The International Comparative Legal Guide to:
Enforcement of Foreign Judgments 2016

1st Edition

A practical cross-border insight into the enforcement of foreign judgments

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## Brazil

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### 1 Country Finder

1.1 Please set out the various regimes applicable to recognising and enforcing judgments in your jurisdiction and the names of the countries to which such special regimes apply.

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<th>Applicable Law/Statutory Regime</th>
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<td>OAS Inter-American Convention on International Commercial Arbitration 1975 – Panama Convention (Legislative Order No. 90, dated 6 June 1995 and Decree No. 1,902, dated 9 May 1996)</td>
<td>All signatory countries to the Convention</td>
<td>Section 3</td>
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<td>OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979 (Legislative Order No. 93, dated 20 June 1995 and Decree No. 2,411, dated 2 December 1997)</td>
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<td>UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 – New York Convention (Legislative Order No. 52, dated 25 April 2002 and Decree No. 4,311, dated 23 June 2002)</td>
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<td>Havana Convention on International Private Law 1928 – Bustamante Code (Decree No. 18,871, dated 13 August 1929)</td>
<td>Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay and Venezuela</td>
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2 General Regime

2.1 Absent any applicable special regime, what is the legal framework under which a foreign judgment would be recognised and enforced in your jurisdiction?

Brazilian law. In general terms, recognition may be defined as the admission and acknowledgment as to the existence, validity and enforceability of the relevant foreign decision by Brazil’s judicial authority responsible for such ratifications (i.e., the Superior Court of Justice). The recognition of a foreign judgment has the effect of legally transforming said decision into an enforceable decision within the Brazilian territory. In its turn, the enforcement of foreign judgments or awards may be defined as the process through which an interested party puts in force (enforces) the provisions contained in the – previously recognised – foreign judgment or award.

Considering the above, it is unlikely that a judgment creditor would be interested in solely seeking the recognition of the relevant foreign decision without carrying out its subsequent enforcement. Notwithstanding, once Brazilian Courts recognise a foreign judgment, it technically starts producing its effects in Brazil immediately, without the need for subsequent enforcement proceedings. In that sense, and especially when it comes to declaratory awards, it is possible that interested parties could solely pursue the recognition of the judgment.

2.2 What requirements (in form and substance) must a foreign judgment satisfy in order to be recognised and enforceable in your jurisdiction?

In Brazil, the basic formal and substantive requirements for the recognition and enforcement of foreign judgments or foreign arbitral awards are:

(a) judgments or arbitral awards must have been rendered by a state court or arbitral tribunal that held jurisdiction over the matter, according to the law of the jurisdiction of origin;

(b) as regards arbitral awards, it is necessary that the parties involved in the arbitral proceedings were legally capable of entering into arbitral agreements/clauses and the matter examined by the arbitral tribunal was indeed arbitrable under Brazilian Law;

(c) defendants must have been duly served process and been given the opportunity to present their case, or, in case a default judgment occurs, it must be evidenced that it was carried out lawfully;

(d) the content of the decision must not violate Brazil’s public policy, national sovereignty or the dignity of the human person;

(e) there must be no conflict between the decision to be recognised and a previous final domestic decision on the same matter and involving the same parties (please refer to question 2.7 below, for further details);

(f) the decision must be valid, lawful and enforceable in the jurisdiction where it was rendered (as a rule, the Superior Court of Justice only ratifies foreign decisions that became res judicata; however, said Court has precedents granting exequatur to letters rogatory issued by foreign authorities based on preliminary decisions);

(g) the original or a certified copy of the foreign judgment to be recognised must be presented together with a sworn translation and have been previously authenticated by the competent Brazilian consular authority; if it is a foreign arbitral award, it should be presented the original or a certified copy of the arbitration agreement as well, together with a sworn translation; and

(h) the foreign judgment or foreign arbitral award must in principle be reasoned.

2.3 Is there a difference between recognition and enforcement of judgments? If so, what are the legal effects of recognition and enforcement respectively?

