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ARBITRATION IN BRAZIL*

JÜRGEN SAMTLEBEN**

I. TREATIES	2
A. <i>International Conventions</i>	2
B. <i>Regional Conventions</i>	6
II. NATIONAL LAW	7
A. <i>Legal Basis</i>	7
B. <i>Practice</i>	11
C. <i>Arbitration Clauses</i>	14
D. <i>Recognition of Foreign Arbitration Awards</i>	21

Information regarding arbitration in Brazil is generally found in the international reports in the various compilations on commercial arbitration. These reports contain primarily a systematic survey of the regulation of the arbitral process in Brazilian law and its particular characteristics. This information is, however, of secondary importance to foreign exporters and importers and their legal advisers because arbitration or execution of a foreign arbitral award in Brazil nevertheless requires the services of a Brazilian attorney. When drafting a contract, it is more important to know beforehand the risks that may be involved in Brazilian or foreign arbitration. This study attempts to assess these risks in light of Brazilian law. The significance of treaties negotiated by Brazil, the extent of use of arbitration procedures, the enforceability of arbitration clauses, and the requirements for recognition of foreign arbitral awards will be discussed. This exposition is based upon Brazilian cases and legal practice.

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I. TREATIES

According to Brazilian law, treaties take precedence over national laws.¹ A treaty must be approved by the legislature, ratified, and its text published in the Official Gazette in order to be valid under Brazilian law. Brazil does not require a special implementing law; legislative approval and publication cause a treaty to become binding in Brazil.²

A. *International Conventions*

1. 1923 Geneva Protocol on Arbitration Clauses

Brazil is one of the signatory countries to the Geneva Protocol on Arbitration Clauses (the Protocol), signed on September 24, 1923.³ In December 1929, the Brazilian Government submitted the Protocol to the legislature,⁴ which took no action. The Protocol was ratified without legislative approval on February 5, 1932, after Getúlio Vargas came to power. Pursuant to article 1, paragraph 2 of the Convention, Brazil declared upon ratification, it would only apply the Protocol to commercial matters.⁵ Brazil's ratification was published, together with the text of the treaty, by Decree No. 21.187 of March 22, 1932. The decree ordered the treaty's execution in national territory.⁶ With regard to West Germany, Brazil

1. Judgment of Mar. 13, 1974, Supremo Tribunal Federal [S.T.F.], 70 Revista Trimestral de Jurisprudência [R.T.J.] 333; Judgment of Aug. 21, 1951, S.T.F., 34 Revista de Direito Administrativo [R.D.A.] 106; Judgment of Nov. 10, 1943, S.T.F., 69 ARCHIVO JUDICIÁRIO [ARCH. JUD.] 13 (extensive vote by Judge Philadelpho Azevedo at 19). See also H. VALLADÃO, ESTUDOS DE DIREITO INTERNACIONAL PRIVADO 528-29, 655-56 (1st ed. 1947); Marotta Rangel, *La Procédure de Conclusion des Accords Internationaux au Brésil*, 55 REVISTA DA FACULDADE DO DIREITO DA UNIVERSIDADE DE SÃO PAULO [R. FAC. DIR. S.P.] 253,264-66 (1960). But see Judgment of June 1, 1977, S.T.F., 83 R.T.J. 809.

2. Judgment of June 20, 1973, S.T.F., 66 R.T.J. 20 (1956 New York Convention on the Recovery Abroad of Maintenance). Compare the decisions cited *infra* in note 17, on the Geneva Conventions on Negotiable Instruments and Checks.

3. Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.

4. The government had heard an expert opinion from Clovis Bevilacqua (drafter of the Brazilian Civil Code) and had consulted with the Bar Association. The opinion of Bevilacqua is published in J.C. DE MAGALHÃES & L.O. BAPTISTA, ARBITRAGEM COMERCIAL 126-27 (1986). For details, see Valladão, *Die Schiedsgerichtsbarkeit in Zivil - und Handelssachen in Brasilien*, in 3 SCHOENKE & KIELWEIN, DIE SCHIEDGERICHTSBARKEIT IN ZIVIL UND HANDELS-SACHEN 109, 113-14 (1956) (reprint of 3 INT'L JB. SCHIEDSG. 57 (1931)).

5. Ratification of the Geneva Protocol by Brazil, Feb. 5, 1932, 117 L.N.T.S. 55.

6. 1932 Coleção das Leis [Coleção] I 434 (Braz.). Literally: "The head of the Provisional Government decrees that the protocol referred to above, appended to this decree, be executed and enforced fully according to its terms."

expressly agreed to the reapplication of the Protocol after World War II.⁷

Although the Geneva Protocol is internationally binding on Brazil, its domestic importance is doubtful. Thus, the Protocol shares the fate of the other treaties ratified by Brazil between 1930 and 1945: the legal effect is problematic because of the lack of legislative participation. Three of the Brussels Maritime Conventions of 1924/26 were ratified by Brazil in December 1930 and in April 1931.⁸ They were promulgated in Brazil only some years later,⁹ based on a provision in the Constitution of 1934 that expressly confirmed all acts of the "provisional government."¹⁰ While the domestic validity of these conventions in Brazil has remained controversial,¹¹ they are in principle accepted by case law.¹² In 1942, Brazil declared its adherence to the Geneva Conventions of 1930/31 on Negotiable Instruments and Checks.¹³ Execution and promulgation did not occur in Brazil until more than twenty years later, under the Castello Branco government.¹⁴ The controversy concerning the

7. 1953 Bundesgesetzblatt [BGB1] II 593 (W. Ger.).

8. The Conventions on Limitation of the Liability of Owners of Sea-Going Vessels (1924), Maritime Liens and Ship Mortgages (1924/26), and Immunity of State-Owned Ships (1926), were approved by the legislature shortly before Getúlio Vargas took power. Decree No. 5.814 of October 14, 1930, 1 Coleção 341; NOVAES DE SOUZA & COSTA FARO, LEGISLAÇÃO COMERCIAL VIGENTE 408 (1938) [hereinafter DE SOUZA].

9. Decrees Nos. 350 & 351 of Oct. 1, 1935, 1 Coleção 1833; Decree No. 1.126 of Sept. 29, 1936, 3 Coleção 1821; DE SOUZA, *supra* note 8, at 922, 929, 1024.

10. See Transitional Regulations, art. 8. The President referred, in fact, to these regulations and not the prior approval of the legislature; see also *supra* note 8.

11. See, e.g., 12 WALDEMAR FERREIRA, TRATADO DE DIREITO COMERCIAL 392-95 (1964) (argues against the validity of the conventions); *id.* vol. 13, at 695-96. Cf. HUGO SIMAS, COMPÊNDIO DE DIREITO MARÍTIMO BRASILEIRO 114-15, 355-58 (1938) (argues that the conventions are valid); Castro Rebêlo, *Convenção Internacional—Limitação Da Responsabilidade Dos Proprietários De Navios*, 199 REVISTA FORENSE [R.F.] 69 (1962) (conventions valid); J. STOLL GONÇALVES, TEORIA E PRÁTICA DA AVARIA COMUN 415-16 (1956) (conventions valid only with respect to international matters); 1 J.C. SAMPAIO DE LACERDA, CURSO DE DIREITO DA NAVEGAÇÃO 166-67 (1969) (conventions valid in international matters).

12. See Judgment of April 30, 1956, S.T.F., 120 ARCH. JUD. 266 (Convention on the Limitation of Liability); with respect to the Convention on Maritime Liens and Ship Mortgages, see Judgment of April 15, 1940, Tribunal de São Paulo [T.S.P.], 131 REVISTA DOS TRIBUNAIS [R.T.] 154, 169, 188; Judgment of April 22, 1940, T.S.P., 130 R.T. 585, 587; Judgment of Sept. 18, 1940, Trib. Rio Grande do Sul, 134 R.T. 274, 279, also found in 84 R.F. 686, 690.

13. See the opinion of the General Counsel of the Republic in 4 ARQUIVOS DO MINISTÉRIO DA JUSTIÇA [ARQ. MIN. JUST.] 92, 113 (1943) (for details). Cf. Brazil's Declaration of Accession to the Geneva Convention in 204 L.N.T.S. 460-62 (1941-43).

14. Legislative Decree No. 54 of Sept. 8, 1964, 28 Lex 753 (declaration of Congress' consent). The text of the Conventions was promulgated in Decree No. 57.595 of Jan. 7, 1966, 30 Lex 27, and Decree No. 57.663 of Jan. 24, 1966, 30 Lex 160.

domestic applicability of these treaties was principally due to the lack of specific implementing legislation.¹⁵ After initial uncertainty in the case law,¹⁶ the Federal Supreme Court resolved the controversy by ruling that the above-mentioned treaties were valid in Brazil as directly applicable law.¹⁷

The domestic validity of the 1923 Geneva Protocol on Arbitration Clauses has not been unequivocally settled. Some authors regard this Protocol as unenforceable either because no implementing law has been promulgated,¹⁸ or because the Code of Civil Procedure of 1939, as *lex posterior*, supplanted the treaty.¹⁹ According to prevailing Brazilian doctrinal opinion, however, the convention is domestically applicable law and takes precedence over national laws.²⁰ It follows from the above-mentioned case law that the convention became domestically applicable law by its publication, despite lack of legislative participation. Prior case law had, in principle, accepted the applicability of the convention, but had expressly limited its applicability to international cases.²¹ To this day, however, the convention has had no real significance in legal practice.²²

15. See Rubens Requião, *Cambial: Invalidez da Lei Que Exige seu Registra*, 10 REVISTA DO DIREITO MERCANTIL [R. DIR. MER.] (New Series) at 13, 16-24 (1971) (good summary of the different opinions); see also Wagner Barreira, *A Lei Uniforme Sobre O Cheque No Direito Brasileiro*, 429 R.T. 28 (1971); Mesquita Da Costa, *Leis Uniformes Sobre Letra De Câmbio, Nota Promissória e Cheque*, 395 R.T. 33 (1968) (opinion of the Procurator General).

16. See Cavalcanti, *A Vigência e Os Efeitos da Convenção de Genebra para Adoção de uma Lei Uniforme sobre Letras de Câmbio e Notas Promissórias*, 419 R.T. 39, 44-45 (1970) (summary of the case law); Rubens Requião, *supra* note 15, at 22-23. *Contra* Judgment of Aug. 13, 1969, Trib. Alçada S.P., 406 R.T. 182; Judgment of Nov. 23, 1971, Trib. Alçada S.P., 437 R.T. 162.

17. Judgment of May 17, 1968, S.T.F., 48 R.T.J. 76; Judgment of May 19, 1971, S.T.F., 58 R.T.J. 744; Judgment of Aug. 4, 1971, S.T.F., 58 R.T.J. 70.

18. See P. GARLAND, *AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW* 80 n.314 (1956).

19. Contrast Soares, *Introdução Histórica ao Estudo das Soluções Pacíficas de Litígios e das Arbitragens Comerciais Internacionais*, 71 R. FAC. DIR. S.P. 163, 188 (1976).

