (mainly Articles V, 1 and 2), the Brazilian Arbitration Act, Articles 38 and 39 contain provisions regarding the cases in which the recognition and enforcement of an award may be refused:

> Art. 38. Recognition or enforcement of a foreign arbitral award may be refused only if the defendant proves that:
>
> I – the parties to the arbitration agreement lacked capacity;
> II – the arbitration agreement was not valid under the law to which the parties have submitted it, or, failing any indication thereof, under the law of the country where the award was made;
> III – proper notice of the appointment of the arbitrator or of the arbitral procedure was not given, or there has been a violation of the principle of adversarial proceedings rendering its full defense impossible;
> IV – the arbitral award has exceeded the scope of the arbitration agreement, and it was not possible to separate the exceeding portion from what was submitted to arbitration;
> V – the commencement of the arbitration proceedings was not in accordance with the submission agreement or the arbitration clause;

42 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I. «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».

43 Brazilian Federal Constitution, Art. 105, I, (i): «Compete ao Superior Tribunal de Justiça: I – processar e julgar, originariamente: i) a homologação de sentenças estrangeiras e a concessão de *exequatur* às cartas rogatórias».

> VI – the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a court in the country in which the arbitral award was made.[44]
>
> Art. 39. Recognition or enforcement of a foreign arbitral award will also be refused if the Superior Court of Justice finds that:
>
> I – according to Brazilian law, the subject matter of the dispute cannot be settled by arbitration;
> II – the decision violates national public policy.
> Sole paragraph. The service 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 through mail with confirmation of receipt, shall not be considered as offensive to national public policy, provided the Brazilian party is granted sufficient time to exercise its right of defense[45].

These are minimum standards required to prevent an arbitral award to offend fundamental rights and core values of the Brazilian legal order. The recognition of foreign arbitral awards, however, is the general rule. In setting out the basis for refusal of recognition and enforcement, these provisions reflect a framework that is clearly favorable to the recognition and enforcement of foreign arbitral awards in Brazil.[46]

Three main elements endorse this 'pro-enforcement' characteristic of Articles 38 and 39. First, the Articles set out a limited number of grounds on which the STJ can deny enforcement of an award. Second, none of the grounds for refusal permit a review of the merits of the arbitral decision. The system that Brazil adopted for the recognition and enforcement of foreign judgments is to merely verify if the award meets the mandatory conditions to be valid in Brazil. When a foreign award comes to the Superior Court of Justice, the Tribunal does not reexamine the merits of the cause. Finally, the party that opposes the recognition of an award has the burden of proving that the case falls into one of the circumstances of Article 38.[47] The STJ can only deny enforcement of a foreign

44 Art. 38 translated into English by Abbud, Levy & Alves (2019), p. 185.

45 Art. 39 translated into English by Abbud, Levy & Alves (2019), p. 197.

46 Abbud, Levy & Alves (2019), p. 185.

47 Abbud, Levy & Alves (2019), p. 185.

award on its own motion (*ex officio*) based on the 2 cases provided by Article 39, which include the public policy exception.[48]

The 2 most important items to be analyzed here are Article 38, IV, and Article 39, II, which have to do with the cases studied in the next section. As it will be seen ahead, the STJ refused the recognition and enforcement of cases in which the arbitration agreement was considered invalid or inexistent. In this case, the decision in the award goes beyond the terms agreed by the parties, and Article 38, IV, can be invoked.

Article 38, IV, is similar to Article V, 1, c, of the New York Convention.[49] This provision derives from the understanding that the power of the arbitral tribunal to decide the dispute comes from the authority given by the parties. «Therefore, any portion of the award that falls outside the scope of the arbitration agreement, or the scope of the questions submitted by the parties to the arbitrators, should not be recognized and enforced».[50] In the cases analyzed ahead, since the arbitration agreements were considered invalid or inexistent, the decision in the award goes beyond the terms agreed by the parties. Despite this, the STJ based its decision of refusing the recognition and enforcement of the awards only on the violation of national public policy (Art. 39, II).

Article 39, II, on the other hand, is similar to Article V, 2, b[51] of the New York Convention and contains the public policy exception. If an award offends the public policy of Brazil, it cannot be recognized and enforced in the country. The term "national public policy" «refers not to the purely domestic public policy, but to the narrower concept of international public policy, understood as the public policy adopted by Brazil in its interactions with other countries and legal systems (*ordre public à usage international*)».[52] Therefore, it is not any infringement of a Brazilian law that constitutes a ground for arguing a violation of public policy before the STJ.

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48 Souza Júnior (2005), pp. 62-66.

49 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, 1, (c): «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».

50 Abbud, Levy & Alves (2019), p. 186.

51 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, 2, b: «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».

