Enforcement of Foreign Judgments

Contributing editor
Patrick Doris

2016
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Brazil

Marcus Alexandre Matteucci Gomes
Felsberg Advogados

1. Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country’s approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Brazil is party to the following bilateral or multilateral treaties that, among other issues, cover the reciprocal recognition and enforcement of foreign judgments:

- the Convention of Judicial Cooperation on Civil Issues, between the Government of the Federative Republic of Brazil and the Kingdom of Spain, enacted in Brazil by Decree No. 166, dated 3 July 1991;
- the Treaty Relating to Judicial Cooperation and the recognition and execution of decisions on Civil Issues between the Government of the Federative Republic of Brazil and the Italian Republic, enacted in Brazil by Decree No. 1.476, dated 2 May 1995;
- the Protocol of Cooperation and Jurisdictional Aid on Civil, Commercial, Labour and Administrative Issues between the Countries of the MERCOSUL, enacted in Brazil by Decree No. 2.067, dated 12 November 1996;
- the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, enacted in Brazil by Decree No. 1.850, dated 10 April 1996;
- the Protocol of Cooperation and Jurisdictional Aid on Civil, Commercial, Labour and Administrative Issues between the Government of the Federative Republic of Brazil and the Government of the French Republic, enacted in Brazil by Decree No. 3.598, dated 12 September 2000; and

In general terms, Brazil has no significant restrictions upon entering into such kinds of treaties, provided that the provisions of the Brazilian Federal Constitution concerning the protection of Brazilian public policy and national sovereignty are preserved. It should be noted, however, that any bilateral or multilateral treaties entered into by Brazil must first be approved by the Brazilian National Congress and enacted by a presidential decree in order to be considered effective and enforceable in Brazil.

2. Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

There is uniformity in the law because the recognition and enforcement of foreign judgments is essentially regulated by the Brazilian Federal Constitution and by Brazilian federal law.

3. Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The main sources of law regarding the enforcement of foreign judgments in Brazil are the Brazilian Federal Constitution (articles 105 l, i, and 109 X), the Brazilian Code of Civil Procedure (articles 483 and 484) and the Rules of Procedure of the Superior Court of Justice (articles 216-A to 216-X, which by virtue of Amendment No. 18 of 17 December 2014 replaced Resolution No. 9 of the same Court). Case law (mainly from the Supreme Court and the Superior Court of Justice) is relevant as an ancillary source of law, providing guidance on the correct interpretation of certain legal provisions.

4. Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Brazil is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5. Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

As a matter of Brazilian law there is no specific legislative provision related to the limitation period for enforcement of a foreign judgment. Based upon this, the determination of such a limitation period may give rise to a diverse range of opinions.

A conservative approach could consider that, based upon the Supreme Court’s case law about the statute of limitations on enforcement proceedings in general (Súmula 150), it should be applicable to the enforcement of a foreign judgment for the same limitation period applicable to the legal action that led to the judgment. Should this be the case, the limitation period should be considered from the moment the judgment becomes res judicata (ie, final and unappealable) and should refer to the statute of limitations of the foreign jurisdiction.
6 Types of enforceable order
Which remedies ordered by a foreign court are enforceable in your jurisdiction?
As a general principle, any final and unappealable foreign judgment, provided that it does not go against Brazilian public policy or national sovereignty, is theoretically enforceable in Brazil.

7 Competent courts
Must cases seeking enforcement of foreign judgments be brought in a particular court?
All foreign judgments must first be confirmed or recognised by the Superior Court of Justice before they can be enforced against a defendant domiciled in Brazil.

After the recognition proceedings are completed, the foreign judgment must be enforced by the federal court of the place in which its compliance is intended (in most cases, the federal court with jurisdiction over the domicile of the Brazilian party or defendant). The enforcement proceedings must follow the rules provided by the Brazilian Code of Civil Procedure.

8 Separation of recognition and enforcement
To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?
As mentioned above, the process for obtaining judicial recognition is completely separate from the enforcement process. The first takes place before the Superior Court of Justice in Brazil and the second takes place before the federal court with jurisdiction over the place in which the enforcement must be performed.

