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ARBITRATION LAW IN BRAZIL: AN INEVITABLE REALITY

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I. INTRODUCTION

On December 12, 2001, the Brazilian Supreme Court[1] by a majority

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1. The Brazilian Supreme Court (Supremo Tribunal Federal) consists of eleven Justices that are appointed by the President and thereafter approved by the absolute majority of the Federal

vote upheld the constitutionality of the Brazilian Arbitration Act ("Arbitration Law").[2] By doing so, the Court effectively ended five years of controversy surrounding arbitration in the Brazilian legal and business community.[3] This long-anticipated ruling revived the expectations of interested parties and restored them to the levels that existed at the time arbitration laws were first passed.

Several articles and books following the Supreme Court's decision greeted the Arbitration Law as a catalyst that would successfully change dispute resolution in private matters.[4] Indeed, the new Arbitration Law is expected to have a propitious impact in the area of private international arbitration. For example, the possibility of settling contractual matters through arbitration will likely become a reality since ninety percent of international trade contracts contain arbitration clauses.[5] Also, the new Arbitration Law may help Brazilian commerce gain worldwide credibility by subjecting its international controversies to globally accepted legal rules.

Furthermore, the new Arbitration Law will also alleviate the Brazilian judiciary's caseload, thereby enhancing its effectiveness. The Brazilian judiciary has long been plagued by a large backlog and, as a result, the average dispute now takes nearly five years for resolution. Consequently, a large number of people have been denied justice, through either governmental oppression or the growing gap between the rights of citizens and their inability to secure legal representation. Renowned legal scholar, Arnold M. Zack, illustrates this growing phenomenon by indicating that "the problem can be traced to the high cost of legal representation, the increasing complexity and litigiousness of the legal process and the limited financial resources of the citizens allegedly being protected by such

Senate. The Court decides constitutional matters and its basic mission is to "safeguard the Constitution." Constituição Federal [C.F.] [Constitution] art. 102 (Braz.).

2. Lei No. 9.307/96, de 23 de setembro de 1996, D.O.U de 09.24.1996, *translated in* Brazil: Arbitration Act, 36 I.L.M. 1562 (1997) [hereinafter Arbitration Act].

3. R.S.T.F., No. 5.206-7, Relator: Sepúlveda Pertence, 12.12.2001, R.T.J., 12.19.2001, Ata No. 40.

4. *See, e.g.*, JOEL DIAS FIGUEIREDO, JR., ARBITRAGEM, JURISDIÇÃO E EXECUÇÃO: ANÁLISE CRÍTICA DA LEI 9.307, DE 23.09.1996 (1999); PEDRO A. BATISTA MARTINS ET AL., ASPECTOS FUNDAMENTAIS DA LEI DE ARBITRAGEM (1999); ARBITRAGEM: A NOVA LEI BRASILEIRA (9.307/96) E A PRAXE INTERNACIONAL (Paulo Borba Casella et al. coord., 1997); JOSÉ M. ROSSANI GARCEZ ET AL., A ARBITRAGEM NA ERA DA GLOBALIZAÇÃO (1997); BEAT WALTER RECHSTEINER, ARBITRAGEM PRIVADA INTERNACIONAL NO BRASIL, DEPOIS DA NOVA LEI 9.307, DE 23.09.1996: TEORIA E PRÁTICA (1997).

5. Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 WORLD ARBITRATION & MEDIATION REPORT 10 (1995-1996) [hereinafter Zack].

legislation."[6] In other words, high costs, the long duration of court proceedings, the limited incomes of claimants, and the relative inaccessibility of relief have all exacerbated the judicial backlog in Brazil.

The following numbers demonstrate the immense backlog that accumulated in Brazil prior to the Arbitration Law's promulgation. From 1993 to 1995, the 33 Justices of Superior Tribunal de Justiça ("STJ") [7] adjudicated 106,000 cases, while 51,000 other cases were immediately dismissed.[8] As a result, each Justice averaged an alarming 3,300 rulings during this period. The Supreme Court has experienced similar results but on a rather smaller scale – 11 Justices deciding 35,000 cases. During the judiciary's recess, from December 21, 1996 to January 17, 1997, the Brazilian Supreme Court received more than 9,000 lawsuit filings, of which the Supreme Court's President was forced to decide 86 cases on an urgent basis.[9] In Brazilian federal and state courts, there were approximately eight million lawsuits filed during 1996, half of which were filed in São Paulo, Brazil.[10] In addition, the numbers of lawsuits filed in Labor Courts have dramatically increased since 1994.[11] In March 1997, for example, there were 100,000 suits filed in the Labor Supreme Court (*Tribunal Superior do Trabalho*).[12]