52 Abbud, Levy & Alves (2019), pp. 197-198.

The public policy exception is also discussed in Brazilian law in Article 17 of the Law of Introduction to the norms of Brazilian Law, no. 4.657 of 1942. The text provides that shall not be effective in Brazil any foreign laws, acts, and judgments, «whenever they offend national sovereignty, public policy, and the good morals».[53]

Along with the expression «public policy» the Article also brings «national sovereignty» and «good morals». Some scholars affirm that the 3 concepts have a different meaning. Tourinho Filho, for instance, says that good morals «establish the rules of conduct, in domestic and social relations, in harmony with the high ends of human life. They are moral precepts. […] the honesty of families, the modesty of the individual and social dignity».[54] However, the majority of the Brazilian doctrine and case law agree that the 3 terms are all included in the definition of public policy. Public policy is «the genre in which the expressions 'sovereignty' and 'good morals' would only be reflections».[55] In this sense, Bento Faria states that «good morals are necessarily integrated into the concept of public policy. It is morality that dominates, particularly, the feeling of laws that protect honesty or public modesty. They are moral laws themselves».[56]

The refusal of recognition and enforcement of foreign arbitral awards by Brazilian Courts due to violation of national public policy is the subject of our work. The next section will be dedicated to studying the cases in which the Superior Court of Justice (after 2004) and the Supreme Federal Court (before 2004) decided to refuse requests of recognition and enforcement of foreign arbitral awards.

The methodology used was the research at online databases of the STF and the STJ, selecting cases from 1996 (after the entry into force of the Brazilian Arbitration Act) to November 21, 2019. Although this work provides a brief overview of all requests of recognition and enforcement of foreign arbitral awards made to these Courts, only cases regarding the refusal of awards due to violation of national public policy will be analyzed.

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53 According to Law 4657/42, Art. 17: «as leis, atos e sentenças de outro país, bem como quaisquer declarações de vontade, não terão eficácia no Brasil, quando ofenderem a soberania nacional, a ordem pública e os bons costumes».

54 Translated by the author. Original text in Portuguese: «estabelecem as regras de proceder, nas relações domésticas e sociais, em harmonia com os elevados fins da vida humana. São preceitos de moral. Nem todo eles terão força para impedir a aplicação da lei estrangeira, a execução das sentenças ou eficácia das convenções. Têm-na, porém os que se referem, mais diretamente, à honestidade das famílias, ao recato do indivíduo e à dignidade social». Tourinho Filho (2008), p. 571.

55 Translated by the author. Original text in Portuguese: «a ordem pública é vista como sendo o gênero no qual as expressões 'soberania' e 'bons costumes´ seriam meros reflexos». Abade (2013), p. 99.

56 Translated by the author. Original text in Portuguese: «os bons costumes se integram, forçosamente, no conceito da ordem pública. É a moral que domina, particularmente, o sentimento das leis que resguardam a honestidade ou o pudor público. São eles próprios leis de moral». Faria (1960), p. 114.

IV. Cases of refusal of recognition and enforcement of foreign arbitral awards by the STF and STJ due to violation of public policy

As already mentioned, before the entry into force of the Constitutional Amendment no. 45 of 2004, the Court responsible for analyzing requests for the recognition and enforcement of foreign arbitral awards in Brazil was the Supreme Federal Court (STF). After the entry into force of the Brazilian Arbitration Act, the STF judged five requests for recognition and enforcement of foreign arbitral awards.[57] Of these, three were approved[58] and two were not approved.[59]

1. *Plexus Cotton v. Santana Têxtil* (SEC 6.753)

The only case in which the STF dealt with allegations of violation of public policy was SEC 6.753.[60] The STF understood that there was a violation of the principle of public policy because the defendant did not manifestly accept an arbitration agreement, so the Court denied the recognition of the arbitral award. The parties celebrated two contracts of sale of raw cotton from Nigeria and a clause stated that «the LCA rules supersede all rules of this contract where the jurisdiction might be questioned».[61] After the buying company (Santana Têxtil) failed to pay its obligations alleging poor product quality and delayed delivery, the seller (Plexus Cotton) submitted the dispute to arbitration at the Liverpool Cotton Association (LCA). The buyer, besides initially questioning the arbitral jurisdiction, participated in the proceeding that resulted in a favorable decision to the seller, which sought the recognition of the arbitral award in Brazil.[62]

The Supreme Federal Court refused the request alleging that: it was not possible to assess the competency of the tribunal that issued the foreign judgment; the contracts were not signed by the buyer and there was no specific arbitration clause in them (just the mention to the LCA rules); even if it was possible to overcome the lack of signature in the contract, it would not be possible to verify the choice of the arbitral institution based on the above-transcribed clause, since the law requires clear expression of the will of the parties.

57 1) SEC 5847, DJ 17.12.1999; 2) SEC 5378, DJ 25.02.2000; 3) SEC 5828, DJ 23.02.2001; 4) SEC 6.753, DJ 04.10.2002; 5) AgRgSE 5206-7, DJ 30.04.2004.

58 1) SEC 5847, DJ 17.12.1999; 2) SEC 5828, DJ 23.02.2001; 3) AgRgSE 5206-7, DJ 30.04.2004.

59 1) SEC 5378, DJ 25.02.2000 e 2) SEC n. 6.753, DJ 04.10.2002.

