The Role of the Brazilian Superior Court of Justice Towards Arbitration

Introduction.

The Superior Court of Justice ("SCJ") is, strictly speaking, the last judicial body competent to deal with matters of an infra-constitutional nature. Hence, it is the Court that harmonizes the case law related to arbitration in Brazil.

In 2004 the Supreme Court transferred to the SCJ the competence to recognize and enforce foreign judicial and arbitral awards. This brought a fresh air by virtue of the SCJ revisiting outdated Supreme Court's understandings.

For instance, immediately after being granted such competence, the SCJ introduced very contemporaneous rules on the recognition and enforcement of foreign awards by issuing on 4 May 2005 the Resolution n. 9 (currently incorporated into its Internal Rules), which departed from several of the Supreme Court prior decisions which had imposed many restrictions on the recognition of foreign arbitral and judicial awards.

In fact, for the time the Supreme Court has held such competence, its rules were extremely conservative to the point that, on some specific instances, it ended up denying justice.

Nowadays, as a result of Resolution n. 9, it is currently:

1. Possible to issue provisional relief during the recognition proceeding. This is of paramount importance for foreign creditors to protect their interests in the country. In other words, creditors have the right to request urgent remedies while in course the proceeding.
2. Possible to issue partial recognition of foreign arbitral awards. In others words, the SCJ can detach the part of the award affected by some degree of defect that prevents its enforcement. Hence, such rule grants to the SCJ power to ensure maximum effect to foreign arbitral awards.
3. Allowed to enforce provisional relief granted abroad through rogatory letter. It does include interim relief issued by arbitral tribunals.

In sum, by means of a single, concise and objective Resolution the SCJ has set aside an old fashion understanding the Supreme Court had applied for decades.

Main Arbitration Concepts.

Prior to addressing the SCJ's arbitration case law, it is worthwhile to revisit and underscore the main arbitration concepts confirmed already by Court decisions and also stated by Brazilian scholars:

1. Arbitration agreements are *per se* capable of producing all legal effects, with exceptions related to adhesion contracts[1] and, to some extent, labour agreements[2].
2. Judicial courts may intervene to impose arbitration if the agreement does not provide the means

thereto.[3] Basically, in case of a "blank" or "silent" arbitration agreement the party needs to seek judicial support to initiate the proceeding.
3. *Kompetenz* principle prevails.[4]
4. Arbitrators exercise jurisdiction. Jurisdictional power is a main concept and hence is of the essence of the Brazilian arbitration law – Law n. 9.307/1996 (*v.g.* articles 18, 22 and 31[5]).
5. Arbitrators can grant provisional remedies and determine the appearance of a witness to the hearing.[6]
6. Parties can seek judicial courts' aid prior to the constitution of the arbitral tribunal.[7] To seek courts for interim relief before the arbitral tribunal has been set up does not violate or invalidate the arbitration agreement. On the other hand, the remedy granted by the court can be modified, maintained or revoked by the arbitral tribunal.
7. Arbitral awards are considered a judicial title[8], which implies that fewer issues may be raised by defendant to prevent the enforcement of the arbitral award.[9]

Those are the basic principles in which arbitration has been grounded in Brazil, which have subject to extensive debate and are currently well accepted by scholars and courts.

Superior Court of Justice and the Recognition of Foreign Arbitral Award.

From the moment the SCJ gained competence to grant recognition to foreign awards, *i.e.* 2005, to November 2018, the Court decided 92 requests for recognition of foreign arbitral awards and denied only 7.

Given this statistic, it is clear that the vast majority of arbitral awards are being recognized to produce full regular effects in the Brazilian territory.

As to the 7 foreign awards to which recognition was denied, this happened basically due to the lack of proof that the parties had effectively agreed on solving their dispute through arbitration.

From those that were recognized, it is clear that the SCJ has consistently followed concepts and rules of the Brazilian arbitration law. Moreover, SCJ fully supported arbitration and, consequently, provided the legal certainty essential to make this means of conflict resolution effective, be on domestic or international contracts.

Let us then go through an overview of the SCJ's most relevant decisions relating to arbitration.

Impossibility to review the merits of foreign arbitral awards.

SCJ's case law is unanimous in stating that it is not possible the review the merits of the foreign award when deciding on the request for recognition.

This is because the judgment on the recognition proceeding is limited to verifying the formal requisites of the request.[10]

Indeed, the substantive legal relation underlying the arbitral award is not under debate when deciding whether to grant enforcement in Brazil.[11]

This will only happen if the Court finds the foreign arbitral award to breach Brazil's public policy or sovereignty. In this sense, "*The proceeding for recognition of foreign awards does not authorize reviewing the merits of the award except if there is a breach to national sovereignty or public policy.*".[12]

Needlessness of rogatory letter to notify Brazilian parties.

With the advent of the Brazilian arbitration law, one of the main obstacles to the recognition of foreign arbitral awards was set aside. That was the need for Brazilian parties to be summoned by means of rogatory letter.

In other words, the Brazilian party only became formally aware of the arbitral proceedings – and hence had to present its defense – after Claimant had gone through the entire rogatory letter procedure and the Respondent had been notified.

Absent due notice through rogatory letter, the arbitral award would not be enforceable in Brazil under any circumstances. Many awards – both arbitral and, more often, judicial – were denied recognition by the Supreme Court based on the lack of due notification by rogatory letter.

Nowadays, art. 39, sole paragraph, of the Brazilian arbitration law states that "*The service with arbitral process of a party that resides or is domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including mail with confirmation of receipt, shall not be considered as in violation of Brazilian public policy, provided the Brazilian party is granted proper time to present its defense*".

Despite the skepticism of some scholars on the possibility of allowing notice to Brazilian parties by any means of communication, the SCJ has championed this rule, as exemplified by the ruling below:

"Ex vi art. 39, sole paragraph, of the Brazilian arbitration law, [citation of the article]. III – Moreover, there is abundant evidence that respondent received through mail not only the summons but also notices aiming at its attendance at the hearings that, after all, were held in its absence. IV – Having all legal requirements being fulfilled including those listed on Resolution n. 9/STJ, from 4 May 2005, relating to formal regularity of the proceedings, recognition of the foreign arbitral award may not be denied. V – Therefore, recognition is granted".[13]

No lis pendens between concurrent actions abroad and in Brazil.

From 2006[14] onwards the SCJ has upheld the previous Supreme Court ruling that the existence of current proceedings before Brazil's state Courts does not prevent recognition of foreign arbitral awards on the same subject.