As a result of this growth in litigation, the burden on society has increased since the financial resources come from the Brazilian taxpayers. As such, solutions regarding the system's efficiency must be ascertained. The new Arbitration Law is a possible solution that can effectively decrease the burden on courts, while providing equitable results at the same time. This proposed solution has been addressed in the United States:

> In the United States, the widespread inaccessibility to justice for the vast majority of the 100,000,000 members of the U.S. workforce led the Dunlop Commission on the Future of the Worker-Management Relations to recommend, in its December 1994 Report, the use of arbitration with due process standards as an alternative, both to the cost and delay of relatively inaccessible judicial relief . . . .[13]

6. *Id.*

7. The Superior Tribunal de Justiça ("STJ") is the Brazilian Supreme Court (the highest federal court of appeals) for all non-constitutional matters.

8. ACESSO À JUSTIÇA 12 (Bryant Garth & Mauro Capelletti eds., 1988).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Zack, *supra* note 5 at 10; s*ee also* Pedro Antonio Batista Martins, *Anotações Sobre a Arbitragem No Brasil e o Projeto de Lei no Senado 78/92*, 77 REVISTA DE PROCESSO 25, 58-59 (1995).

Despite expectations of interested parties, clogged court dockets, and the consternation of the legal community, Supreme Court Justice Sepúlveda Pertence delivered his opinion in the "*Agravo Regimental*,"[14] holding that certain articles of the Arbitration Law were unconstitutional.[15] His ruling, however, defied the opinion of the Brazilian Attorney General (*Procurador-Geral da República*) who earlier stated that all of the Arbitration Law provisions were indeed constitutional.[16] Moreover, on May 8, 1997, following Justice Sepúlveda Pertence's ruling, Justice Nelson Jobim reviewed the proceedings and delivered the final ruling on December 12, 2001, recognizing the constitutionality of the new Arbitration Law in Brazil.[17]

Had the Court declared the Arbitration Law unconstitutional, private parties would be unable to enforce existing arbitration clauses in contracts. By contrast, upholding the constitutionality of the Arbitration Law will encourage the settlement of contractual disputes through arbitration and thus promote both foreign and domestic business transactions.

This article examines the new Brazilian Arbitration Law, its recognition, and enforcement of foreign arbitral awards in light of recent developments. Part II outlines the history of Arbitration Law in Brazil and its basic framework. Part III describes the most important international arbitration conventions and how they relate to Brazil's newly enacted Arbitration Law. Part IV provides essential information on arbitration law in the United States. Part V discusses the administration of Arbitration in Brazil. Part VI compares Brazilian and United States arbitration laws. Finally, Part VII concludes this article with some final remarks regarding the highly anticipated Brazilian Arbitration Law. This article will not discuss arbitration procedures, a field covered by many scholars and commentators.

II. THE NEW BRAZILIAN ARBITRATION LAW'S BASIC LEGAL FRAMEWORK

Brazilian arbitration law was strongly influenced by the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration

14. STF, No. 5.206-7, Relator: Sepúlveda Pertence, 10.10.1996, D.O.U. 10.21.1996, Ata No. 40. This case is an appeal from a ruling by the President of a court or bench (in the case of the Supreme Federal Tribunal) (per art. 222; unique to the STF's Internal Rules - RISTF), and it is addressed to the largest body of the same court.

15. *Id.*

16. *Id.*

17. *Id.*

Rules, which was enacted in 1976.[18] In 1985, the United Nations approved the UNCITRAL Model Law on International Commercial Arbitration,[19] and published the UNCITRAL Notes on Organizing Arbitral Proceedings in 1996.[20] The UNCITRAL Model Law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[21] ("New York Convention"), and the Inter-American Convention on International Commercial Arbitration[22] ("Panama Convention") all had a profound impact on Brazil's new Arbitration Law,[23] although Brazil had ratified only the latter at the time it enacted the Arbitration Law.[24]

The new Arbitration Law has extended and modernized old and archaic rules set forth in the Brazilian Civil Code and the Brazilian Civil Procedure Code. For example, the previous arbitration law (*Cláusula Compromissória*) refused to enforce agreements to arbitrate future disputes.[25] By contrast, the new Arbitration Law enforces arbitration clauses, which refer to *future disputes*, and arbitral submissions (*compromisso arbitral*) that refer to *pending disputes*.[26] Equally important, Articles 6 and 7 of the new Arbitration Law provide for specific judicial enforcement regarding a party's obligation to sign the arbitral submission.[27]

18. *Arbitration Rules of the United Nations Commission on International Trade Law*, G.A. Res. 31, U.N. GAOR, Supp. No. 17, U.N. Doc. A/31/17 (1976).