60 Supremo Tribunal Federal, SEC 6.753, Rel. Min. Maurício Corrêa, DJ 04.10.2002.

61 Supremo Tribunal Federal, SEC 6.753, Rel. Min. Maurício Corrêa, DJ 04.10.2002.

62 Barros (2013), p. 176.

The Court understood that «since it has not been shown in the case files that the parties legitimately subjected themselves to the LCA's arbitration rules, this foreign award cannot be taken as rendered by a competent court, which is why the allegation of offense to the national public policy is upheld».[63]

The STJ, in its turn, since the entry into force of the Constitutional Amendment no. 45 of 2004, has judged 61[64] requests for recognition and enforcement of foreign arbitral awards, from December 30, 2004, to November 21, 2019. Of these 61 requests, 41 were granted, 11 were refused,[65] 5 extinguished,[66] and 3 were partially granted.[67]

63 Translater by the author. Original text in Portuguese: «[...] não havendo sido demonstrado nos autos que as partes se sujeitaram, de forma legítima, às regras de arbitragem da LCA, não se pode ter a sentença *(sic)* homologanda estrangeira como proferida por juízo competente, razão pela qual procede a alegação de ofensa à ordem pública nacional». Supremo Tribunal Federal, SEC 6.753, Rel. Min. Maurício Corrêa, DJ 04.10.2002.

64 1) SEC 856, DJ 27.06.2005; 2) SEC 802, DJ 19.09.2005; 3) SEC 967, DJ 20.03.2006; 4) SEC 887, DJ 03.04.2006; 5) SEC 611, DJ 04.05.2006; 6) SEC 874, DJ 15.05.2006; 7) SEC 760, DJ 28.08.2006; 8) SEC 968, DJ 25.09.2006; 9) SEC 866, DJ 16.10.2006; 10) SEC 833, DJ 30.10.2006; 11) SEC 349, DJ 21.05.2007; 12) SEC 1.210, DJ 06.08.2007; 13) SEC 839, DJ 13.08.2007; 14) SEC 918, DJ 13.08.2007; 15) SEC 507, DJ 13.11.2007; 16) SEC 831, DJ 19.11.2007; 17) SEC 1.305, DJ 06.12.2007; 18) SEC 1.657, DJ 01.02.2008; 19) SEC 1302, DJ 06.10.2008; 20) SEC 894, DJ 09.10.2008; 21) SEC 966, DJ 04.12.2008; 22) SEC 2.707, DJ 19.02.2009; 23) SEC 978, DJ 05.03.2009; 24) SEC 3.661, DJ 15.06.2009; 25) SEC 3.660, DJ 25.06.2009; 26) SEC 3.035, DJ 31.08.2009; 27) SEC 3.313, DJ 22.03.2010; 28) SEC 4.415, DJ 19.08.2010; 29) SEC 885, DJ 10.09.2010; 30) SEC 826, DJ 14.10.2010; 31) SEC 4.980, DJ 07.06.2011; 32) SEC 2.716, DJ 06.12.2011; 33) SEC 4.933, DJ 19.12.2011; 34) SEC 4.439, DJ 19.12.2011; 35) SEC 001, DJ 01.02.2012; 36) SEC 6.335, DJ 12.04.2012; 37) SEC 3.709, DJe 29.06.2012; 38) SEC 6365, DJe 28.02.2013; 39) SEC 4837, DJe 30.08.2012; 40) SEC 6760, DJe 22.05.2013;41) SEC 4213, DJe 26.06.2013; 42) SEC 5828, DJe 26.06.2013; 43) SEC 6753, DJe 19.08.2013; 44) SEC 4024, DJe 13.09.2013; 45) SEC 6761, DJe 16.10.2013; 46) SEC 4516, DJe 30.10.2013; 47) SEC 854, DJe 07.11.2013; 48) SEC 8847, DJe 28.11.2013; 49) SEC 2410, DJe 19.02.2014; 49) SEC 9880, DJe 27.05.2014; 50) SEC 9714, DJe 27.05.2014; 51) SEC 9502, DJe 05.08.2014; 52) SEC 5692, DJe 01.09.2014; 53) SEC 10658, DJe 16.10.2014; 54) SEC 10643, DJe 11.12.2014; 55) SEC 3892, DJe 11.12.2014; 56) SEC 11529, DJe 02.02.2015; 57) SEC 10702, DJe 23.03.2015; 58) SEC 8242, DJe 19.03.2015; 59) SEC 10432, DJe 19.10.2015; 60) SEC 5782, DJe 16.12.2015; 61) SEC 11593, DJe 18.12.2015; 62) SEC 12236, DJe 18.12.2015; 63) SEC 11969, DJe 02.02.2016; 64) SEC 9619, DJe 19.05.2016; 65) SEC 12115, DJe 03.05.2016; 66) SEC 9820, DJe 26.10.2016; 67) SEC 12041, DJe 16.12.2016; 68) SEC 12493, DJe 21.02.2017; 69) SEC 3687 DJe 11.05.2017; 70) SEC 9412, DJe 30.05.2017; 71) SEC 11106, DJe 21.06.2017; 72) SEC 14679, DJe 14.06.2017; 73) SEC 12781, DJe 18.08.2017; 74) SEC 6855, DJe 24.08.2017; 75) SEC 11108, DJe 31.08.2017; 76) SEC 11463, DJe 13.09.2017; 77) SEC 15977, DJe 15.09.2017; 78) SEC 8421, DJe 11.10.2017; 79) SEC 16016, DJe 28.11.2017; 80) SEC 16208, DJe 05.12.2017; 81) SEC 13080, DJe 14.12.2017; 82) SEC 14385 DJe 21.08.2018; 83) SEC 7009, DJe 28.08.2018; 84) SEC 15750, DJe 27.11.2018; 85) HDE 120, DJe 12.03.2019; 86) HDE 1808, DJe 16.04.2019; 87) HDE 1914, DJe 11.06.2019; 88) SEC 14930, DJe 27.06.2019; 89) HDE 2578 DJe 10.09.2019.