Indeed, the SCJ has ruled that recognition may be granted to arbitral awards issued abroad in spite of the existence of judicial proceedings in Brazil.[15]

Even if the court proceeding deals with the validity of the arbitration agreement there is no suspension of the arbitral award issued abroad that declared the very same clause valid and effective and, thus, submitted the party to arbitration.[16]

As stressed by the SCJ's Special Court,[17] the processing of two equivalent lawsuits – one in Brazil and one abroad – is a typical case of "*concurrent jurisdiction. In such case, the first decision to reach res iudicata bars the other. It is of the system's essence that if the foreign award reaches res iudicata first, the Brazilian one is barred and vice-versa. Thus, if we suspend this recognition proceeding, we will in effect end the concurrent jurisdiction regime and always establish the Brazilian exclusive jurisdiction* ."[18]

In the same sense, a broader opinion by another judge on the same ruling:

"When there is concurrent jurisdiction, as there is no lis pendens nor is the Brazilian courts barred from hearing the claim under the already mentioned art. 90 of the Code of Civil Procedure, and to avoid the legal conflict caused by the existence of two awards – one domestic and another foreign – with possibly different results for the same controversy, the temporal criteria applies, checking the date of res iudicata to know which will prevail in the case at hand. In other words, if there is already res iudicata in Brazil concerning the same conflict, recognition is barred. In the other hand, if the recognition decision reaches res iudicata prior to the internal one, the proceedings before the national courts must be dismissed under art. 267, V, of the Code of Civil Procedure. In other words, the recognition proceeding must continue together and parallel to the proceeding on the merits before the state courts, being inconceivable to suspend either of them. Being a situation of concurrent jurisdiction, suspending one of the proceedings would be equal to opting for one of the jurisdictions as the lawsuit that continues will certainly reach res iudicata first, barring any decision on the other lawsuit".[19]

Hence, court proceedings in Brazil do not bar the granting of *exequatur* to foreign arbitral awards.[20]

This means that, once the foreign award is recognized, its *dictum* becomes effective in Brazil; thus, the concurrent court proceeding must be dismissed with no ruling of the merits, as stated by the SCJ, *verbis*:

"(...) once the foreign arbitral award is recognized the dismissal of the national court proceedings with the same object is not based simply on the agreement to arbitrate – that the parties may agree to set aside – but on the binding effect that the arbitral award acquires on national territory. In order to be recognized, the arbitral award must necessarily be binding on the parties. In this sense, the rule on art. 5º, §1º, e, of the New York Convention, reproduced on art. 38, VI, of Law n.º 9.307/96, verbis: [citation of article]. However, the binding nature of foreign arbitral awards that must under art. 3 of the New York Convention be ensured by the State Parties can only be considered by the national State authorities from the moment recognition is granted, when the award acquires full effect in the national territory under arts. 483 of the Code of Civil Procedure and 36 of Law 9.307/96. (…) Thus, if the foreign arbitral award after recognition has full effect in the national territory and cannot – being binding – be reviewed or modified by the Courts, it is not possible to allow the continuity of court litigation with the same object as the recognized award. In this aspect, I emphasize that the Court of origin recognized that the request for relief and the cause for action of the arbitral proceeding before the FOSFA encompassed those of this action. The appellant did not challenge this finding. In this context, continuing the court proceedings and

endangering the binding nature of the recognized foreign arbitral award might even constitute a breach of international law, considering that, as previously stated, Brazil undertook to recognize as binding foreign arbitral awards when it ratified the New York Convention. Thus, the decision to dismiss the claim with no judgment of the merits was correct."[21]

In line with the firm and recurring understanding of the SCJ over the years, this topic came into law on Brazil's new Code of Civil Procedure[22] through its art. 24, sole paragraph: "*The pendency of an action before Brazilian courts does not bar the recognition of a foreign judgment when this is required for its enforcement in Brazil.*"

Under this rule bringing claims on the same subject in Brazil and abroad does not lead to *lis pendens*. This means there is no need to suspend the latter proceeding due to the fact that another was previously started on a foreign jurisdiction.

Under this scenario, the Brazilian law makers opted to admit the existence of concurrent jurisdictions. Therefore, at the end of the day, the ruling that will prevail is the one that first reaches *res iudicata* in Brazil. While the foreign arbitral award is not recognized, domestic court proceedings will follow their due course and can even achieve *res iudicata*. Only when this happens the recognition proceedings will be affected to prevent the foreign arbitral award to produce its effects in Brazil.

Public policy. Fundamental values.

Despite a variety of arguments on public policy violations raised by the parties to prevent the foreign arbitral awards' recognition, the SCJ has systematically rejected them as groundless.[23]

As well stated by renowned Judge Nancy Andrighi, "*It is not any kind of breach of local law that implies violation of public policy, meaning SCJ may not carry out a deep analysis of the contents and/or justice of the foreign decision; only if it finds an infringement of fundamental values of brazilian legal culture*".[24]

Thus, allegations on violation of public policy must be duly substantiated and grounded on legal values effectively of paramount importance. Or, as registered in another ruling, "*Given the undetermined character of these concepts, in order not to subvert the role of the SCJ on recognition, they must be interpreted only to repel those acts and facts that are absolutely incompatible with the Brazilian legal system.*"[25].

Also in this sense, one of the SCJ's judges has already emphasized that "*The concept of public policy is wide and examining whether it was breached on a limited review setting is a delicate issue* (…) *When interpreting it, however, for the recognition of foreign awards, the interpreter must do it to set aside those acts that are absolutely repugnant to the international social order*".[26]

These excerpts were selected to emphasize the fact that the importance given by the SCJ to the contents of foreign arbitral awards is solely to seek its compliance to elements of profound relevance to the national legal order.

Thus, it is not any alleged violation of public policy that will lead to a re-examination of the merits of a foreign award.

Indeed, the SCJ has accepted as a matter of public policy the lack of evidence to the existence of the arbitration agreement.

For instance, in at least five decisions on contested requests for recognition, the SCJ denied *exequatur* due to the lack of proof of consent to the arbitration agreement.[27]

On the other hand, in one case recognition was partially denied due to violation of Brazil's sovereignty.[28]

In this very specific case, an US judge referred the parties to arbitration and imposed on the Brazilian parties (a company and an individual) criminal and civil penalties for not complying with the US Court anti-suit injunction. The SCJ understood this injunction to violate the right of any Brazilian company or citizen to seek the judicial courts in Brazil.[29]

Finally, on a ruling from April 2017, the SCJ understood that the lack of disclosure by the arbitrator of facts considered relevant breached public policy and thus barred recognition of the foreign arbitral award. The presiding arbitrator had failed to disclose that he was a senior partner at a law firm that, through some of its other partners, had advised companies from a group that included some of the parties to the arbitration. This happened not only for the structuring of an investment for two major solar energy projects before the United States Department of Energy but also for two others corporate operations with the holding company of the group.

Here is the decision's abstract and some opinions from the Court's judges:

"(...) Allegation of partiality of the arbitrator. Requirement for the validity of the decision. Annulment of arbitral award filed in the US where the Arbitral Tribunal was constituted. Binding of the SCJ to the decision of the American justice. Not occurring. Existence of creditor/debtor relationship between the law firm of the president and the economic group of one of the parties. Objective hypothesis likely to compromise the arbitrator's exemption. Business relationship, whether prior, future or ongoing, direct or indirect, between arbitrator and one of the parties. Duty of disclosure. Non-observance. Breach of trust. Suspicion. (...) 2. Impartiality of the judge is one of the guarantees that result from due process, being always arguable and applicable to arbitration by virtue of its jurisdictional nature. The non-observance of this requirement breaches, directly, the national public order, reason why the SCJ is not precluded by the prior decision of the alien Courts on the matter. 3. It offends the national public order an arbitral award that has been issued by an arbitrator who had, with the parties or with the controversy, any of the situations that give rise to legal impediment or suspicion of judges (articles 14 and 32, II, of Law No. 9.307/1996). 4. Given the contractual nature of arbitration, which emphasizes the fiduciary trust between the parties and the arbitrator, the breach by the arbitrator of the obligation to disclose any circumstances that may reasonably raise doubts about his impartiality and independence prevents the recognition of the arbitration award (...)"[30]