19. *Report of the United Nations Commission on International Trade Law*, G.A. Res. 40/17, U.N. GAOR, Supp. No. 17, at para. 360, U.N. Doc. A/40/17 (1985) *reprinted in United Nations International Commission on Trade Law: Model Law on International Commercial Arbitration*, 24 I.L.M. 1302, 1308 (1985).

20. *UNCITRAL Notes on Organizing Arbitral Proceedings*, U.N. Commission on International Trade Law, U.N. GAOR, 29th Sess., at para. 21, U.N. Doc. A/51/17 (1996); *see generally* Howard M. Holtzmann, *Introduction to the UNCITRAL Notes on Organizing Arbitral Proceedings,* 5 TUL. J. INT'L & COMP. L. 407 (1997).

21. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1985, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

22. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, OAS SER A20 (SEPEF), 14 I.L.M. 336 (1975) [hereinafter Panama Convention]. The text of this Convention is reprinted in the notes following § 301 of Chapter 3 of the Federal Arbitration Act, 9 U.S.C.A. § 301 (West 1999).

23. MARTINS ET AL., *supra* note 4, at 58-59.

24. See *supra* notes 19-22 and accompanying text. The Arbitration Act clearly incorporated the New York Convention's Article V language in its Articles 38 and 39.

25. "Brazilian Civil Code: Arts. 101 and 1.072 to 1.102 of Act number 5.869 of 11 January 1973, Code of Civil Procedure; and other provisions to the contrary are revoked." Arbitration Act, *supra* note 2, art. 44, at 1577.

26. Arbitration Act, *supra* note 2, arts. 3 and 4, at 1565.

27. The Arbitration Act states:

> Art. 6. Sole Paragraph. If the summoned party does not appear or, if present, refuses to sign the arbitration agreement, the other party may make an application in accordance with Article 7 of this Act before the judicial body which originally would have had jurisdiction over the action[.]

In addition, the Arbitration Law recognizes both domestic and foreign arbitral awards. In accordance with the Arbitration Law, recognition of a foreign arbitral award may only be denied in a few limited circumstances, such as where there is an invalid arbitration agreement, a due process violation, or an arbitration award that is beyond its proper scope.[28] Furthermore, Articles 38 and 39 of the Arbitration Law incorporate the language of Article V of the New York Convention,[29] and permits the Brazilian Supreme Court to deny the homologation of a foreign arbitral award.[30] Local arbitral awards are fully enforceable under the Arbitration

> Art 7. Should an arbitration clause exists and opposition to instituting arbitration exists, the interested party may make an application for the other party to be summoned to appear before the court in order to draw up an agreement, the judge appointing a hearing to that end.
>
> § 1 The appellant shall indicate, with accuracy, the purpose of the arbitration, attaching to the application the document containing the arbitration clause.
>
> § 2 Should the parties attend the hearing, the judge shall firstly try to settle the dispute. Not succeeding, the judge shall try to direct the parties, in agreement, to sign the arbitration clause.
>
> § 3 Should the parties not be able to agree on the provisions of the arbitration agreement, the judge shall decide, after the hearing the respondent, on its content, in the same hearing, within a period of ten days with respect to the provisions in the arbitration clause, considering what is stipulated in Arts. 10 and 21, § 2 of this Act.
>
> § 4 If the arbitration clause states nothing about the appointment of the arbitrators, it shall fall to the judge, after hearing the parties, to establish this, it being possible for the judge to appoint a sole arbitrator to find a solution to the dispute.
>
> § 5 The absence of the appellant at the hearing, designated for the drawing up of the arbitration agreement, without just cause, shall cause the termination of the proceedings without judgment on merits.
>
> § 6 If the respondent does not appear before the court, it falls to the judge, after having heard the appellant, to stipulate the contents of the agreement and to appoint a sole arbitrator.
>
> § 7 The judgment which is pronounced, arising from the application, shall amount to the arbitration agreement.

