RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A NEW CHAPTER IN BRAZILIAN ARBITRATION HISTORY

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I. INTRODUCTION

On September 23, 1996, Brazil enacted its first arbitration law. The Brazilian Arbitration Law[1] ("BAL") was published in the Federal Official Gazette on September 24, 1996. It entered into force 60 days later,[2] as provided by its Article 43.

Although this was not the first regulation regarding arbitration in Brazil,[3] this was the first Brazilian law that had a single method of alternative dispute resolution as the main subject.[4] Brazil, that had been known for its isolationist and traditionalist use of law in the international context, started to show signs of changes and improvements.[5] The BAL comes as the first law that addresses international commercial arbitration.[6] Its innovations created the hope that Brazil would finally be joining the international community.

Brazil also had been known for a very outdated relation with arbitration, being one of the few countries in the world that never signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").[7] Besides, Brazil used to require the double homologation or *exequatur* of foreign arbitral awards in order for them to be recognized, making arbitration almost nonexistent, whenever enforcement involved Brazil. Moreover, there were many other obstacles to the use of arbitration both nationally and internationally.

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[1] Statute 9307, de 23 de setembro de 1996, D.O.U. de 24.09.1996.

[2] The law actually became valid as of November 25, 1996.

[3] There were already sections of the Civil and the Civil Procedure Codes about arbitration and some provisions in the Commercial and Consumer Codes, among others.

[4] Senado Federal (Brazil) Projeto de Lei do Senado no. 78/92 p. 24.

[5] Mary B. Brusewitz, *Brazil Ceases Its Antipathy Toward ADR*, THE NATIONAL LAW JOURNAL, SECTION C (December 23, 1996), at 1.

[6] Senado Federal (Brazil) Projeto de Lei do Senado no. 78/92 p. 25.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, T.I.A.S. No. 6997.

Such obstacles were said to be left behind with this new statute. Brazil was entering the modern world in terms of arbitration and distribution of justice. Relying on international statutes and treaties to build its own, Brazil wanted to open up its economy using the most modern elements at hand. The BAL was inspired by the UNCITRAL Model Arbitration Rules, the Spanish Arbitration Law, the New York Convention itself and the Panama Convention. The BAL had as a main goal to be an instrument to resolve disputes involving international business and complex litigation issues that the judiciary is not well prepared to deal with. At the same time, the BAL's enactment was expected to relieve the courts from their excessive workloads.[8]

These were said to be the main reasons for the enactment of the BAL. On the other hand, when one reads the BAL, particularly Chapter VI,[9] many doubts arise. Chapter VI (Articles 34-40[10]) gives the clear impression that the BAL does not rely upon the most modern theories and practices of international commercial arbitration or the recognition and enforcement of foreign arbitral awards. Instead, the BAL seems to adopt very outmoded theories and practices and some of its provisions appear to have been created with the intention of creating obstacles to the use of international commercial arbitration.

This article will examine the issues raised by Chapter VI of the BAL, in order to respond to the doubts it raises. Was the BAL a real improvement in relation to the Brazilian position toward international commercial arbitration or was it just a timid step in that direction or, even, a step backward in some sense? This article aims to present some answers to this question.

If it turns out that the BAL is not as helpful to arbitration as it claims to be, what would make it better? The second goal of this article is to propose solutions to the problems revealed herein.

The focus on Chapter VI reflects the comparative nature of this study. Chapter VI contains the provisions relating to international arbitration.

The New York Convention seems to be the most appropriate source for comparative analysis of the BAL. This selection is based on the near unanimous acceptance of the New York Convention in the international arena and on its international origins. These characteristics contribute to a more unbiased analysis of the different issues involving the recognition and enforcement of foreign arbitral awards. Its wide-spread acceptance suggests that it reflects modern theories and practices of international arbitration. Moreover, while Brazil is one of the few nations that still has not signed the New York Convention, the Convention was a source of inspiration for the drafters of Chapter VI.

This article is divided in six parts. Part I is the Introduction. Part II discusses the history of arbitration in Brazil. Part III is a general analysis of the theoretical basis of the BAL. Part IV examines the articles of Chapter VI in detail. Part V

[8] Senado Federal (Brazil) Projeto de Lei do Senado no. 78/92 at p. 24-5.

[9] Statute 9307, de 23 de setembro de 1996, D.O.U. de 24.09.1996, Chapter VI: "Recognition and Enforcement of Foreign Arbitral Decisions."

[10] "Articles" in Brazilian laws are equivalent to "sections" in American statutes.

advances some proposals to improve the BAL and thereby ameliorate the conditions for international commercial arbitration in Brazil.

II. THE HISTORY

A. *International Arbitration in Brazil*

1. *The Evolution*

While Brazil was a Portuguese colony, it was ruled by Portuguese ordinances.[11] As Portugal recognized arbitration as an official institution, Brazil, as a colony, also recognized it as an official institution.

When independence was proclaimed in 1922, Brazil continued to recognize arbitration, even referring to it in Article 160 of the Constitution of 1824.[12] Laws that were passed subsequently made arbitration mandatory for certain cases, as did the Commercial Code (Articles 294 & 348) and the Ordinance 737 (Article 411),[13] both enacted in 1850. Arbitration became mandatory for commercial cases, and Brazil seemed to be building a favorable culture towards arbitration.

On June 26, 1867, Decree No. 3,900 revoked the rule of mandatory arbitration for commercial cases, preserving only the provision for voluntary arbitration.[14] The Decree marked the beginning of a history of resistance and an about-face in the country's policy in relation to arbitration.

The increasing prejudice against foreign arbitral awards and the claims against their legitimacy resulted in judicial avoidance of all foreign arbitral awards until 1940.[15] This lack of recognition of foreign arbitral awards was justified on the basis of the jurisdictional exclusivity of the courts found in the Civil Code of 1916 and then in the Civil Procedure Code of 1939 and 1973.[16]

Meanwhile, Brazil became a signatory to the Protocol of Geneva of September 24, 1923 and ratified it through Decree No. 21,167, of May 22, 1932. Although this could be understood as intended to reopen the country to international arbitration, the Civil Procedure Code of 1939 substantially — though not formally — preempted the international treaty in Brazil. Consequently, the Protocol of Geneva was never quoted in a Brazilian court.[17]

In 1981, the Federal Government acknowledged the isolationist position taken by Brazil in regard to international and national arbitration.[18] It published in the

[11] ALFREDO BUZAID, DO JUIZO ARBITRAL [ARBITRAL TRIBUNAL] 8.

[12] Jose Alexandre Tavares Guerreiro, *A Execucao Judicial de Decisoes Arbitrais*, 75 REVISTA DE DIREITO MERCANTIL 31, 31.

[13] Salvio de Figueiredo Teixeira, *A Arbitragem No Sistema Juridico Brasileiro*, p. 9. Unpublished. This ordinance represented the first attempt to codify the Brazilian procedural laws.

[14] *See* BUZAID, *supra* note 11, at 8.

[15] *See* Jurgen. Samtleben, Procedimento Arbitral No Brasil — O Caso "Lloyd Brasileiro Contra Ivarans Renderi" Do Supreior Tribunal De Justiça (trans. Strenger), LXVII REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SAO PAULO 185, 210. *See also* Guerreiro *supra* note 12, at 32.

[16] *See* Samtleben, *supra* note 15, at 276.

[17] Jorge Barrientos Parra, *Fundamentos da Arbitragem no Direio Brasileiro e Estrangeiro*, 107 REVISTA DE INFORMACAO LEGISLATIVA, BRASILIA 215, 221 (July 1990).

[18] Carlos Alberto Carmona, *A Arbitragem no Brasil, Em Busca de Uma Nova Lei*, 166

Brazilian Official Diary[19] a draft arbitration law[20] to initiate public debate in May 27, 1981. The intention of this draft law was to relieve the Judiciary of its excessive workload.[21]

This draft arbitration law introduced two basic changes concerning international arbitration; however it did not address international arbitration directly. The first change was the introduction of *kompetenz-kompetenz*, whereas Brazil used to have only normal contractual liability for those who would not comply with an arbitration clause. The second change was the assimilation of the arbitral award to an extra-judicial executive title, which enabled the party to enforce the award without the need for recognition. At this time, some of the most respected Brazilian jurists in the field of arbitration did not support the adoption of a special law on arbitration, on the ground that it would destroy the normative unity in the Civil Procedure Code.[22]

The criticisms of the draft arbitration law were numerous. They focused on the failure to keep judicial intervention at a minimum level. On account of this and other shortcomings of the draft law, it was finally abandoned.[23]

On February 27, 1987 the Federal Government published a new version of the draft arbitration law in the Brazilian Federal Diary (the "1986 version"). The 1986 version was praised for its quality, and attracted the attention of many sectors of civil society. In spite of the improvement in relation to the 1981 version, the new version still had some structural problems that became apparent on its publication.

The draft arbitration law contained only one article related to international arbitration.[24] Under this article, a foreign arbitral award would be eligible for enforcement if it were notarized by a Brazilian consulate and translated into Portuguese by an official translator. In addition, the award had to comply with the requirements of Article 585, §2 of the Civil Procedure Code.[25]

The 1986 version of the draft arbitration law did not require judicial recognition of the foreign arbitral, since the award would become an extra-judicial executive title (as under the 1981 version). The 1986 version differed from the 1981 version by specifically regulating the recognition and enforcement of foreign arbitral awards, although both versions would in theory treat the matter the same way.

The third draft arbitration law was Ordinance 298 of June 20, 1988, published

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JURISPRUDENCIA BRASILEIRA 17-19.

[19] The Brazilian version of the slip law. A Brazilian law can only become valid after publication in this daily newspaper.

[20] This project was introduced by the Ordinance 319, of May 25, 1981.