Yes, recognition and enforcement are different concepts under Brazilian law. In general terms, recognition may be defined as the procedure through which a foreign judgment or foreign arbitral award may vary, on average, between 12 and 18 months, with a possible upward deviation of another 9 months. For each of the Stage 1 procedures, the length of the proceedings may vary considerably, depending on whether the opposite party agrees with the recognition request or challenge it, thus increasing the procedure’s complexity. A time estimate for the Superior Court of Justice to recognise a foreign judgment or a foreign arbitral award may vary, on average, between six months and two years.
Against a final decision recognising a foreign judgment or foreign arbitral award rendered by the Superior Court of Justice, the parties involved may present an extraordinary appeal, directing the case to the Federal Supreme Court of Brazil.

Once the recognition is granted by the Superior Court of Justice, the foreign judgment becomes res judicata, and the interested party may present a request for enforcement before competent Brazilian Federal Courts.

It is possible for the Superior Court of Justice to recognise only a part of the judgment in matter. This may occur either because the Court understands that only a part of the judgment was recognisable, or because the parties, for any given reason, requested the recognition of only part of the decision.

2.5 On what grounds can recognition/enforcement of a judgment be challenged? When can such a challenge be made?

Formal and substantive oppositions may be presented with the purpose of challenging requests for recognition of foreign decisions in Brazil. These oppositions may be presented before the Superior Court of Justice during the recognition proceedings.

The main grounds for opposing recognition consist in alleging that:

(a) the process was not duly served on the defendant;
(b) the decision in matter was issued by an incompetent state court or arbitral tribunal;
(c) the decision in matter fails to fulfil the requirements for it to be considered valid, lawful and enforceable in its jurisdiction of origin;
(d) the decision was granted in error;
(e) the interested party failed to observe the procedural requirements and/or provide the necessary documents for the recognition proceeding;
(f) the decision did not become res judicata and/or is not, for any given reason, enforceable in its jurisdiction of origin; and/or
(g) the decision in matter violates Brazil’s public policy, its national sovereignty or the dignity of the human person.

Concerning arbitral awards, certain specific defences may also be presented, such as:

(a) the parties lacked capacity for entering into/signing arbitral agreements/ clauses;
(b) the arbitration agreement/clause that led the parties to arbitration is invalid according to the law of the jurisdiction in which the proceedings were seated and the award was rendered;
(c) one or some of the parties was not given the opportunity to participate in the selection of arbitrators or in other relevant aspects of the proceedings and/or did not have the chance to present its case;
(d) the arbitral proceedings are, for any given reason, invalid under the law of the jurisdiction where the award was rendered;
(e) the arbitral award is, for any given reason, not binding and/or enforceable in the jurisdiction where it was rendered (the award is being challenged before state courts of the jurisdiction of origin, for example, and, therefore, has been set aside or suspended);
(f) the award settles disputes related to matters that are not arbitrable according to Brazilian Law (which admits arbitration only for the resolution of conflicts involving disposable patrimonial rights); and/or
(g) the arbitral award violates Brazil’s public policy, its national sovereignty or the dignity of the human person.

2.6 What, if any, is the relevant legal framework applicable to recognising and enforcing foreign judgments relating to specific subject matters?

There are no particular legal provisions applicable for the recognition and enforcement of foreign judgments or arbitral awards related to specific subject matters.

2.7 What is your court’s approach to recognition and enforcement of a foreign judgment when there is: (a) a conflicting local judgment between the parties relating to the same issue; or (b) local proceedings pending between the parties?

In Brazil, there is no lis pendens between domestic and foreign proceedings. Therefore, the first decision (domestic or foreign) to become res judicata will be enforceable in Brazil, and subsequent judgments on the matter are considered not enforceable. For these purposes, a foreign judgment may only be considered res judicata within the Brazilian territory when the corresponding decision of recognition granted by the Superior Court of Justice becomes final and not subject to appeal (also, therefore, res judicata).

2.8 What is your court’s approach to recognition and enforcement of a foreign judgment when there is a conflicting local law or prior judgment on the same or a similar issue, but between different parties?