"These facts evidence that the chairman's law firm had in the course of the arbitration relevant contacts

with the Abengoa group on issues of high importance to the economic group. Although it is not a client-lawyer relationship, it certainly cannot be disregarded, especially if taken into account the amounts involved, which authorizes its inclusion in the open clause of suspicion fixed by item V of art. 135 of the CPC."[31]

"First, it is important to highlight that the impartiality of the judge is not a merits issue, but a subjective procedural requirement for the validity of every procedural relationship carried out in a Democratic State. In other words, in any legal system where the principles of isonomy and due process are in force, the impartiality of the judge is a requirement that must be present for the merits of any suit to be validly judged by him. (…) Therefore, as the violation to the principle of impartiality equals to violating principle and fundamental constitutional guarantees of the Federative Republic of Brazil, it is an issue of public interest, of public policy and not subject to statute of limitations. Indeed, the impartiality of the judge is a matter of public policy in Brazil and, therefore, is knowable at any time, even after delivery of the award; if it is also sufficient cause for setting aside pleas (subsections I and II from article 485 from the Code of Civil Procedure), with better reason it may be examined when in course the recognition of the award in which the actions of the partial judge took place."[32]

"I clarify that article 33 rules on the setting aside of arbitral awards, but the examination of the arbitrator's independence may be done, concerning foreign arbitral awards, also in the recognition procedure under article 39, II, of the Law, since the impartiality of the judge is a matter of public policy. (…) The existence of these payments by Grupo Abengoa's companies to the law firm of the chairman of the arbitral tribunal is a factor that certainly would take anyone, having knowledge of them, to question if the arbitrator would not be somehow influenced by them, even though the argument that the payments were for services to the Energy Department would be presented. At least the called average man certainly would say that, in doubt, it would be better for the arbitrator to be someone else. In the case, there is an aggravating circumstance since there was no communication to the parties of the existence of these payments, in breach of the duty of disclosure."[33]

Award annulled at the seat of arbitration.

In a leading case from December 2015, the SCJ, by unanimity of votes, ruled that no recognition may be granted to an arbitral award set aside at the seat of arbitration.[34] Such decision took into consideration the New York Convention (art. V, 1, e), the Panama Convention (art. V, 1, e), the Brazilian Arbitration Law (art. 38, vi), the SCJ's Internal Rules (art. 216-D) and the Las Leñas Protocol (art. 20, e).

As decided, "*From these excerpts, we arrive at the interpretation that it is not possible to recognize a foreign arbitral award that is suspend or annulled by judicial order at the seat of arbitration.* (…) *One cannot forget that the recognition process does not add effects to the foreign award, be it arbitral or not, but merely sets free the effects therein contained, internalizing its effects in our country; recognition of awards is not apt to remove vices or to give a different interpretation to the foreign country decision.*"[35]

Summing up, considering that the recognition process aims only at allowing the foreign arbitral award to produce in Brazil the effects therein contained, if those effects no longer exist due to the annulment at the seat of arbitration, there is nothing to recognize or to enforce in the national territory.

Basic requirements on the reasoning of foreign awards.

The need of reasoning of awards is a recurring theme on the framework that underlies the Brazilian legal system, being recognized as a guarantee of fair trial to those subject to the Court's jurisdiction.

Nonetheless, the SCJ has mitigated the requirements on reasoning for foreign arbitral awards, which may not strictly follow the formal structure applied to domestic decisions.

In other words, the SCJ accepts the structure applied by the law of the seat. However, it does not mean that the SCJ has already accepted the recognition of foreign awards with no reasoning at all.

So far, foreign arbitral awards shall provide at the very least some minimal reasoning to allow the Court to verify if the basic requirements for recognition are met.

Even if succinct and under other structure, the reasoning must allow the SCJ to verify whether its content meets and fulfills the basic conditions for its internalization into the country.

In this sense, the reference to witness statements and documents analyzed and considered or not as evidence for the purpose of convincing the arbitrator is considered reasonable to confirm a critical assessment of the case and to indicate the reasons followed.

It is also possible to speculate whether case law may advance to allow recognition of foreign arbitral awards with no reasoning.

When the Supreme Court still held competence, recognition of foreign awards without reasoning was allowed although those rulings were restricted to specific cases involving divorce and family law.

The Federal Public Prosecutor's office argued at one of these rulings that "*the structure of a foreign arbitral award follows the law of the place where the arbitration took place*".[36]

The Federal Public Prosecutor's office also emphasized that the New York Convention did not include in its art. V the lack of reasoning as sufficient to deny recognition to foreign arbitral awards.[37]

There are several rulings that state that the law of the place where the award was given prevails. This would mean that foreign arbitral awards might be recognized even if with no reasoning.

Reasons for such potential acceptance exist and can be summarized as follows: (i) the need for reasoning established under art. 26, II, of the Brazilian arbitration law[38] only applies to domestic arbitral awards; (ii) the need for reasoning established under art. 93, IX, of the Brazilian Federal Constitution[39] is aimed specifically to awards given by the state courts; (iii) the list of reasons to deny recognition to foreign arbitral awards listed under art. 38 of the Brazilian arbitration law[40] does not include reasoning as a mandatory requisite; and (iv) finally, lack of reasoning is not a breach of Brazil's public policy (art. 39, *caput*, of the Brazilian arbitration law[41]) as arbitration deals with transferable patrimonial rights having the parties broad freedom to even choose the applicable law and the arbitral procedure. If the applicable law does not require reasoning to awards, it is assumed that party autonomy must prevail to respect *pacta*

sunt servanda and to guard legal certainty.

Conclusion.

From all the above, it becomes crystal clear all the support the SCJ has given to arbitration through these last 15 years.

This positive attitude towards arbitration is also evident from opinions given by several of its Justices on lectures and interviews, including former members. Former members who not rarely are appointed as arbitrators or legal experts after retirement.

The SCJ's pro-arbitration stance ends up positively influencing all other Brazilian courts and therefore granting the legal certainty required for it to be seen as a country friendly to arbitration.

1. Brazil's Law n. 9.307/1996, Article 4. "Paragraph 2. In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause." ?
2. See Art. 507-A of Brazil's Consolidated Law on Labour, as added by Law n. 13.467/2017: "On individual labour contracts on which remuneration exceeds two times the upper limit established for benefits at the Regime Geral da Previdência Social [General Regime for Social Security], arbitration clauses may be agreed, as long as the employee takes this initiative or gives its express consent as established under Law n. 9.307, from 23 September 1996." ?
3. Brazil's Law n. 9.307/1996, Article 7. "If there is an arbitration clause and there is objection for the commencement of arbitration, the interested party may request that the other party be served with process to appear in court so that the submission agreement is drawn up. The court judge will designate a special hearing for this purpose." ?
4. Brazil's Law n. 9.307/1996, Article 8. "An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sole paragraph. The arbitrator has jurisdiction to decide ex officio or at the parties' request the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause." ?
5. Brazil's Law n. 9.307/1996, Article 18. "An arbitrator is the judge in fact and in law, and his award is not subject to appeal or recognition by judicial court."Brazil's Law n. 9.307/1996, Article 22. "The sole arbitrator or the arbitral tribunal, either ex officio or at the parties' request, may hear parties' and witnesses' testimony and may rule on the production of expert evidence, and other evidence deemed necessary."Brazil's Law n. 9.307/1996, Article 31. "The arbitral award shall have the same effect on the parties and their successors as a judgement rendered by the Judicial Authority and, if it includes an obligation for payment, it shall constitute an enforceable instrument thereof." ?
6. Brazil's Law n. 9.307/1996, Article 22. "The sole arbitrator or the arbitral tribunal, either ex officio or at the parties' request, may hear parties' and witnesses' testimony and may rule on the production of expert evidence, and other evidence deemed necessary." ?
7. Brazil's Law n. 9.307/1996, Article 19. "The arbitration shall be deemed to be commenced when

the appointment is accepted by the sole arbitrator or by all of the arbitrators, if there is more than one." ?