65 1) SEC 967, DJe 20.03.2006; 2) SEC 866, DJe 16.10.2006; 3) SEC 833, DJe 30.10.2006; 4) SEC 2.707, DJe 19.02.2009; 5) SEC 978, DJe 05.03.2009; 6) SEC 885, DJe 10.09.2010; 7) SEC 826, DJe 14.10.2010; 8) SEC 5782, DJe 16.12.2015; 9) SEC 11593, DJe 18.12.2015; 10) SEC 12236, DJe 18.12.2015; 11) SEC 9412, DJe 30.05.2017.

66 1) SEC 968, DJe 25.09.2006; 2) SEC 1.657, DJe 01.02.2008; 3) SEC 966, DJe 04.12.2008; 4) SEC 3.313, DJe 22.03.2010; 5) SEC 2.716, DJe 06.12.2011.

67 1) SEC 854, DJe 07.11.2013; 2) SEC 2410, DJe 19.02.2014; 3) SEC 12781, DJe 18.08.2017; 4) SEC 8421, DJe 11.10.2017; 5) SEC 14385, DJe 21.08.2018.

2. *Plexus Cotton v. Santana Têxtil* (SEC 967)

The first case in which the STJ dealt with allegations of violation of public policy and refused the request was SEC 967, judged in 2006. This was a new request of recognition and enforcement of the same arbitral award of the case SEC 6.753 submitted to the STF. This new demand is a possibility foreseen in Article 40[68] of the Brazilian Arbitration Act, when a party considers that the prior request was denied based only on formal procedural defects, once these defects had been remedied.

The Court denied the request on the same grounds as the previous case. A Justice noted that:

> The STF's decision [prior to the current case] clearly recognized the absence of any arbitration clause and, consequently, the absolute impossibility of homologation, as the judgment was rendered by a non-competent tribunal. This issue, as decided, did not appreciate formal issues. It lies in the application of the principle of public policy to refuse approval. It is today, in my view, clothed with *res judicata*. It is impossible to revise it except in the case of termination action.[69]

The Court understood that the prior decision was not only based on formal reasons. The principle of public policy was violated because of the non-existence of an arbitration agreement. The STJ also pointed out that the new documentation brought in the SEC 967 could not prove the existence of an arbitration agreement accepted by the defendant, so the violation of public policy was maintained. Regarding that, a Justice stated:

> The discussion is centred on the absence of a voluntary written statement by the defendant to accept the arbitration clause. It is, therefore, an offense to public policy to go against the principle that

68 Brazilian Arbitration Act, 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.»

69 Superior Tribunal de Justiça. SEC n.º 967. Relator: José Delgado, DJ 15.02.2006, pp. 12-13. Translated by the author. Original text in Portuguese: «A decisão do STF [anterior ao caso corrente], de forma clara, reconheceu a inexistência de cláusula compromissória e, consequentemente, a impossibilidade absoluta da homologação, por o julgado ter sido proferido por juízo incompetente. Essa questão, como decidida, não apreciou questões formais. Situa-se na aplicação de princípio de ordem pública para indeferir a homologação. Ela está, hoje, revestida, a meu entender, com força da coisa julgada. Impossível revê-la, salvo em sede de ação rescisória.»

> is inscribed in our legal system that requires the express acceptance of the parties to submit the solution of conflicts that arose in private contractual legal business to arbitration.[70]

The Court concluded arguing that the offence to public policy stemmed from the lack of manifestation of the defendant in accepting arbitration as the mechanism of dispute resolution. As deemed by the STF, the Superior Court of Justice also understood that the autonomy of the parties, an overriding rule of international arbitration, was infringed. This was the reason why the Court could not tacitly accept the validity of the former arbitral tribunal since it was a violation of public policy.

3. *Moreno v. Paulista* (SEC 866)

The second case was judged by the STJ in 2006. Oleaginosa Moreno Hermanos, an Argentinian company, asked for the recognition and enforcement of a foreign arbitral award, issued in the United Kingdom by The Grain and Feed Trade Association (GAFTA) in October of 2000, against the defendant Moinho Paulista Ltda. a Brazilian company.

The claimant alleged that the defendant failed to pay the amount agreed in 4 contracts of sale of Argentinian wheat. These contracts were concluded by telephone between CEREAGRO S/A, a representative of the claimant, and Mr. Antônio Adriano Farinha de Campos, who acted on behalf of the defendant.

After being notified of an arbitral proceeding to resolve the above dispute, the defendant failed to appoint its arbitrator, who ended up being appointed by GAFTA. The institution issued an arbitral award in favor of the claimant. After that, the defendant appealed to GAFTA, but the institution confirmed the award, condemning Moinho Paulista to pay more than US$ 1.5 million dollars, plus other fees, and expenses.[71]

Before the STJ, the defendant presented its allegations and replied that the contracts mentioned above were nonexistent since Mr. Antônio Adriano Farinha de Campos did not have the power to contract on behalf of Moinho Paulista and all business intermediated by him would only be valid through written confirmation of the company.