[21] *See* Carmona, *supra* note 18, at 19.

[22] Guido F. S. Soares, *Arbitragens Comerciais Internacionais no Brasil: Vicissitudes*, 641 REVISTA DOS TRIBUNAIS 38,47 (1989).

[23] Waldemar Mariz Oliveira Junior, *Do Juizo Arbitral*, PARTICIPACAO E PROCESSO 308, 315.

[24] *See* Carmona, *supra* note 18, at 19.

[25] Article 585, §2 of the Brazilian Civil Procedure Code lays down the conditions for the enforcement of foreign extra-judicial executive titles: 1. formal compliance with the rules of the country where the award was issued; and 2. an indication that Brazil would be the country where it would be enforced.

in the Official Diary on July 14, 1988 for public discussion.[26] The authors of this draft law tried to respond to the criticism of the lack of normative unity. As a result, the 1988 draft law aimed only at the amendment of the Civil Procedure Code.[27]

The 1988 draft law project was considered worse than its predecessors.[28] It included articles that would discourage arbitration, as for example, the power of the court to revise the arbitral award and the requirement that the arbitrator be a lawyer. In addition, the 1988 draft law did not provide for the recognition and enforcement of foreign arbitral awards,[29] which meant that foreign arbitral awards would still need to pass through double *exequatur*.[30] Because of all these shortcomings, the 1988 draft law never was sent to Congress for consideration.

After all these failures, the Federal Government gave up trying to find out what the business community wanted from arbitration. The Liberal Institute of Pernambuco[31] then initiated the "*Operação Arbiter*,"[32] calling for the participation of both the public and the private sectors of Brazil.[33] After a draft was elaborated, it was submitted for public discussion, and many suggestions were incorporated into the final draft.[34]

The project was inspired by the new Spanish Arbitration Law, the UNCITRAL Model Law, the New York and Panama Conventions.[35] On April 27, 1992, it was introduced to Congress[36] and, on September 23, 1996, it became Law No. 9307/96.[37]

In what seemed at the time to be a preparation for the enactment of the new arbitration law, Brazil signed and ratified "The Inter-American Convention on International Commercial Arbitration" (the "Panama Convention") on May 9, 1996. The Panama Convention was published in the Brazilian Federal Diary on May 10, 1996.[38] Brazil is still not a signatory of the New York Convention.

2. *The Major Historical Problems*

This section examines the major historical problems of international commercial arbitration in Brazil relating to the recognition and enforcement of foreign arbitral awards. There were two major problems with arbitration in Brazil: the non-recognition of the arbitration clause and the requirement of

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[26] *See* Soares, *supra* note 22, at 48.

[27] *See* Carmona, *supra* note 18, at 19.

[28] *See* Soares, *supra* note 22, at 48.

[29] *See* Carmona, *supra* note 18, at 20.

[30] *See* Soares, *supra* note 22, at 48.

[31] Pernambuco is a Brazilian state at the northeast region and one of the most important states of this area both academically and economically.

[32] "Operation Arbiter," where arbiter is the Latin word for judge, juror, arbitrator etc.

[33] *See* Carmona, *supra* note 18, at 20.

[34] *Id.* at 21.

[35] *Id.*

[36] The Vice President and former Senator of Pernambuco, Marco Maciel, was responsible for introducing the result of the "*Operação Arbiter*" to Congress.

[37] *See* Carmona, *supra* note 18, at 21.

[38] *See* Teixeira, *supra* note 13, at 9.

double *exequatur*.[39] The first was a problem of Brazilian arbitration generally, and therefore goes beyond the scope of this work. The second is clearly related to the international focus of this article and will be the main subject of this chapter.

The requirement of double *exequatur*, also known as double homologation or double recognition, was standard in Brazil before the BAL. It consisted of the need to recognize the foreign arbitral award in the country where the arbitration took place, in order to fulfill the Brazilian requisite for the recognition of this award — transformed into a judicial decision. Only then would the Supreme Court examine the "award" and submit it to the several tests for recognition. The Brazilian legislature did not favor the "single" *exequatur* of foreign arbitral awards.[40] Moreover, the Supreme Court did not consider the claims for recognition of foreign arbitral awards unless they were previously recognized by the judiciary of another country.[41]

These requirements were necessary because of the Brazilian understanding of the nature of the foreign arbitral award as a legal instrument. Only two kinds of foreign acts could be enforced in Brazil after recognition by the Brazilian Judiciary: foreign judicial decisions and executive extra-judicial titles. A foreign judicial decision had to be recognized by the Supreme Court in order to become an executive title. Only then could it be enforced. Executive extra-judicial titles were subject to a much simpler procedure for enforcement.[42]

The foreign arbitral award could easily have been classified under the second category, if it were not a *numerus clausus* classification. Unfortunately, the foreign arbitral award was never classified under Article 585 of the CPC, which lists the cases where a title is considered an executive extra-judicial title. On the other hand, it appeared under Article 584 of the same CPC, listed as a judicial executive title. For that reason, it had to comply with the requirements for a foreign judicial decision.

Therefore, a foreign arbitral award could become enforceable only if legally considered a judicial executive title. To be considered a judicial executive title under the category of a foreign judicial decision, a foreign arbitral award had to go through double *exequatur*. First, it had to be recognized by the judiciary of the country where the foreign arbitral award was rendered. Then the foreign judicial decision had to be recognized by the President of the Brazilian Supreme Court. As is readily apparent, this process made any kind of international arbitration involving enforcement in Brazil extremely unattractive.

This requirement was not only completely outdated, but also worked against the benefits of arbitration.[43] The confidentiality of the award would be destroyed, as recognition by the Judiciary would make it public. The cost of arbitration would be increased by the obligation to submit the award to the judiciary. In

[39] *See* Carmona, *supra* note 18, at 18.

[40] *See* Guerreiro, *supra* note 12, at 32.

[41] Guido F. S. Soares, *O Supremo Tribunal Federal e as Arbitragens Comerciais Internacionais: "De Lege Ferenda"*, 642 REVISTA DOS TRIBUNAIS 38, 39 (1989).

[42] *See* Soares, *supra* note 22, at 39.

[43] As repeated throughout in this article, those benefits are cost, time savings and confidentiality.

addition, time savings would be lost because of the slowness of the recognition process and the possibility of a special appeal.[44]

In addition to the requirement of previous and valid recognition of the foreign arbitral award in the country where it was rendered, its recognition in Brazil had to comply with three other requirements. First, the decision had to be made by the competent judge and respect Brazilian standards of due process. Second, the decision should not infringe upon national sovereignty, public policy or good morals.[45] Finally, the decision should be notarized by the Brazilian consul and officially translated into Portuguese.[46]

There were three major problems of non-compliance with the due process requirements of Brazilian law for the recognition of foreign arbitral awards in the country. First, there was the lack of service by the Brazilian party through a letter rogatory to the Brazilian judiciary. Second, the foreign decision that recognized the foreign arbitral award without explaining its reasons was considered void.[47] Finally, the Supreme Court required the evidence that this foreign decision was *res judicata* in its original country.[48] This last item occasioned severe problems of incompatibility,[49] since countries have different concepts of *res judicata*.[50] Those three requirements were the main reasons for the non-recognition of ten[51] out of 14 cases presented to the Supreme Court over the course of 33 years.[52]

[44] This right of appeal, named special appeal ("*recurso especial*") allows the parties to require the revision of decisions made by the Supreme Court that might violate a Civil Procedure Code rule. Judicial recognition plus the appeal may take years. *See* Carmona, *supra* note 18, at 18.

[45] For the sake of illustration, a violation of public policy was considered to occur when there was exclusive Brazilian jurisdiction or when the service formalities did not comply with Brazilian law.

[46] *See* Parra, supra note 17, at 221.

[47] *See* Soares, *supra* note 22, at 51.

[48] This is compatible with what the Civil Code Introduction Law provided in Article 15, reinforced by the Supreme Court Ruling No. 420: "A foreign decision shall not be recognized if there is no evidence of *res judicata*." (free translation) Supreme Court Rulings are rules issued by the Supreme Court independent from any case; they do not make law nor are they binding. However, they establish the Supreme Court's preferred interpretation of the law. Practically, these rulings establish a uniform interpretation of the law by the courts, since the lower courts know that if they decide contrary to the Ruling, and the case ends up at the Supreme Court, the decision will be overruled.

[49] Supreme Court decision SE No. 1.982 - USA (RT 54/704) contains dicta stating that in the case that a country does not require judicial recognition for arbitral awards, the Brazilian Supreme Court would accept the law of that country and waive the foreign recognition requirement. The law should be brought to court, notarized and officially translated into Portuguese. *See* Jose Maria Rossani Garcez, *Contratos Internacionais - Solução de Conflitos*, 23 REPERTÓRIO IOB DE JURISPRUDÂNCIA 516 (December 1992).

[50] *See* Guerreiro, *supra* note 12, at 37.

[51] Just to gather some non-recognition decisions based on the issues above, we could cite SE 1.982 - USA, SE 2.671 - UK, SE 2.424 - UK, SE 2.476 - UK and SE 2.597-3 - UK. *See* Luís César Ramos Pereira, *A Arbitragem Comercial nos Contratos Internacionais* 572 REVISTA DOS TRIBUNAIS 26, 28-9 (1983).

[52] These numbers are taken from a 1989 study of Supreme Court cases on international commercial arbitration. *See* Soares, *supra* note 22, at 51.