A conflict between the content of a foreign decision and provisions of Brazilian law will only constitute an obstacle for the recognition and enforcement of said decision in Brazil if it is demonstrated that such conflict represents a violation of Brazil’s public policy, of its national sovereignty or of the dignity of the human person. Similarly, a prior judgment on the same or a similar issue involving different parties is not, at least in principle, an obstacle for the recognition and enforcement of foreign decisions in Brazil.

2.9 What is your court’s approach to recognition and enforcement of a foreign judgment that purports to apply the law of your country?

The Superior Court of Justice does not review the merits of the decision or award. Therefore, the recognition of foreign judgments in Brazil depends solely on the fulfillment of the necessary legal requirements (see question 2.2 above).

One relevant factor pertaining to this topic is that Brazilian law establishes that Brazilian Courts hold exclusive jurisdiction over certain subject matters. Therefore, any foreign judgment that decides on such matters is unrecognisable and unenforceable within the Brazilian jurisdiction.

2.10 Are there any differences in the rules and procedure of recognition and enforcement between the various states/regions/provinces in your country? Please explain.

There are no differences in the rules and procedure of recognition and enforcement between states/regions/provinces in Brazil.
2.11 What is the relevant limitation period to recognise and enforce a foreign judgment?

Under Brazilian law, the limitation period for the enforcement of a judgment is the same as that applicable to the filing of the procedure in which the state court or arbitral tribunal rendered the relevant decision.

3 Special Enforcement Regimes Applicable to Judgments from Certain Countries

3.1 With reference to each of the specific regimes set out in question 1.1, what requirements (in form and substance) must the judgment satisfy in order to be recognised and enforceable under the respective regime?

- **Las Leñas Protocol.** Judgments must: (a) be adequate to the formal requirements provided by the law of their jurisdiction of origin; (b) have been duly translated into the language of the jurisdiction where they are to be recognised and enforced; (c) have been rendered by a competent state court or arbitral tribunal; (d) have been rendered in a proceeding where service of process was duly provided and the defendant had the opportunity to present its case; (e) be enforceable in their jurisdiction of origin; and (f) not violate public order principles of the jurisdiction in which recognition/enforcement is sought.

- **Panama Convention.** Arbitral awards that are not appealable according to the applicable law shall have the force of a final judgment.

- **Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.** Judgments must: (a) fulfil the formal requirements to be considered authentic in the jurisdiction of origin; (b) have been officially translated into the language of the jurisdiction where they are to be recognised/enforced; (c) have been legalised under the law of the jurisdiction where they are to be recognised/enforced; (d) have been rendered by a competent state court or arbitral tribunal; (e) have been rendered in a proceeding in which the plaintiff was duly summoned or subpoenaed; (f) have been rendered in a proceeding in which the parties had the chance to present their case; (g) be final or have become res judicata in the jurisdiction of origin; and (h) not be contrary to principles of public order of the jurisdiction where they are to be recognised/enforced.

- **New York Convention.** Arbitral awards must be preceded by a valid arbitration clause or arbitration agreement, which must have been made in writing.

- **The MERCOSUL Accord on International Commercial Arbitration.** Arbitral awards must be given in writing, be reasoned and completely decide the controversy. Arbitral awards shall contain: (a) date and place where they were rendered; (b) the grounds that support their conclusions; (c) a decision that encompasses all matters submitted by the parties; and (d) information on the arbitration’s expenses.

- **Havana Convention (Bustamante Code).** Judgments rendered in one of the signatory jurisdictions may be executed in the others provided that: (a) they were rendered by a competent authority; (b) parties were duly notified to participate in the proceedings; (c) they do not violate the public policy or public laws of the jurisdiction in which recognition/execution is sought; (d) they are enforceable in their jurisdiction of origin; (e) they are duly translated to the language of the jurisdiction in which recognition/enforcement is sought; and (f) they fulfill the authenticity requirements set out by the laws of the jurisdictions involved.