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70 Superior Tribunal de Justiça. SEC n.º 967. Relator: José Delgado, DJ 15.02.2006, p. 16. Translated by the author. Original text in Portuguese: «A discussão está centrada na ausência da manifestação voluntária por escrito da requerida em aceitar a cláusula arbitral. É, portanto, ofensa à ordem pública por ir de encontro a princípio insculpido em nosso ordenamento jurídico que exige aceitação expressa das partes para submeterem a solução dos conflitos surgidos nos negócios jurídicos contratuais privados à arbitragem.»

71 Superior Tribunal de Justiça. SEC n.º 866. Relator: Felix Fischer. DJ 17.05.2006, p. 3.

The defendant also stated that the arbitral award was issued by a non-competent tribunal because there was no arbitration clause agreed in writing between the parties. Besides, its presence in the arbitral tribunal did not induce the recognition of competency since the defendant had already alleged that it did not recognize the competency of the tribunal.

The claimant answered that Mr. Antônio Adriano Farinha de Campos had the power to contract on behalf of the defendant. Also, the party argued that the arbitration agreement was existent and valid since they exchanged messages that contained an arbitration agreement with express reference to the arbitration rules of the GAFTA.

The Brazilian Attorney General's Office asked the STJ for the denial of the request as there was no evidence that the parties had expressly and legitimately agreed to submit themselves to the GAFTA rules.

In the end, the STJ understood that there was insufficient proof that the defendant accepted an arbitration agreement (and its defense before the arbitral tribunal did not mean a tacit acceptance) and that the arbitral decision offended the national public policy, since the competency of the arbitral tribunal depended on the existence of an arbitration agreement, according to Article 37, II[72] and Article 39, II[73] of the Brazilian Arbitration Act no. 9307/96.[74]

In this last argument, the Court cited the above-mentioned decision SEC 6753, in which the STF understood that the lack of a written arbitration agreement implies the non-competency of the arbitral tribunal, resulting in a violation of the national public policy.[75]

4. *Indutech v. Algocentro* (SEC 978)

Indutech SPA requested, before the STJ, the recognition and enforcement of a foreign arbitral award, issued by a member of the Liverpool Cotton Association (LCA) – England, against Algocentro Armazéns Gerais Ltda., which was

72 Brazilian Arbitration Act, 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: II – o original da convenção de arbitragem ou cópia devidamente certificada, acompanhada de tradução oficial.»

73 Brazilian Arbitration Act, Art. 39: «A homologação para o reconhecimento ou a execução da sentença arbitral estrangeira também será denegada se o Superior Tribunal de Justiça constatar que: II – a decisão ofende a ordem pública nacional.»

74 Superior Tribunal de Justiça. SEC n.º 866. Relator: Felix Fischer. DJ 17.05.2006, p. 3.

75 Superior Tribunal de Justiça. SEC n.º 866. Relator: Felix Fischer. DJ 17.05.2006, pp. 9-10.

sentenced to pay around US$ 416,000 due to a breach of contract of raw cotton supply. This case was judged by the STJ in 2008.[76]

After the beginning of the procedure at the STJ, Algorentro was called to present its allegations, but the company did not answer. As such, a trustee was appointed to represent Algocentro: the Federal Public Defender's office. The defense claimed that the signature of the defendant was missing in the contracts that gave rise to the condemnation.[77]

The Court stated that the clause of choice of the arbitral seat existent in the contract and its addendum, as well the indication of an arbitrator on behalf of the defendant, were not signed by Algocentro. As a result, there was no substantial evidence of the defendant's manifest declaration of willingness to waive State jurisdiction in favor of an arbitral tribunal.

The request, then, was denied based on a violation of Article 4, § 2[78] of the Brazilian Arbitration Act and the principle of party autonomy, which offended national public policy. That is, the absence of proof that the party accepted the indication of the arbitral seat and the indication of an arbitrator without its consent is a violation of the principle of the party autonomy and, therefore, of national public policy.

The Court also based its decision on Article 5, I, and Article 6 of the Resolution no. 9 of May 4, 2005, of the STJ: Article 5. «The following are indispensable requirements for the homologation of a foreign judgment: I – to have been issued by a competent authority»; Article 6. «No foreign sentence shall be homologated or conceded *exequatur* to a rogatory letter that offends sovereignty or public policy».[79]

5. *Biglift v. Transdata* (SEC 11593)

Despite the time elapsed between the last case (2008) and the current one (2015), the discussion resembles the last cases analyzed. Biglift Shipping BV

76 Superior Tribunal de Justiça. SEC n.º 978. Relator: Hamilton Carvalhido, DJ 17.12.2008, p. 3.

77 Superior Tribunal de Justiça. SEC n.º 978. Relator: Hamilton Carvalhido, DJ 17.12.2008, p. 3.

78 Brazilian Arbitration Act, 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. § 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 expressamente para essa cláusula.»

79 Translated by the author. Original text in Portuguese: «Art. 5.º Constituem requisitos indispensáveis à homologação de sentença estrangeira: I – haver sido proferida por autoridade competente»; «Art. 6.º Não será homologada sentença estrangeira ou concedido *exequatur* a carta rogatória que ofendam a soberania ou a ordem pública.»

(claimant) requested the recognition and enforcement of a foreign arbitral award against Transdata Transportes Ltda. (defendant).