8. Brazil's Law n. 9.307/1996, Article 31. "The arbitral award shall have the same effect on the parties and their successors as a judgment rendered by the Judicial Authority and, if it includes an obligation for payment, it shall constitute an enforceable instrument thereof."Brazil's Code of Civil Procedural Code, Article 515. "The following are considered judicial executive titles, whose compliance shall follow the rules under this Title: […] VII – the arbitral award". ?
9. Brazil's Code of Civil Procedural Code, Article 525. "If the voluntary payment has not been effected, upon the expiry of the deadline set forth in art. 523, (…) § 1 In his or her objection, the defendant [on the enforcement proceeding] may argue: I – the lack or nullity of the service of process if, in the cognizance proceedings, the action proceeded in default; II – the lack of standing of the party; III – the unenforceability of the instrument or of the obligation; IV – the incorrect levy of execution or erroneous appraisal; V – excessive execution or undue accumulation of executions; VI – the lack of exclusive or relative jurisdiction of the execution court; VII – any cause that modifies or discharges the obligation, such as a payment, novation, compensation, settlement or statute of limitations, provided it supervenes the judgment". ?
10. Recognition of foreign arbitral awards depends on complying with the requisites established on arts. 216-A to 216-N of the SCJ's Internal Rules, on arts. 15 and 17 of the Introductory Law to Brazilian Law (Decree-Law n. 4.657/1942) and, if applicable, those on treaties and conventions. ?
11. "*It is worth highlighting that the recognition procedure for foreign awards is limited to the analysis of the formal requirements. The merit issues raised by Respondent cannot be appreciated by the SCJ in this judgment of deliberation because they surpass the limits fixed by art. 9, caput, of SCJ Resolution n. 9 of 4/5/2005. The statement of defense to the recognition request must be restricted to the fulfillment of the formal requirements contained in this provision. In other words, the object of deliberation in the recognition proceeding must not be confused with that of the suit that gave rise to the foreign decision*" (free translation). In the original, "*Cumpre destacar que o ato homologatório da sentença estrangeira limita-se à análise dos requisitos formais. As questões de mérito levantadas pelo requerido não podem ser apreciadas pelo Superior Tribunal de Justiça neste juízo de delibação, pois ultrapassam os limites fixados pelo art. 9º, caput, da Resolução STJ n. 9 de 4/5/2005. Os termos da contestação ao pedido de homologação devem restringir-se ao atendimento dos requisitos formais constantes desse dispositivo. Em outras palavras, o objeto da delibação na ação de homologação de sentença estrangeira não se confunde com aquele do processo que deu origem à decisão estrangeira*" (SEC 5.828/IT, Rel. Min. João Otávio de Noronha, DJe 26.06.2013).See, also, SEC 4.738/EU, Rel. Min. Celso de Mello, DJe 07.04.1995; SEC 9.502/EX, Rel. Min. Maria Thereza de Assis Moura, DJe 05.08.2014; SEC 6.761/EX, Rel. Min. Nancy Andrighi, DJe 16.10.2013; SEC 10.643/EX, Rel. Min. Humberto Martins, DJe 11.12.2014; SEC 9.600/EX, Rel. Min. Luis Felipe Salomão, DJe 28.10.2014; SEC 6.197/EX, Rel. Min. Herman Benjamin, DJe 02.02.2015; SEC 6.761/EX, Rel. Min. Nancy Andrighi, DJe 16.10.2013; SEC n. 5.828/EX, Rel. Min. João Otávio de Noronha, DJe 26.6.2013; SEC n. 4.439/EX, Rel. Min Teori Zavascki, DJe 19.12.2011; SEC n. 760/US, Rel. Min. Felix Fischer, DJ 28.08.2006. ?
12. Free translation. In the original, "*O procedimento de homologação de sentença estrangeira não autoriza o reexame do mérito da decisão homologanda, excepcionadas as hipóteses em que se configurar afronta à soberania nacional ou à ordem pública*." (SEC 9412/US, Rel. Min. Felix Fischer, DJe 30.05.2017). ?
13. Free translation. In the original, "*Ex vi do parágrafo único do art. 39 da Lei de Arbitragem*

brasileira, [citação do artigo] *III - Ademais, é farto o conjunto probatório, a demonstrar que a requerida recebeu, pela via postal, não somente a citação, como também intimações objetivando o seu comparecimento às audiências que foram realizadas, afinal, à sua revelia. IV - Observados os requisitos legais, inclusive os elencados na Resolução n. 9/STJ, de 4/5/2005, relativos à regularidade formal do procedimento em epígrafe impossibilitado o indeferimento do pedido de homologação da decisão arbitral estrangeira. V - Pedido de homologação deferido, portanto.*" (SEC 874/EX, Rel. Min. Francisco Falcão, DJ 15.05.2006). ?

14. "*Recognition of Foreign Award. Arbitral Award. Merit Issues. Irrelevance. Art. 38 of Law no. 9,307/96.* (...) *2. The existence of annulment proceedings of a foreign arbitral award in the domestic courts is not an impediment to the recognition of the foreign award; there is not breach of national sovereignty, hypothesis that would require the existence of a domestic decision on the same issues resolved by the arbitral tribunal. Law no. 9,307/96, art. 33, §2, provides that the award that grants a request for annulment will determine that the arbitrator or tribunal issues new award, which means that it is forbidden for the judge to issue a substitute award. Hence the existence of conflicting decisions. 3. Recognition granted for the foreign arbitral award.*" (free translation). In the original, "*Homologação de Sentença Estrangeira. Sentença Arbitral. Matéria de Mérito. Irrelevância. Art. 38 da Lei n. 9.307/96.* (...) *2. A existência de ação anulatória de sentença arbitral estrangeira em trâmite nos tribunais pátrios não constitui impedimento à homologação da sentença alienígena, não havendo ferimento à soberania nacional, hipótese que exigiria a existência de decisão pátria relativa às mesmas questões resolvidas pelo Juízo arbitral. A Lei n. 9.307/96, no §2º do seu art. 33, estabelece que a sentença que julgar procedente o pedido de anulação determinará que o árbitro ou tribunal profira novo laudo, o que significa ser defeso ao julgador proferir sentença substitutiva à emanada do Juízo arbitral. Daí a existência de decisões conflitantes. 3. Sentença arbitral estrangeira homologada.*" (SEC 611/EX, Rel. Min. João Otávio de Noronha, DJ 11.12.2006). ?
15. Except for matters on which the Brazilian courts hold exclusive jurisdiction under art. 23 of Brazil's Code of Civil Procedure, *verbis*: "It is for Brazilian judicial authorities, to the exclusion of all others, to: I – hear cases dealing with real property located in Brazil; II – in matters of succession, proceed with the probate of a holographic will and the sharing of an estate located in Brazil, even if the deceased has a foreign nationality or domicile outside Brazil; III – proceed with the sharing of property located in Brazil in cases of divorce, legal separation and dissolution of a civil union, even if the owner has a foreign nationality or domicile outside Brazil.". ?
16. "*Civil Process. Appeal in Contested Foreign Award Recognition Request. Request for the suspension of the judgment accepted. External preliminary. Suit in which it is discussed the validity of the award being processed in the first degree of jurisdiction. Impossibility of suspension. Reform of decision. 1. The filing of suit in Brazil discussing the validity of the arbitration clause because inserted, without emphasis, in an adhesion contract, does not prevent the recognition of the foreign arbitral award that deemed it valid. 2. The Supreme Court, when the constitutional competence for recognition of foreign awards was theirs, did not consider that a domestic lawsuit with the same object barred the recognition. Case law. The SCJ case law, still in formation on the matter, has been moving towards the same position. 3. Exception to this rule only when dealing with matters under exclusive international jurisdiction of Brazil, or in issue involving the interest of minors. Case law. 4. If one of the elements that would prevent recognition of foreign awards is the existence of a res iudicata award about the same object in Brazil, suspending the recognition proceedings until a lawsuit is decided in the country would imply advancing a still non-existent fact to extract from it effects that, presently, it does not have. 5.*