20. 3 H. VALLADÃO, *DIREITO INTERNACIONAL PRIVADO* 212 (1st ed. 1978); Barros Leães, *Arbitragem Comercial Internacional*, 221 R.F. 421, 424 (1968); Dunshee de Abranches, *A Arbitragem Comercial no Brasil*, 228 R.F. 381, 386 (1969); Soares, *supra* note 19; Marotta Rangel, *National Report: Brazil*, 3 Y.B. COM. ARBITR. 31, 32-33 (1978); see also Azevedo Mercadante, *O Protocolo sobre Clausulas Arbitrais Assinado em Genebra em 1923*, in *COMITÉ JURÍDICO INTERAMERICANO, TERCER CURSO DE DERECHO INTERNACIONAL* 435, 439-44 (1977).

21. Judgment of July 18, 1933, C. Dist. Fed., cited in 14 J.M. CARVALHO SANTOS, *CÓDIGO CIVIL BRASILEIRO INTERPRETADO* 25 (1936); See also Magalhães, *A cláusula arbitral nos contratos internacionais*, 43 R. DIR. MER. 29, 35-36 (1981) (infers from the Protocol that arbitration clauses must be valid all international contracts).

22. Cf. Marotta Rangel, *supra* note 20, at 44; Azevedo Mercadante, *supra* note 20, at

2. 1927 Geneva Convention on the Execution of Foreign Arbitral Awards

The Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards was not signed by Brazil. Although it was submitted to the Brazilian legislature, together with the Geneva Protocol of 1923,²³ dissolution of the legislature prevented its consideration. Brazil did not adhere to the convention, nor is it now a signatory country.²⁴

3. Other Conventions

Thus far, Brazil has neither adhered to the UN Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards nor to the European Convention on International Commercial Arbitration of 1961.²⁵ Nor is Brazil a party to the World Bank Convention of 1965 on the Settlement of Investment Disputes.²⁶ Nevertheless, the Brazilian government has accepted the Center of the World Bank (ICSID) as designating authority in connection with arbitration agreements relating to borrowings made on the Euro-market.²⁷

444; see *infra* notes 108, 144.

23. See *supra* note 4.

24. The reference made by Celso A. Frazão Guimarães, *Report, Brazil*, in 2 INT'L COM. ARB. 23, 25 (P. Sanders Rptr. 1960), which characterizes Brazil as a signatory of the "Convention of Geneva of 1928" is misleading. Presumably, what was meant was the Geneva Protocol of 1923.

25. Parties to the U.N. Convention in Latin America are Ecuador (1962), Mexico (1971), Cuba (1975), Chile (1975), Colombia (1979), Uruguay (1983), Guatemala (1984), Haiti (1984), and Panama (1984). See Samtleben, *Schiedsgerichtsbarkeit in Chile*, 29 RECHT INT'L WIRTSCH. 167, 168 (1981); Samtleben, *Schiedsgerichtsbarkeit in den Andenpaktstaaten*, 30 RECHT INT'L WIRTSCH. 600-01 (1984) (regarding application of this convention in some of these countries). The only Latin American state to adhere to the European Convention is Cuba. See Samtleben, *Die Aussenhandels-Schiedsgerichtsbarkeit in der Republik Kuba*, 5 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 214, 215 n.10 (1971).

26. Cf. J. PIRRUNG, *DIE SCHIEDSGERICHTSBARKEIT NACH DEM WELTBANKUEBEREINKOMMEN FUER INVESTITIONSTREITIGKEITEN* 27, 29-30 (1972) (concerning the opposition of the Latin American states to this convention); Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971); Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 138-39 (1976). See Valladão, 52 ANN. INST. DR. INT'L II, 432-33 (1967) (especially for Brazil).

27. See Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 120-21 (1984).

B. Regional Conventions

1. Codigo Bustamante

Brazil is a party to the Bustamante Code of 1928, a comprehensive treaty on international civil, commercial, criminal, and procedural law that is in force among fifteen Latin American states. Even though binding only with respect to countries that are parties to the treaty, its provisions are occasionally consulted when states not a party to the treaty are concerned.²⁸ The Bustamante Code contains two specific provisions concerning arbitration. According to articles 210 and 211, the arbitrability of the subject, as well as the conclusion and effect of the arbitration agreement, are determined by the "territorial law," which in this case must be understood as the *lex fori*.²⁹ In addition, article 432 provides that the provisions of the Bustamante Code dealing with the mutual recognition and enforcement of judgments apply to arbitral awards rendered in a country that is party to the treaty, if the subject is arbitrable according to the law of the country in which execution is sought.³⁰ While these provisions concerning the recognition of foreign court judgments often play a role in Latin American practice,³¹ an equivalent influence on foreign arbitration has not been noticeable in Brazil.³²

2. Inter-American Conventions of 1975 and 1979

The Panama Inter-American Convention of 1975 on International Commercial Arbitration is thus far in force in ten Latin American countries.³³ It contains specific provisions concerning the

28. See 1 J. SAMTLEBEN, *INTERNATIONALES PRIVATRECHT IN LATEIN-AMERIKA* 57-59, 138-68 (1979); *id.* at 286-89 (for Brazil).

29. Cf. 2 A.S. DE BUSTAMANTE Y SIRVÉN, *DERECHO INTERNACIONAL PRIVADO* nos. 1248, 1254 (1931). On the other hand, the personal capacity to enter into an arbitration agreement is governed by personal law. See *id.* no. 1250.

30. The only prerequisite of this provision is that the place of arbitration be within a state that is a party to the Convention, irrespective of the participating parties. Cf. J. SAMTLEBEN, *supra* note 28, at 149 n.130.

31. See, e.g., J. SAMTLEBEN, *supra* note 28, at 155-56.

32. Compare Rosenn, *Enforcement of Foreign Arbitral Awards in Brazil*, 28 AM. J. COMP. L. 498, 504 (1980) ("Since . . . there has traditionally been considerable reluctance to resort to arbitration in Latin American countries, it is not surprising that Art. 432 has apparently never been invoked in Brazil.")

33. See Samtleben, *Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht*, 44 RABELSZ 257, 265-69 (1980). Parties to the convention are Chile, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, El Salvador, Venezuela, and Uruguay.

validity of arbitration clauses in international commerce and the enforcement of foreign arbitration awards. Although the convention does not expressly say so, its applicability probably requires that the participating parties be located in states that are parties to the convention.³⁴ Brazil has signed, but not yet ratified, the convention. The Inter-American Convention on the Extraterritorial Viability of Foreign Judgments and Arbitral Awards, signed in Montevideo in 1979, contains supplementary provisions.³⁵ According to article 1, paragraph 2, its provisions are applicable to arbitral awards so long as the Panama Convention of 1975 does not provide otherwise. Brazil has signed the Montevideo Convention, albeit with a reservation, but has not yet ratified it.³⁶ However, in recent decisions regarding the recognition of arbitral awards, the Brazilian Supreme Court referred to the principles of this Convention.³⁷

II. NATIONAL LAW

A. *Legal Basis*

Arbitration has been legally recognized in Brazil since the era of Portuguese colonization.³⁸ Its legislation has been reformulated a number of times, and arbitration today is based on various legal provisions.

1. Constitutional Law

Article 160 of the first Brazilian Constitution of 1824 provided that civil suits could be settled by an arbitrator appointed by the parties. Although such a provision cannot be found in later constitutions, the legality of an arbitral tribunal has remained unchallenged until recently. Article 5 XIX(c) of the Constitution of 1934 placed commercial arbitration among the subjects that could be governed by federal law. The Constitution of 1946 for the first time expressly included a guaranty of access to the courts, a guaranty

34. *Id.* at 317.

35. *Id.* at 299-303. Thus far the convention has been ratified by Argentina, Colombia, Ecuador, Paraguay, Peru, and Uruguay.

36. Brazil's reservation refers to article 2(d) of the convention which requires that the international jurisdiction of the state of the judgment be examined according to the domestic law of the state of enforcement. See *infra* note 125.

37. See *infra* notes 126, 150.

38. ORDENAÇÕES FILIPINAS, BOOK III, TITLE 16 (1603). See also MORAES CARVALHO, PRAXE FORENSE 44 (1850)(with respect to the Brazilian Empire).

that has been adopted by the current Constitution of 1969.³⁹ This provision was a reaction to the limitation of access to the courts under the Getulio Vargas government and was not aimed against arbitration,⁴⁰ although that interpretation has occasionally been found in the academic doctrine.⁴¹ The case law has made it clear that this provision does not conflict with an agreement to arbitrate.⁴² In addition, the state may submit to the decision of an arbitral tribunal⁴³ so long as the dispute does not deal with its sovereign activities.⁴⁴

2. Civil Code

Even today the juridical basis for an arbitration agreement is found in article 1037 *et seq.* of the Civil Code of 1916. Article 1037 provides that parties having the power to contract may, in a written arbitration contract, agree to submit legal disputes to an arbitral tribunal.⁴⁵ An arbitration contract may be entered into in the course of a legal action via court protocol, or in a public or private document signed by both the parties and two witnesses.⁴⁶ The sub-

39. Constituição Federal art. 153, para. 4 (Braz. 1969). The same provision can be found in Braz. Const. of 1946, art. 141, para. 4 and Braz. Const. of 1967, art. 150, para. 4.

40. Cf. 3 A. DE SAMPAIO DORIA, DIREITO CONSTITUCIONAL, COMENTÁRIOS À CONSTITUIÇÃO DE 1946, at 599-600 (1960).

41. See Mendonça Lima, *O Juízo Arbitral em Face da Constituição*, 227 R.F. 381 (1969); Mendonça Lima, *O Juízo Arbitral e o Art. 150, § 4.º, da Constituição de 1967*, 402 R.T. 9 (1969) (for more recent expression of this view); contrast Oliveira Filho, *O Juízo Arbitral e o Poder Judiciário*, 122 R.F. 614, 615 (1949); Carvalho Santos, *Juízo Arbitral—Compromisso—Constitucionalidade—Juros da Mora*, 164 R.F. 115 (1956); 15 PONTES DE MIRANDA, COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 136, 144 (1962); Magalhães, *Arbitragem Internacional Privada*, 279 R.F. 99, 103 (1982).

42. Judgment of Jan. 29, 1952, Trib. Dist. Fed., 30 REPERTÓRIO ENCICLOPÉDICO DO DIREITO BRASILEIRO 42; Judgment of Aug. 27, 1953, T.S.P., 217 R.T. 233; Judgment of Dec. 17, 1959, T.S.P., 296 R.T. 410. While these decisions still require the possibility of examination by the courts, the Supreme Court considers that a legal exclusion of any later judicial examination is compatible with the Constitution. Judgment of Nov. 14, 1973, S.T.F., 68 R.T.J. 382, 392-93, 396.

43. Judgment of June 13, 1969, S.T.F., 52 R.T.J. 168, 171-74. See Judgment of Nov. 14, 1973, S.T.F., 68 R.T.J. 382, 384, 191-97 (more thoroughly).

44. See Judgment of June 16, 1942, S.T.F., 142 R.T. 774 (with respect to tax obligations). See also Opinion of the Ministry of Transportation of Apr. 15, 1943, 95 R.F. 56 (with respect to monetary measures). Cf. PONTES DE MIRANDA, *supra* note 41, at 160; and *infra* note 48.

