

# Enforcement of Foreign Judgments

*Contributing editor*  
**Patrick Doris**



2017

GETTING THE  
DEAL THROUGH 

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*Contributing editor*

**Patrick Doris**

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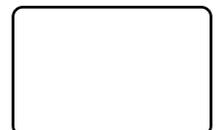


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# Brazil

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## 1 Treaties

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

Brazilian laws are generally favourable towards cooperation with other countries. Besides the statutory rules on judicial cooperation that apply to any foreign state, there are also bilateral treaties signed between Brazil and a number of states, such as France (1985), Peru (1993), Italy (1995), Argentina (1995) and Uruguay (1996). Those treaties are not identical, but most of them contain provisions aiming at expediting the acts that must be performed for the competent exequatur to be obtained from the Brazilian Superior Court of Justice.

Multilateral treaties have also been signed by Brazil on judicial cooperation with countries of the American continent under the Organization of American States (OAS) and the Common Market of the South (MERCOSUR). It is worth noting that Brazil is party to the OAS Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention), the OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

Except for the constitutional requirement of recognition of any foreign judgment by the Superior Court of Justice prior to its enforcement in Brazil, no relevant reservations have been made by Brazil to such treaties.

## 2 Intra-state variations

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

Enforcement of foreign judgments is ruled by federal law, which is applicable uniformly throughout Brazil.

## 3 Sources of law

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

Enforcement of foreign judgments in Brazil is founded in the Federal Constitution and regulated by ordinary legislation (mainly the Code of Civil Procedure), the applicable international treaties (which, once approved by the National Congress and enacted by a presidential decree, are incorporated into the Brazilian legal system) and the internal rules of the Superior Court of Justice.

The Brazilian Federal Constitution states that any foreign award – either issued by a judicial court or an arbitral tribunal – must be recognised by a specific superior court prior to its enforcement before Brazilian trial courts, irrespective of the existence of reciprocity or specific international treaty or convention between the country of origin of the judgment and Brazil. The current constitutional regulation, through article 105, I, 'i', determines the Superior Court of Justice as the only competent court in Brazil to hear cases concerning the 'recognition of foreign judgments and the granting of *exequatur* to letters rogatory' procedure regulated by the Superior Court of Justice's Internal Rules (*Regimento Interno*, RISTJ). The recognition proceeding is limited to the verification of formal aspects of

the foreign judgment in light of Brazilian sovereignty, public order and the principle of dignity of the human person. The merits of the foreign judgment are not revisited.

## 4 Hague Convention requirements

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

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

## 5 Limitation periods

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

There is no specific provision in Brazilian law with respect to the limitation period for enforcement of a foreign judgment. Guiding Precedent (*Súmula*) No. 150 of the Brazilian Federal Supreme Court states that 'enforcement is time-barred within the same period applicable to the relevant action [in which the enforceable judgment was rendered]'. Based on this precedent, most Brazilian scholars affirm that the limitation period for enforcement of a judgment is the same as that applicable to the filing of the court action or arbitration in the relevant foreign jurisdiction.

The limitation period for enforcement of a foreign judgment starts to run from the date on which the judgment became final and unappealable at the relevant jurisdiction.

## 6 Types of enforceable order

**Which remedies ordered by a foreign court are enforceable in your jurisdiction?**

Application for the enforcement of a foreign court order in Brazil (or the converse), such as summons, injunctive reliefs and subpoenas, must be made to the competent authorities by means of letter rogatory. The letter rogatory must comply with any applicable international convention as to admissibility and enforcement. If there is no applicable convention, the letter rogatory is translated into the language of the country where the order is to be carried out (in this case, Brazilian Portuguese), and is sent to the competent court through diplomatic channels. The enforcement of letter rogatory from foreign courts is subject to the Internal Rules of the Superior Court of Justice, as modified by Amendment No. 18 of 17 December 2014.

Before the Constitutional Amendment No. 45-2005, dated 30 December 2004 (which transferred the jurisdictional competence for analysis of letters rogatory and exequaturs from the Federal Supreme Court to the Superior Court of Justice), the established understanding of the Federal Supreme Court was to deny exequatur for any foreign order that could be understood as having a constrictive nature, such as an order for the freezing of assets or exhibition of documents in support of a foreign litigation.