There were two problems inherent in the requirement of double *exequatur,* in addition to the normal disadvantages for international arbitration already discussed above. One was that many countries did not require the recognition of the arbitral award for its enforcement and validity. Consequently, the award was made unenforceable since Brazil required the recognition of the foreign arbitral award by the foreign judiciary.[53] The other was that Brazil could not recognize foreign arbitral awards issued by a private institution, *e.g.* the AAA.[54] This rule flowed from the requirement of recognition. As the private institution would issue a foreign arbitral award that did not require recognition in the country of rendition, there would be no recognition by the foreign judiciary. With no recognition by the foreign judiciary, the foreign arbitral award could not be recognized in Brazil.

On the other hand, there was one case where an award, even though issued by a private institution, was recognized by the Supreme Court because it had been registered at the City registrar office.[55] This was one of a line of Supreme Court cases considering decisions made by foreign executive authorities as having the same value as foreign judicial decisions.[56] A political and legal inconsistency results in so far as it seems less politically reasonable to accept foreign executive orders than to accept arbitral awards issued by neutral private organizations.[57]

An interesting fact is that double *exequatur* was not a requirement created by the written law, but by the Supreme Court. This may suggest a tendency of the Supreme Court against arbitration.[58] The foreign arbitral award did not have to be recognized by the foreign judiciary. If a foreign arbitral award complied with the other requirements for its recognition in Brazil, there was no legal impediment to its direct enforceability in the State courts. Only if the foreign arbitral award did not satisfy the Brazilian requirements, was its recognition by the foreign judiciary and by the Brazilian Supreme Court required.

The judicial divergence from the written law grew out of a conflicting interpretation of the Supreme Court's jurisdiction, based on its Internal Statute.[59] This issue touches on the nature of the arbitral award and on the theory of arbitration itself. In addition, it involves the distinction made in Brazil among national, foreign and international arbitration. These issues deserve a chapter of their own, since they influenced the elaboration of the new law. Chapter VI of the BAL grew out of the historical context described above. It will be helpful to

[53] Clùvis V. Do Couto E Silva, *O Juízo Arbitral no Direito Brasileiro,* 620 REVISTA DOS TRIBUNAIS 15 (1987).

[54] *See* Soares, *supra* note 22, at 50. (SE 1982 - United States of America of June 3, 1970, Northern International Co. Inc. v. Kern Mattes - issued by the AAA and SE 2006 - England of November 18, 1971, Otraco S.A v. Conoil - issued by The Cattle Food Trade Association).

[55] *Id.* - (SE 2597 - Great Britain of April 22, 1982, Nan Fung Textiles Ltd. V. Soares de Oliveira Indóstria e Comercio S/A - award issued by the Liverpool Cotton Association Ltd.).

[56] *See* Guerreiro, *supra* note 12, at 37.

[57] *Id.*

[58] *See* Do Couto E Silva, *supra* note 53, at 21.

[59] *Id.* There are some decisions that consolidated this understanding of Articles 216 & 217 of the Supreme Court Internal Statute (SE 1982, EEUU, RTJ 54/714, 92/515, 60/28).

examine those tensions in more detail to better understand international arbitration in Brazil.

III. THE NEW BAL AND ITS CHAPTER VI

A. *General Comments*

1. *The Intentions*

This chapter analyzes the goals of this new law as pertains to the recognition and enforcement of foreign arbitral awards. Therefore, the general comments treat aspects of the BAL that influence in one way or another Chapter VI.

The BAL was intended as a response to the two major problems facing the institution of arbitration in Brazil, since it was recognized that those problems were making the use of arbitration impossible.[60] The first problem was the non-binding nature of the arbitration clause and the second was double *exequatur.* Although the first problem seems to have no direct relation to Chapter VI, the change in the approach to arbitration in Brazil involved the creation of a very delicate system. There are reasons to believe that the solution adopted for one problem throws some light on the other, even if they are not directly connected.

Furthermore, the BAL aimed to open the doors of the country to a broader number of investments and investors.[61] Brazil was trying to harmonize with the consensual theory of arbitration expressed through the various treaties that inspired the said law.[62] Another intention was to create a favorable environment for arbitration in order to encourage its use.[63]

Another expressed intention of the BAL was to create a specialized forum to deal with complex cases, international matters or commercial law. In addition, it was hoped that the BAL would release the judiciary from those cases which it was not prepared to review. Another goal was to speed the process and to facilitate access to the judiciary.[64]

As explained in the chapter II.A.2. of this article, the lack of enforcement of the arbitration clause was one of the major problems in the old arbitration systems and was consistent with the jurisdictional theory then in vogue. Although Brazil recognized the arbitration clause to initiate an arbitration procedure,[65] there was no enforcement. The arbitration clause was the same as a "gentlemen's agreement" that would not bind the parties to arbitration. The sole remedy for the refusal to arbitrate was in damages.

[60] *See* Senado, *supra* note 4, at 24.

[61] *See* Brusewitz, *supra* note 5.

[62] *See* Senado, *supra* note 4, at 26.

[63] *See* Brusewitz, *supra* note 5.

[64] *See* Senado, *supra* note 4, at 25.

[65] The other method to initiate an arbitration in Brazil was the "submission agreement." The restricted pragmatic nature of this option, though, made arbitration in Brazil a remote option, since the "submission agreement" depends on an agreement obtained after a conflict arises. That is harder to achieve than an agreement *ex ante* on arbitration through an arbitration clause.

With the enactment of the BAL, Brazil recognized the autonomous nature of an arbitration clause in a contract. This changed the understanding of the concept of arbitration in the country and influenced the solution to the problem of double *exequatur*.

After the solution of the arbitration clause problem, the BAL eliminated the requirement that national arbitral awards be recognized in order to be enforced. These two measures plus the respect for the parties' autonomy led to the adoption of the most modern theory on international arbitration. Everything pointed in the direction that Brazil would adopt the contractual-autonomous theory for arbitration in both the national and international contexts.

The BAL eliminated the system of double *exequatur* consistent with its goal of eliminating the major arbitration problems in Brazil. Surprisingly, however, the BAL maintained the requirement for the recognition of foreign arbitral awards by the Brazilian Supreme Court. The BAL dispensed with the need for the recognition of the foreign arbitral award abroad, but reinstated this requirement for its national Supreme Court.[66] This provision respected the Court's case law[67] requiring Brazilian homologation, at the same time that part of the double *exequatur* problem was put aside and minimized.

Those obstacles as already enumerated were: the various difficulties for the recognition of arbitral awards in the country of the seat of the arbitration[68] and the satisfaction of the requirement that the award be recognized by foreign judicial decision. These differences could arise either because the country where the award was rendered had no requirement for homologation of the award or because the award was made by a non-national or purely international institution such as the AAA or the ICC. In one way, the approach to the recognition and enforcement of foreign arbitral awards changed for the better in Brazil, but it seems to have been a timid step.

Brazil demonstrated some willingness to change, but not how far it was willing or able to go. Therefore, some questions arise since the reasons for the changes in the institution of arbitration did not harmonize entirely with international consensual theory.

If Brazil really wanted to demonstrate to the international community that it had ceased its antipathy towards ADR,[69] more specifically international commercial arbitration, by adopting the most modern theories on this institution, why was the requirement of recognition by the Supreme Court maintained? Many countries do require the recognition of foreign arbitral awards by their

[66] Article 35 of Law No. 9.307/96 (the BAL): "Article 35 - To be recognized or enforced in Brazil, the foreign arbitral decision has to be homologated by the Brazilian Supreme Court." (free translation).

[67] As explained at the end of Chapter II.A.2. *supra*, the Supreme Court has jurisdiction to recognize foreign arbitral awards.

[68] This includes awards issued by private institutions or in countries where there was no provision for the recognition of arbitral awards, or even when the concept of *res judicata* differed from the Brazilian one.

[69] *See* Brusewitz, *supra* note 5.

judiciaries, and this is not the criticism made here. The question is why only the Supreme Court (and not any other court) has jurisdiction over the matter?

If Brazil wanted to adopt the most modern theories on international commercial arbitration, why did it adopt an old-fashioned theory as to jurisdiction instead of adopting the contractual-autonomous one? Furthermore, if Brazil was willing to open its doors to new investments and investors from abroad, why treat national and foreign arbitral awards so differently?

Some answers might be found in the study of the mechanisms used in the BAL to achieve the goals listed in this chapter in connection with the history of the different institutions. The distinction between recognition and homologation may influence the understanding of the concept of jurisdiction in relation to foreign arbitral awards. The same may be true for the concept of national, foreign and international awards and it may help to explain the different treatment of the different awards. The equating of arbitral award with judicial decision might explain the choice of the theory. Some other tensions found in the BAL will be studied with the hope that they will present most of the answers to the questions raised here.

2. *The Mechanisms*

This chapter discusses the more controversial mechanisms of the BAL. The mechanisms of the BAL are evaluated in light of the stated purposes of this law. An in-depth study of each article is reserved for the following chapters.

As already mentioned, this chapter aims modestly to identify the means the BAL used to achieve its goals and the adequacy of those means. For this purpose, this chapter traces the tensions between the techniques used in the BAL and the techniques used by the signatories of the New York Convention. That comparison will be made on the basis that the majority of the signatories of the New York Convention follows a similar standard for international commercial arbitration with higher success than Brazil.

By making this comparison, we are not evaluating which model is better, but only affirming that in international practice one model has been used with a certain degree of success not yet achieved by Brazil. Meanwhile, we evaluate how the intended new system, the BAL, stands in relation to the New York Convention model, whether more or less favorable for the advancement of international commercial arbitration through the facilitation of the process of recognition and enforcement of foreign arbitral awards.

i. *Homologation And Recognition*

The legal literature in Brazil identifies two ways of recognizing a foreign arbitral award different from the double *exequatur*. First, there is the one known in Brazil as "homologaçao" ("homologation") that consists of a special process of the same name[70] and transforms the foreign arbitral award into a national enforceable title ready to be enforced. This homologation is an initial and distinct process that precedes the enforcement; Brazil adopted this system to

[70] *See* Soares, *supra* note 41, at 59.

recognize foreign arbitral awards.[71] The second way is a natural assimilation and recognition of the foreign arbitral award inside the enforcement process ("direct recognition").[72] This second process is the one used in most countries and is totally independent from the first one. The second system of recognition makes homologation totally dispensable.