45. Parents can enter into an arbitration agreement for their minor children only with the consent of the courts. Judgment of June 26, 1926, Trib. Minas Geraes, 47 R.F. 715. An arbitration agreement with minors for partition of an inheritance is not permitted. Judgment of Aug. 21, 1941, T.S.P., 135 R.T. 157.

46. Código Civil [C.C.], art. 1038. It is also possible to take court recordings outside a

mission must precisely describe the subject of the suit, as well as the designated arbitrators and their substitutes. More detailed provisions concerning the contents of the arbitration submission and the arbitration proceedings are contained in articles 1040 through 1047, which were modified by subsequent codes of civil procedure.⁴⁷ The provisions relating to settlements are applied to arbitration contracts by statutory incorporation; therefore, an arbitration agreement is only admissible with respect to patrimonial rights in private law.⁴⁸

3. Commercial Law

The mandatory arbitration procedure in commercial matters (adopted in the Commercial Code of 1850 and based on the French model) was abolished in 1866; commercial arbitration was given a new regulation by Decree 3.900 of 1867.⁴⁹ Article 9 of the Decree was of special importance, providing that an arbitration clause about future disputes is only a promise.⁵⁰ The decree remained in effect along with the Civil Code and was only gradually replaced by procedural laws of both the states and federal government.⁵¹ Mandatory arbitration for certain commercial undertakings provided for by state statutes has been regarded as unconstitutional.⁵² In maritime law, compulsory settlement by arbitrators is also excluded; even the provisions of article 783 of the Commercial Code

legal dispute without witnesses. See Judgment of June 19, 1939, T.S.P., 121 R.T. 201. A private written arbitration agreement is null and void without witnesses. See Judgment of June 1, 1962, Trib. Guan., 2 R. JURIS. GUAN. 226. For an arbitration clause in a will, compare J.M. CARVALHO SANTOS, *supra* note 21, at 28-29 with PONTES DE MIRANDA, *supra* note 41, at 145; *infra* note 59.

47. See *infra* section II(A)(4) of text.

48. C.C. arts. 1035, 1048; Judgment of Sept. 29, 1942, S.T.F., Brazil-Acórdãos, 2 Nova Série 1st Supplement 90 (1949).

49. Cf. S.O. DE ARAUJO COSTA, CÓDIGO COMERCIAL DO IMPERIO DO BRAZIL 498, 619, 985 (3d ed. 1878); J. GONÇALVES DO COUTO, DO JUÍZO ARBITRAL 16-17 (1920). On the non-applicability of the pertinent provisions of the Commercial Code, see also Judgment of Nov. 18, 1925, T.S.P., 56 R.T. 435; *infra* note 53.

50. See *infra* section II(C)(3).

51. Cf. 2 BENTO DE FARIA, CÓDIGO COMERCIAL BRASILEIRO 7-8, 205 (3d ed. 1920); J.G. DO COUTO, *supra* note 49, at 51; DE SOUZA, *supra* note 8, at 31; Costa Carvalho, *O Juízo Arbitral no Código de Processo Civil Brasileiro*, 106 R.T. 16 (1937); Valladão, *supra* note 4, at 109-10.

52. E.g., Law No. 1.416 of the State of São Paulo of July 14, 1914, which provided for mandatory arbitration for trading in commodity futures. See Costa e Silva, *Juízo Arbitral Obrigatorio (sua Inconstitucionalidade)*, 36 R.T. 185 (1920) (for discussion of the case law).

are with respect to general average no longer mandatory.⁵³ No special regulation exists in the current commercial law that refers directly to arbitral jurisdiction. Some references are, however, found in the Corporation Law of 1976.⁵⁴

4. Procedural Law

Arbitration procedure, previously included in the various federal and state codes of procedure, was uniformly regulated for the first time in the Civil Procedure Code of 1939.⁵⁵ In the Civil Procedure Code of 1973, the relevant chapter has been revised.⁵⁶ Up to now, arbitration procedure is governed by its provisions.⁵⁷ Articles 1072 through 1077 contain provisions concerning the arbitration agreement that repeat and partly supplement the provisions of the Civil Code. Articles 1078 through 1084 contain more specific regulations concerning arbitrators.⁵⁸ The former rule, providing that a foreigner could not be an arbitrator, was eliminated.⁵⁹ Articles 1085 through 1096 govern the implementation of the arbitration procedure and the formulation of the arbitration award.⁶⁰ An arbitration award requires judicial confirmation to be effective; during this procedure the court examines whether there has been compliance

53. Judgment of April 6, 1918, S.T.F., 56 R. Sup. Trib. 61, 247; May 19, 1923, S.T.F., 17 R. Sup. Trib. 108. Corresponding clauses in bills of lading are considered without legal effect and the usual adjustment by average adjusters, which under art. 783 was to be an arbitration procedure, is considered only as expert opinion. J. STOLL GONÇALVES, *supra* note 11, at 300.

54. Article 118, para. 3, permits specific performance of agreements between shareholders. Therefore, arbitration clauses contained in such agreements are considered as binding and enforceable. Marotta Rangel, *supra* note 20, at 32; Magalhães, *supra* note 41, at 101. See also Brazilian Corporation Law, art. 129, para. 2 for arbitration clauses in the by-laws.

55. See Código de Processo Civil [C.P.C.], arts. 1031-46. See *supra* note 51 (with reference to prior law); Costa Carvalho, *supra* note 51 (regarding draft Code of Civil Procedure).

56. Cf. Marotta Rangel, *supra* note 20, at 33-43 (general survey).

57. A Bill on Arbitration was published in 1981, but it had no success. See Marotta Rangel, *National Report: Brazil*, 7 Y.B. COM. ARBITR. 57 (1982); Ramos Pereira, *O Juízo Arbitral e o Projeto de Lei sobre Arbitragem*, 564 R.T. 275 (1982).

58. There must now be an odd number of arbitrators, C.P.C., art. 1076. Cf. Judgment of Oct. 22, 1964, T.S.P., 374 R.T. 176 (with respect to prior law).

59. Cf. art. 1031 (III) of the Code of Civil Procedure of 1939. A judge can be nominated as an arbitrator but a court as such cannot, and therefore, an arbitration clause in a will was declared null and void for that reason only. Judgment of Dec. 2, 1952, T.S.P., 208 R.T. 194.

60. See Marotta Rangel, *supra* note 20, at 37-43 (for details). The arbitral award has to be delivered within the agreed period of time or within the legally determined time period, C.P.C., arts. 1077 (III), 1091, 1093. See Judgment of June 19, 1939, T.S.P., 121 R.T. 201; Judgment of Dec. 11, 1956, T.S.P., 260 R.T. 347 (calculation of the time period).

with certain legal requirements.⁶¹ According to articles 1101 and 1102, the court decision may be appealed. The arbitration agreement may not bar appeal, but a penalty can be stipulated in case an appeal is denied.⁶² Case law also allows the possibility of a "re-scissory action" which permits reopening of proceedings.⁶³ An arbitration award confirmed by the courts is executed in the normal execution procedure by an ordinary court of law.⁶⁴

B. Practice

General descriptions of arbitration in Brazil regularly report that arbitration has achieved little importance in practice.⁶⁵ The traditional aversion to this form of settlement of disputes and the arbitration clause's lack of binding character may be the reasons for this;⁶⁶ a closer look shows a more complex picture.

61. C.P.C., arts. 1097-1100. See Judgment of June 26, 1975, Trib. Rio de Janeiro, 481 R.T. 197 (procedure and extent of control; no examination of the merits); Judgment of May 16, 1978, T.S.P., 514 R.T. 82 (arbitration agreement null and void and error in arbitration proceedings); see also Judgment of Sept. 19, 1980, S.T.F., 96 R.T.J. 689 (powers of attorney). Compare with reference to prior law, Judgment of Nov. 21, 1952, Trib. Dist. Fed., 150 R.F. 236 (limited judicial examination); Judgment of March 29, 1913, T.S.P., 5 R.T. 270 (equitable decision); Judgment of Nov. 9, 1954, T.S.P., 232 R.T. 162 (going beyond the arbitration agreement). See *supra* note 42 (decisions cited).

62. C.P.C., arts. 1101-02. Cf. C.C., art. 1101, para. 1. See also Judgment of May 2, 1918, C. Supr., 7 Brazil—Acórdãos No. 19.221 (1935); Judgment of May 9, 1912, C. Dist. Fed., 25 REVISTA DE DIREITO [R. DIR.] 310 (third party objections); Judgment of July 9, 1938, Trib. Minas Gerais, 76 R.F. 347 (the giving of security); Judgment of June 1, 1962, Trib. Guan., 2 R. JURIS. GUAN. 226; Judgment of May 16, 1978, T.S.P., 514 R.T. 82, 83-84 (size of the penalty). With reference to previous law, see Judgment of May 6, 1905, S.T.F., 101 O DIREITO 243 (references therein).

63. See Judgment of Oct. 21, 1940, S.T.F., 137 R.T. 332; rescissory action against an arbitral award (because of contradiction to the exact terms of a statute). Cf. PONTES DE MIRANDA, *supra* note 41, at 142 (rescissory action only available against a judicial confirmation of the arbitral award).

64. See Judgment of Sept. 29, 1920, S.T.F., 37 R.F. 52; Judgment of Nov. 14, 1944, Trib. Dist. Fed., 158 R.T. 803. Contrary to article 1045 of the Civil Code, in accordance with the procedural law currently in force, even an arbitral award rendered by a judge can only be executed after confirmation by the courts. Cf. Judgment of Oct. 28, 1952, T.S.P., 207 R.T. 130 (with respect to prior law, see the decision *supra* note 63). Voluntary agreement to comply with an arbitral award does not require a confirmation by the courts. Judgment of June 29, 1955, Trib. Dist. Fed., 115 ARCH. JUD. 308.

65. Valladão, *supra* note 4, at 109, 112-13 (the history); P. GARLAND, *supra* note 18, at 79; Marotta Rangel, *supra* note 20, at 31; Miranda Rosa, *Juízo arbitral e os tribunais judiciais (Brazilian Report, Copenhagen 1975)*, 254 R.F. 478, 479; Gusmão Carneiro, *Juízo Arbitral e a simplificação do processo, Tribuna da Justiça*, Nov. 5, 1980, São Paulo; J.G. Villela, *Reconhecimento de decisões arbitrais estrangeiras*, 75 R. INF. LEG. 53 (1982).