In the last few years, however, the Superior Court of Justice and some Brazilian scholars, mostly based on the provision of article 216-O, first

paragraph, of the STJ Internal Rules (the *exequatur* shall be granted to letters rogatory related to both decision and non-decisional acts) have been manifesting – and even encouraging – a possible turnaround in the interpretation formerly adopted by the Federal Supreme Court. In recent case law, the *exequatur* to constrictive orders has been granted by the Superior Court of Justice so far primarily in cases where there is an express authorisation provided in judicial cooperation conventions or bilateral treaties signed by Brazil and the relevant foreign jurisdiction (all mainly when there are criminal acts in discussion or under investigation).

## 7 Competent courts

### Must cases seeking enforcement of foreign judgments be brought in a particular court?

As mentioned, the current constitutional regulation determines the Superior Court of Justice (STJ) as the only competent court in Brazil to hear cases concerning the ‘recognition of foreign judgments and the granting of *exequatur* to letters rogatory’.

Once recognition is granted by the STJ, actual enforcement is requested before the federal courts of the place where the obligation must be performed or where the respondent is domiciled.

## 8 Separation of recognition and enforcement

### To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The process of recognition of a foreign judgment is carried out exclusively before the Superior Court of Justice and aims at transforming said judgment into an enforceable decision within Brazilian territory (ie, equivalent to any judgment rendered within Brazilian territory). The process for enforcement of the then recognised foreign judgment is ultimately carried out before the federal court with jurisdiction over the place in which the obligation must be performed or the respondent is domiciled and aims at actually enforcing the orders of the judgment.

## 9 Defences

### Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant cannot raise merits-based defences or any other defences related to the scope of the foreign award. Through the process for recognition of the foreign judgment, the STJ will solely analyse the compliance of formal requirements under Brazilian law, as well as whether the foreign judgment is in accordance with national sovereignty, public policy and the dignity of the human person.

## 10 Injunctive relief

### May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Although the grounds for defence are defined in the applicable laws and rules, the defendant is entitled to fully exercise its right of defence in both the process for recognition of the foreign award before the Superior Court of Justice and the subsequent process for enforcement thereof before the competent federal court.

In exceptional and duly justified circumstances, however, the defendant may file for injunctive relief to prevent proceedings from either being initiated (anti-suit injunction) or following its regular course (stay-effect injunction). To that end, the defendant must prove that the processing of the recognition and/or the enforcement requests would cause it irreparable damages. Even in such a situation, however, the claimant party may plead for the regular development of the proceedings by offering security (bond) in an amount to be determined by the court.

## 11 Basic requirements for recognition

### What are the basic mandatory requirements for recognition of a foreign judgment?

The Internal Rules of the Superior Court of Justice (RISTJ) sets forth, in its articles 216-C and 216-D that the recognition will be granted if:

- the judgment is entered by a competent court in the jurisdiction of origin;
- the parties are regularly served process in the original case;
- the judgment is final and unappealable, complying with the necessary formalities in the country where the award was rendered; and
- the judgment is legalised by the Brazilian consulate and translated into Portuguese by a sworn translator in Brazil.

In addition, the RISTJ also establishes that the recognition will be denied if the award or the letter rogatory awaiting *exequatur* violates Brazil’s national sovereignty, public policy or the dignity of the human person. In the case of a foreign arbitral award, it is also necessary to demonstrate the existence of a valid arbitration agreement and its sworn translation into Portuguese.

The recognition of foreign judgments in Brazil commences with the interested party presenting a recognition request (in the form of a petition or application in writing) to Brazil’s Superior Court of Justice, and providing the necessary documents to demonstrate the fulfilment of the formal and substantive requirements for ratification.

After the filing of the recognition request, the President of the Court may demand that the interested party presents additional documents or amend its initial application. Should the court interpret that documents presented by the plaintiff are sufficient and the request is adequate, it will determine that service of process be effected on the defendant, which will then have the opportunity to present its response.