Arbitration Act, *supra* note 2, arts. 6 and 7, at 1566-67.

28. Arbitration Act, *supra* note 2, arts. 38 and 39, at 1575-76.

29. New York Convention, *supra* note 21, art. V, at 2520, 330 U.N.T.S. at 40, 42.

30. The Arbitration Act states:

> Art. 38. The validation of the recognition or enforcement of the foreign arbitral judgment shall only be negated, when the respondent proves that:
>
> I - the parties to the arbitration convention did not have capacity;
>
> II - the arbitration convention was not valid under the law which the parties chose to govern it or, failing any indication thereof, under the law of the country where the arbitral judgment was pronounced.;
>
> III - he was not notified about the appointment of the arbitrator nor about the arbitration proceedings and the adversary principal was violated, rendering a legal defense impossible;
>
> IV - the arbitral judgment was pronounced outside the scope of the arbitration convention and it was not possible to separate that part which exceeds the scope from that part which falls within the scope of the arbitration convention;
>
> V - the arbitration institution is not in accord with the arbitration agreement or the arbitration clause;
>
> VI - the arbitral judgment has not yet become binding on the parties, has been set

Law and are not subject to the requirement of confirmation by any Brazilian court.

III. AN OVERVIEW OF THE MOST IMPORTANT INTERNATIONAL CONVENTIONS REGARDING ARBITRATION AND HOW THEY AFFECT BRAZILIAN ARBITRATION LAW

A. *The New York Convention*

On June 10, 1958, the United Nations Conference on Commercial Arbitration convened in accordance with resolution 604 (XXI) of the Economic and Social Council of the United Nations and prepared the New York Convention.[31] The New York Convention is generally recognized as the most important treaty in international arbitration, superseding the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Enforcement of Foreign Arbitral Awards of 1927.[32] The purpose of the New York Convention is to liberalize procedures for enforcing foreign arbitral awards.[33] It imposes obligations on its members to recognize arbitration agreements, refer litigants within its courts to arbitration proceedings (unless the parties' agreement is found to be void), recognize awards under such agreements, and to enforce the agreements by expeditious proceedings.[34] The New York Convention was adopted by twenty-six of the forty-five states participating in the conference and, as of October 2002, one hundred and thirty two countries have since ratified it.[35]

On June 7, 2002, Brazil acceded to the New York Convention.[36] Brazil

> aside or has been suspended by a judicial body of the country where the arbitral was pronounced.
>
> Art. 39 The validation of the recognition or enforcement of the arbitral judgment shall also be negated, if the Federal Supreme Court finds that:
>
> I - the subject matter of the dispute cannot be resolved through arbitration under Brazilian law;
>
> II - the decision is contrary to national public policy.

Arbitration Act, *supra* note 2, arts. 38 and 39, at 1575-76.

31. U.N. ESCOR, 21st Sess., Supp. No. 1, at 5, U.N. Doc. E/2889 (1956).

32. New York Convention *supra* note 21, art. VII(2), at 2521, 330 U.N.T.S. at 44.

33. "This Convention shall apply to the recognition and enforcement of arbitral award made in the territory of a State other than the State where the recognition and enforcement of such award is sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, *supra* note 21, art. I(1), at 2519, 330 U.N.T.S. at 38.

34. *See generally* New York Convention, *supra* note 21.

35. http://www.chamber.se/arbitration/svenska/lagar/newyork_conv_sign_sve.html

36. Decreto No. 52, de 25 de abril de 2002, D.O.U. 4.26.2002, at 2.

finally adopted the New York Convention following legislative approval and the Presidential Decree on July 23, 2002,[37] and it became effective on September 5, 2002.[38] Brazil's adoption of the New York Convention will significantly change the practice of arbitration in Brazil. For example, foreign parties conducting business in Brazil may confidently choose arbitration as a means of dispute resolution. Consequently, the creation of arbitral courts Brazilian cities will increase the demand for arbitrators.