9 Defences
Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?
In the recognition proceedings, the Superior Court of Justice is not going to render any kind of decision regarding the merits of the foreign judgment, but will solely evaluate the compliance or non-compliance of formal requirements existing under Brazilian law (or under the applicable bilateral or multilateral treaties, should this be the case).
This being so, a defendant cannot raise a merit-based defence. A defendant will essentially be able to:

- challenge the compliance of formal requirements;
- challenge the authenticity of the documents attached to the proceedings;
- challenge the clarity or understanding of the foreign judgment; or
- raise the existence of an offence to public policy, to national sovereignty or to human dignity as a barrier to the granting of the recognition of the foreign judgment.

As a consequence thereof, the defendant is limited to narrow grounds for challenging the recognition of a foreign judgment by the Brazilian Superior Court of Justice.

10 Injunctive relief
May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?
Once recognised by the Superior Court of Justice, the foreign judgment will follow the same proceedings provided in the Code of Civil Procedure for the enforcement of a national judgment. Pursuant to the Code of Civil Procedure, it is possible for a party to seek injunctive relief during the opposition to such proceedings.
It is worth mentioning that, as a general rule, the presentation of an opposition or of a motion to stay the enforcement proceedings will not automatically have the effect of suspending or preventing such enforcement.

However, the federal court may grant injunctive relief exceptionally to suspend the proceedings until a decision is rendered on the opposition or motion, provided that the arguments presented for such are considered relevant and provided that the court is convinced that the enforcement proceedings have the clear possibility of causing damages where repair of such is deemed impossible or uncertain. Even in such a situation, however, the enforcing party is still allowed to plead to the federal court for the regular development of the proceedings by offering security in an amount to be determined by the court.

11 Basic requirements for recognition
What are the basic mandatory requirements for recognition of a foreign judgment?
The basic requirements for recognition of a foreign judgment under Brazilian law are:

- a certified and consularised copy of the judgment (the copy has to be attested by a competent officer or a competent notary where the court is located and such certification must be recognised by the nearest Brazilian consulate);
- a certified translation of the judgment into Portuguese;
- evidence that the judgment was rendered by a court with competent jurisdiction over the dispute;
- evidence that the parties were regularly served of process and, in so being, were given the opportunity to defend themselves;
- evidence that the judgment is final and unappealable; and
- the judgment cannot be contrary to Brazilian public policy, to Brazilian national sovereignty or to human dignity.

12 Other factors
May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?
Except for the requirements mentioned in question 11 and for the existence of specific terms of reference and requirements regulated in some bilateral or multilateral treaties to which Brazil is a party, there are no other factors for recognition of a foreign judgment to be considered.

13 Procedural equivalence
Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?
There is no specific requirement that the judicial proceedings where the judgment was entered should correspond to the proceedings in Brazilian jurisdiction.

Nevertheless, it should be noted that:

- the Brazilian Superior Court of Justice may refuse to grant recognition to a foreign judgment if the opposing parties challenge and are able to prove that they were not given the opportunity to defend themselves. Whatever the foreign proceeding, the compliance of a minimum due process of law is expected; and
- under Brazilian law, defendants who are resident and domiciled in Brazil must receive service of process of any judicial lawsuit filed against them abroad by means of a letter rogatory. Pursuant to the case law of both the Brazilian Supreme Court and the Superior Court of Justice, compliance with this rule is considered to be mandatory for a foreign judgment to be recognised and enforced in Brazil.

14 Personal jurisdiction
Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?
As mentioned in question 13, evidence that the judgment was rendered by a court with competent jurisdiction over the dispute is one of the requirements for the recognition of the foreign judgment in Brazil. The existence of personal jurisdiction over the defendant must be evaluated in accordance with the jurisdiction rules of the place where the foreign decision was rendered.
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| 15 | **Subject-matter jurisdiction**  
Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met? |

The information provided in question 14 is applicable to this question. As one of the requirements for the recognition of the foreign judgment in Brazil, it must be proven that the judgment was rendered by a court with both personal and relevant subject-matter jurisdiction over the controversy.

| 16 | **Service**  
Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient? |

As a general rule, there is no specific requirement concerning the form of service of process in the foreign jurisdiction. However, as indicated in question 13, compliance with a minimum due process is desirable so that defendants are duly offered the opportunity to defend themselves. This being so, whenever possible, formal notice is preferable. Additionally, and as previously noted, it is considered to be a mandatory requirement that defendants who are resident and domiciled in Brazil must receive notice of any judicial lawsuit filed against them abroad by means of a letter rogatory.

| 17 | **Fairness of foreign jurisdiction**  
Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment? |

According to Brazilian law, and as a general rule, the relative inconvenience is not relevant provided that the parties have been regularly serviced of process and have been given the opportunity to defend themselves.