66. See *infra* section II(C)(3).

1. Practice in Contracts

An agreement to settle disputes by arbitration is not rare in Brazilian practice, as proven by the extensive number of court decisions in this area. In the past, arbitration clauses were found principally in contracts made between local communities or cities and utility companies who were often backed by foreign companies. Additionally, public agencies appear as parties to arbitration agreements, for which legal authorization is frequently required.⁶⁷ For international loans, such an authorization is contained in Decree Law No. 1312 of February 15, 1974: according to article 11 of this law, the Federal Treasury can enter into arbitration agreements, even as to future disputes, either directly or through a financial agency, concerning international financial operations.⁶⁸ Within Brazil, arbitration clauses are also often utilized in commercial activities; partnership agreements in particular often include such clauses.⁶⁹ It is also common to include arbitration clauses, in a variety of forms, in international contracts.⁷⁰ Previously, the use of such clauses was not advised because of uncertainty regarding recognition of foreign arbitral awards in Brazil.⁷¹ This has since undergone a change which will probably influence future practice.⁷²

67. Cf. Judgment of Nov. 14, 1973, S.T.F., 68 R.T.J. 382, 392. For an earlier case, see Judgment of Nov. 20, 1905, C. Dist. Fed., 5 R.F. 45. For further references to the case law, see *infra* notes 75-76. Regarding an arbitration agreement between Western Telegraph Co. Ltd. and the Ministry of Transportation, see Decision of Tax Authorities of Feb. 17, 1937, in 8 R. Fiscal (1937), Imposto do Sello No. 110. An arbitration clause used by Petrobras in contracts with foreign enterprises is commented upon in G.F.S. SOARES, *CONCESSÕES DE EXPLORAÇÃO DE PETRÓLEO E ARBITRAGENS INTERNACIONAIS* 133-38, 157-63 (1977).

68. Cf. Dolinger, *A imunidade jurisdicional dos Estados*, 76 R. INF. LEG. 5, 58-62 (1982)(critical view). For examples from practice see, Delaume, *supra* note 27; Dolinger, *Bônus brasileiros no mercado financeiro alemão*, 244 R.F. 373, 379-80 (1973). See generally Salles, *Alguns aspectos jurídicos dos contratos internacionais de mútuo*, 256 R.F. 37, 43 (1976)(regarding arbitration clauses in international loan contracts).

69. Cf. Ascarelli & Sciascia, *Brazilian Law and Practice*, 5 ARB. J. 204, 206 (1950).

70. A survey regarding the most common clauses in favor of Brazilian or foreign arbitral tribunals is given in Dunshee de Abranches, *supra* note 20, at 386. For a discussion of the frequent references to the rules of the ICC in Paris, see Barros Leães, *supra* note 20, at 426. See R. MOSER, *FRAGEN DES LATEINAMERIKANISCHEN HANDELSRECHTS* 33-34 (1966)(details of a case involving an arbitration clause in a German-Brazilian consortium agreement). For a recent New York case involving an arbitral clause in a joint venture between a Brazilian mining company and foreign companies, see INT'L FIN. L. REV., Mar. 1984, at 38.

71. See Coriat, *Transfer de Technologie au Brésil*, 6 DROIT PRAT. COM. INT'L 273, 278 (1980); de Carvalho & Powers, *Drafting Contracts under Brazilian Law: A Practical Guide to Enforceability*, 14 INT'L LAW. 115, 121 (1980).

72. See *infra* section II(D).

2. Arbitration Practice

As in other countries, arbitral awards are seldom published in Brazil; this has happened only in a few spectacular cases. At the beginning of this century, the case of *Dr. Werneck v. Minas Geraes*,⁷³ concerning the lease of a complete resort town, attracted a great deal of attention. More recently, the case *Companhia Siderúgica Nacional v. Batista Pereira*,⁷⁴ dealing with the exploitation of coal deposits in the State of Santa Catarina, became well known. Based on the previously mentioned arbitration agreements with local utility companies, public authorities have often participated in arbitration proceedings without invoking the non-binding character of the arbitration clause.⁷⁵ Other arbitration proceedings have involved payment of compensation by the state for confiscated property.⁷⁶ Arbitration proceedings are also becoming more frequent between private persons, as inferred from corresponding court decisions. In these cases the subject of the arbitration is rarely mentioned, but is usually connected with commercial transactions.⁷⁷

73. Arbitral Award of Mar. 13, 1916, 25 R.F. 307-47 (1916). See de Oliveira, et al., *Pareceres e Razões*, 27 R.F. 229-40 (1917) (legal opinions); Judgment of Aug. 8, 1917, S.T.F., 13 R. Sup. Trib. 52; Judgment of Apr. 20, 1918, S.T.F., 51 R. Dir. 526; Judgment of May 25, 1918, S.T.F., 51 R. Dir. 537. See also Rosas, *Juízo Arbitral*, 568 R.T. 9 (1983).

74. Arbitral Award of Jan. 15, 1952, 150 R.F. 239-47. See Judgment of Nov. 21, 1952, Trib. Dist. Fed., 150 R.F. 236.

75. Cf. the arbitral award in *Prefeito de Bello Horizonte v. Companhia de Electricidade*, July 12, 1915, 24 R.F. 271-315. For the validity of this award with respect to third parties, see Judgment of May 23, 1917, and Nov. 14, 1917, Trib. Minas Geraes, 29 R.F. 175, 177; the opinion of Levi Carneiro in the case of *The Rio de Janeiro City Improvements Co. v. Governô Federal*, 3 PARECERES DO CONSULTOR GERAL DA REPÚBLICA (1931-32) 75 (1954); Judgment of Sept. 16, 1920, T.S.P., 36 R.T. 24 (1920); Judgment of Jan. 16, 1942, S.T.F., 142 R.T. 774; Judgment of Oct. 28, 1952, T.S.P., 207 R.T. 130; Judgment of Aug. 27, 1953, T.S.P., 217 R.T. 233; Judgment of Sept. 11, 1954, T.S.P., 232 R.T. 162; Judgment of Feb. 2, 1963, Trib. Alçada S.P., 346 R.T. 442. See J. GONÇALVES DO COUTO, *supra* note 49, at 34-43, 123-65.

76. An arbitration proceeding of this type concerning property confiscated of the "Organização Lage" during the war was the object of the decision of Nov. 14, 1973, S.T.F., 68 R.T.J. 382. See Judgment of July 9, 1938, Trib. Minas Geraes, 76 R.F. 347 (arbitration proceeding instead of a confiscation). Cf. Judgment of Oct. 21, 1940, S.T.F., 137 R.T. 332 (withdrawal of a lottery concession).

77. For earlier legal practice, compare a 1907 arbitral award, 10 R.F. 370 (guarantee of a bill). See also Judgment of Feb. 10, 1925, T.S.P., 53 R.T. 235 (partnership agreement); Judgment of June 19, 1939, T.S.P., 121 R.T. 201 (timber delivery contract); Judgment of Sept. 7, 1926, C. Dist. Fed., 83 R. Dir. 355 (insurance contract); Judgment of Nov. 14, 1944, Trib. Dist. Fed., 158 R.T. 803 (law of mortgages and bills of exchange); Judgment of June 29, 1955, Trib. Dist. Fed., 115 ARCH. JUD. 308 (exclusive distribution contract for North American wheat); Carvalho Santos, *supra* note 41 (more recent practice); *supra* note 53

3. Institutions

There have always been endeavors to further arbitration in Brazil, especially in commercial transactions, by establishing adequate institutions.⁷⁸ Tangible success has been achieved only recently with the considerable activities of the Inter-American Commercial Arbitration Commission (IACAC).⁷⁹ The Centro Brasileiro de Arbitragem, located in Rio and founded in 1967, functions as a permanent arbitration institution and as a regional section of the IACAC.⁸⁰ Moreover, in 1979, within the Canadian-Brazilian Chamber of Commerce, a permanent arbitration institution was established, particularly for international commerce. Its activities are not restricted to Canadian-Brazilian commerce and are open to other nations. Brazilian professors and attorneys have been chosen as arbitrators.⁸¹

C. Arbitration Clauses

Arbitration clauses are used increasingly in Brazilian practice and have in certain cases led to arbitration proceedings. The legal significance of such clauses, however, has always been highly controversial.⁸² The predominant opinion in the literature today is that these clauses are merely a civil obligation: noncompliance with this obligation can result in a claim for damages but does not qualify as a defense before an ordinary court of law. Specific perform-

(average adjustment).

78. See Arruda, *Juízo Arbitral*, 40 R.T. 95, 96 (1921); Valladão, *supra* note 4, at 112-13; Dunshee de Abranches, *supra* note 20, at 386. An official draft of a law in 1951 had provided for creation of an arbitration commission for foreign commerce. Cf. 1 R. DIR. MERC. 831 (1951).

79. See Samtleben, *supra* note 33, at 266 (history and practice of the IACAC and references therein). The IACAC's current rules of procedure and its recommended arbitration clause can be found in the 3 Y.B. COM. ARB. 231 (1978); see also Braufman, *Arbitration's Role in Inter-American Trade Contracts*, 6 ARB. J. 153, 154-56 (1951); 11 INTER-AM. ARB. 2 (1984)(IACAC arbitration cases involving Brazilian parties).

80. Cf. Soares, *supra* note 19, at 194-95; Marotta Rangel, *supra* note 20, at 31. For the Brazilian branch of the ICC, see 1984 *Revue de l'arbitrage* 545.

81. See Ramos Pereira, *A Arbitragem Comercial nos Contratos Internacionais*, 285 R.F. 526, 529 (1984); Pinheiro Neto & Cia., *Legal Memorandum: Brazil*, 12 LAW. AM. 251, 252 (1980); Soares, *Arbitragem no Comércio Internacional*, 156 ARQ. MIN. JUST. 233, 258 (1980)(with rules of procedure at 259-68). Up to the end of 1986 this body had not yet dealt with an arbitration.

82. Compare Dunshee de Abranches, *supra* note 20, at 384; Nunes, *Da Cláusula Compromissória no Direito Brasileiro*, 284 R.T. 12, 15-20 (1959). A good overview can also be found in the following decisions: Judgment of Nov. 18, 1936, C. Minas Geraes, 69 R.F. 116; Judgment of Mar. 7, 1978, Trib. Alçada S.P., 512 R.T. 170.

ance of an arbitration clause, including court appointment of the arbitrators, is seldom acknowledged in the literature.⁸³ The case law often considers the clause totally void and denies its effectiveness.

1. Domestic Cases

The development of Brazilian law in matters of arbitration was strongly influenced by Decree No. 3.900 of 1867; article 9 of the decree clearly characterizes an arbitration clause regarding future disputes as a mere promise. From this, 19th century case law concluded that such a clause could not preclude ordinary legal proceedings.⁸⁴ The same concept underlayed the provisions of the Civil Code of 1916, which regulated only arbitration contracts with respect to existing disputes and their formal requirements.⁸⁵ With few exceptions, courts have not permitted objections to their jurisdictions based on a simple arbitration clause while along with these provisions Decree No. 3.900 remained in force.⁸⁶ The Supreme Court's decision in *Alves Medeiros & Co. v. Lloyd Industrial Sul Americano*, declaring an arbitration clause in a maritime insurance contract absolutely without effect,⁸⁷ became particularly important. Lower courts adhered to this decision.⁸⁸ Some decisions

83. Principally, MENDES PIMENTEL in his frequently cited study *DA CLÁUSULA COM-PROMISSÓRIA NO DIREITO BRASILEIRO* (1934). One finds a corresponding regulation already included in the draft of the Civil Code Procedure for the Federal District of 1910. Cf. Val-ladão, *supra* note 4, at 111; J. GONÇALVES DO COUTO, *supra* note 49, at 93.