B. *Brazil's Participation in the Panama, Montevideo, and Other Important Conventions*

In addition to the New York Convention, Brazil has ratified two other international conventions concerning private commercial arbitration: the Panama Convention and the Montevideo Convention.[39]

The Panama Convention was adopted in Panama on January 30, 1975. Although Brazil signed the Panama Convention during its inception, it only acceded to it some twenty years later on August 31, 1995. On May 8, 1979, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention"), in which Brazil participated, was signed in Montevideo, Uruguay.[40] Brazil intentionally ratified the Montevideo Convention on the same date that the Panama Convention was ratified. The rules of the Montevideo Convention were aimed at arbitral awards "in all matters not covered by the [Panama Convention, which] . . . apply to judgments and arbitral awards rendered in civil, commercial, or labor proceedings in one of the States Parties."[41]

Brazil did not, however, sign or ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which operated under the umbrella of the World Bank.[42] Pursuant to the ICSID Convention, a Centre was to be established whose purpose was "to provide facilities for conciliation and

37. Decreto No. 4311 de 23 de julho 2002, D.O.U. 7.24.2002, at 3 (regarding Brazil's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958).

38. *Id.*

39. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser. A.28 (SEPF), *reprinted in Second Inter-American Specialized Conference on Private International Law: Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 18 I.L.M. 1224 (1979).

40. *Id.*

41. *Id.* at 1225.

42. Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

arbitration of investment disputes between Contracting States."[43] As of March 6, 2003, there were 153 signatory countries to the ICSID Convention, including the United States.[44]

The effort to unite the economies of the Western Hemisphere into a single free trade agreement began at the Summit of the Americas in December 1994. The Heads of State and Government of the thirty-four democracies in the region agreed to create a Free Trade Area of the Americas ("FTAA") in an effort to progressively eliminate barriers to trade and investment.[45] Negotiations of the agreement are anticipated to be completed by 2005. The FTAA established nine negotiating groups, including the FTAA Negotiating Group on Dispute Settlement ("NGDS").[46] By mandate, the FTAA designed programs that will facilitate and promote the use of arbitration and other alternative dispute settlement methods for managing and settling disputes in the private sector. Discussions were held and an agenda has been agreed upon to establish the arbitration rules within the FTAA. Brazil, as a member of the Organization of American States, has a representative participating in the NGDS.

IV. FUNDAMENTAL INFORMATION ON ARBITRATION IN THE UNITED STATES

A. *The Federal Arbitration Act*

The Federal Arbitration Act ("FAA"), enacted on February 12, 1925, first established arbitration procedures in the United States.[47] The FAA governs international dispute resolution by way of arbitration in the United States.[48] The U.S. was not a signatory to any prior multilateral agreement on the enforcement of arbitral awards and did not intially sign the New York Convention in 1958.[49] However, in July 1970, the United States acceded to the New York Convention and implemented its accession by including Chapter 2, now sections 201 through 208 of the FAA.[50] Congress subsequently passed two new FAA sections in 1988, which were renumbered on December 1, 1990. The FAA applies to any arbitration

43. *Id.* art. 1(2), at 1273.
44. http://www.worldbank.org/icsid/constate/c-states-en.htm.
45. http://www.ftaa-alca.org/View_e.asp.
46. http://www.ftaa-alca.org/Ngroup_e.asp.
47. http://www.lalabor.com/material/arb_adr/usaa.html.
48. *Id.*
49. New York Convention, *supra* note 21, at 2517.
50. 9 U.S.C. §§ 201-208 (2002).

clause in a written contract between parties involving maritime transaction or commerce.[51]

1. Specific Provisions of the FAA Affecting Arbitration Procedures

Section 208 of the FAA provides that sections 1 through 14 of Chapter 9 of the United States Code apply to the enforcement of foreign arbitration awards, except where the latter conflicts with the New York Convention.[52] Section 201 generally provides for enforcement of the New York Convention.[53]

Section 202 limits the FAA's applicability to awards arising out of *commercial relationships* and to those transactions arising out of a relationship between citizens of the United States that "involve [] property located abroad, or had some other reasonable relation with one or more foreign states."[54] Section 203 vests jurisdiction over New York Convention cases in federal courts without regard to the federal jurisdiction that was required under the 1925 version of the FAA.[55] Under FAA mandates, federal courts can order arbitration as specified in an agreement even if the location agreed upon is outside U.S. territory, something that was not possible under the 1925 version of the FAA.