The claimant argued that both parties signed a contract of ship charter for the transportation of power transformers between two Brazilian ports. Due to a delay in transportation, the claimant started an arbitral proceeding in London according to the terms of the contract. The defendant did not answer the claimant´s request to nominate an arbitrator, which was why a sole arbitrator was appointed to judge the case. The arbitrator sentenced the defendant to pay the amount of approximately US$ 100,000, applying the English law to the dispute.[80]

The defendant, before the STJ, answered that the contract with the claimant was executed and enforced in Brazil so that Brazilian law was the one that should be applied to the contract to the detriment of any other, under penalty of undermining national sovereignty and public policy. Also, that Transdata Transportes did not sign the contract presented to the arbitral tribunal and did not accept any arbitration agreement. The defendant claimed that the constituted arbitral tribunal was not competent, since it had never expressed its agreement with an arbitration clause.[81]

The STJ, in turn, understood that the arbitral tribunal was non-competent because the contract was not signed by the parties and there was no arbitration clause stipulated in writing, violating Article 4, §1 of the Brazilian Arbitration Act. The Court affirmed that the need for a written and signed arbitration agreement in order to the parties to submit their demand to arbitration was a matter pacified in the STJ and the STF, according to previously analyzed cases, as SEC 967, SEC 978, and SEC 866.

The Court refused the request and stated that «since the parties have not validly stipulated an arbitration clause, because they have not observed the form written and signed by both parties, there is no way to recognize enforceability in Brazil to the arbitration decision in analysis, pursuant to Art. 15, "a", of the Law of Introduction to the Rules of Brazilian Law (Decree-Law 4657/42)».[82]

It is important to mention that the STF did not expressly mention the violation of public policy as a reason for the denial of the request but made reference to previous cases denied by the same reasons as SEC 11593 that were not approved due to a breach of national public policy. As the cases had similar nature

80 Superior Tribunal de Justiça. SEC n.º 11.593. Relator: Benedito Gonçalves. DJ 12.12.2015, pp. 2-4.

81 Superior Tribunal de Justiça. SEC n.º 11.593. Relator: Benedito Gonçalves. DJ 12.12.2015, pp. 4-5.

82 Translated by the author. Original text in Portuguese: «[…] não havendo as partes estipulado validamente cláusula compromissária, por não terem observado a forma escrita e subscrita por ambas, não há como se reconhecer executoriedade no Brasil à decisão arbitral homologanda, nos termos do art. 15, «a», da Lei de Introdução às Normas do Direito Brasileiro (Decreto-lei 4.657/42)».

and factual elements, we can consider that this current case could not be approved due to a violation of public policy.

6. *ASA Bioenergy Holding et al. v. Adriano Ometto* (SEC 9412)

This is a case ruled by the STJ in 2017.[83] ASA Bioenergy Holding Ag (a company constituted under Swiss Law), Abengoa Bioenergia Agrícola Ltda., Abengoa Bioenergia São João Ltda., and Abengoa Bioenergia Santa Fé (constituted under Brazilian Law) required the recognition and enforcement of two arbitral awards (ICC no. 16.176 and ICC no. 16.513) issued by an arbitral tribunal constituted under the Arbitration Regulation of the International Chamber of Commerce (ICC), that condemned Adriano Giannetti Dedini Ometto (a Brazilian citizen) and Adriano Ometto Agrícola Ltda. (a company constituted under Brazilian Law) to pay to the claimants more than US$ 14 million (in ICC no. 16.176) and US$ 117 million (in ICC no. 16.513).

The deal started in 2007 when ASA Bioenergy signed a sale agreement for Adriano Ometto's sugar mill properties located in the State of São Paulo (Brazil). The other companies participated in the deal as «consenting actors»,[84] according to SEC 9412. ASA Bioenergy alleged that, after the deal, it realized that the seller (Adriano Ometto) manipulated and omitted information during the audit and negotiation process. This was the reason why ASA Bioenergy started an arbitral proceeding in New York against the defendant.

The defendant alleged that, after the arbitral awards were rendered, he became aware that the president of the arbitral tribunals was a partner in Debevoise & Plimpton law firm, which participated in at least three operations involving the Abengoa group, receiving fees of at least US$ 6.5 million. Then, claiming violation of impartiality and independence of the arbitrator, Adriano Ometto's company appealed to the US Federal Court. The Court, however, upheld the arbitral awards.

Even with such decision, the defendant believed in the partiality of the arbitrator and asked for the refusal of the request due to a violation of public policy and the right to due process.[85]

Most members of the STJ voted for the refusal of the request, arguing that the kind of relation that the arbitrator had with the claimant called into question its independence as arbitrator. According to the Court, there was solid evidence that the arbitrator had reasons to be partial and the partiality of the arbitrator

83 Superior Tribunal de Justiça. SEC n.º 9412. Relator: Felix Fischer, DJ 19.04.2017.

84 Superior Tribunal de Justiça. SEC n.º 9412. Relator: Felix Fischer, DJ 19.04.2017, p. 4

85 Superior Tribunal de Justiça. SEC n.º 9412. Relator: Felix Fischer, DJ 19.04.2017, p. 6.

violated national public policy and the right to due process, the reason why the request had to be rejected. Also, the fact that the case had previously been submitted to the US Courts was also deemed irrelevant.