84. Judgment of Aug. 13, 1889, J. Bahia, 51 O DIREITO 234 (partnership agreement); Judgment of Dec. 2, 1896, T.S.P., 7 Brasil-Acórdãos No. 19.226 (1936).

85. The author of the Civil Code explained in his commentary that the arbitration clause did not create any ban to assertion of jurisdiction but merely gave rise to a civil obligation with a right to damages. CLOVIS BEVILAQUA, *CÓDIGO CIVIL*, art. 1037, note 3 (1979 reprint).

86. Judgment of Apr. 20, 1920, C. Dist. Fed., 56 R. DIR. 530 (partnership agreement); Judgment of Sept. 15, 1922, C. Dist. Fed., 69 R. DIR. 336 (partnership agreement); Judgment of Jan. 18, 1927, J. Dist. Fed., 83 R. DIR. 389 (building construction contract); Judgment of Apr. 10, 1924, T.S.P., 50 R.T. 111 (building construction contract); Judgment of Dec. 11, 1924, T.S.P., 53 R.T. 31; Judgment of Dec. 1, 1932, J. São Paulo, 48 R.T. 534 (no action to require the conclusion of an arbitration contract); see also the legal opinions in 50 R. DIR. 458, 467-69 (1918), 47 R.F. 282-83 (1926); 2 PANDECTAS BRASILEIRAS, II 458-65 (1927). *Contra* Judgment of Aug. 26, 1922, J. Dist. Fed., 40 R.F. 397 (partnership agreement); Judgment of July 10, 1925, C. Dist. Fed., R. CRIT. JUD. 236 (1925) (insurance contract); Judgment of Feb. 10, 1925, T.S.P., 53 R.T. 235 (partnership agreement).

87. Judgment of Aug. 24, 1927, S.T.F., 3 ARCH. JUD. 507, reprinted in 85 R. DIR. 425, 63 R.T. 372, 49 R.F. 387, 13 R. JUR. BRAS. 174. See Judgment of Oct. 7, 1931, S.T.F., 15 R. JUR. BRAS. 41 (maritime insurance case).

88. Judgment of July 26, 1929, T.S.P., 72 R.T. 104; Judgment of Nov. 27, 1931, T.S.P.,

attempted to prove that, even if the clauses were valid, they would not cover the dispute,⁸⁹ or at least did not exclude jurisdiction.⁹⁰

With the uniform regulation of civil procedure through the Civil Procedure Code of 1939, Decree No. 3.900 was finally abolished.⁹¹ Thereafter, some decisions actually permitted objections to jurisdiction on the ground of an arbitration clause.⁹² The majority of decisions, however, continued to adhere to the traditional view and declared arbitration clauses invalid,⁹³ or treated them as only civil obligations.⁹⁴ The Civil Procedure Code of 1973 took this development into consideration and permitted an objection to jurisdiction only on the basis of a formal arbitration contract.⁹⁵ Questions concerning other effects of an arbitration clause have not yet

81 R.T. 97 (concession contract); Judgment of Aug. 3, 1934, T.S.P., 94 R.T. 542 (license contract; opinion by Lacerda at 356); Judgment of Sept. 22, 1937, T.S.P., 112 R.T. 530 (road construction contract; further references at 532); Judgment of Feb. 9, 1938, T.S.P., 112 R.T. 584 (partnership agreement); Judgment of Dec. 2, 1940, Trib. Rio Grande do Sul, 58 ARCH JUD. 53 (lease contract). See Judgment of Nov. 18, 1936, C. Minas Geraes, 69 R.F. 116 (Nonato, J., dissenting)(concession contract).

89. Judgment of May 27, 1929, C. Dist. Fed., 94 R. DIR. 331 (the clause that "preferably" a court of arbitration should decide, represents only a possibility of option); Judgment of June 22, 1936, C. Dist. Fed., 67 R.F. 727 (arbitration clause in the partnership agreement is only applicable to current administration, not to a case of dissolution); Judgment of July 27, 1943, Trib. Dist. Fed., 147 R. DIR. 314 (arbitration clause with respect to contract interpretation does not apply to nonperformance).

90. Judgment of Feb. 3, 1931, T.S.P., 77 R.T. 320 (other effects not denied); Judgment of Nov. 3, 1939, Trib. Dist. Fed., 131 R.T. 707 (arbitration clause provides only for a penalty).

91. The decree had been partially replaced by codes of procedure of individual federal states. See *supra* note 51.

92. Judgment of Apr. 23, 1952, Trib. Dist. Fed., Diário da Justiça, of Aug. 25, 1955, Jurispr., at 2945 (architectural contract); Judgment of Oct. 22, 1959, T.S.P., 293 R.T. 263 (partnership agreement). See Judgment of Dec. 17, 1959, T.S.P., 296 R.T. 410 (form contract); Judgment of Dec. 2, 1952, T.S.P., 208 R.T. 194 (will). The exception of lack of jurisdiction was based on the generally applicable rule of art. 182(I) of the Code of Civil Procedure of 1939, which did not contain any specific provisions regarding objecting to jurisdiction because of an arbitral clause.

93. See 4 ALEXANDRE DE PAULA, CÓDIGO DE PROCESSO CIVIL ANOTADO 376-79, 388-91 (1977)(résumé of the case law). Compare Judgment of July 2, 1951, Trib. Santa Catarina, 143 R.F. 351; Judgment of Apr. 11, 1957, Trib. Dist. Fed., 30 REPERTÓRIO ENCICLOPÉDICO DO DIREITO BRASILEIRO 37.

94. Judgment of June 8, 1962, T.S.P., 334 R.T. 194 (partnership contract), *confirmed in* Judgment of Nov. 16, 1962, 361 R.T. 139; Judgment of May 16, 1963, 360 R.T. 198 (engineering contract); Judgment of Aug. 5, 1971, Trib. Alçada S.P., 434 R.T. 159 (partnership agreement)(with dissent).

95. Art. 301(IX). See Judgment of Oct. 2, 1974, T.S.P., 470 R.T. 150 (partnership agreement), also in 268 R.F. 237; Judgment of Aug. 7, 1974, 472 R.T. 127 (partnership agreement)(with dissent); Judgment of Mar. 7, 1978, 512 R.T. 170 (partnership agreement); 17 EDSON PRATA, REPERTÓRIO DE JURISPRUDÊNCIA DO CÓDIGO DE PROCESSO CIVIL 5565-69, 5574-76 (1978)(other decisions).

been clarified.

2. International Cases

Brazilian literature occasionally expresses the opinion that the validity of an arbitration clause in international contracts is governed by the *lex contractus*, which in history could mean foreign law.⁹⁶ The cases, however, always consider such arbitration clauses according to Brazilian law, expressly consulted as *lex contractus* or without specific justification as *lex fori*. In the latter cases, the admissibility of jurisdictional objections based on an arbitration clause is being tacitly characterized as a problem of procedural law.

The following individual decisions are summarized in chronological order:

*C. Dist. Fed. July 26, 1923, Société Générale d'Entreprises au Brésil v. United States Steel Products Company*⁹⁷

The Belgian plaintiff and the North American defendant, both doing business in Brazil, entered into a contract for the purchase of manganese. The contract provided for arbitration in London. Faced with an action brought against it in Brazil, the defendant contested the court's jurisdiction on the basis of the arbitration clause and won in the court of the first instance.⁹⁸ The appeals court initially confirmed the decision, but on rehearing declared the arbitration clause invalid in a widely noted plenary decision.⁹⁹ The decision referred to Decree No. 3.900 of 1867 and to article 13 of the Law of Introduction to the Civil Code of 1916, which subjected contracts made or to be performed in Brazil to mandatory Brazilian law and thus to Brazilian jurisdiction.

96. J. CARVALHO SANTOS, *supra* note 21, at 30-31; H. VALLADÃO, *supra* note 20, at 215. See also Barros Leães, *supra* note 20, at 421, 423; Magalhães, *supra* note 21, at 31-32, 36. Cf. Ascarelli & Sciascia, *supra* note 69, at 206-07.

97. 66 R.S.T. 3 (also found in 73 R. DIR. 145, 41 R.F. 455, 2 PANDECTAS BRASILEIRAS II 447 (1927)).

98. Judgment of Sept. 10, 1920, J. Dist. Fed., 35 R.F. 234 (contrary to the prevailing interpretation of Decree No. 3.900 of 1867, the judge saw a *binding* promise in the arbitration clause). See Judgment of Aug. 26, 1922, 40 R.F. 397 (a later decision by this judge); *supra* note 86.

99. The decision resulted in a public dispute in the daily press among the judges concerned. Cf. 2 PANDECTAS BRASILEIRAS II 455 (1927). The case has decisively influenced the development of Brazilian law.

*C. Dist. Fed. July 29, 1927, Herdes v. Werkspoor*¹⁰⁰

The plaintiff had been the general representative of the Dutch defendant in Brazil. The underlying contract contained an arbitration clause, according to which only persons residing in the Netherlands could be chosen as arbitrators. After the defendant had terminated the contract by giving notice, the plaintiff raised claims in Brazilian courts on grounds of the existing contractual relations. The jurisdictional objection based on the arbitration clause was rejected by the lower and upper courts with reasoning similar to the preceding case.¹⁰¹

*Trib. Rio Grande do Sul, Sept. 18, 1940, J. Henry Schroeder & Cia v. Hamburg-Suedamerikanische Dampfschiffahrts-Gesellschaft*¹⁰²

At the beginning of World War II, the plaintiff bank, located in London, had embargoed the German ship Montevideo in the harbor of Rio Grande do Sul because of a ship's mortgage. During the subsequent executory proceedings, the German defendant invoked, among other defenses, a contract clause which provided for settlement of disputes by an arbitral tribunal of the International Chamber of Commerce. The jurisdiction of the Brazilian courts was first rejected by the lower courts for general reasons, but affirmed on appeal, with the casual comment that the creditor could waive the choice of jurisdiction in his favor. The question of arbitration as such was not discussed.¹⁰³

*Trib. São Paulo, March 31, 1943, Knowles & Foster v. Misuraca*¹⁰⁴

The defendant sold several lots of wheat flour to the plaintiff

100. 85 R. DIR. 548.

101. Here also the jurisdiction of the Brazilian courts was considered unavoidable by reference to arts. 13 and 15 of the Law of Introduction to the Civil Code of 1916. *Contra* Valladão, *supra* note 4, at 114.

102. 134 R.T. 274 (also in 84 R.F. 686), *aff'd*, Judgment of Sept. 22, 1941, S.T.F., 62 ARCH. JUD. 119.

103. During the war, the Brazilian courts regularly asserted their jurisdiction in similar cases, despite art. 482 of the Commercial Code which permits the seizing of foreign ships only in the case of obligations incurred in Brazil. *Cf.* 13 WALDEMAR FERREIRA, *supra* note 11, at 730-35; P. GARLAND, *supra* note 18, at 86 n.349.