B. *A Landmark Case Concerning Arbitration in the United States*

The leading arbitration case in the United States is *Scherk v. Alberto-Culver Company*.[56] In *Scherk*, the Supreme Court declared an arbitration agreement before a tribunal is a type of specialized forum selection clause that posits the origin of the lawsuit and the procedure that must be utilized in resolving the dispute between parties.[57] In addition, the Court stated that invalidating the agreement would not allow the party to disregard its promise, but would "reflect a 'parochial concept that all disputes must be resolved under our law and our courts.'"[58] The Court further stated that the "'[U.S.] cannot have trade and commerce in world markets and international waters exclusively on [its] terms, governed by [its] laws, and

51. 9 U.S.C. § 2 (2002).
52. 9 U.S.C. §§ 1-14 (2002).
53. 9 U.S.C. § 201 (2002).
54. 9 U.S.C. § 202 (2002).
55. 9 U.S.C. § 203 (2002); *see also* 28 U.S.C. § 1331 (2002).
56. 417 U.S. 506 (1974).
57. *Id.* at 519.
58. *Id.* at 519 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

resolved in [its] courts.'"[59] Finally, the Court concluded that the agreement between the parties to arbitrate any dispute arising out of an international commercial transaction must be enforced in the federal court system, consistent with the provisions of the FAA.[60] Securing judicial enforcement of international arbitral agreements after the Court's holding in *Scherk* has become considerably easier to accomplish in the United States.

In addition to the FAA, most states in the United States have specific statutes governing arbitration. Essentially, the applicability of state law regarding foreign arbitration awards must be consistent with the provisions of the FAA and relevant federal decisions. As such, state arbitral law governs when it does not conflict with relevant federal law. Where it does conflict, state law is pre-empted by federal law in accordance with Article VI of the United States Constitution.[61]

V. THE ADMINISTRATION OF ARBITRATION

Most countries have various organizations that are involved in numerous aspects of the administration of arbitration proceedings, including promulgation of rules of procedure and the appointment of arbitrators. Chambers of commerce and/or trade associations create their own arbitral courts, and they are usually affiliated with internationally recognized institutes in order to legitimize their procedures. In the United States, for instance, the American Arbitration Association ("AAA"), created in 1926, is the most important arbitration organization. Outside the United States, however, the International Chamber of Commerce (*Chambre de Commerce International* – "ICC"), which was founded in Paris in 1919, is arguably the most important organization. Since 1983, the AAA, the ICC, and the ICSID have co-sponsored a series of colloquia to discuss various topics relating to international arbitration.[62]

After the 1996 Brazilian Arbitration Law was enacted, new arbitral courts were created in Brazil. Examples of new arbitral courts include the Chamber of Mediation and Arbitration of São Paulo from the Federation and Center of Industries (*Câmara de Mediação e Arbitragem de São Paulo*), the Chamber of Mediation and Arbitration of Rio de Janeiro Commercial Association (*Câmara de Mediação e Arbitragem da Associação Comercial do Rio de Janeiro*), the Arbitration Center of the American Chamber of Commerce of São Paulo (*Centro de Arbitragem da Câmara Americana de*

59. *Id.*
60. *Id.* at 519-20.
61. U.S. CONST. art. VI, cl. 2.
62. http://www.worldbank.org/icsid/about/about.htm

Comércio de São Paulo), and the Arbitration Chamber of Paraná State (*Câmara de Comércio do Estado do Paraná*).

The Brazilian Supreme Court's ruling on the Arbitration Law's constitutionality and Brazil's accession to the New York Convention will significantly increase arbitration to resolve private international disputes and, in turn, the number of arbitral institutions overall. Moreover, many Brazilian law firms currently use arbitration as a means of resolving commercial disputes between companies since arbitration has developed into a practice area that has attracted many attorneys.

Moreover, the Brazilian Law of Corporations (*Lei das Sociedades Anônimas*) was recently amended by a provision that allows a corporation to exercise the option of adding an arbitration clause into its articles of incorporation.[63] In addition, arbitration has become the sole means to resolve disputes arising in the New Market of the São Paulo Stock Exchange (*Novo Mercado da Bolsa de Valores de São Paulo - Bovespa*) ("New Market").[64] The New Market was created to deal specifically with shares of listed companies that voluntarily adopt higher standards of corporate practice and accountability than those standards that are currently required by statute. According to the New Market, the stock price and its liquidity are influenced by the shareholders' certainty about their rights and by the quality of the information provided by the listed corporations. In this context, the possibility of using arbitration as a means resolving disputes between shareholders and corporate boards will attract even more investors.