It seems quite obvious that direct recognition meets more adequately the goals of an arbitration process, since it reduces time and cost. On the other hand, the old double *exequatur* system was at least twice as expensive and slower than the sole homologation required by the BAL in Article 35. That article was definitely an advance in terms of easing the recognition of foreign arbitral awards.

The question remains, then, why did Brazil adopt a middle solution, when it could have gone further in its reforms and adopt the "direct recognition" system? By continuing to require recognition of the foreign arbitral award by the Brazilian Supreme Court, the legislature chose a less favorable system for international commercial arbitration. Assuming that this was an intentional choice, since the other option, the "direct recognition," was already a worldwide practice, what becomes intriguing are the reasons why this choice was made.

ii. *Arbitral Award Or Decision?*

The BAL implemented the homologation system by requiring this process in its Article 35 for all foreign arbitral awards. After homologation by the Supreme Court, the recognized award goes to a court with jurisdiction over the matter to enforce it. By requiring Supreme Court review of the foreign arbitral award, Brazil adopted the system of homologation, when it could have done away with it and implemented "direct recognition."

The confusion grows in light of the fact that the system implemented by the BAL, is considered unconstitutional by several jurists in Brazil.[73] These jurists are of the opinion that the Supreme Court lacks jurisdiction to homologate or recognize foreign arbitral awards, because the Constitution[74] does not include this activity within its jurisdiction. The Constitutional article that lays down the Supreme Court powers and duties reads:

> Article 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence:
> (. . .)
>
> h) to homologate foreign court decisions and to grant *exequatur* to letters rogatory, powers which may be conferred by its internal regulations upon its President;[75]

Under this article, it becomes clear that the Supreme Court has no jurisdiction over the recognition of foreign arbitral awards, but only over the recognition of

[71] *See* Article 35, *supra* note 66.

[72] *See* Soares, *supra* note 41, at 59

[73] ALEXANDRE FREITAS CAMARA, ARBITRAGEM - LEI No. 9.307/96, p. 123/125.

[74] The Brazilian Constitution, like the Constitutions of other civil law countries, includes the basic concepts of many fields of the Law and not only the basic rights and the organization of the State. It has 246 articles.

[75] Brazilian C.F. Subsecretaria de Edições Técnicas, Brasília, p. 66 (1996).

foreign court decisions. Under the Constitution, the proper courts to recognize and enforce the foreign arbitral awards would be the State courts and homologation would not be necessary.[76]

Without entering the merits of the constitutional issue, we will try to explain how the BAL justifies the jurisdiction of the Supreme Court to homologate foreign arbitral awards.

Brazil has always clearly distinguished between arbitral awards and arbitral decisions, though often they were used interchangeably. Jurists and scholars, on the other hand, always called attention to the use of the correct terminology that was considered to be "arbitral award." At the same time, the status of an arbitral award was never the same as that of a judicial decision. This was the rationale for the old system that required the judicial homologation of even national awards.

The BAL ended the homologation requirement for national arbitral awards and gave the national arbitral award the status of an arbitral decision. The consequence of this change was that the status of the national arbitral award became the same as that of a judicial decision; both are judicial titles ready to be enforced.[77]

The problem is that by calling an arbitral award an arbitral decision, the BAL also made the status equal for arbitral and judicial decisions.[78] This may serve to justify the elimination of the requirement of homologation for national arbitral decisions and the satisfaction of another article in the Constitution that guarantees the right to judicial determination of legal rights.[79]

This maneuver to save arbitration from unconstitutionality by calling it an arbitral decision and granting it the status of a judicial title seems to give the BAL support consistent with the two relevant constitutional articles. It first works for the constitutionality of the Supreme Court jurisdiction over the homologation of foreign arbitral awards. Second, it justifies the jurisdictional concept of arbitration and does not infringe upon Article 5, XXXV of the Brazilian Constitution.

Briefly, since this statement is going to be examined further on, by changing the name from arbitral award to arbitral decision and attributing judicial status to the arbitrator and his/her decision, the BAL seems to adopt the jurisdictional theory. By adopting this theory, the BAL satisfies the Supreme Court's jurisdictional problem in that a foreign arbitral award is now considered under

[76] *See* Camara, *supra* note 73, at 125.

[77] Article 31 of the BAL. "Article 31 - The arbitral decision produces, between the parties and their successors, the same effects as a decision made by the judiciary and, if condemnatory, it constitutes an executory judicial title." (free translation).

[78] *Id.*

[79] Article 5, XXXV of the Brazilian Constitution: "Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
(. . .)
XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;"

the law to be a foreign court decision. This can be explained by the harmonization of the arbitrator's and the judge's roles,[80] both of which constitute "court" decisions. The constitutional issue is satisfied under the words "foreign court decision," as the BAL expanded the meaning of the word "court" in order to fit the homologation under the jurisdiction of the Supreme Court.

On the other hand, the BAL also managed to include arbitration withing the jurisdictional sphere. By doing so, arbitration does not break the monopoly of the juridical arm, as it does from a jurisdictional standpoint. This construction respects the monopoly of the judicial power. One question that remains is: why did the BAL want to retain the homologation system? Or was it a consequence of the above legal construction? There may be answers to both questions, as is discussed later on in this article.

There were some consequences of these mechanisms that the BAL used to enhance arbitration in Brazil: First, the adoption of the jurisdictional theory. Second, the different treatment of foreign and national arbitral awards in regard to the homologation process.

3. *The Consequences*

The BAL in view of its intentions and mechanisms, was not in the vanguard of international commercial arbitration. The narrow analysis of the problem of international commercial arbitration in Brazil might have contributed to the BAL's focus on few problems. By focusing only on these, the BAL lost the opportunity to make more radical changes. The changes that were accomplished were not particularly encouraging in terms of international commercial arbitration.

This concentration may have had the effect that the big picture of international commercial arbitration was lost in Brazil. Another effect/cause might have been the willingness to compromise with the natural obstacles to arbitration within the Brazilian legal system and the tailoring of changes to have the least disruptive effect upon Brazilian legal principles. Under this hypothesis, the country would be attempting to take steps toward the modernization of international commercial arbitration that are within the country's institutional capacity. Finally, the BAL could be the result of a political compromise with the historical Brazilian judiciary's opposition to the institution of arbitration in general.

The necessity of the homologation by the Supreme Court for the recognition and enforcement of foreign arbitral awards will basically lead to higher costs and greater time expended, as well as a loss of confidentiality. Since such cost and time reductions are among the main goals of the BAL, as expressed in the

[80] This harmonization was created by the Articles 17 & 18 of the BAL that assimilated the arbitrator to the judge.

"Article 17 - The arbitrators, while acting under or by the powers of the arbitration proceedings, are assimilated to public officers, for the purposes of criminal law." (free translation)

"Article 18 - The arbitrator is assimilated, by all means, to a judge, and his decision will not be subject to a legal appeal nor to the homologation of the judiciary." (free translation)

BAL bill itself, retaining the homologation procedure seems to contradict the bill's own statements.

The change of terminology from award to decision might imply the adoption of the jurisdictional theory for international commercial arbitration and this surely will have many consequences, as will be studied in the next chapter. Ultimately, there are still doubts about whether the BAL addressed the problems of arbitration as a whole in the best possible way.

B. *A Misunderstanding of International Arbitration*

As one can see, the BAL in its attempt to solve some of the main problems of the institution of arbitration in Brazil, may have failed to deal with — or may even have "created," problems. Some hypotheses include the need for consistency inside the legal system; another may cover the international policy of Brazil when the BAL was enacted; another could be conflicts between the internal or national situation and the international one; finally, there is always the possibility that judicial pressure on the legislature against the development of arbitration led to the adoption of a narrower scope for the BAL.

Although those hypotheses are not directly examined in this chapter, the study will try to go deeper into the theoretical structure of the BAL to extract the elements necessary to test the mentioned hypotheses. First, there will be a study of the legal theory adopted to define the legal nature of arbitration. The second part will deal with the distinction between national and international environments. Finally, the assimilation of the judicial decision and the arbitral award will be analyzed. All three elements are going to be examined with regard to the impact they have on the BAL and on the recognition and enforcement of foreign arbitral awards in Brazil.

1. *What is the Adopted Theory (Jurisdictional Problem)?*

In this section, in order for us to understand the BAL underlying theory toward Chapter VI and international commercial arbitration, it may be helpful to examine the different theories. After that, we analyze the BAL's theoretical framework under the Brazilian legal system. Then, we verify and comment on the BAL's consistency with international modern standards. Finally, the motivations and options for the BAL's choice of theory are considered.

The choice of theory for international commercial arbitration dictates the way or, at least, the framework in which a country deals with the recognition and enforcement of foreign arbitral awards. The BAL seems to have chosen the jurisdictional theory. This section examines this choice, its reasons and consequences.

i. *The Different Theories*

There are basically two opposing theories for international commercial arbitration: the contractual and the jurisdictional theory. There are also two further developments of those extremes: the mixed theory[81] and the contractual-

[81] G. Sauser-Hall, *L'Arbitrage en Droit International Privé* (Rapport et projet de Résolution),

autonomous approach. We will begin with the jurisdictional theory, briefly comment on the mixed theory, define the contractual theory and finish with the contractual-autonomous. The contractual-autonomous is left for last because it is the most modern and updated.

The jurisdictional theory confers judicial power on the arbitrators, with the effect that the arbitral awards will have the same value as a judicial decision. The international arbitration will be subject to the *lex fori* of its seat and, therefore, all the rules of procedure and mandatory provisions of the law of that country should apply.