104. 145 R.T. 633, *reprinted in* 98 R.F. 112 (headnote).

and shipped it to England, where examination discovered deviations in weight and quality. Faced with a suit in Brazil, the defendant referred to a clause in the contract calling for an arbitral tribunal to be appointed by the parties in case of disputes. This jurisdictional objection was ruled immaterial in both trial and appellate courts since no arbitral tribunal had been appointed and the clause was therefore ineffective.

*Sup. Trib. Fed., June 2, 1967, Insubra S.A. Intercomercial Sueco-Brasileira v. Bueromaschinen—Export GmbH*¹⁰⁵

The plaintiff worked for the defendant, a foreign trade enterprise in the German Democratic Republic (GDR), as a commission agent in Brazil. The commission contract contained a clause to arbitrate before an export arbitration tribunal in the GDR. The complaint for damages on grounds of non-performance was countered by the defendant invoking the arbitration clause. This was rejected. The reasoning was that the arbitration clause only provided for a request for an arbitration contract and possibly for a claim for damages, but could not exclude the jurisdiction of the Brazilian courts.¹⁰⁶

*Trib. São Paulo, Oct. 3, 1967, Neptúnia Sociedade Marítima Comercial Ltda. v. Agência Marítima Triton Ltda.*¹⁰⁷

The plaintiff sought compensation for harbor fees, stemming from the unloading of ships from the defendant, who represented the interests of foreign ship owners in Brazil. The underlying freight contract provided for arbitration in New York; the plaintiff had not responded to a summons there. The Brazilian court judge denied jurisdiction because of the arbitration clause. This decision, however, was reversed on appeal because in case of non-compliance, the arbitration clause allowed only for damages and did not permit an objection to the jurisdiction of an ordinary court of law.

Recently, the courts have again dealt with international arbitration clauses. In two decisions, defendant German enterprises ar-

105. 42 R.T.J. 212.

106. This jurisdiction was based on Brazil's being the place of performance (art. 12 of the 1942 Law of Introduction to the Brazilian Civil Code), jurisdiction which was considered unavoidable by the judge of the first instance.

107. 390 R.T. 180.

gued the incompetence of the Brazilian courts, relying on an arbitration clause in the contract on which the claim was based. The courts, however, did not admit the defense, stressing the non-binding character of the clause.¹⁰⁸ The Geneva Protocol on Arbitration Clauses of 1923, in force between Brazil and Germany,¹⁰⁹ was not mentioned in these decisions.

3. Conclusions

According to Brazilian law, arbitration clauses are basically unenforceable, even in international cases. However, with regard to the nation-parties, the 1923 Geneva Protocol on Arbitration Clauses has to be followed, which according to the predominant view, takes precedence over national law.¹¹⁰ In reality, however, the Protocol has not been applied by the courts. When drafting a contract, it is therefore necessary to consider the possibility that, despite agreement regarding arbitration, a law suit will be permitted to proceed in Brazil and a jurisdictional objection based on the arbitration clause will be rejected. Theoretically, some decisions regard such violation of the arbitration clause as giving rise to a claim for damages; in practice, however, it would be difficult to prove damages. The doctrine, therefore, recommends that the contract should provide for a penalty in case of non-compliance with of the arbitration clause.¹¹¹

On the other hand, considering the above arbitration practice, it seems quite possible to give effect to an arbitration clause by arbitrating in Brazil with the consent of the other party.¹¹² It is then absolutely necessary to ensure that a formally valid arbitration contract describes precisely the subject of the dispute and the

108. Judgment of Dec. 22, 1981, T.S.P., *Irmandade da Santa Casa de Misericórdia de Rio Preto v. Siemens Aktiengesellschaft Wernerwerk für Medizinische Technik*, 558 R.T. 80; Judgment of June 21, 1983, Trib. Alçada S.P., *Polynor S.A. e Indústrias Reunidas F. Matarazzo v. Theodor Wille KG*, 577 R.T. 152 (sustained the unavoidable competence of Brazilian courts, based on art. 12, Law of Introduction). Compare Judgment of Oct. 30, 1979, Trib. Rio de Janeiro, *Société d'Application Générale d'Électricité et de Mécanique v. Equipamentos Eletrônicos S.A.*, 533 R.T. 181, 540 R.T. 157 (did not admit an objection to jurisdiction based on an arbitration agreement before the defendant had been formally served).

109. *Supra* note 7.

110. *Supra* note 20.

111. Nunes, *supra* note 82, at 19; 2 S. RODRIGUES, *DIREITO CIVIL* 275 (10th Ed. 1980); Ramos Pereira, *supra* note 57, at 278. Compare R. MOSER, *supra* note 70, at 31, 33-34; Magalhães, *supra* note 41, at 101.

112. See *supra* section II(B)(2).

arbitrators. Absence of such an arbitration contract, according to the case law, will imply nullification of the arbitration award, even when the participants have tacitly submitted to an arbitral tribunal.¹¹³ An agreement providing for selection of the arbitrators by an arbitration institution will also be insufficient; the lack of an arbitration contract will not be cured by participation of the parties in the arbitration proceedings.¹¹⁴ Finally, arbitration proceedings can also take place in a foreign country; in this case the requirements for confirmation of an arbitration award in Brazil must be examined more closely.

D. Recognition of Foreign Arbitration Awards

Recognition and enforcement of foreign arbitration awards was originally regarded as the object of letters of rogatory. In 1846, a French arbitration award was enforced in Brazil based on the request by the French Embassy.¹¹⁵ By 1878 the recognition of foreign arbitration awards was regulated by law. This regulation is the point of departure for the later development of the law.

1. Legal Regulation

Decree No. 6.982 of 1878 dealt with the enforcement of foreign court decisions and arbitration awards.¹¹⁶ An extensive revision was enacted by Law No. 221 of 1894, transferring recognition of foreign decisions to the Supreme Court.¹¹⁷ The relevant rules were then collected in the *Consolidação das Leis Referentes a Justiça Federal of 1898*,¹¹⁸ which for a long time was the basis for recognition of foreign decisions.¹¹⁹ These provisions were, for the most

113. Judgment of May 16, 1978, T.S.P., 514 R.T. 82, also in 267 R.F. 188.

114. *Contra* Marotta Rangel, *supra* note 20, at 33, 36-37, 43 (opinion not supported by the cases and contradicting the law, see arts. 1074(II) and 1100(I) of the Code of Civil Procedure). Compare also Magalhães, *supra* note 41, at 102, 103.

115. PIMENTA BUENO, *DIREITO INTERNACIONAL PRIVADO* 143, 145 (1863).

116. Decree No. 6.982 of July 27, 1878, Coleção 445 (1878). Complemented by Decree No. 7.777 of July 27, 1880, Coleção 380 (1880). See ALMEIDA OLIVEIRA, *A LEI DAS EXECUÇÕES* 8, 276-81 (1915).

117. Law No. 221 of Oct. 20, 1894, art. 12, para. 4. See 1 C. BEVILAQUA, *CÓDIGO CIVIL* 150-51 (1979 reprint).

118. *Consolidação*, part V, arts. 7-19; see 2 TAVARES BASTOS, *DECRETO NO. 3.084 DE 5 DE NOVEMBRO DE 1898 OU CONSOLIDAÇÃO DAS LEIS REFERENTES À JUSTIÇA FEDERAL* 357-62 (1915).

119. The Law of Introduction to the Civil Code of 1916 had no regulations of its own regarding the enforcement of foreign decisions, referring only to the "conditions fixed by

part, adopted unchallenged in subsequent legislation¹²⁰ and in Internal Rules of the Supreme Court.¹²¹ Article 483 of the current Civil Procedure Code of 1973 leaves recognition of foreign decisions to the Supreme Court and refers to the court's Internal Rules for the prerequisites.¹²² Since 1977, the President of the Supreme Court has been responsible for deciding whether to accord recognition, but when the petition is contested, the full court will decide.¹²³ The enforcement must then be pursued in a competent federal court.

The Internal Rules require that:

—The judgment must be final and enforceable in the country of origin.¹²⁴

—The judgment must have been rendered by a judge with jurisdiction, following proper service of the parties or verification of a default in accordance with legal principles; in theory, the law governing these requirements is the law of the country of origin.¹²⁵

—The decision must not violate Brazilian public policy; such a violation is assumed when Brazil has exclusive jurisdiction or when the formalities of service of process are incompatible with the Brazilian *lex fori*.¹²⁶

—The decision must be authenticated by the Brazilian consul

Brazilian law" (art. 16), which meant the Consolidação of 1898. Compare 1 CARVALHO SANTOS, *supra* note 21, at 195 (1934).

120. C.P.C., art. 791-96 (1939); Law of Introduction of 1942, art. 15.

121. See the Internal Rules of the Supreme Court of 1980, arts. 215-24, in NILSON VITAL NAVES, REGIMENTO INTERNO E SÚMULA DA JURISPRUDÊNCIA PREDOMINANTE DO SUPREMO TRIBUNAL FEDERAL 65-67 (1981).

122. Criticized by H. VALLADÃO, *supra* note 20, at 188-89.

123. Art. 215 of the Internal Rules of the Supreme Court, as amended in 1981, corresponding to the Constitutional Amendment No. 7 of Apr. 13, 1977, art. 119, para. 3(d). See 5 J.C.B. MOREIRA, COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 85-86 (5th ed. 1985). With respect to a reopening of the proceedings, see Judgment of June 16, 1976, S.T.F., 80 R.T.J. 1.

124. See Judgment of July 1, 1983, S.T.F., 107 R.T.J. 563. Provisional enforceability of a foreign judgment is not sufficient. Cf. Judgment of Nov. 3, 1978, S.T.F., 89 R.T.J. 33.

125. Expressly in Consolidação of 1898, art. 8, and the Code of Civil Procedure of 1939, art. 791. Also the current provisions of the Law of Introduction of 1942, art. 15, and the Internal Rules of the Supreme Court of 1980, art. 217, which do not contain any specific references regarding the law of the state of origin, are interpreted in this sense. H. VALLADÃO, *supra* note 20, at 199-200. See Judgment of July 1, 1983, S.T.F., 107 R.T.J. 563, 567.

126. See H. VALLADÃO, *supra* note 20, at 200; 10 PONTES DE MIRANDA, *supra* note 41, at 54. For details with reference to these requirements, see *infra* notes 150, 155-60. That service of process must be equivalent to Brazilian law, is occasionally based on the Montevideo Convention of 1979, discussed *supra* in section I(B)(2); see Judgment of Apr. 9, 1980, S.T.F., 95 R.T.J. 23, 31-32.

and be accompanied by an official sworn translation done in Brazil.¹²⁷

In general, these principles also apply to the recognition of foreign arbitral awards. Decree 6.982 of 1878 linked recognition to judicial confirmation of the arbitral award in the country of origin. This regulation was also included in the *Consolidação* of 1898.¹²⁸ All subsequent laws, including article 483 of the current Code of Civil Procedure, refer only to the recognition of foreign court judgments. According to prevailing doctrine, these laws apply also to judicial decisions that confirmed an arbitral award or declared it enforceable; these decisions are subject in Brazil to the normal recognition process.¹²⁹ Foreign arbitral awards that have not been judicially confirmed in the country of origin cannot be recognized by the President of the Supreme Court.¹³⁰

2. Case Law

Until 1940, no Brazilian decisions referred directly to the recognition of foreign arbitral awards.¹³¹ At that time, the courts considered the agreements for foreign arbitration tribunals entirely unenforceable so long as the place for completion of the contract or the residence of the defendant was in Brazil; enforcement of a foreign arbitration award in Brazil was regarded as against public policy.¹³² This corresponded to the traditional view which inferred exclusive jurisdiction of the Brazilian courts from articles 13 and 15 of the Law of Introduction to the Civil Code of 1916.¹³³ The situation changed only when the Code of Civil Procedure of 1939 and the Law of Introduction of 1942 went into force. Thereafter, certain foreign arbitral awards were recognized by the courts.