VI. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BRAZIL AND THE UNITED STATES: A BRIEF COMPARATIVE OVERVIEW

In the Unites States, the FAA[65] generally does not distinguish between international and domestic arbitration, except where the dispute results in a foreign arbitral award. In such cases, the foreign arbitral award must be enforced pursuant to the provisions of the New York Convention or the Panama Convention. Section 304 of the FAA states that arbitral decisions or awards made in the territory of a foreign state shall, on the basis of reciprocity, be recognized and enforced only if that state has ratified or acceded to the Panama Convention.[66] By contrast, the Brazilian Arbitration

63. Lei No.10.303, de 31 de outubro de 2001, D.O.U. 11/1/2001, art. 2, *amended by* Lei No.6404, de 15 de dezembro de 1976, art. 109, para. 3.

64. Regulamento de Listagem do Novo Mercado, art. 13.1, *available at* www.novomercadobovespa.com.br/RegulamentoNMercado.pdf.

65. *See* discussion *supra* Part IV.A., IV.A.1.

66. This was a reservation made by the U.S. when it acceded to the Panama Convention. *See* 9 U.S.C. § 304 (2002).

Law does not make this distinction. Rather, it provides that foreign arbitral awards will be recognized or enforced in Brazil pursuant to the international treaties to which Brazil has ratified.[67]

The New York Convention requires the courts of the signatory countries to enforce arbitration agreements entered into in foreign countries, and to recognize and enforce arbitral awards rendered in the territories of other signatory countries.[68] Article V of the New York Convention also sets standards for a signatory country to refuse to enforce a foreign award.[69] It provides that an award need not be enforced if it was unfairly or irregularly procured, or if it is outside the scope of the parties' arbitration agreement. Moreover, a court may refuse enforcement if it would violate public policy or the standards of arbitration of the state enforcing the agreement. Such standards are generally construed narrowly in the United States and most other countries to promote the New York Convention's overall goal of encouraging the prompt enforcement of awards.[70]

67. *See* Arbitration Act, supra note 2.

68. New York Convention, *supra* note 21, art. I, at 2519, 330 U.N.T.S. at 38.

69. Art. 5 of the New York Convention states:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> a. The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> b. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> e. The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country;
>
> b. The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 21, at 2520, 330 U.N.T.S. at 40, 42.

70. *See, e.g.,* Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'industrie du Papier (Rakta), 508 F.2d 969 (2d Cir. 1974) (affirming the enforcement of a foreign arbitral award

Section 202 of the FAA permits both parties to be United States citizens if the dispute involves property located abroad; requires performance or enforcement abroad; or a party to the dispute has some other relationship with one or more foreign countries.[71] Otherwise, agreements or awards arising out of a relationship between United States citizens will not fall under the auspices of the New York Convention.

Conversely, this distinction does not exist under Brazilian law. Brazilian law does not differentiate between foreign arbitral awards that are rendered outside of Brazilian territory, regardless of the parties' citizenship.[72] Thus, two Brazilian nationals may enter into an arbitration agreement in Brazil, appoint a New York arbitrator under the AAA rules, and submit their case in New York where the award would be proffered. Under the Brazilian arbitration law, the arbitral award would be considered a foreign award and trigger different rights of the parties than an award granted within Brazilian territory.[73]

In the United States, where objection is made against the enforcement of a foreign arbitral award, a court will consider the objection even if the parties' arbitration results in "final and binding" language in the award.[74] The Second Circuit, for example, refused to enforce an arbitration award because a party to the agreement did not have a meaningful opportunity present its claims to the Iran/U.S. Claims Tribunal.[75] The court's decision was primarily based on due process rights obtained under Article V(1)(b) of the New York Convention.[76]

If the award is made outside of the United States, a party may seek to have it vacated in the United States as long as the parties agree to resolve their dispute pursuant to American law, "thus ensuring that the award was made 'under [United States] law.'"[77] As such, a motion to vacate an arbitral award "may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose procedural law was specifically invoked in the contract calling for arbitration of contractual disputes."[78] Even though Brazil only recently acceded to the New York

on grounds that enforcement would not violate the forum state's most basic notions of morality and justice).

71. 9 U.S.C. § 202 (2002).

72. *See* Arbitration Act, *supra* note 2.

73. *See* Arbitration Act, *supra* note 2.

74. New York Convention, *supra* note 21, arts. 5 and 6, at 2520, 330 U.N.T.S. at 40, 42.

75. Iran Aircraft Indus. v. Avco Corp., 980 F. 2d 141, 146 (2d Cir. 1992).

76. *Id.* at 145-46.