3.2 With reference to each of the specific regimes set out in question 1.1, does the regime specify a difference between recognition and enforcement? If so, what is the difference between the legal effect of recognition and enforcement?

- **Las Leñas Protocol.** There is no explicit differentiation between recognition and enforcement, but it is possible to argue that such distinction is implicit.

- **Panama Convention.** There is no explicit differentiation between recognition and enforcement, but it is possible to argue that such distinction is implicit.

- **Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.** There is no explicit differentiation between recognition and enforcement, but it is possible to argue that such distinction is implicit.

- **New York Convention.** There is no explicit differentiation between recognition and enforcement, but it is possible to argue that such distinction is implicit.

- **The MERCOSUL Accord on International Commercial Arbitration.** There is no explicit differentiation between recognition and enforcement.

- **Havana Convention (Bustamante Code).** There is no explicit differentiation between recognition and enforcement.

3.3 With reference to each of the specific regimes set out in question 1.1, briefly explain the procedure for recognising and enforcing a foreign judgment.

- **Las Leñas Protocol.** Proceedings for the recognition and enforcement of foreign judgments are disciplined by the law of the jurisdiction where such decision is to be recognised and enforced. Recognition and enforcement required by judicial authorities are to be carried out through rogatory letters and between central authorities designated by each signatory state.

- **Panama Convention.** Provides that the recognition/enforcement of arbitral awards should be carried out in the same manner as judgments rendered by state courts, according to the law of the jurisdiction where they are to be recognised/enforced.

- **Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.** Proceedings for recognition/enforcement, including discussions related to jurisdiction, must be governed by the law of the jurisdiction in which the decision is to be recognised/enforced.

- **New York Convention.** Proceedings for the recognition/enforcement of arbitral awards must be carried out in accordance with the applicable rules of procedure laid out within the jurisdiction in which recognition/enforcement is sought. Conditions, fees and charges may not be substantially more onerous in comparison with the recognition/enforcement of domestic awards. The interested party should supply, when presenting its request for recognition, (a) the arbitral award (in its original version or a certified copy thereof), (b) the arbitral agreement/clause (in its original version or a certified copy thereof), and (c) if necessary, translations of said documents into the official language of the jurisdiction in which the award is to be recognised/enforced.

- **The MERCOSUL Accord on International Commercial Arbitration.** In what regards procedure for the recognition/enforcement of awards, the document refers to the rules provided by other international conventions.

- **Havana Convention (Bustamante Code).** The interested party should present its request for recognition/enforcement before the competent state court. The opposing party and
prosecuting attorney are heard within a term of 20 (twenty) days (through letters rogatory, if necessary), after which the court renders its ruling on the case. If recognition is granted, its execution is carried out as if it were a domestic judgment.

3.4 With reference to each of the specific regimes set out in question 1.1, on what grounds can recognition/enforcement of a judgment be challenged under the special regime? When can such a challenge be made?

- **Las Leñas Protocol.** The defendant may challenge recognition/enforcement if, in the jurisdiction where the decision is to be recognised/enforced, (a) a previous decision was rendered, involving the same parties, facts and object, thus being incompatible with the judgment to be recognised/enforced, or (b) there is a pending procedure involving the same parties, facts and object.

- **Panama Convention.** Recognition/enforcement may be challenged on the grounds that: (a) the arbitral agreement is invalid and/or parties lacked capacity for signing it; (b) the defendant was not duly notified of the proceeding, the appointment of arbitrators or in any way was denied the opportunity to present its case; (c) the award decides on matters not comprised in the scope of the arbitral agreement; (d) the arbitral proceeding – and/or the constitution of the arbitral tribunal – was carried out in a way that is incompatible with the terms of the arbitral agreement; (e) the relevant decision is not binding or has been suspended or set aside in the jurisdiction of origin; (f) the subject matter of the dispute is not arbitrable under the law of the jurisdiction in which the decision is to be recognised/enforced; or (g) the recognition/enforcement of the relevant decision would violate the public order of the jurisdiction in which it is to be recognised/enforced.