The vote of Justice Nancy Andrighi sums up the understanding of the Court majority in this case:

> Therefore, requesting all respects from the eminent rapporteur, I understand that it is not only possible but indispensable, that "this Superior Court" resolves "the issue raised, namely the partiality of the judge conducting the arbitration proceedings", which to me is really clear because of the above payment in these cases, as stated by Humberto Theodoro Jr., "It is essential to the fairness and prestige of court decisions the absence of the slightest doubt about personal reasons that may influence the judgment of the judge.[86]

V. Conclusions

This article has the purpose of studying Brazilian case law regarding the requests of recognition and enforcement of foreign arbitral awards that were refused by Brazilian courts due to a violation of public policy. The objective of this research was to evaluate the pattern of decision of this issue by the STJ and the STF, the two Courts that have and had the competency to decide matters of foreign awards in Brazil. Since 2004, it is the STJ that decides requests for recognition and enforcement of foreign arbitral awards. Before that, it was the STF that had this competency.

It is important to mention that Brazil is a Member-State of the most important international conferences regarding international arbitration, particularly the New York Convention, which disciplines the recognition and enforcement of foreign arbitral awards. According to Article III of the Convention, an arbitral award shall be *prima facie* considered binding and enforceable. Along with the New York Convention, the Brazilian Arbitration Act follows the same international perspective regarding the recognition and enforcement of arbitral awards.

86 Superior Tribunal de Justiça. SEC n.º 9412. Relator: Felix Fischer, DJ 19.04.2017, p. 55. Translated by the author, Original text in Portuguese: «Assim, pedindo todas as venias ao eminente relator, mas entendo não apenas possível, como indispensável, que "este Superior Tribunal" resolva "a questão suscitada, ou seja, a parcialidade do juiz condutor do processo arbitral", que para mim está escancarada diante do pagamento acima comprovado nestes autos, afinal, como afirma Humberto Theodoro Jr., "É imprescindível à lisura e prestígio das decisões judiciais a inexistência da menor dúvida sobre motivos de ordem pessoal que possam influir no ânimo do julgador".»

Article V of the Convention, however, indicates the grounds on which an award may be refused. One of these grounds is if the arbitral award is contrary to the public policy of the country where recognition and enforcement are sought (Article V, 2, (b)). In the same manner, the Brazilian Arbitration Act, in Article 39, II, considers that the recognition and enforcement of foreign arbitral awards shall be denied if the decision violates national public policy.

From the ratification of the Brazilian Arbitration Act (1996) until November 21, 2019, the Brazilian Courts refused 6 requests of recognition and enforcement of arbitral awards based on grounds of violation of public policy.

The 5 first cases (SEC 6.753-STF, SEC 967-STJ, SEC 866-STJ, SEC 978--STJ, SEC 11593-STJ) were denied based on the same reason: that the lack of a written arbitration agreement (and also the lack of signature of the parties) implies the non-competency of the arbitral tribunal, resulting in a violation of national public policy. The last case (SEC 9412-STJ) was denied since the Court found that the arbitrator was partial, and the partiality of the arbitrator violates national public policy and the right to due process.

We can conclude, in the first place, that there are very few reasons that led Brazilian Courts to deny recognition and enforcement of foreign arbitral awards based on the public policy exception. We found only 2 until November 2019. One of them aims to protect the autonomy of the parties, a basilar principle in Private International Law, and the other intends to ensure the right to due process and the equality of arms.

In the second place, a violation of procedural public policy can be found in all 6 cases, even though the STJ and STF did not mention this category specifically. In the cases SEC 6.753-STF, SEC 967-STJ, SEC 866-STJ, SEC 978-STJ, SEC 11593-STJ, the awards were based on an invalid arbitration agreement, and were rendered by a non-competent court. In SEC 9412-STJ, there was a violation of due process, fairness, and equity.

In the third place, we can conclude that in the first 5 cases (SEC 6.753-STF, SEC 967-STJ, SEC 866-STJ, SEC 978-STJ, SEC 11593-STJ) in which there were a lack of a valid arbitration agreement, there was a violation of Article 38, IV. Since the arbitration agreements were considered invalid or inexistent, the decision in the award goes beyond the terms agreed by the parties. Then, in the terms of Article 38, IV, «the arbitral award has exceeded the scope of the arbitration agreement».

Finally, from the analysis of the jurisprudence of the STJ and STF, there were very few reasons that led the Courts to fail to recognize and enforce foreign arbitral awards. The position of Brazil, then, is to follow the spirit of the New York Convention, recognizing that *prima facie* most foreign arbitral awards must be considered binding and enforceable. Not only have the jurisprudence reinforced

this conclusion, but also the Brazilian legislation (Arts. 38 and 39 of the Brazilian Arbitration Act) has a limited number of grounds on which the STJ can deny enforcement of an award. Certainly, this research deserves continuity because of the increase in international arbitrations involving Brazilian parties (and the potential of its arbitral awards being appreciated by the STJ).

Bibliography

Abade, Denise Neves. (2013). *Direitos fundamentais na cooperação jurídica internacional: extradição, assistência jurídica, execução de sentença estrangeira e transferência de presos*, Saraiva, São Paulo.

Abbud, André, Levy, Daniel de A., Alves, Rafael F. (2019). *The Brazilian Arbitration Act: A Case Law Guide*, Kluwer Law International, The Hague.

Allsop, James. (2017). "International Arbitration and Conformity with International Standards of Due Process and the Rule of Law", in *International Arbitration and the Rule of Law: Contribution and Conformity*, Andrea Menaker (ed.), ICCA Congress Series, Vol. 19, Kluwer Law International, ICCA & Kluwer Law International, pp. 763-796.