77. M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F. 3d 844, 848 (6th Cir. 1996) (no citation for the direct quote in the court's opinion).

78. *Id.* at 849.

Convention in June 2002, the 1996 Arbitration Law clearly adopted the language of Article V of the New York Convention, which states that the objections a *defendant* may raise in opposition to the enforcement of a foreign arbitral award.[79]

The Brazilian Arbitration Law and the FAA do not specify which nation's law applies in determining whether there has been proper compliance with due process requirements in the arbitral proceedings leading to the granting of an arbitral award. In the United States, courts have held that the law of the forum state where the enforcement is sought should be applied to determine whether a party was given proper notice or if it was unable to present its case.[80] In Brazil, only three cases of international awards were brought before the Brazilian Supreme Court for homologation after the 1996 Arbitration Law entered into force.[81] The five years that the Supreme Court spent in ruling on the law's constitutionality was apparently a sufficient reason to detract a plethora of lawsuit filings. This begs the question: why would anyone enter into an arbitral clause that never had a chance of enforcement? In *Tardivat International S/A v. B. Oliveira S/A - Indústria, Comércio e Exportação*, the Brazilian Supreme Court denied the homologation of a French arbitral award because service of process was not properly carried out on the Brazilian defendant.[82] However, in *Elkem Chartering A/S v. Conan - Cia Navegação do Norte*,[83] the Court granted the request for homologation of a Norwegian arbitral award, notwithstanding the defendant's opposition, on grounds that it was in conformity with Articles 37 to 39 of Law No. 9.307/96.[84]

United States courts have also addressed issues regarding the confirmation of an arbitral award against the party that the agreement was originally invoked unless that party furnishes proof that was not available in the original case.[85] Furthermore, at least one United States court has held that "an arbitral award should be denied or vacated, if the party challenging the award proves it was not given a meaningful opportunity to be heard, in accordance with applicable due process as our jurisprudence defines it."[86]

79. *See* Arbitration Act, *supra* note 2; *see also* New York Convention, *supra* note 21, art. V, at 2520, 330 U.N.T.S. at 40-42.

80. *Parsons & Whittemore Overseas Co.*, 508 F.2d at 975.

81. *See infra* notes 83, 84, 88 and accompanying text.

82. STF, No. 5378, Relator: Min. Maurício Corrêa, 02.03.2000, R.T.J. 2.25.2000, p. 268.

83. STF, No. 5828-7, Relator: Min. Ilmar Galvão, 12.06.2000, R.T.J. 12.14.2000, p. 116.

84. *Id.*; *see also* Arbitration Act, *supra* note 2.

85. *See, e.g.,* Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1129 (7th Cir. 1997).

86. *See id.* at 1129-30 (citing Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145 (2d Cir.1992); *Parsons & Whittemore Overseas Co.,* 508 F.2d at 975.

In *Aiglon Dublin Limited v. Teka Tecelagem Kuenrich S/A*,[87] the Supreme Court granted homologation of a United Kingdom arbitral award, even though the Brazilian party opposed its enforcement on the grounds that the contract it entered into was an adhesion contract. The Brazilian Supreme Court, however, found otherwise.[88]

VII. CONCLUSION

The Brazilian legal and business community has patiently waited for a constitutionally valid arbitration law since a large number of international transactions require fast and technical solutions that Brazilian courts are generally not capable of providing. The highly anticipated Arbitration Law is the solution many interested parties have been awaiting.

At the time when the Brazilian Supreme Court addressed the constitutionality of the Arbitration Law, Isabel C. Franco precisely defined a word describing the feelings the new law generated among the business community: skepticism.[89] However, Brazil would have missed another opportunity to modernize its institutions and include itself in the international business community if the law was found unconstitutional. Fortunately for Brazil and the international community, such is not the case. Clearly, arbitration law is an essential element to economic prosperity and it provides an efficient solution to both national and international contractual disputes. By declaring the Arbitration Law constitutional, the Brazilian Supreme Court began to alleviate the immense backlog in the Brazilian judicial system and it also propelled Brazil into the world stage of international business transactions.

87. STF, No.5847-1, Relator: Min. Maurício Corrêa, 01.12.1999, R.T.J. 12.17.99, p. 236.

88. *Id.*

89. *See Arbitration in Brazil: Is this Dispute Finally Resolved?,* 26 INT'L NEWS 3, 8-9 (1997).