Appeal granted to determine the continuity of SEC's judgment." (free translation). In the original, "*Processo Civil. Agravo Regimental em Pedido de Homologação de Sentença Estrangeira Contestada. Pedido de Suspensão do Julgamento Deferido. Prejudicialidade Externa. Ação na qual se Discute a Validade da Sentença em Trâmite em Primeiro Grau de Jurisdição. Impossibilidade de Suspensão. Reforma da Decisum. 1. A propositura de ação, no Brasil, discutindo a validade de cláusula arbitral porque inserida, sem destaque, em contrato de adesão, não impede a homologação de sentença arbitral estrangeira que, em procedimento instaurado de acordo com essa cláusula, reputou-a válida. 2. A jurisprudência do STF, à época em que a homologação de sentenças estrangeiras era de sua competência constitucional, orientava-se no sentido de não vislumbrar óbice à homologação o fato de tramitar, no Brasil, um processo com o mesmo objeto do processo estrangeiro. Precedentes. A jurisprudência do STJ, ainda em formação quanto à matéria, vem se firmando no mesmo sentido. Precedente. 3. Exceção a essa regra somente se dava em hipóteses em que se tratava de competência internacional exclusiva do Brasil, ou em matéria envolvendo o interesse de menores. Precedentes. 4. Se um dos elementos que impediria o deferimento do pedido de homologação de sentença estrangeira é o fato de haver, no Brasil, uma sentença transitada em julgado sobre o mesmo objeto, suspender a homologação até que se julgue uma ação no país implicaria adiantar o fato ainda inexistente, para dele extrair efeitos que, presentemente, ele não tem. 5. Agravo regimental provido para o fim de determinar a continuidade do julgamento da SEC.*" (AgRg na SEC 854/EX, Rel. Min. Luiz Fux, DJe 14.04.2011). ?

17. The SCJ's Special Court is composed of 15 judges and meets, among others, to decide on requests for recognition that are challenged by the counterparty (Resolution SCJ n. 9/2005, art. 9º, § 1º). ?
18. Free translation. In the original, "*Sr. Presidente, estamos diante de um caso típico de competência concorrente. Em casos da espécie, a primeira decisão que transitar em julgado prejudica a outra. É da essência do sistema que, se transitar em julgado primeiro a sentença estrangeira, fica prejudicada a brasileira e vice-versa. Assim, se suspendermos o julgamento da homologação de sentença, nós estaremos, na prática, acabando com a competência concorrente e estabelecendo sempre a competência exclusiva brasileira*" (AgRg na SEC 854/EX, Justice Teori Zavascki's vote, DJe 07.11.2013, p. 56). ?
19. Free translation. In the original, "*No caso de competência concorrente, como não há litispendência nem está a autoridade judiciária brasileira impedida de processar a ação e as que lhe são conexas, nos termos do já citado art. 90 do CPC, e para se evitar o conflito jurídico pela existência de duas sentenças – uma nacional e outra estrangeira – com resultados possivelmente distintos para a mesma controvérsia, deve-se adotar o critério temporal, verificando a data do trânsito em julgado, para saber-se qual deve prevalecer no caso concreto. Em outras palavras, se já há coisa julgada no Brasil sobre a mesma lide, fica obstado o deferimento do pedido de homologação, porque haveria violação à res judicata. Por outro lado, se a decisão homologatória transitou em julgado antes da sentença proferida na demanda interna, inibe-se o prosseguimento do processo perante a jurisdição nacional, que deve ser extinto com base no inciso V do art. 267 do CPC. Em outras palavras, o processo de homologação de sentença estrangeira deve correr simultânea e paralelamente ao processo sobre o mérito que tramita no Judiciário brasileiro, sendo, pois, inconcebível a suspensão de qualquer deles. Tratando-se de jurisdição concorrente, a suspensão de um dos processos equivale à opção definitiva por uma das jurisdições, pois o processo que prosseguir certamente transitará em julgado primeiro, inibindo qualquer decisão no outro processo*" (AgRg na SEC 854, Justice Castro Meira's vote, Dje

14.04.2011, p. 25). ?

20. Under art. 34, sole paragraph, of the Brazilian Arbitration Law, "A foreign award is considered to be an award rendered outside the national territory". ?
21. Free translation. In the original, "(...) *uma vez homologada a sentença arbitral estrangeira, a extinção do processo judicial nacional, com o mesmo objeto, não se fundamenta na simples pactuação da convenção de arbitragem – a qual pode ser renunciada por acordo entre as partes – mas na obrigatoriedade que a sentença arbitral adquire no território nacional. Para ser homologada, a sentença arbitral estrangeira deve, necessariamente, ter-se tornado obrigatória para as partes. A este respeito, o enunciado normativo do art. 5º, §1º, e, da Convenção de Nova York, reproduzido no art. 38, VI, da Lei n.º 9.307/96, verbis:* [citação do artigo]. *No entanto, a obrigatoriedade da sentença arbitral estrangeira, que deve, segundo o art. 3º da Convenção de Nova York, ser assegurada pelos Estados partes, somente pode ser considerada pelas autoridades estatais nacionais a partir da sua homologação, momento em que adquire, nos termos dos arts. 483 do CPC e 36 da Lei 9.307/96, plena eficácia no território nacional.* (...) *Portanto, se a sentença arbitral estrangeira, depois da sua homologação, adquire plena eficácia no território nacional e não pode, em razão da sua obrigatoriedade, ser revista ou modificada pelo Poder Judiciário, não há como se admitir a continuidade de processo estatal com o mesmo objeto da sentença homologada. Ressalto, neste aspecto, que o Tribunal de origem reconheceu, de forma soberana (Súmula 07/STJ), que o pedido e a causa de pedir do processo arbitral instaurado na FOSFA abrangiam os da presente ação de cobrança e de indenização, não havendo, ademais, a recorrente apresentado qualquer irresignação a este respeito no recurso especial. Nesse contexto, a continuidade do processo judicial estatal, colocando em perigo a obrigatoriedade da sentença arbitral estrangeira homologada, poderia até mesmo configurar ilícito internacional, já que, como referido, o Brasil assumiu, com a ratificação da Convenção de Nova York, o compromisso de reconhecer como obrigatórias as sentenças arbitrais estrangeiras. Correta, portanto, a extinção do processo sem o julgamento do mérito determinada no acórdão recorrido.*" (REsp 1.203.430 – PR, Rel. Min. Paulo de Tarso Sanseverino, DJe 01.10.2012, pp. 11-12). ?
22. Enacted on March 2015; came into force on March 2016. ?
23. For instance, there is no violation of public policy when (i) the foreign award does not apply the *exceptio non adimpletus contractus* principle; or (ii) the parties opt for arbitration setting aside the possibility to go to the State courts. ?
24. Free translation. In the original, "(...) *não é qualquer contrariedade ao sistema jurídico local que pode implicar ofensa à ordem pública, de tal sorte que descabe ao STJ fazer análise profunda acerca do conteúdo e(ou) da justiça da decisão estrangeira quando não constatada malversação a valores fundamentais da cultura jurídica pátria.*" (SEC 4.024/EX, Rel. Min. Nancy Andrighi, DJe 13.09.2013, p. 7). ?
25. Free translation. In the original, "*Dado o caráter indeterminado de tais conceitos, para não subverter o papel homologatório do STJ, deve-se interpretá-los de modo a repelir apenas aqueles atos e efeitos jurídicos absolutamente incompatíveis com o sistema jurídico brasileiro.*" (SEC 9412/US, Rel. Min. Felix Fischer, DJe 30.05.2017). ?
26. Free translation. In the original, "*O conceito de ordem pública é amplo e o exame da sua violação, no juízo de delibação, delicado* (...) *Ao interpretá-lo, entretanto, em sede de homologação de sentença estrangeira, deve fazê-lo o aplicador do direito com vista a afastar da ordem jurídica aqueles atos absolutamente repugnantes à sua ordem social interna.*" (SEC 9.412/ US, Rel. Min. Felix Fischer, DJe 30.05.2017, p. 91). ?
27. "*Com efeito, não há nos autos elementos seguros de que a empresa requerida acordou com a*