If the defendant assents to the recognition request, the President of the Court him or herself decides the case. Should the defendant challenge the request, the court may determine the plaintiff and defendant to provide, respectively, their reply and rebuttal, and the case is remitted to the Superior Court of Justice’s Special Court (composed by the most senior Justices of the Court). The Public Attorneys’ Office is then notified to present an opinion on the case.

Finally, after the Public Attorneys’ Office has given its opinion, the Special Court proceeds to render its final decision.

## 12 Other factors

### May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Except for the existence of specific terms and requirements set forth in some bilateral or multilateral treaties to which Brazil is a party, there are no other factors for recognition of a foreign judgment to be considered than those mentioned above.

## 13 Procedural equivalence

### Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no specific requirement that the judicial proceedings where the judgment was entered should correspond to the proceedings in Brazilian jurisdiction. Nevertheless, the STJ should consider whether a minimum degree of respect for the due process of law has been observed, as the foreign judgment must not violate Brazil’s public policy, national sovereignty or the dignity of the human person. The defendant must have been duly served process and given the opportunity to present its case in the foreign proceedings; in the event that a default judgment occurred, it must be evidenced that it was carried out lawfully.

## 14 Personal jurisdiction

### Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Article 216-D of the RISTJ requires that the foreign judgment was issued by ‘a competent authority’, which means that the court where the judgment was entered should have had personal jurisdiction over the defendant. In its request for recognition, the claimant should expressly state that this requirement has been met. If the defendant, in its response to the claimant’s request, challenges compliance with this requirement, the parties will be allowed to produce all sorts of evidence as may be necessary to prove their allegations.

### Update and trends

In 2016 Brazil ratified the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention), which was concluded at The Hague in 1961, through the enactment of Federal Decree 8,660. The convention aims at removing the requirement of diplomatic or consular legalisation of foreign documents, which may facilitate the submission of requests for recognition and enforcement of foreign judgments, among others.

### 15 Subject-matter jurisdiction

**Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?**

The answer to question 14 is also applicable. The court where the judgment was entered should have had both personal and subject-matter jurisdiction over the defendant.

### 16 Service

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

In principle, service of process on the defendant should follow the law governing the relevant action. However, it is considered a matter of public policy – and is therefore mandatory – that service of process on a party who is resident or domiciled in Brazil to appear in a legal action initiated at a foreign court must be made in Brazil through a letter rogatory (it cannot be made by fax or letter sent by lawyers, for example). The letter rogatory and the documents attached thereto should be translated into Portuguese by an official translator and sent to Brazil through diplomatic channels. The service must be supervised by a Brazilian court and carried out by a court official.

### 17 Fairness of foreign jurisdiction

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

Under Brazilian law, the relative inconvenience of the foreign jurisdiction to the defendant is not a cause for the recognition and enforcement requests to be denied, provided that the Brazilian defendant has been duly served process and given full opportunity to present its case before the foreign court.

### 18 Vitiating by fraud

**Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?**

Upon analysing the request for recognition, the STJ will focus on the formal requirements mentioned above, and will not analyse the merits of the foreign judgment. However, if the occurrence of fraud is proved and such fraud is proved to have impaired the exercise by the defendant of its right of defence, this may be accepted by the STJ as a cause of denial of the claimant's request for recognition and subsequent enforcement.

### 19 Public policy

**Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?**

The STJ will decline to recognise the validity of the foreign judgment if it violates Brazil's national sovereignty, public policy or the dignity of the human being. Inconsistency with Brazil's substantive laws is not relevant unless such inconsistency is deemed a violation of these three principles.

### 20 Conflicting decisions

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

There is no specific rule as to how the STJ should act if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties, whether in the country where the foreign judgment was taken or in a third country. In principle, once it is proved that the foreign judgment sought to be enforced is final and unappealable and was rendered by a competent court, the existence of another decision rendered outside of Brazil should not be taken into consideration by the STJ.

However, if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment issued in Brazil involving the same parties and the same subject matter, the Brazilian judgment will be considered *res judicata* and should prevail, thus impeding the foreign judgment from being enforced.