Barrocas, Manuel Pereira. (2008). *Manual de Arbitragem*. 2nd ed., Almedina, Coimbra.

Barros, Vera Cecília Monteiro. (2013). *Homologação para o reconhecimento ou execução da sentença arbitral estrangeira no Brasil*: *exceção de ofensa à ordem pública*. Dissertation (master's degree), Faculty of Law, University of São Paulo, São Paulo.

Blackaby, Nigel *et alii*. (2009). *Redfern & Hunter on International Arbitration*, 5th ed., Oxford University Press, Oxford.

Born, Gary. (2015). *International Arbitration*: *Law and Practice*. 2nd ed., Kluwer Law International, The Hague.

Brazilian Arbitration Act, Law no. 9307/96 of 1996.

Brazilian Federal Constitution of. (1988).

Costa, José Augusto F., Pimenta, Rafaela L. V. (1999). "Ordem pública na Lei n. 9.307/96", in *Arbitragem – a nova lei brasileira (9.307/96) e praxe internacional*, Paulo Borba Castella (coord.), 2nd ed., LTr, São Paulo.

Dolinger, Jacob. (1979). *A evolução da ordem pública no Direito Internacional Privado*, Graf Luna, Rio de Janeiro.

Dolinger, Jacob. (1997). *Direito Internacional Privado*: *Parte Geral*. 4th ed., Renovar, Rio de Janeiro.

Dolinger, Jacob. (2008). *Direito Internacional Privado*: *Parte Geral*, Renovar, Rio de Janeiro.

Dutoit, Bernard. (1985). *L'ordre public*: *camaleón du droit international privé*. Mélanges Guy Flattet, Lausanne.

Faria, Bento de. (1960). *Código de Processo Penal*, vol. 3, 2.ª ed., Record, Rio de Janeiro.

Fouchard, Philippe *et alii*. (1999). *International Commercial Arbitration*, Kluwer Law International, The Hague.

Husserl, Gerhart. (1938). "Public Policy and Ordre Public", *Virginia Law Review*, vol. 25, Issue 1, pp. 37-67.

International Law Association. (2002). *Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.*

Lalive, Pierre. (1987). "Transnational (or Truly International) Public Policy and International Arbitration", In *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series no. 3, Pieter Sanders (coord), Kluwer Law International, The Hague, pp. 257-318.

Law of Introduction to the norms of Brazilian Law, no. 4.657 of 1942.

Lew, Julian. (2018). "Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals", *IX Conferencia Internacional Hugo Grocio de Arbitraje,* Fundación Universitaria San Pablo CEU, Madrid.

Lew, Julian D. M., Mistelis, Loukas A., Kröll, Stefan. (2003). *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague.

Lloyd of Hampstead, Denis. (1953). *Public Policy: A Comparative Study in English and French Law*, University of London, Athlone Press, London.

Murphy, Kent. (1981). "The Traditional View of Public Policy and Ordre Public in Private International Law", Vol. 11, *Georgia Journal of International and Comparative Law*, no. 3, pp. 591-615.

Ramos, Rui Manuel M. (1979). *Direito Internacional Privado e Constituição. Introdução a uma análise das suas relações.* Coimbra Editora, Coimbra.

Schwarz, Franz T., Ortner, Helmut. (2008). "Chapter III: The Arbitration Procedure – Procedural Ordre Public and the Internationalization of Public Policy in Arbitration", in *Austrian Arbitration Yearbook 2008, Austrian Yearbook on International Arbitration*, Christian Klausegger, Peter Klein *et alii* (coord.), Manz'sche Verlags-und Universitätsbuchhandlung, pp. 133-220.

Souza Júnior, Lauro da Gama. (2005). "O STJ e a homologação de sentenças arbitrais estrangeiras: novas perspectivas?", *Revista Brasileira de Arbitragem*, IOB, vol. 5, pp. 133-220.

Stetner, Renato Parreira, Pitombo, Eleonora Coelho. (2004). "A Convenção de Nova York: ratificação pelo Brasil", in *Novos Rumos da Arbitragem no Brasil*, Eleonora Coelho Pitombo, Luiz F. V. A. Guilherme (coord.), Ed. Fiúza, São Paulo, pp. 307-325.

Superior Tribunal de Justiça. SEC n.º 11.593. Relator: Benedito Gonçalves. DJ 12.12.2015.

Superior Tribunal de Justiça. SEC n.º 9412. Relator: Felix Fischer. DJ 19.04.2017.

Superior Tribunal de Justiça. SEC n.º 978. Relator: Hamilton Carvalhido. DJ 17.12.2008.

Superior Tribunal de Justiça. SEC n.º 967. Relator: José Delgado. DJ 15.02.2006.

Superior Tribunal de Justiça. SEC n.º 866. Relator: Felix Fischer. DJ 17.05.2006.

Supremo Tribunal Federal. SEC n.º 6753, Rel. Min. Maurício Corrêa. DJ 04.10.2002.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Tourinho Filho, Fernando da Costa. (2008). *Código de Processo Penal Comentado (Arts. 394 a 811 e legislação complementar),* 11.ª ed., Saraiva, São Paulo.

Van Den Berg, Albert Jan. (1981). *The New York Arbitration Convention of 1958*, T.M.C. Asser Institute, The Hague.

World Duty-Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7.