cláusula compromissória, renunciando à jurisdição estatal, o que impõe o reconhecimento da incompetência do juízo arbitral." (SEC 866/GB, Rel. Min. Felix Fischer, DJ 16.10.2006).See, also, SEC 885/EX, Rel. Min. Francisco Falcão, DJe 13.08.2012; SEC 967/GB, Rel. Min. José Delgado, DJ 20.03.2006; SEC 978/GB, Rel. Min. Hamilton Carvalhido, DJe 05.03.2009; and SEC 12.236, Rel. Min. Mauro Campell Marques, DJe 25.04.2016. ?

28. "*Award partially recognized only excluding the order to withdraw the domestic proceedings and the criminal sanction, as these excluded part breach public policy.* (...) *4. - Impossibility to recognize the part of the foreign award that determines under sanction the withdrawal of annulment proceedings filed in Brazil, given the preservation of concurrent jurisdiction. 5. - Foreign award partially recognized to refer the parties to the arbitration proceedings, excluding, however, the determination of withdrawal of the suit filed in Brazil under sanction of fine*" (free translation). In the original, "*Deferimento, em parte, da homologação, excluída apenas a ordem de desistência do processo nacional e a sanção penal, ante a ofensa à ordem pública pela parte excluída.* (...) *4.- Impossibilidade de homologação de parte da sentença estrangeira que determina a desistência, sob sanção, de ação anulatória movida no Brasil, dada a preservação da concorrência de jurisdição. 5.- Sentença estrangeira parcialmente homologada, para a submissão das partes ao procedimento arbitral, afastada, contudo, a determinação de desistência, sob pena de multa, da ação movida no Brasil.*" (SEC 854/EX, Rel. Min. Massami Uyeda, DJe 07.11.2013). ?
29. "*I asked to see the suit for better analysis, mainly because it has impressed me the argument that the national sovereignty would have been being hurt, given that one of the awards intends to impose an obstacle to the continuance of a judicial lawsuit filed in Brazil. I think that a foreign judicial order cannot determine the extinction of a judicial suit in progress in the Brazilian courts. It is considering this premise that I develop my vote.* (...) *Concerning the enforcement by the United States courts of the arbitration clause freely agreed by the parties, I do not disagree from the Rapporteur's vote, because I understand that it deserves to be recognized. However, concerning the decision rendered on an injunction lawsuit that ordered the respondent to 'take, immediately, the necessary arrangements to archive the Brazil's suit…' (pg. 142), I think that cannot be made effective internally through recognition, as it is contrary to this country's legal system. If, on one hand, a dispute between the parties concerning material law arising from the signed contracts shall be settled by an arbitral tribunal since the arbitration clause implies a decision to set aside the possibility to submit the controversy to the State courts, on the other hand, it does not mean that the competent Court of the seat of arbitration is authorized to determine to other courts in which, eventually, material issues are being discussed to put an end to that suit or even to determine that one of the parties do it; this would breach art. 5º, XXXV of the Federal Constitution.*" (free translation). In the original, "*Pedi vista para melhor análise, principalmente porque impressionou-me o argumento de que a soberania nacional estaria sendo ferida, tendo em vista que uma das sentenças pretende impor óbice ao trâmite de ação judicial promovida no Brasil. Penso que uma ordem judicial alienígena não pode determinar a extinção de ação judicial em trâmite nos tribunais brasileiros. É considerando essa premissa que desenvolvo meu voto.* (...) *Com relação à imposição pelo Poder Judiciário Americano de cumprimento do compromisso arbitral firmado livremente pelas partes, não discordo do voto do Ministro Relator, pois entendo que merece ser homologada a sentença que assim determinou. Contudo, quanto à sentença proferida em sede de ação cautelar, que impôs ao requerido que "tomasse, imediatamente, as providências necessárias para arquivar o Processo do Brasil..." (fl. 142), penso que não se pode conferir a ela eficácia interna por meio da homologação, porquanto*

contraria o ordenamento legal pátrio. Se por um lado eventual litígio havido entre as partes atinente ao direito material advindo dos contratos firmados deverá ser dirimido no juízo arbitral, uma vez que a cláusula compromissória implica verdadeira renúncia de submissão do litígio ao Poder Judiciário, por outro lado, isso não quer dizer nem mesmo autoriza que o Juízo competente para julgamento de ação que vise o cumprimento do compromisso arbitral determine a outro, no qual, eventualmente, esteja sendo discutido direito material ou mesmo a cláusula compromissória, que ponha fim ao processo ou mesmo que determine a uma das partes que o faça, sob pena de ferir as disposições do art. 5º, XXXV da Constituição Federal." (SEC 854/EX, Judge João Otávio de Noronha's vote, pp. 28 e 30, DJe 07.11.2013).