- **Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.** Recognition/enforcement may be challenged based on the non-fulfilment of any of the requisites described in question 3.1 above.

- **New York Convention.** Recognition/enforcement may be challenged on the same grounds provided by the Panama Convention, referred to above.

- **The MERCOSUL Accord on International Commercial Arbitration.** In what regards procedure for the recognition/enforcement of awards, the document refers to the rules provided by other international conventions.

- **Havana Convention (Bustamante Code).** Recognition/enforcement may be challenged based on the non-fulfilment of any of the requisites described in question 3.1 above.

4 Enforcement

4.1 Once a foreign judgment is recognised and enforced, what are the general methods of enforcement available to a judgment creditor?

Under Brazilian Law, enforcement proceedings can only start after the recognition of the foreign decision is granted by the Superior Court of Justice. Enforcement proceedings must follow the federal rules set forth in the Brazilian Code of Civil Procedure. The following methods may be applied for the enforcement of a duly recognised foreign judgment:

(a) imposition of a fine corresponding to 10% (ten percent) of the total amount of the debt, should the defendant fail to pay the debt within 15 (fifteen) days after service of process is completed;

(b) imposition of an additional fine corresponding to 20% (twenty percent) of the total amount of the debt, should the defendant fail to present, when ordered to do so, information related to assets that could be attached for the payment of the debt;

(c) attachment of the defendant’s assets, according to a preferential order stipulated by the Brazilian Code of Civil Procedure;

(d) online attachment of the defendant’s funds, through the Brazilian Central Bank’s integrated system; and

(e) in very specific – and extraordinary – circumstances, disregarding of the corporate entity and redirection of the enforcement proceedings towards the defendant’s shareholders.

5 Other Matters

5.1 Have there been any noteworthy recent (in the last 12 months) legal developments in your jurisdiction relevant to the recognition and enforcement of foreign judgments or awards? Please provide a brief description.

On 16 March 2015, a new Code of Civil Procedure was enacted in the country – Federal Law No. 13,105 – which will enter into force on 18 March 2016. This new piece of legislation provides an overhaul in the Brazilian civil procedure system, and contains important improvements also related to the recognition and enforcement of foreign judgments and awards (articles 960 to 965).

Another recent development that deserves mentioning – this one pertaining to case law – is the rendering of an unprecedented decision by the Brazilian Superior Court of Justice, in December 2015, on the matter of the recognition and enforcement of a foreign arbitral award that was annulled by state courts in its jurisdiction of origin – Argentina (SEC No. 5,782 – EX – 2011/0129084-7).

In this important case, the Court held that, since the Argentinean state courts annulled the arbitral award – annulment which, it is worth mentioning, had already become res judicata – the award should also be considered null in Brazil and, therefore, could not be recognised.

5.2 Are there any particular tips you would give, or critical issues that you would flag, to clients seeking to recognise and enforce a foreign judgment or award in your jurisdiction?

Seeking assistance and advice from Brazilian counsel when the foreign judicial or arbitral proceedings are still ongoing can help guarantee the future success of the recognition proceedings and the actual enforcement of the decision in Brazil. Parties interested in recognising and enforcing foreign judgments in Brazil should be aware that recognition proceedings might vary significantly in length and complexity depending on each specific case.
Renato Stephan Grion is a partner at Pinheiro Neto Advogados, based in São Paulo. Mr Grion concentrates his practice on commercial disputes before international and domestic arbitral tribunals, as well as on commercial mediations. He handles arbitration and mediation cases before virtually every major institution, including the ICC and other leading arbitration and mediation centres in Brazil and abroad. He also represents Brazilian and international clients in litigation in Brazil involving disputes over the enforcement of arbitral awards and arbitration agreements, as well as other transnational disputes.

Guilherme Piccardi de Andrade Silva is an associate at Pinheiro Neto Advogados. He holds a degree in law from the Pontifical Catholic University of São Paulo (Pontifícia Universidade Católica de São Paulo – PUC/SP) and focuses his practice on arbitration, civil and commercial litigation and international law.

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