The attractiveness of the jurisdictional theory was the explanation of the source of power and authority, as well as the definition of a system of rules to be applied in an international commercial arbitration. Although it was adopted in many countries like France, Italy, UK and others, the jurisdictional theory ended up being abandoned by most of them.

This theory has a serious problem. One of the biggest obstacles for the jurisdictional theory is the interconnection between the arbitration clause and the arbitral award. How can an arbitral award, considered to be at the same level as a judicial decision, be set aside when the arbitration clause is considered to be void? This question explicates the issue that arbitral awards rely on the agreement of the parties, otherwise they would not suffer the consequences from problems in the arbitration clause. Unfortunately, the jurisdictional theory was not able to explain this connection within its theoretical framework.

Consequently, arbitral awards cannot be completely assimilated to judicial decisions. If they really were at the same level, the jurisdictional power imbedded in the arbitral award would prevent it from being affected by problems with the original arbitration clause. The fact that any interpretation of the arbitration clause affects the award demonstrates the link between clause and award.

That relationship forces us to admit a contractual basis for the arbitration, since not even the jurisdictional theory contests the contractual nature of the arbitration clause. The arbitral award, by the nature of its connection with the arbitration clause, is also influenced by the contract. The conclusion could be that the award receives at least part of its authority from the contract or the agreement of the parties. There is no logic in radicalizing the concept that the jurisdictional power is the one that validates an arbitral award.

On the other hand, the jurisdictional theory might operate under the assumption that all the adjudicatory authority derives from the State or from the national law at the seat of the adjudication. Pragmatically speaking, it is true that international arbitration depends to a large extent for its success on the support of national legal systems. This judicial support can be manifested in many different procedures, from provisional measures to the enforcement of the award.

Even under the above assumption, the jurisdictional theory has been eroded for various reasons. First, there is no compelling requirement for an international

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Institut de Droit International, 44 (I) Annuaire 469, 520 (1952).

arbitration to be attached to a national legal order. Indeed, the arbitration procedure can be ambulatory, since it does not need a geographical base or the authorization of a legal or political authority to legitimize the process. Therefore, if there is no need for the legitimacy attributed to the arbitration by the hosting nation(s), the legitimacy may well arise from the parties' agreement.

In non-domestic arbitrations, the jurisdictional theory is even more fragile, because of the diffusion of sovereignty. By diffusion, it is understood that no country will be able to claim exclusive jurisdiction over an arbitration procedure to legitimize either the arbitration process or the award. Finally, the jurisdiction theory is considered to be outmoded, since it fails to explain comprehensively the legal nature of arbitration.

As in most fields of law, whenever there are two opposing theories, a third one usually is built by the merger of two concepts. Indeed, there is also a mixed theory for international commercial arbitration. This mixed theory considers the origins of the arbitration procedure, the arbitration clause, to be contractual. At the same time, the mixed theory calls for the jurisdiction theory to explain the authority that the procedural law grants to the arbitral award.

The mixed theory was created in the 1950s by Professor Sauser-Hall and others. The theory tried to combine and compromise elements from both the contractual and the jurisdictional theories. This theory is considered to be outmoded, since it does not answer some of the complexities of the legal nature of international commercial arbitration. In particular, the mixed theory does not respond to some flaws of the jurisdictional theory, for example the ambulatory aspect of non-domestic arbitration.

The contractual theory considers international commercial arbitration as a pure contractual institution with all powers and authorities flowing from the agreement of the parties. The award would be considered as a determination of the contents of a contract as if the arbitrator were a neutral interpreter. The solution for non-compliance with the award was through a regular claim to enforce the contract or to obtain damages for its breach.

Some critiques are directed to the contractual theory. First, the arbitrators are not mere agents of the parties. If arbitrators were only agents of the parties, they would only be entitled to do what the parties have the right to do. Since the parties cannot judge themselves, the same restriction would apply to the arbitrators. Along the same lines, some critics of the contractual theory consider the tasks of the arbitrators similar to those of a judge and argue, accordingly, that the jurisdictional power of the arbitrators is based on civil procedural laws.

The other critique states that to consider arbitration as purely contractual diminishes its legal nature. This diminution may oversimplify arbitration and confuse it with other legal institutions.

Just like the jurisdictional and the mixed theories, the contractual theory was not able to respond to all the complexities of international commercial arbitration. The contractual theory was then developed into a new theory, that had the advantages of the contractual theory and solved, as well, most of its practical problems. This theory is known as the contractual-autonomous theory, and it is widely accepted in the international arena.

The contractual-autonomous theory relies mostly on the contractual one, adding the juridical autonomy element. This autonomy arises from the independence of arbitration in relation to a national legal system in order to validate and legitimize its proceedings. The contractual-autonomous theory fills one of the major gaps of the old contractual theory. The old contractual theory never managed to respond to the pragmatic critique that an arbitral award depended at least partially on the legitimacy and validation of a national legal system. The autonomy of arbitration answers this criticism by explaining the independence of the award in regard to sovereignty.

The autonomous element of arbitration is totally consistent with the contractual theory and even complementary to it. It explains the ambulatory aspect of arbitration in comparison with judicial tribunals and allows greater control by the parties of the *lex fori*. Nowadays, the parties will just fly to another country where the *lex fori* is more favorable to arbitration. Arbitration lately has been largely controlled by the parties and the judicial and the national interventions tend to shrink.

The empowerment of the arbitral award and the adoption of the autonomous element could come about only by the building of an international consensus. This consensus established that each participant in the international community has the right to initiate arbitrations with its own choice of law, distinct from any national legal system. This international agreement made the autonomy of the arbitration proceeding possible, fulfilling one of the major gaps of the contractual theory, as already mentioned. Simultaneously, the autonomy of arbitration makes the jurisdictional theory critique pointless, since it extinguishes the legitimate need for a *lex fori* attachment to a national legal order.

Furthermore, the growth of the international sphere enables the international actors to solve their problems in this arena, without having to refer to any specific country. In that sense also, the integration of many sovereigns in the international community builds a balancing check that avoids through international pressure of the sovereigns involved the national appropriation of certain kinds of conflicts.

ii. *The BAL's Theory for International Commercial Arbitration*

The BAL adopts the jurisdictional theory. Without evaluating the appropriateness of this option, this chapter will describe the Brazilian debate over the legal nature of arbitration.

Some Brazilian jurists assume that the parties are the ones who give authority and power to the arbitrators to decide,[82] which seems to be consistent with the contractual theory. However, those jurists would say that both the contractual and jurisdictional theories are too radical for the BAL. The starting point of their argument is that the arbitrators pursue a public activity, once they deal with conflict resolution in cooperation with the state. At the same time, the contractual nature of the arbitration clause is put aside by the argument that the arbitration proceeding is legally distinct from the arbitration clause. The

[82] *See* Camara, *supra* note 73, at 8.

arbitration clause will have a private nature, but the arbitration as a proceeding, connected to procedural law, is public. This theory views arbitration as having two stages: first, the arbitration clause and, then, a second stage represented by the arbitration proceedings.

These jurists refute the jurisdictional theory by arguing that, despite its public nature, arbitration lacks jurisdictional authority. This absence of jurisdictional power is due to the State's constitutional monopoly over jurisdiction. The monopoly precludes any non-State agent or institution from having jurisdiction; however, this does not lead to the monopoly of justice. The arbitration procedure, even respecting the basic principles of a judicial procedure, would never establish a procedural relationship that includes the State. Because an arbitration procedure will not include the State, it will never be attributed the jurisdictional element, otherwise the State's monopoly would be broken.

The intervention of the State is accomplished through the judge. The arbitrator, under the rationale being explored, is not considered to be a judge because he is not a State agent. At this point, the jurisdictional theory is also refuted, but without rejecting the prior assertion of the public activity of the arbitrator. Finally, those jurists will position themselves as supporters of a public theory for arbitration, rather than a jurisdictional or a contractual one. There are many parallels between the so-called public theory in Brazil and the mixed theory. There is no specific consideration of arbitration in an international scenario.

On the other hand, the majority of the authors seems to support the jurisdictional theory.[83] One could argue that the BAL assimilated the arbitrator to the judge[84] and the arbitral award to the judicial decision[85] with the intention of fostering arbitration. Under those two assimilations, even with the need for an homologation, the arbitral award would be considered to be a jurisdictional act. The arbitrators' power to say what the law is in a particular case is given to them by the parties and the BAL. The activity of the arbitrators also substitutes and integrates the parties' interests in conflict. For the above mentioned reasons, those jurists consider the arbitrator's activity to be jurisdictional.

This jurisdictional theory accepts the already-discussed argument against the contractual theory based on the distinction between the arbitration clause and the arbitration process. The jurisdictional theory also answers the criticism of the arbitral award's need for an homologation in order to receive the jurisdictional power, because it lacks the involvement of a public entity during the arbitration process.[86] The response to this line of reasoning nowadays is that homologation

[83] PAULO FURTADO, LEI DA ARBITRAGEM COMENTADA 12.

[84] *See* BAL, *supra* note 80, Art. 18.

[85] BAL, Art. 31 . The arbitral award was made equivalent to the judicial decision, what causes the award to fulfill some formal decision requirements of validity. A judicial decision in Brazil is composed of three main parts: the report; the reasoning; and the decision. The first mainly reports what the case involves and who are the parties. The reasoning includes all the legal analysis and argumentation. Finally, the decision is the opinion of the judge for one or the other party. Guilherme Gonçalves Strenger, *Do Juízo Arbitral*, 30/31.