"*In this context, it is necessary to verify whether the foreign award that contains civil and criminal sanctions, as well as a fine, because of the fact the adverse party (PARAMEDICS ELETROMEDICINA COMERCIAL LTDA. (TECNIMED), and PAULO IRAN FAGUNDES WERLANG), have not given up the lawsuit filed in Brazil aimed at recognizing the nullity of the arbitration clause, breaches or not the national sovereignty. According with what has been decided, it should be noted that the exercise of the right of demand, as an individual guarantee that is, has a constitutional seat, and it is not possible, therefore, to recognize a foreign award that simply determines the waiver of such right exercised in Brazil and that imposes, as a result of the non-compliance with a determination that is considered illegitimate, civil and criminal sanctions - this is absolutely unreasonable - as well as a fine.*" (free translation). In the original, "*Nesse contexto, impõe-se aferir se a sentença estrangeira que comina sanções civis e criminais, além de pena de multa, pelo fato de a parte adversa (PARAMEDICS ELETROMEDICINA COMERCIAL LTDA. (TECNIMED), e PAULO IRAN FAGUNDES WERLANG) não ter desistido da ação promovida no Brasil, destinada a reconhecer a nulidade do compromisso de arbitragem, fere ou não a soberania nacional. Por coerência ao que até aqui se decidiu, é de se assinalar que o exercício do direito de demanda, como garantia individual que é, tem assento constitucional, não se revelando possível, por isso, homologar sentença estrangeira que simplesmente determina a renuncia de tal direito exercido no Brasil e comina, em razão do descumprimento de determinação que se tem por ilegítima, sanções de natureza cível e criminal - esta absolutamente descabida -, além de pena de multa*" (SEC 854/EX, Judge Massami Uyeda's vote, pp. 46, DJe 07.11.2013).

"*A provision, however, of these foreign awards cannot be recognized. It is the one related to the determination, contained in the injunction judged abroad, ordering the Claimant to withdraw the lawsuit in progress in Brazil, under penalty of criminal liability. This determination clearly encounters an obstacle in the principle of access to justice, which is a clause of the Brazilian Constitution (article 5, XXXV), so that in this part recognition must be refused." (free translation). In the original, "Uma disposição, contudo, das presentes sentenças estrangeiras, não pode ser homologada. É a relativo à determinação, constante da Medida Cautelar julgada no exterior, ordenando que a contestante desistisse da ação em andamento no Brasil, sob pena de responsabilização criminal. Essa determinação claramente encontra obstáculo no princípio do acesso à Justiça, que é cláusula pétrea da Constituição Brasileira (CF, art. 5º, XXXV), de maneira que nessa parte deve-se recusar a homologação*" (SEC 854/EX, Judge Sidnei Benetti's vote, p. 66, DJe 07.11.2013). ?

30. Free translation. In the original, "(…) *Alegação de parcialidade do árbitro. Pressuposto de validade da decisão. Ação anulatória proposta no estado americano onde instaurado o tribunal*

arbitral. Vinculação do STJ à decisão da justiça americana. Não ocorrência. Existência de relação credor/devedor entre escritório de advocacia do árbitro presidente e o grupo econômico integrado por uma das partes. Hipótese objetiva passível de comprometer a isenção do árbitro. Relação de negócios, seja anterior, futura ou em curso, direta ou indireta, entre árbitro e uma das partes. Dever de revelação. Inobservância. Quebra da confiança fiducial. Suspeição. (...) *2. A prerrogativa da imparcialidade do julgador é uma das garantias que resultam do postulado do devido processo legal, matéria que não preclui e é aplicável à arbitragem, mercê de sua natureza jurisdicional. A inobservância dessa prerrogativa ofende, diretamente, a ordem pública nacional, razão pela qual a decisão proferida pela Justiça alienígena, à luz de sua própria legislação, não obsta o exame da matéria pelo STJ. 3. Ofende a ordem pública nacional a sentença arbitral emanada de árbitro que tenha, com as partes ou com o litígio, algumas das relações que caracterizam os casos de impedimento ou suspeição de juízes (arts. 14 e 32, II, da Lei n. 9.307/1996). 4. Dada a natureza contratual da arbitragem, que põe em relevo a confiança fiducial entre as partes e a figura do árbitro, a violação por este do dever de revelação de quaisquer circunstâncias passíveis de, razoavelmente, gerar dúvida sobre sua imparcialidade e independência, obsta a homologação da sentença arbitral* (...)" (SEC 9.412/US, Rel. Min. Felix Fischer, DJe 30.05.2017). ?

31. Free translation. In the original, "*Tais fatos evidenciam que o escritório do árbitro presidente teve contatos relevantes com sociedades do grupo Abengoa e com questões de alta importância para o grupo econômico no curso da arbitragem. Ainda que não se trate de relações cliente-advogado, por certo que não podem ser desconsideradas, sobretudo se levados em conta os valores nelas envolvidos, o que autoriza seu enquadramento na cláusula aberta de suspeição prevista no inciso V do art. 135 do CPC.*" (SEC 9.412/US, Judge João Otávio de Noronha's vote, DJe 30.05.2017, p. 33). ?
32. Free translation. In the original, "*De início, convém ressaltar que a imparcialidade do julgador não é matéria de mérito, mas pressuposto processual subjetivo de validade de toda relação processual que se desenvolva num Estado Democrático de Direito. Em outras palavras, em qualquer ordenamento onde vigorem os princípios da isonomia e do devido processo legal, a imparcialidade do julgador é pressuposto que deve estar presente para que o mérito de qualquer processo seja validamente por ele julgado* (…) *Assim, como a violação ao princípio da imparcialidade equivale a violar princípio e garantias constitucionais fundamentais da República Federativa do Brasil, trata-se de matéria de interesse público, de ordem pública e não sujeita à preclusão. Com efeito, a questão relativa à imparcialidade do julgador consubstancia matéria de ordem pública no Brasil e, portanto, é cognoscível a qualquer tempo, ainda que após a prolação da sentença, já que por ser até mesmo causa suficiente para ação rescisória (incisos I e II do art. 485 do CPC), com maior razão pode ser examinada quando em curso o processo de homologação de decisão em que se aponta a atuação de julgador parcial*" (SEC 9.412/US, Judge Nancy Andrighi's vote, DJe 30.05.2017, pp. 41 and 45). ?
33. Free translation. In the original, "*Esclareço que o art. 33 trata da ação de nulidade de sentença arbitral, mas o exame da questão da suspeição ou impedimento do árbitro pode ser feito, em se tratando de sentença arbitral estrangeira, também no processo de homologação, com base no art. 39, II, da lei, já que a imparcialidade do julgado é questão de ordem pública.* (...) *A existência desses pagamentos por empresas do Grupo Abengoa ao escritório do presidente do tribunal arbitral é fator que certamente levaria qualquer um, tendo conhecimento deles, a questionar se o árbitro não seria de alguma forma influenciado por eles, ainda que se apresentasse o argumento de que os pagamentos eram por serviços prestados ao Departamento de Energia. No mínimo, o*

chamado homem médio certamente diria que, na dúvida, seria melhor o árbitro ser outra pessoa. No caso, há a agravante de que não houve comunicação às partes da existência desses pagamentos, em desrespeito ao dever de revelação." (SEC 9.412/US, Judge Herman Benjamin's vote, DJe 30.05.2017, pp. 76, 77 and 79). ?