### 21 Enforcement against third parties

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

As a rule, the request for recognition at the STJ should be processed between the same parties to the action where the judgment sought to be recognised was rendered, and the subsequent enforcement will commence against the named judgment debtor. However, during the course of the enforcement proceedings, the creditor may request application of the disregard doctrine based on article 50 of the Brazilian Code, which states that the corporate veil of a company may be disregarded by the court to achieve the personal assets of its managers and shareholders at the request of the interested party and/or the Public Prosecutor Office, in the event of abuse of power, characterised by deviation from its purpose (where it is proved that the company distorted its objectives and was used to cover up the practice of irregularities) and commingling of assets (where there is equity confusion between the assets of the partners and the corporate entity in which they take part).

### 22 Alternative dispute resolution

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

If the parties had an enforceable arbitration agreement and the party seeking to enforce disregarded such an agreement and directly resorted to court, if the defendant submitted a timely motion to dismiss based on non-compliance by the claimant with the arbitration agreement and if the court even so proceeded with the action until final judgment, then it is likely that the defendant will succeed in its challenge to the claimant's request for enforcement of the judgment at the STJ. This is because Brazilian law fully recognises the enforceability of the arbitration agreement and the principle of competence-competence, which preserves the powers of arbitrators to decide on their own jurisdiction. Other alternative means of dispute resolution, such as mediation and conciliation, although provided in Brazilian legislation as well, do not have the same enforceability as arbitration.

### 23 Favourably treated jurisdictions

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

No. Due to some bilateral and multilateral treaties, some requests for judicial cooperation may be given greater deference, but recognition and enforcement of foreign judgments are all subject to the same treatment by the STJ and subsequently by the competent federal court.

**24 Alteration of awards**

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

Article 216-A, second paragraph, of the RISTJ sets forth that 'foreign judgments may be partially recognised'. That means that only a part or certain parts of the judgment may be recognised, but the STJ is not expected to alter or limit a damage award.

**25 Currency, interest, costs**

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

The STJ recognises the foreign judgment in its complete terms, including the amount of the damage award in the original currency, which may or may not include court costs and related fees, as well as other factors, such as interest at the rate established in the judgment. Filing of the subsequent enforcement proceedings at the federal court requires conversion of the damage award into Brazilian reais, and from this moment on the amount in reais will start to accrue inflation-based monetary adjustment and legal interest at the rate established by Brazilian law until actual payment by the debtor.

**26 Security**

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

The party may appeal from a judgment recognising a foreign judgment either to the STJ itself or to the Federal Supreme Court, in accordance with the relevant rules. Enforcement of the recognised foreign judgment may then be immediately initiated at the competent federal court.

**27 Enforcement process**

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

The recognised foreign judgment has the same force and validity as a national judgment and its enforcement follows the provisions of the Brazilian Code of Civil Procedure with respect to the enforcement of judicial executive titles. Once the enforcement request is filed by the creditor, the debtor is served to pay within 15 days. If payment is not made within such period, a penalty of 10 per cent is automatically added to the debt and the creditor is entitled to appoint the debtor's assets it wishes to be constrained for payment purposes. After the constriction and evaluation of the attached assets, the debtor is again served to file, if so desired, an opposition, which does not affect the course of the enforcement proceedings unless the judge determines otherwise. The range of defences is limited. If the defendant again does not pay the debt, the attached property shall be evaluated and sold in a public auction and the values are reverted to pay the creditor. The Brazilian legal system does not provide for any criminal sanction for debtors.

**28 Pitfalls**

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

The Brazilian judicial system is trustworthy, not protectionist and gives the same deference to national and foreign litigators. However, the duration of court proceedings is still the most significant pitfall in pursuing an expeditious outcome for any dispute in Brazil, due to the enormous number of court proceedings under way before both the common and the federal courts. A process for recognition of a foreign judgment at the STJ, if contested by the defendant, may take up to two years to be concluded, and the subsequent process for enforcement of the recognised judgment may take from two to three years.

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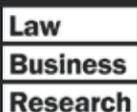
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