[86] *See* Buzaid, *supra* note 11, at 10 and *see also See* Furtado, *supra* note 83, at 12.

is not a requirement for the validity of the award,[87] since the BAL no longer requires homologation. Consequently, as already mentioned, the arbitral award was assimilated to the judicial decision in terms of jurisdictional authority. Moreover, the fact that an arbitrator was assimilated to a judge responds to the necessity — under the jurisdictional theory — of a public entity participating in the arbitration process.

Another criticism of the jurisdictional theory is the lack of enforcement power of the arbitral tribunal or arbitrator, since if they have jurisdiction, they should be able to enforce their own awards. The answer to this criticism is that it oversimplifies the concept of jurisdiction, because there may be other expressions of jurisdiction. What might seem to be a constitutional prohibition[88] against the jurisdictional theory, may be one of the strongest arguments in favor of the theory. Arbitration would be considered as public participation in the administration of Justice,[89] one admitted exception to the constitutional provision[90] in question. Insofar as there is no threat or injury to a right that should be protected by the State, the State may keep the solution of the conflict in the hands of the public.[91]

In the debate about the legal nature of arbitration there is only the discussion about the contractual and the jurisdictional theories. Not even the most modern texts or those written by the jurists that participated in the elaboration of the

[87] *See* BAL, *supra* note 80, Art. 18.

[88] Brazilian C.F., art. 5, XXXV: "XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;"

[89] Brazilian C.F., Articles 5, XXXVIII; 111, §1, II; 217, §§ 1 & 2; and 98, II. These are the main articles from the Brazilian C.F. that rule the public's participation in the administration of justice.

Article 5, XXXVIII: "XXXVIII - the institution of the jury is recognized, according to the organization which the laws shall establish, and the following are ensured:

a) full defense;

b) secrecy of voting;

c) sovereignty of verdicts;

d) power to judge willful crimes against life."

Article 98, II.: "II - remunerate justice of peace, formed by citizens elected by direct, universal and secret vote, with a term of office of four years and competence to, under the terms of the law, perform marriages, examine qualification proceedings, *ex officio* or in view of the presentation of a challenge, and exercise conciliatory functions, of a non-jurisdictional nature, besides others established by law."

Article 111, §1, II: "Paragraph 2 - The Court shall forward lists of three names to the President of the Republic, observing, as regards the vacancies intended for lawyers and for members of the Public Prosecution, the provisions of Article 94, and, as regards temporary judges, the result of the appointment by an electoral college composed of the boards of directors of the national confederations of workers or employers, as the case may be; the lists of three names for the filling of the offices intended to career labor judges shall be prepared by the tenured togated Justices."

Article 217, § 1: "Paragraph 1 - The Judicial Power shall only accept legal actions related to sports discipline and competitions after the instances of the sports courts, as regulated by law, have been exhausted."

Article 217, § 2: "Paragraph 2 - The sports courts shall render final judgment within sixty days, at the most, counted from the date of the filing of the action."

[90] Selma Ferreira Lemes, *Arbitragem. Princípios Jurídicos Fundamentais. Direito Brasileiro e Comparado*, 686 REVISTA DOS TRIBUNAIS 73, 75/76 (1992).

[91] *See* Senado, *supra* note 4, at 37.

BAL mention the contractual-autonomous theory. During the BAL bill discussions, there were arguments that the jurisdictional theory would be unconstitutional because it would break the jurisdictional monopoly of the Judiciary. In addition to this criticism, there were others that argued the lack of theoretical support of the jurisdictional theory.[92]

The choice of the jurisdictional theory in preference to the mixed theory as the only option to the formerly accepted contractual theory is part of the subject of the next chapter which will also cover the reason why the contractual-autonomous theory was not explored as a possibility during the drafting and discussions of the BAL.

iii. *Reasons and Impact of the Jurisdictional Theory Choice*

Homologation was a requirement that worked against the economy of cost and time and the confidentiality of arbitration. Homologation, and even the double homologation for international commercial arbitration, was one of the major obstacles to the development of arbitration in Brazil.[93] Actually, the homologation requirement was a legal consequence of the adoption of the contractual theory in Brazil before the BAL.

The arbitral award was considered under a contractual theory. As a consequence, the arbitral award was not granted the same value as a judicial decision and the award was not considered to be an executory judicial title. Since the award was not an executory judicial title, it needed to go through a process of homologation to become enforceable.

It is claimed that in order to extinguish the homologation requirement, the contractual theory had to be abandoned. To do so technically, would require assimilation of the arbitral award to the judicial decision, as Western Europe did in order to get rid of homologation. Therefore, to get rid of homologation, the BAL switched from the contractual theory to the jurisdictional one.

The assimilation of the arbitrator to the judge was another step toward the jurisdictional theory. Those two assimilations impact on the recognition and enforcement of foreign arbitral awards in many different ways. One is in the choice of criteria for the definition of foreign arbitral award. Another effect is the maintenance of the requirement of recognition or homologation of the foreign arbitral award by the Supreme Court.

The first one, dealing with choice of criteria to define foreign arbitral awards, demonstrates that the territorial choice as the sole criterion to define an award as foreign is consistent with the rest of the BAL. If an award is issued under a jurisdictional conception of international arbitration, the award's power and authority has to come from a national legal system. If an award is issued outside Brazil, it is consistent for the BAL to assume that the *lex fori* choice was a

[92] *See* Senado, *supra* note 4, at 37/38. Those arguments were made against the jurisdictional theory and also against the contractual, the mixed, and the contractual-autonomous theories without proposing any new theory for arbitration.

[93] As seen in chapter II.B, the double *exequatur* was one of the major problems of the old system for international commercial arbitrations.

foreign one. Therefore, the award would be considered foreign, because it would rely on a legal system of a different nation.

On the other hand, the non-domestic criterion conflicts with the jurisdictional theory. The non-domestic criterion is aligned with the contractual-autonomous theory of international arbitration. In a non-domestic criterion case, the *depeçage* of the arbitration and the possible conflicts of jurisdiction may get in the way of the jurisdictional theory concept. Those problems to the jurisdictional theory could theoretically generate a positive or a negative conflict of jurisdiction.

The positive conflict would cause multiple countries to claim jurisdiction over the arbitration as the *lex fori*. In this case, the arbitration would be national to many countries, because many countries would legitimate the process by the partial support of their legal systems. This would be inconsistent under the jurisdictional theory, since the support of the national legal system is not supposed to be shared with other countries. Besides, *depeçage* is an international contractual principle and to accept this principle could imply the acceptance of the contractual element of the award.

The negative conflict is mostly only a switch in point of view. The countries would all recognize the arbitration award as a foreign one, once the award did not fit completely under the domestic criterion or did satisfy the requirements of the non-domestic criterion. This negative conflict would strengthen the contractual-autonomous theory of arbitration, by pragmatically resulting in a case that leaves no room for contesting the autonomy of the award. The award would exist without being national to any country, an impossibility under the jurisdictional theory.

These two conflicts prove that the adoption of the non-domestic criterion for the definition of foreign arbitral award is inappropriate under the jurisdictional theory. These conflicts would cause problems that the jurisdictional theory is not able to solve. By keeping the definition of foreign arbitral award restricted to the territorial criterion, the BAL not only kept the criterion simple and objective, it also acted consistently with the jurisdictional theory.

We turn now to the second impact. The maintenance of the recognition of the foreign arbitral award by the Supreme Court has the following rationale. The jurisdictional theory assimilates the arbitral award to the judicial decision. The criterion to define a foreign arbitral award is the territorial one. Therefore, a foreign arbitral award would be assimilated to a foreign judicial decision. If a foreign judicial decision is brought to Brazil to be enforced, it will have to be homologated by the Supreme Court,[94] in order to validate the sovereign act of another State. Consequently, the same will apply to a foreign arbitral award.

A foreign arbitral award will need to be homologated by the Supreme Court, because under the jurisdictional theory it is also legitimized and validated by another national legal system. Thus, the foreign arbitral award carries a sovereign act of another country that is intended to be enforced in Brazil. In order to protect its own sovereignty, Brazil requires that this award be homologated by the Supreme Court.

[94] *See* Article 35, *supra* note 66.

The advantage of the adoption of the jurisdictional theory is that Brazil does not require the foreign arbitral award to be recognized in its own country. The requirement of the double *exequatur* becomes useless since Brazil already assimilates the award to a decision. For Brazil to require a country to homologate the award before it went to the Supreme Court, would be counter-productive and illogical. It would be the same as requiring a country to validate and legitimize the arbitral award twice. As the award is not considered by the BAL to be legitimized by the agreement of the parties, there is no need for the double *exequatur*. The award already comes legitimized by the foreign national legal system under the jurisdictional theory and for that reason Brazil, through the Supreme Court, has to homologate the award as for its sovereign element.

The empowerment of the arbitral award is given through an international consensus — the New York Convention — in which all participants accord the right to establish an arbitration as independent of any other legal order. Brazil is not an active member of this international community. Therefore, Brazil does not feel the pressure to adhere to this international legal construction to support the contractual-autonomous theory for arbitration, but prefers to adopt an outmoded system that does not cover the entire institution in its international format. On the other hand, the option for the jurisdictional theory seems more consistent with the BAL and, perhaps, with the political intentions of the nation.

By adopting the jurisdictional theory, the BAL sends a message to the world that it will impose a stricter control on foreign arbitral awards. This control means that the Supreme Court intervention will increase the time and cost necessary, while putting an end to the confidentiality of the foreign arbitral award. This control may cause parties to avoid arbitration whenever the award would have to be enforced in Brazil.