34. "*Recognition of Contested Foreign Arbitral Award. Article 34 of Law no. 9,307/1996. Initial application of international treaties with efficacy in the domestic legal system. Application of the Arbitration Law in the absence of these. Arbitration award annulled in the country of origin with res iudiciata. Judgment of deliberation. Does not allow examination of the merits of the arbitral award. Impossibility of the analysis of the foreign judicial decision. Rejection of the homologation claim. 1. Article 34 of Law no. 9.307/1996 provides that the foreign arbitral award will be recognized in Brazil, initially, in accordance with international treaties which are effective in the domestic legal system and that, only in the absence thereof, will be subject to the provisions of the Brazilian Arbitration Law. 2. In the case at hand, the arbitration award which is intended to be recognized was judicially annulled by the Argentine Judiciary with res iudicata. 3. The legislation applicable to the matter - New York Convention, Article V (1) (e) of Decree no. 4,311/2002; Panama Convention, Article 5 (1) (e) of Decree no. 1,902/1996; Brazilian Arbitration Law, Article 38, item VI, of Law no. 9,307/1996; and Protocol of Las Leñas, Article 20 (e) of Decree n. 2,067/1996, all internalized in the Brazilian legal system - leaves no doubt as to the indispensability of the foreign award, whether arbitral or not, to have reached res iudicata in order to be recognized by this Superior Court, having the domestic scholars the same understanding. 4. The Internal Rules of this Superior Court provides for fulfillment of the aforementioned requirement for the recognition of a foreign award, whether arbitral or not, as shown in the caput of article 216-D of the RI/STJ. 5. The recognition procedure does not add effects to the foreign award, but only releases the effects contained therein, internalizing its effects in our country, thus not serving to remove vices or give a different interpretation to the decision of a foreign State. Precedents of this Superior Court and the Federal Supreme Court. 6. In the case at hand, as this arbitration award is null in Argentina because of a judicial decision issued in that country with res iudicata, the arbitration award in Brazil is null and, therefore, cannot be recognized. 7. Request for recognition of foreign arbitral award rejected.*" (free translation). In the original, "*Homologação de Sentença Arbitral Estrangeira Contestada. Artigo 34 da Lei n. 9.307/1996. Incidência inicial dos tratados internacionais, com eficácia no ordenamento jurídico interno. Aplicação da Lei de Arbitragem na ausência destes. Laudo arbitral anulado no país de origem, com sentença judicial transitada em julgado. Juízo de delibação. Descabimento do exame do mérito da sentença arbitral. Impossibilidade da análise da decisão judicial estrangeira. Indeferimento da pretensão homologatória. 1. O artigo 34 da Lei n. 9.307/1996 determina que a sentença arbitral estrangeira será homologada no Brasil, inicialmente, de acordo com os tratados internacionais com eficácia no ordenamento interno e que, somente na ausência destes, incidirão os dispositivos da Lei de Arbitragem Brasileira. 2. No caso em exame, a sentença arbitral que se pretende homologar foi anulada judicialmente pelo Poder Judiciário Argentino, com decisão transitada em julgado. 3. A legislação aplicável à matéria – Convenção de Nova York, Artigo V(1)(e) do Decreto n. 4.311/2002; Convenção do Panamá, Artigo 5(1)(e) do Decreto n. 1.902/1996); Lei de Arbitragem Brasileira, Artigo 38, inciso VI, da Lei n. 9.307/1996; e Protocolo de Las Leñas, Artigo 20(e) do Decreto n. 2.067/1996, todos internalizados no ordenamento jurídico brasileiro – não deixa dúvidas quanto à imprescindibilidade da sentença estrangeira, arbitral ou não, ter transitado em julgado para ser homologada nesta Corte Superior, comungando a doutrina pátria do mesmo entendimento. 4. O Regimento Interno deste*

Sodalício prevê o atendimento do mencionado requisito para a homologação de sentença estrangeira, arbitral ou não, conforme se depreende do caput do artigo 216-D do RI/STJ. 5. O procedimento homologatório não acrescenta eficácia à sentença estrangeira, mas somente libera a eficácia nela contida, internalizando seus efeitos em nosso País, não servindo, pois, a homologação de sentença para retirar vícios ou dar interpretação diversa à decisão de Estado estrangeiro. Precedentes desta Corte Superior e do Supremo Tribunal Federal. 6. Na hipótese sob exame, sendo nulo na Argentina o presente laudo arbitral por causa de decisão judicial prolatada naquele País, com trânsito em julgado devidamente comprovado nos autos, nula é a sentença arbitral no Brasil que, por isso, não pode ser homologada. 7. Pedido de homologação de sentença arbitral estrangeira indeferido." (SEC 5.782/EX, Rel. Min. Jorge Mussi, DJe 16.12.2015). ?

35. Free translation. In the original, "*Desses excertos, a interpretação a que se chega é pelo não cabimento de homologação de sentença estrangeira arbitral suspensa ou anulada por órgão judicial do país onde a sentença arbitral foi prolatada. (...) Não se pode olvidar que o procedimento homologatório não acrescenta eficácia à sentença estrangeira, arbitral ou não, mas somente libera a eficácia nela contida, internalizando seus efeitos em nosso País, não servindo, pois, a homologação de sentença para retirar vícios ou dar interpretação diversa à decisão do Estado estrangeiro.*" (SEC 5.782/EX, Rel. Min. Jorge Mussi, DJe 16.12.2015). ?
36. Free translation. In the original, "*Ademais, tem-se que a estrutura de um laudo arbitral estrangeiro obedece à lei do local em que a arbitragem foi conduzida.*" (SEC 5682/US, Rel. Min. Ari Pargendler, page 2402 of the complete files).See, also, Brazil's Supreme Court, SEC 5720/AU, Rel. Min. Marco Aurelio Melo, DJ 22.02.1999: "*The formalities regarding the issuance of the foreign award are those established in the country where it is issued, there being no room to consider the structure of domestic judicial rulings.*" (Free translation. In the original, "*As formalidades alusivas à prolação da sentença estrangeira são aquelas previstas no país em que prolatada, descabendo cogitar da estrutura dos provimentos judiciais pátrios.*"). ?
37. "*It is important to emphasize that the New York Convention does not list lack of reasoning as a motive to deny recognition to an arbitral award under article V, where it deals with the reasons to deny recognition to an arbitral award.*". Free translation. In the original, "*Importante ressaltar que a Convenção das Nações Unidas sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras de 1958 (Convenção de Nova Iorque) em seu artigo V, ao dispor acerca das hipóteses de recusa de homologação de sentença arbitral, não elencou a falta de fundamentação como motivo de recusa ao reconhecimento a execução de um laudo arbitral.*" (SEC 5682/US, Rel. Min. Ari Pargendler, page 2402 of the complete files). ?
38. Brazil's Law n. 9.307/1996, Article 26. "The arbitral award must contain: (…) II – The grounds of the decision with due analysis of factual and legal issues, including, as the case may be, a statement that the award is made in equity;". ?
39. Brazil's Federal Constitution, Article 93. "A supplementary law, proposed by the Supreme Federal Court, shall provide for the Statute of the Judicature, observing the following principles: (…) IX – all judgments of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity (…)" ?
40. Brazil's Law n. 9.307/1996, Article 38. "Recognition or enforcement of the foreign arbitral award may be refused if the party against which it is invoked, furnishes proof that: I – The parties to the arbitration agreement were under some incapacity; II – The arbitration agreement was not valid under the law to which the parties have subject it, or failing any indication thereon, under the law of the country where the award was made; III – It was not given proper notice of the appointment

of an arbitrator or the arbitral proceedings, or was otherwise unable to present his case; IV – The arbitral award was issued beyond the scope of the arbitration agreement and it was not possible to separate the exceeding portion from what was submitted to arbitration; V – The commencement of the arbitration proceedings was not in accordance with the submission agreement or the arbitration clause; VI – The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court in the country where the arbitral award was made." ?

41. Brazil's Law n. 9.307/1996, Article 39. "Recognition or enforcement of a foreign arbitral award will also be refused if the Superior Court of Justice finds that: I – According to Brazilian law, the object of the dispute cannot be settled by arbitration; II – The decision violates national public policy." ?