127. See Judgment of Apr. 22, 1982, S.T.F., 103 R.T.J. 530, 532-35.

128. Decree No. 6.982 of 1878, art. 13; *Consolidação*, art. 14.

129. AMILCAR DE CASTRO, *DIREITO INTERNACIONAL PRIVADO* 526 (3d ed. 1977); 2 CAMPOS BATALHA, *TRATADO DE DIREITO INTERNACIONAL PRIVADO* 453-54, 456 (2d ed. 1977); Barros Leães, *supra* note 20, at 423; H. VALLADÃO, *supra* note 20, at 217.

130. According to an opinion defended in the doctrine, such arbitral awards are to be treated as private law transactions. H. VALLADÃO, *supra* note 20, at 217. For another view, see MAGALHÃES, *supra* note 4, at 109 (confirmation by Brazilian courts).

131. Even in 1952, an opinion issued by the legal counsel of the Brazilian Ministry of the Exterior, in response to an inquiry by a professor from Cologne, came to the conclusion that the Supreme Court until then had not dealt with the recognition of foreign arbitral awards. H. Accioly, *Homologação de sentenças estrangeiras, Sentenças arbitrais em matéria de direito privado*, 8 BOL. SOC. BRAS. DIR. INT'L 111, 115-16 (1952).

132. See *supra* the decisions cited in notes 97, 100.

133. Cf. references by P. GARLAND, *supra* note 18, at 89.

Individual decisions are summarized below:

*Sup. Trib. Fed., April 22, 1941, Alves Vilela v. Dannemann*¹³⁴

This case did not concern a foreign arbitral award in the strict sense, but an opinion of experts. Cotton, delivered by the plaintiff to the defendant in Brazil, was resold by the defendant to England, where an examination by experts showed considerable quantities missing. The Brazilian court's decision based on these expert findings was appealed to the Supreme Court alleging that the rules concerning recognition of foreign decisions had been violated. The Supreme Court rejected the appeal as unfounded in that it involved an evidentiary issue, governed by the foreign local legislation.

*Sup. Trib. Fed., May 2, 1945, Frank Feher & Co. v. Cia. Industrial, Comercial e Agricola*¹³⁵

The British plaintiff bought cotton oil from the Brazilian defendant for delivery in Liverpool, which led to arbitration with the defendant in England. The arbitral award, confirmed by an English court, awarded damages for non-performance. The Brazilian Supreme Court, at plaintiff's request, held this decision was enforceable in Brazil: the parties had effectively submitted to the jurisdiction of the English court. Similarly, Brazilian public policy was not offended because article 12 of the 1942 Law of Introduction to the Civil Code allowed the jurisdiction of the Brazilian courts to be supplanted, although the place of performance or the defendant's domicile was in Brazil.¹³⁶

*Sup. Trib. Fed., May 4, 1959, M. Augueso & Co., Inc. v. M. Aparicio & Cia. Ltda.*¹³⁷

The American plaintiff imported Carnauba wax from the Brazilian defendant and demanded damages because of its poor quality. Based on an arbitration clause in the contract, the plaintiff,

134. 88 R.F. 123.

135. 75 ARCH. JUD. 409.

136. The reasoning also shows the influence of the BUSTAMANTE CODE art. 318 (expressly permits international forum selection by the parties). Cf. Samtleben, *supra* note 28, at 159 n.187 (with respect to this decision).

137. 10 R.T.J. 409.

through the American Arbitration Association in New York, obtained an arbitral award for \$2,800.00. The defendant did not participate in the proceedings. Judgment was entered in the New York Supreme Court on this award. The decision was recognized by the Brazilian Supreme Court, since the agreed upon jurisdiction of foreign tribunals or arbitration courts did not offend Brazilian public policy.¹³⁸ On request for a rehearing, the Supreme Court failed to accept the defendant's argument that it had not been served in the New York proceedings. It confirmed recognition of the award, referring to the arbitration clause and to article 12 of the 1942 Law of Introduction to the Civil Code.

The fact that Brazil was the place for completion of the contract or the place of the defendant's domicile was no longer considered an obstacle to recognition of foreign arbitration awards in these decisions. This reflects the new, general view on the jurisdiction of the Brazilian courts, which is no longer regarded as exclusive under article 12 of the 1942 Law of Introduction.¹³⁹ Therefore, the choice of foreign arbitration with enforcement of the arbitral award in Brazil would generally not violate public policy.¹⁴⁰ Brazilian doctrine and practice, however, widely disregarded these decisions.

Only ten years later, a new attempt was made to enforce foreign arbitration awards in Brazil. This time, emphasis was placed on judicial confirmation as a prerequisite. Thus the Supreme Court in three consecutive cases ruled that foreign arbitral awards may not be executed in Brazil if they have not been confirmed by a court in the country of origin.

*Sup. Trib. Fed., March 20, 1969, Panchaud Frères v. Cia. Paulista de Exportação*¹⁴¹

This concerned a letter rogatory in a Swiss proceeding by

138. Judgment of Aug. 4, 1958, S.T.F. (not published). See Straus, *Inter-American Commercial Arbitration: Unicorn or Beast of Burden*, 21 BUS. LAW. 43, 51 (1965).

139. Compare the references found in P. GARLAND, *supra* note 18, at 91-92; H. VALADÃO, *supra* note 20, at 139-40. *Contra supra* notes 106, 108 (decisions).

140. The question of public policy arose during a case before the Supreme Court over recognition of two arbitral awards which had been judicially confirmed in Italy and involved the resignation and succession of the head of an aristocratic family. Cf. Redig de Campos, *Sentença estrangeira Juízo arbitral-Homologação*, 166 R.F. 117, 120 (1956). The result of the case is not known.

141. 52 R.T.J. 299, 235 R.F. 64.

which a Swiss firm requested a levy of execution against a Brazilian corn exporter based on an arbitral award by the "London Corn Trade Association." The President of the Brazilian Supreme Court initially rejected the request to serve the Brazilian participants because they could only be sued in Brazil, and the arbitral award had not been confirmed by a court. On appeal, the Supreme Court permitted the request for service, although enforcement of the unconfirmed arbitral award would have been impossible in Brazil. Serving notice of the pending proceedings in Switzerland did not constitute execution.¹⁴²

*Sup. Trib. Fed., June 3, 1970, Northern International Co., Inc. v. Curtume Kern-Mattes S.A.*¹⁴³

The North American plaintiff, who bought leather from the Brazilian defendant in Rio Grande do Sul, sought recognition of an arbitral award of \$1,100.00 against the defendant entered by the Inter-American Commercial Arbitration Commission in New York, based upon an arbitral clause. The Brazilian Supreme Court refused to homologate this unconfirmed arbitral award since it was a decision of a private organization without any governmental participation. Although this form of settlement of disputes corresponded to a prevalent tendency in favor of arbitration in international commerce,¹⁴⁴ in Brazilian law, court confirmation of the arbitral award was required in every case by the guaranty of the right of access to the courts contained in article 153, paragraph 4 of the Constitution.¹⁴⁵ The plaintiff has been unable to prove that a different attitude prevailed in American law.¹⁴⁶

142. See Samtleben, *supra* note 33, at 274 n.107 (1980) (regarding the question whether a letter rogatory can be executed in Brazil, even though the corresponding foreign decision would not be recognizable).

143. 54 R.T.J. 714.

144. In this context we find a casual reference to the Geneva Conventions of 1923 and 1927, 54 R.T.J. 715.

145. Compare *supra* notes 39, 42, 61.

146. One cannot conclude from this that the court would decide the necessity of judicial confirmation actually in accordance with the law of the State of origin (*see infra* note 153). It was simply easier to reject this argument which had obviously been raised during the proceedings, on the basis of lack of proof. Cf. Samtleben, *La aplicación de la ley extranjera en América Latina y en la República Federal de Alemania*, PRIMER SEMINARIO NACIONAL DE DERECHO INTERNACIONAL PRIVADO 211, 229-30 (México 1979).

*Sup. Trib. Fed., November 18, 1971, Otraco S.A. v. Cia. Nacional de Oleos Vegetais*¹⁴⁷

The Swiss plaintiff bought castor oil seeds from the Brazilian defendant and demanded damages on grounds of poor packing. An arbitral decision by the "Cattle Food Trade Association" in London awarded damages of 40,000 French francs against the defendant. As in the prior case, confirmation of the award was rejected by the Brazilian Supreme Court because of the lack of court confirmation. Moreover, proof of jurisdiction and of service of process had not been submitted.

The result of these decisions was that recognition of foreign arbitral awards in Brazil once again became uncertain. Passage of another decade was necessary before the Supreme Court again had the opportunity to decide these questions.¹⁴⁸ Recently the Supreme Court has clarified the requirements for recognition of foreign arbitral awards. Declaring that, in principle, there are no obstacles to recognition of an arbitral award that has been confirmed by a competent foreign court. Recognition, however, depends on properly serving the defendant by legal means.

*Sup. Trib. Fed., November 8, 1979, Centrofin S.A. v. La Pastina S.A.*¹⁴⁹

The Swiss plaintiff, who bought rice from the Brazilian defendant, had a sales contract with a "friendly arbitration in Hamburg" clause and later obtained an arbitration award of \$25,000.00 in damages. During the arbitration proceedings, the defendant was represented by a Hamburg firm. The arbitration award was declared executory by the Landgericht (regional court) in Hamburg; the defendant did not attend the proceedings, even though it was served by letter rogatory. Recognition of the arbitral award in Brazil by the President of the Supreme Court was based on the following arguments: the agreed jurisdiction of the court in Hamburg was effective according to German law; exclusive jurisdiction of Brazilian courts did not exist, the defendant was legally served with process by the Landgericht in Hamburg and could no

147. 60 R.T.J. 28.

148. See Villela, *supra* note 65, at 58.

149. 92 R.T.J. 515, confirming the decision of the President of June 30, 1979, D. JUST. of Aug. 27, 1979 at 6285, also reported in 91 R.T.J. 48. Regarding this decision, see Rosenn, *Enforcement of Foreign Arbitral Awards in Brazil*, 28 AM. J. COMP. L. 498 (1980).

longer claim irregularities in service of notice to attend the arbitration proceedings because it had been represented at the proceedings, and in the subsequent judicial proceedings this irregularity had not been raised. Brazilian public policy was not violated: the arbitral award had been judicially confirmed and was therefore of the same force and effect as a foreign judgment.¹⁵⁰ The decision of the President was fully confirmed by the Supreme Court, following an appeal by the defendant. A formal or substantive examination of the arbitral award was expressly rejected.