Accordingly, the parties in a dispute that is intended to be enforced in Brazil will have no good reason to arbitrate the dispute instead of seeking court adjudication. There would be no incentive for an international commercial dispute to be arbitrated outside Brazil. First, the parties will not be able to rely on the New York Convention for the recognition and enforcement of the foreign arbitral award. Second, if they insist on arbitration, they will have to go through a costly and time consuming process of recognition at the Supreme Court level, that will have as a side effect the destruction of the confidentiality of the award.

iv. *The Motivations and Options for the Jurisdictional Theory Choice*

The options of the parties in an international conflict that will be potentially enforced in Brazil are few and unattractive. First, they could avoid Brazil for arbitration whenever the case does not strictly require enforcement in Brazil. Second, they could opt for immediate court adjudication, instead of opting for arbitration and later having to go to the courts. Third, they could work out a way to arbitrate inside the Brazilian territory, in order to receive a national arbitral award and be free of the homologation requirement.

Were the above decisions conscious ones made by the Brazilian legislature? If there were an intention behind the choice, did it cover the discouragement of international arbitration in Brazil, to protect the judiciary from a hypothetical

fear of arbitration? Or maybe exactly the contrary, the jurisdictional theory choice tries to encourage the establishment of arbitration tribunals inside Brazil, instead of outside the country? Or even, was it a side effect of solving some of the old problems of arbitration in Brazil? If a side effect, could it not be avoided? Could it have been underestimated? Could it have been either ignored or desired? Those questions will be answered in different chapters of this article.

2. *Foreign or International Arbitral Award?*

Although this topic is partially covered by both the chapter that deals with the jurisdictional theory[95] and the one that will deal with the definition of foreign arbitral award,[96] it is useful treat it in a separate section in order to call attention to the confusion inside Brazilian law or politics respecting the concepts of "foreign" and "international."[97] Attention is also called to the possible effects of that confusion on most of the policies and motivations underlying the decisions made in terms of recognition and enforcement of foreign arbitral awards.

Historically, Brazil adopted a position of isolationism and aversion in relation to international commercial arbitration. Many decisions of the Supreme Court refused recognition and enforcement of foreign arbitral awards. International arbitration was seen under a suspicious veil as if it were an act of sovereign invasion from another State. One result was that Brazil developed a mixed concept of the terms "foreign" and "international," and, as a consequence the country had a distorted image of foreign arbitral awards.

Brazil does not differentiate between foreign and international. Rather, the law considers that the concept of "international" is the same as that of "foreign," since the concept of "international" would not add anything else or different to the concept of "foreign." In Brazil, the foreign concept dominates and includes both terms. Consequently, under the jurisdictional theory, any arbitral act in order to be international must have a connection to a sovereign State.[98] In that way, the arbitral act is understood as being a foreign one.

By not distinguishing "international" from "foreign," Brazil nourishes its historical sovereign fear for whatever is international, though seen as carrying a national sovereign element as if it were "foreign."[99] Brazil's fear could be a consequence of the adoption of the jurisdictional theory. In Brazil, the jurisdictional as well as the sovereignty issues are both based on territory utility[100]. Under this basic principle, the idea of territory becomes the line with which concepts of national, foreign and international are demarcated.

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[95] As seen in Chapter III.B.1.

[96] As in Chapter VI.A.

[97] Guido F.S. Soares, *Arbitrageus Comerciais Internacionais no Brasil - Vicissitudes*, 641 REVISTA DOS TRIBUNAIS 32 (1989).

[98] *Id.*

[99] Hermes Marcelo Huck, *Deficiencias da Arbitragem Comercial Internacional*, *in* 593 REVISTA DOS TRIBUNAIS 28-29 (1985).

[100] Irineu Stranger, *Aplicacao de Normas de Ordem Publica nos Laudos Arbitrais*, *in* 606 REVISTA DOS TRIBUNAIS 10 (1986).

The notion of territory is thus fundamental for defining what is national; whatever is outside of the Brazilian territory is not national. Brazil recognizes that there are other countries and those are foreign. Then Brazil accepts the idea of an international community composed by many foreign nations, but there is no recognition of international acts as something done separately from the joint effort of many such "foreign" entities.

In the BAL, Brazil theoretically requires a national and jurisdictional attachment to a country for any international award to be considered valid. The consistency with the jurisdictional theory choice makes the attachment to a national (or foreign) legal system the source of legitimacy for an arbitration. That understanding definitely imposes a foreign element on any arbitral award. In this perspective, the confusion between foreign and international becomes even more complicated.

Brazil, relying on the territorial criterion together with the jurisdictional theory of arbitration, does not recognize the international consensus on the right to initiate arbitrations distinct from any national legal system. Without accepting this international agreement, Brazil cannot adopt the autonomy principle of international commercial arbitration. By the BAL not accepting the autonomous element, Brazil has a problem with going beyond the jurisdictional theory and a broader-than-foreign-concept of the term "international."

The lack of the acceptance of a purely international concept leads Brazil to a defensive and hostile relationship towards international commercial arbitration. Brazil perceives the foreign arbitral award as the product of a different sovereign state, instead of the international arena. Hence, Brazil renders difficult — if not impossible — the adoption of a contractual-autonomous theory of international commercial arbitration, based on the lack of a clear statement of these different terms.

We could ask if all of this were done accordingly to the political intentions of the nation or if they were a consequence of the construction of a legal system. As said before, Brazil is an isolationist country when it comes to international issues. Did the government intentionally seek to maintain this position, or is the government struggling to get out of this situation little by little? Will Brazil, under the jurisdictional theory, conceive of awards rendered by the AAA as American and by the ICC as French? Can Brazil recognize the non-national character of these international institutions?

The tension between the concepts of "international" in international commercial arbitration and of "foreign" in foreign arbitral awards played a role in the development of the Brazilian confusion between international and foreign. The solution could be to consider arbitration an international act and to understand the foreign element of the award as not necessarily connected to another State, but only non-national to Brazil. This change in perspective could relieve some tension from the different terms and adapt the Brazilian situation to a more internationally acceptable one.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In this chapter, each article will be analyzed separately. The issues may be treated in more than one article, or one article may contain more than one issue. This chapter treats every issue raised by the BAL's Chapter VI, hence covering all issues related to the recognition and enforcement of foreign arbitral awards.

Since the theoretical background has already been discussed in the previous chapters of this article, the discussions of the articles will, it is hoped, be enriched. Each issue is approached separately in order to give an understanding of the issue's practical impact on the Brazilian society. The issues will be considered in the order in which they are found in the BAL.

Article 34 corresponds to the International Treaties; its sole paragraph deals with the Definition of Foreign Arbitral Award; Articles 35 and 36 deal with Supreme Court jurisdiction; Articles 37 to 39 cover the Requirements for the Recognition of Foreign Arbitral Awards; and, finally, the sole paragraph of Article 39 and Article 40 regulate Formal Vices.

A. *International Treaties*

This section considers Article 34 of the BAL; the article is not an ambitious one. Its only goal is to lay down the international treaties involving international arbitration of which Brazil is already a signatory, even if such treaty has not yet been ratified. On the other hand, this section may demonstrate some of the political strategies that Brazil is adopting regarding international commercial arbitration.

As already said in Chapter II.A, the Protocol of Geneva of 1923 was signed by Brazil, though never cited in a case until 1990.[101] In spite of the former desuetude of this Protocol, Supreme Court decisions involving international commercial arbitration have brought it back to life. These decisions may demonstrate a change in the Court's understanding of arbitration.[102]

On the other hand, Brazil has not yet signed the New York Convention. The BAL was inspired by the New York Convention and indicated a move of the Brazilian Congress toward this Convention. However, the results achieved by the BAL were not as good for international commercial arbitration as Brazil hinted they would be. The Supreme Court was beginning to apply the Protocol of Geneva — a predecessor of the New York Convention — and Congress was discussing a bill inspired by the New York Convention. There was a clear and general change in the Government's perspective toward international commercial arbitration and, more specifically, the recognition and enforcement of foreign arbitral awards.

Without questioning the Brazilian position in relation to the New York Convention, it might be helpful to get a better picture of the country's position

[101] Eunice Nunes, Camara de Arbitragem Agiliza Solvacao de Litigios Comerciais, Folha de Sao Paulo - Caderno Cotidiano at 3.2, Saturday, June 3, 1995.

[102] *Id.*

regarding other international treaties. Before the enactment of the BAL, Brazil enacted some laws adopting international commercial arbitration treaties.[103] Those enactments give the impression that the way was being prepared for the BAL.

In 1995, Brazil enacted two laws adopting international commercial arbitration treaties. The first was the Inter-American Convention on International Commercial Arbitration — Panama (January 30, 1975) — enacted through legislative decree No. 90 of 1995 and published in the Official Gazette of June 12, 1995. The second was the Inter-American Convention on the Extra-Territorial Validity of Foreign Arbitral Awards and Decisions-Montevideo, 1979, enacted through legislative decree No. 93 of 1995 and published in the Official Gazette of June 23, 1995. The closeness in time in which both were enacted might implicate an effort to prepare the country for a future bigger step toward arbitration, to come through the BAL.

Besides those two treaties, Brazil also ratified the Protocol of Brasilia of December 17, 1991, which establishes arbitration as one of the means to resolve MERCOSUL[104] conflicts.[105] Another treaty that Brazil enacted, as decree No. 129 of 1995, was the Protocol of Buenos Aires on Contractual Jurisdiction.[106] The first establishes arbitration generally as a dispute resolution method for disputes both among States and private parties. The second, more specific, regulates arbitration as an international commercial dispute resolution method for private parties only.

Under the recent explosion of international commercial arbitration treaties, there seems to be some reasons for the isolationism of Brazil in terms of the New York Convention. In the BAL bill discussions, it was asserted that (free translation): "(. . .) Brazil recognizes the need to adhere to the important international legal acts, since the country is establishing itself in the international scenario as the major South American nation."[107]

There may be many reasons why Brazil signed certain treaties and failed to sign others. One reason could be that the nation is trying to progress in small steps. Therefore, Brazil signed only regional treaties, in order to move toward arbitration cautiously. That way, the country would have some time for the development of the institution of arbitration in Brazil, before embracing the major international treaty in the field (the New York Convention). Under less international pressure, due to the smaller number of parties involved in the regional treaties, Brazil might feel that there is more room for change and less pressure for improvements.