| 18 | **Vitiation by fraud**  
Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court? |

As mentioned in question 11, the Superior Court of Justice is not going to render any kind of decision regarding the merits of the foreign judgment, but will only examine the compliance or non-compliance of the formal requirements existing under Brazilian law and make sure that the judgment is not contrary to Brazilian public policy, to national sovereignty or to human dignity. However, if it is possible to show that the existence of fraud has harmed the defendant’s right of defence, the recognition of the foreign judgment in Brazil could hypothetically be challenged.

| 19 | **Public policy**  
Will the court examine the foreign judgment for consistency with the enforcing jurisdiction’s public policy and substantive laws? |

The foreign judgment will only be examined for consistency with Brazilian public policy and national sovereignty. As highlighted previously, such consistency is one of the requirements for the granting of the recognition.

| 20 | **Conflicting decisions**  
What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity? |

Except for the existence of specific terms of reference regulated in certain bilateral or multilateral treaties to which Brazil is party, there is no specific regulation under Brazilian law concerning how to act if the foreign judgment sought to be enforced is in conflict with another judgment involving the same parties in the country where the judgment was rendered or in a third country.

However, if the foreign judgment sought to be enforced is in conflict with a previous Brazilian final and unappealable judgment involving the same parties and concerning the same matters, the Brazilian judgment is expected to prevail.

| 21 | **Enforcement against third parties**  
Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor? |

As a general rule, the enforcement of a foreign judgment will commence against the named judgment debtor. Despite this fact, during the enforcement proceedings, the federal court may pierce the corporate veil of the named judgment debtor in order to prevent fraud, thus having access to assets of a related third party. In fact, this situation may apply when the third party is a company that has been set up for fraudulent purposes and to avoid the satisfaction of an existing obligation pertaining to the named judgment debtor (the so-called ‘diversion of the objectives of the company’). Additionally, the piercing of the corporate veil may also apply when there is evidence of commingling of assets between the named judgment debtor and a third party.

| 22 | **Alternative dispute resolution**  
What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce? |

If the parties had an enforceable agreement to use alternative dispute resolution and it was disregarded by the foreign court, the recognition of the foreign judgment is likely to be denied. As a matter of Brazilian law, and as a general rule, a valid and enforceable alternative dispute resolution agreement should prevail over the jurisdiction of the foreign court.

| 23 | **Favourably treated jurisdictions**  
Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why? |

Except for the existence of specific terms of reference regulated in certain bilateral or multilateral treaties to which Brazil is party, judgments from certain foreign jurisdictions are not awarded greater deference.

| 24 | **Alteration of awards**  
Will a court ever recognise only part of a judgment, or alter or limit the damage award? |

The Brazilian Superior Court of Justice is not expected to limit or change a damage award. However, the Superior Court of Justice may validly recognise only a part, or certain parts, of a foreign judgment.

| 25 | **Currency, interest, costs**  
In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest? |

As a matter of Brazilian law, in order to be enforced in Brazil, the damage award must be converted into local currency.

In recognising a foreign judgment, the Brazilian Superior Court of Justice will only take into account factors such as interest, court costs and exchange controls provided that such factors have been covered and clearly decided upon by the foreign judgment. The recognition proceedings will not result in the rendering of any kinds of decisions on issues, factors or subjects that were not encompassed by the foreign judgment. Within this rationale, the rate of interest is to be governed by the law decided by the foreign judgment.

| 26 | **Security**  
Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed? |

Under Brazilian law, the parties have the right to appeal, according to specific court regulations and depending on the circumstances of the case, to the Superior Court of Justice or to the Supreme Court.
If applicable, appropriate and necessary, the reporting justice may grant a preliminary injunction in order to ensure that the judgment will become enforceable.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

The recognised foreign judgment becomes a judicial execution instrument. As specified by the Brazilian Federal Constitution, the federal courts of Brazil have the authority to enforce it. Therefore, after the recognition, the Superior Court of Justice must extract a writ of execution with the main procedural documents that are to be sent to the federal court that has the jurisdiction to do so (which is determined by the internal jurisdiction rules). When the writ of execution reaches the federal court, it follows the same enforcement proceedings applicable to the enforcement of a national judgment. The federal court will then be able to order the compliance or other actions necessary to enforce the foreign judgment.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Usually, the most common pitfalls concern the regular service of process. The parties should comply with Brazilian law regarding the service of process of Brazilian resident parties.
Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
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