*Pres. of Sup. Trib. Fed., December 14, 1979, Compagnie Noga S.A. v. Fasko S.A.*¹⁵¹

The Swiss plaintiff sought recognition of an English arbitration award that ordered the Brazilian defendant to pay her U.S. \$120,000.00. The arbitral award had been confirmed by the High Court (Q.B.). Service for both proceedings had been delivered to the Brazilian Consul General in London; the defendant had not appeared at the court proceedings. The President of the Brazilian Supreme Court refused to recognize the award because service for the proceedings had not been made by a formal letter rogatory.

*Sup. Trib. Fed., April 9, 1980, Société Nouvelle D'Affrètement v. Caldas Ltda.*¹⁵²

The French plaintiff ordered the shipment of wood to Algiers by the Brazilian defendant. Based upon an arbitration clause contained in the freight contract, a London arbitration court awarded 62,000 Pounds Sterling against the defendant for breach of contract. The arbitral award had been confirmed by the High Court (Q.B.). The defendant was served by regular mail and through agents in Brazil, but did not appear. During the recognition proceeding, the President of the Brazilian Supreme Court stressed that on the basis of the clause in the contract, the arbitration court

150. Faced with the argument that the guarantee of the right of judicial process of art. 153, para. 4 of the Constitution of 1969 goes against recognition of the arbitral award, the President of the S.T.F., among others, referred to the equivalent treatment of foreign judicial decisions and arbitral awards in the Montevideo Convention of 1979, discussed in section I(B)(2), *supra*.

151. 92 R.T.J. 1074.

152. 95 R.T.J. 23, confirming the decision of the President of Dec. 19, 1979, 92 R.T.J. 1077.

and the High Court had jurisdiction under English law and that, in principle, the form of service should also be judged according to English law. Brazilian public policy, however, required that if the whereabouts of the defendant in Brazil are known, service must be made by letter rogatory delivered through a Brazilian officer of the court.

The Brazilian Supreme Court has confirmed this view in various decisions. According to this case law, recognition is based on the foreign judicial decision confirming the arbitral award.¹⁵³ It is, therefore, necessary that the defendant be served in a regular manner in this foreign court proceeding. Theoretically, service is made according to the *lex fori*. In practice, however, if the defendant is domiciled in Brazil, service has to be effectuated by means of a formal letter rogatory.¹⁵⁴ The recent case law states unequivocally that any other form of service violates public policy;¹⁵⁵ this is also true with direct service via diplomatic or consular representatives.¹⁵⁶ This defect is curable only if the defendant, despite the

153. See Judgment of June 4, 1980, S.T.F., confirming the decision of the President of Apr. 23, 1980, *Bunge v. Indústria de Óleos Pacaembu SA*, 95 R.T.J. 1011, 1017; Decision of Jan. 19, 1981, Pres. of S.T.F., *Schubert & Salzer Maschinenfabrik AG v. Suessen Máquinas SA*, S.E. 2.768-2 (unpublished); Judgment of May 14, 1981, S.T.F., *Harlow & Jones Inc. v. Perflação Comércio e Indústria de Aço Ltda.*, 97 R.T.J. 537; Judgment of Apr. 22, 1982, S.T.F., *Nan Fung Textiles Ltd. v. Soares de Oliveira SA*, 103 R.T.J. 530; Judgment of Feb. 2, 1983, S.T.F., *Matter SA v. Fenelon Machado SA*, 109 R.T.J. 30; Judgment of July 1, 1983, S.T.F., *Anderson, Clayton & Co. v. Irodusa*, 107 R.T.J. 563, 579 R.T. 221; Judgment of Mar. 2, 1983, S.T.F., *Palmer & Wall Ltd. v. Algoper*, 105 R.T.J. 491; Judgment of May 10, 1984, S.T.F., *Schubert & Salzer Maschinenfabrik AG v. Suessen Máquinas SA*, 111 R.T.J. 157, 588 R.T. 216, *confirmed* in Judgment of Nov. 14, 1984, 595 R.T. 256. Whether judicial confirmation is required in the State of origin, is irrelevant. Cf. Judgment of June 4, 1980, S.T.F., 95 R.T.J. at 1019-20. *Contra Barros Leães, Juízo arbitral, Homologação de decisão estrangeira*, 547 R.T. 254, 257 (1981).

154. The letter rogatory must be confirmed by the President of the Supreme Court (arts. 225 *et seq.* of the Internal Rules of the Supreme Court) and must have been served prior to promulgation of the foreign decision. Judgment of Apr. 29, 1970, S.T.F., 54 R.T.J. 501.

155. Compare the practice of the Supreme Court regarding service by publication, Judgment of Oct. 20, 1958, 8 R.T.J. 275; Judgment of Nov. 19, 1979, S.T.F., 92 R.T.J. 522. Regarding service by registered mail, see Judgment of Nov. 14, 1958, S.T.F., 9 R.T.J. 263; Judgment of Apr. 4, 1974, S.T.F., 87 R.T.J. 384; Judgment of Oct. 30, 1978, S.T.F., 89 R.T.J. 743; Judgment of Nov. 19, 1981, S.T.F., 99 R.T.J. 570. Regarding service by regular mail, see Judgment of Oct. 23, 1978, S.T.F., 87 R.T.J. 782; Judgment of Oct. 30, 1978, S.T.F., 89 R.T.J. 742. See also *supra* note 153 (decisions).

156. Cf. MENDONÇA PAIS, *Citações de portuguesas no Brasil por intermédio dos agentes consulares*, 4 SCIENTIA JURÍDICA 359 (1955). Service through German diplomatic or consular representatives was initially considered invalid in Brazil, although admitted by section 199 of the German Civil Procedure Code, Judgment of Oct. 20, 1958, S.T.F., 8 R.T.J. 276, but later recognized as valid, Judgment of July 25, 1960, S.T.F., 14 R.T.J. 272. Recent practice

lack or insufficiency of service, has in some way waived his right to object.¹⁵⁷

3. Conclusions

Today, recognition of foreign arbitration awards in Brazil can largely be regarded as certain, although in some circumstances, long, drawn-out proceedings can be expected.¹⁵⁸ The jurisdiction of the foreign arbitral tribunal is respected if it was agreed upon according to the law of the place of arbitration or based upon submission¹⁵⁹ and the Brazilian courts do not have exclusive jurisdiction.¹⁶⁰ Service of notice of the arbitration proceedings is not examined formally; recognition of an award entered in the absence of the defendant is even possible.¹⁶¹ It is, however, required that the defendant have ample opportunity for defense.¹⁶² The award is not examined with regard to form or substance, so long as it does not violate Brazilian public policy. This may occur if unfair arbitration clauses are used in form contracts¹⁶³ or if no reasoning is

has returned to the position of the older case, Decision of June 4, 1979, Pres. of S.T.F., 90 R.T.J. 777; Judgment of Jan. 26, 1981, S.T.F., 98 R.T.J. 44.

157. This may occur by submission to the foreign court, Judgment of Nov. 14, 1958, S.T.F., 9 R.T.J. 263; Decision of Aug. 6, 1979, Pres. of S.T.F., 91 R.T.J. 56; Judgment of Mar. 2, 1983, S.T.F., 105 R.T.J. 491; or by having applied for recognition in Brazil, Decision of Nov. 17, 1978, Pres. of S.T.F., 90 R.T.J. 14; Decision of June 4, 1979, Pres. of S.T.F., 90 R.T.J. 777; Decision of June 4, 1979, Pres. of S.T.F., 91 R.T.J. 419; or having made some other use of the foreign judgment, Decision of June 4, 1979, Pres. of S.T.F., 90 R.T.J. 780.

158. Between the requirement of judicial confirmation of the arbitral award in the country of origin and recognition by the Brazilian Supreme Court, periods of 4 to 10 years at times elapse. See *supra* the decisions in notes 149, 152-53. For criticism of these delays, see Rosenn, *supra* note 149, at 499, 503-06. The transference of the recognition process to the President of the Supreme Court from 1977-81 was evidently not appropriate to expedite the proceedings. See *supra* note 123.

159. This must be proved by evidence of the arbitration clause or the submission to the arbitration proceedings. See Judgment of May 14, 1981, S.T.F., 97 R.T.J. 537; Judgment of Apr. 22, 1982, S.T.F., 103 R.T.J. 530; Judgment of Mar. 2, 1983, S.T.F., 105 R.T.J. 491.

160. The Brazilian courts have exclusive jurisdiction according to art. 89 of the Code of Civil Procedure of 1973 only with regard to real property located in Brazil and inheritance. In addition, exclusive jurisdiction is argued to exist in suits where the Brazilian Government is directly involved. Cf. Dolinger, *supra* note 68, at 54-57, 62-63; Rosenn, *supra* note 149, at 502 n.14; *contra* J.C. DE MAGALHÃES, *supra* note 4, at 79-84; Marotta Rangel, *supra* note 20, at 34.

161. *Contra* Marotta Rangel, *supra* note 20, at 39, 44 (referring to decisions of the Supreme Court). The published decisions offer no support for this viewpoint. See especially *Augueso v. Aparício*, 10 R.T.J. 409.

162. Compare generally, H. VALLADÃO, *supra* note 20, at 200. See also *Centrofin v. La Pastina*, 91 R.T.J. at 56 (express reference regarding this requirement found in the decision cited).

163. H. VALLADÃO, *supra* note 20, at 220; Villela, *supra* note 65, at 57-58 (with reference

given in the arbitral award.¹⁶⁴

A necessary requirement for recognition of an arbitral award is that it was confirmed or declared enforceable by a court in the country of origin. It is this decision, according to the case law, that properly speaks to the object of the recognition proceeding. The judicial decision, therefore, must fulfill all prerequisites for recognition of foreign judgments under Brazilian law. As a rule, the confirming court has jurisdiction as long as the arbitration court had jurisdiction according to the respective local law. It is, however, of critical importance that the defendant in Brazil be served in the foreign judicial proceeding by a formal letter rogatory. When an arbitral award is declared executory by a German court, this prerequisite would now normally be satisfied as a matter of course.¹⁶⁵ If the arbitration and the judicial confirmation of the award take place in a third country where law provides for less formal service of process, as in the United States, recognition of the arbitral award in Brazil is only guaranteed if the defendant can be served there by letter rogatory or if he submits himself to the proceedings of the foreign court.¹⁶⁶

to section 1025, paragraph 2 of the German Civil Procedure Code). *See also* Feher v. Cia. Industrial, 75 ARCH. JUD. at 415 (requires "loyal play"); Judgment of Sept. 21, 1982, S.T.F., 103 R.T.J. 878 (form contract).

164. Judgment of July 1, 1983, S.T.F., 107 R.T.J. 563, 579 R.T. 221. *Cf.* Judgment of Aug. 12, 1980, S.T.F., 95 R.T.J. 34. *Contrast* Judgment of Nov. 8, 1979, S.T.F., 92 R.T.J. 515, 519.

165. *See Centrofin* case, 92 R.T.J. 515. For former practice, see *supra* note 156.

166. *See supra* note 157.