[103] *See* Senado, *supra* note 4, at 55.

[104] South America Free Trade Agreement, including Brazil, Argentina, Uruguay, Paraguay, Bolivia and Chile. The original treaty was signed on May 26, 1991. (Asunciùn Treaty), only among the first four of the above list, the last two having joined later. In Brazil, the treaty was enacted as the decree No. 350, on Nov. 21, 1991.

[105] Luis Rodrigues Wambier, A Arbitragem Internacional e o Mercosul, JB 171 at 73.

[106] Selma Maria Ferreira Lemes, O Mercosul e a Arbitragem Comercial.

[107] *See* Senado, *supra* note 4, at 55.

The other reason might be the need for control. Viewing itself as the major country in South America, Brazil might want more sovereign control over the treaties it adopted. Its partners are presumably not as strong or not so many as in a worldwide international consortium. Therefore, Brazil's opinion might have more value and respect, satisfying the interest of having more control. The country might see those treaties less as a threat to its sovereignty than the New York Convention.

Both reasons are tied to a fear of opening Brazil's economy too rapidly, the first in a mature and positive aspect, the second in a more selfish and negative one. Both may exist at the same time, though one might influence more the actions of the nation than the other. The expectations that those motivations create depend on which motivation prevails. If the cautious one is the stronger, the New York Convention can soon be signed and ratified by Brazil. On the other hand, if the strongest interest is the sovereign control one, then the New York Convention might well have to wait a long time before Brazil signs it.

B. *The Definition of Foreign Arbitral Award*

The single paragraph of BAL Article 34 establishes the territorial criterion to define which awards are considered foreign in Brazil.[108] Under the territorial criterion every award that is issued outside the Brazilian territory is considered foreign for legal purposes, even if it is rendered under Brazilian law and involves only Brazilian parties.[109]

The importance of treating an arbitral award as foreign rather than national, especially in Brazil, can mean the difference between a successful and a frustrating arbitration experience. The national award does not require homologation by the judiciary, while the foreign requires homologation by the Supreme Court. This requirement results in more cost and time and a loss of the confidentiality of the whole arbitration process.

The Senate did not discuss the definition of foreign arbitral award while drafting and amending the BAL bill.[110] The bill proposed by the private sector through the "*Operaçao Arbiter*" was unchanged in this aspect,[111] as one can confirm by comparing the article in the first draft introduced to the Senate and in the final version of the BAL. Unfortunately, the writings of the scholars that participated in the drafting of the project as well as the BAL itself do not address the issue or the discussions out of which this paragraph grew. Consequently, it is difficult to infer or conclude what was the rationale behind the decision to adopt only the territorial criterion. Indeed, understanding is made still more difficult by the fact that the New York Convention's Article I (1), with

[108] Lei No. 9.307/96, Article 34, sole paragraph - published in the Official Diary in 9.24.96, p. 18897-18900.

[109] CAMARA, ALEXANDRE FREITAS, ARBITRAGEM - LEI NO. 9.307/96. Ed. Lumen Juris, Rio de Janeiro, 1997, p. 122.

[110] *See* Senado, *supra* note 4.

[111] *Id.*

its dual test, was used as a model in drafting Chapter VI.[112]

The New York Convention in Article I,[113] defines its scope in terms of what it considers to be a foreign arbitral award. The text reads as follows:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are 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.[114]

The New York Convention terms have a broad scope and provide two criteria to define foreign arbitral award; the first criterion is exclusively territorial; the second is open-ended and within the control of each State.[115] Each sentence of Article I defines one criterion respectively. By making two criteria available, the New York Convention keeps open the possibility of enlarging and encouraging the use of international commercial arbitration. This broadness helps give flexibility to different countries with different understandings of international commercial arbitration. The flexibility allows the countries to better shape the institution and adapt it to domestic arbitration. As a result, the adoption of the New York Convention criteria to define foreign arbitral awards can build a more systematic structure.

The downside of this flexibility can be the rivalry between competing legal systems and the possibility that arbitrators might be led not to confront the issue of applicable law until they have decided the merits of the case.[116] However, these downsides would be a consequence of a doubtful interpretation of Article I and a failure to apply this provision consistently with the New York Convention taken as a whole.[117]

1. *The American Case*

Unlike the Federal Arbitration Act ("FAA"), the BAL does not add any other criteria to the territorial one. The FAA takes advantage of the non-domestic provision of the New York Convention to clarify the boundaries between national and foreign arbitral awards.[118] Domestic awards are those that arise out of a relationship between U.S. citizens.[119] On the other hand, the non-domestic criterion embraces relationships between U.S. citizens, when the relationship has some reasonable relation with one or more foreign states.[120] As specified in the

[112] *Id.* at 26.

[113] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 7.

[114] *Id.*

[115] Historically, this criteria was included in the New York Convention as a compromise to the Belgian situation.

[116] Jan Paulsson, *The New York Convention's Misadventures in India*, 7(6) INT'L ARB. REP. 18 (1992).

[117] *Id.*

[118] *See* 9 U.S.C. §202.

[119] *Id.*

[120] *Id.*

Act, the relationship may involve property located abroad or envisage performance or enforcement abroad.[121]

The U.S. could have many reasons for broadening the concept of foreign arbitral award under its laws, most of them deriving from the American role internationally. As a major commercial partner for most countries in the world, with business interests almost everywhere, with its citizens (including corporations) spread all over the globe, there can be many advantages in the broadening of the use of international commercial arbitration, even or especially when it involves U.S. citizens.

With the New York Convention's acceptance almost all over the world,[122] to broaden the scope of the term "foreign" might result in a better protection of U.S. citizens' interests. In this sense, the U.S. guarantees a faster and cheaper way to settle disputes, to which its citizens are parties, that involve any kind of international element. The award will not be a domestic one, and therefore easier to enforce abroad under the New York Convention. It will also avoid the courts of a foreign country or even those of the U.S., when the dispute involves American parties.

The avoidance of the courts of so-called underdeveloped countries is one of the major benefits of international commercial arbitration for U.S. citizens.[123] As the New York Convention made the recognition and enforcement of foreign arbitral awards relatively so easy, it is better for the U.S. to have its citizens' international disputes resolved by international commercial arbitration rather than by any judiciary,[124] even its own. The situations mentioned above fit under the FAA non-domestic criterion for foreign arbitral awards.

In those cases, it would be cheaper, faster and more predictable to arbitrate than to submit the claim to the Judiciary.[125] The non-domestic criterion gives the option to arbitrate the claim and still have it enforced as a foreign arbitral award. Consequently, the U.S., by including the non-domestic criterion in §202 of the FAA, responded to the interests of its citizens. The adoption of this criterion gives U.S. citizens an instrument to avoid the courts. What could be seen as a domestic award (the citizenship criterion), is then made international, because the non-domestic criterion respects the international elements in the dispute.[126]

On the other hand, this system inhibits the attempts to create foreign awards out of national disputes. Such is the case where national citizens, with national arbitrators, applying national law, seeking national enforcement of a national transaction, go abroad just to be able to produce under the territorial criterion a

[121] *Id.*

[122] More than 100 countries have signed and ratified it.

[123] CAL. LAW. 41 (July 16, 1996).

[124] The fact that arbitration and mediation clauses are standard between American and Canadian firms, clearly demonstrates that the arbitration and mediation options are also useful for relations between developed countries. (Anthony Aarons, *Going International*, THE LOS ANGELES DAILY JOURNAL, Oct. 21 1996, v109, n204, p5, col. 1).

[125] CAL. LAW. 41 (July 16, 1996).

[126] 9 U.S.C. §202.

foreign arbitral award. At the same time, the FAA lays down some legitimate criteria to allow an award produced inside the country to be considered international. In that case, all that is needed is the existence of an international element in the dispute.[127]

This approach to international commercial arbitration and the definition of a foreign arbitral award are consistent with the U.S. role in the international community. As a leader in the international community and having numerous interests abroad, the U.S. is trying to reduce the submission of its citizens to the disadvantages of foreign courts.[128] The mechanism seems to be the encouragement of the use of international commercial arbitration. The way to encourage the use of arbitration was to broaden the concept of foreign arbitral award — by using the non-domestic criterion — and to take advantage of the large acceptance of the New York Convention to enforce those decisions more easily.

Of course, U.S. citizens could try to have a national arbitration and a U.S. domestic award if the territorial criterion was the only one, but then they would not be able to profit from the benefits of the New York Convention. Hence, by broadening the definition of foreign arbitral award,[129] the U.S. enlarges the application of the New York Convention and avoids the submissions of their citizens' disputes to long and expensive judicial procedures.

2. *The Brazilian Case*

The adoption of only the territorial criterion by the BAL raises questions about the reasons why that decision was made. Some hypotheses for the exclusive adoption of the territorial criterion are explored below. One hypothesis is ignorance of other criteria, such as the non-domestic criterion, while the law was being discussed. On the other hand, this is extremely hard to accept. It was expressly written in the report draft BAL that the New York Convention was one of the texts used as a model for drafting the BAL.[130]

[127] Therefore, if any party is not American, if the assets or the transaction are not from the U.S., if any element involving the contract can be considered international, the FAA admits the award's international character. This is consistent with the contractual-autonomy theory of international commercial arbitration, that undervalues the weight of the jurisdictional country.

[128] It is possible to understand a protective intention in the encouragement of the institution of international commercial arbitration by the U.S. through the adoption of the non-domestic criterion. The protection would be of U.S. citizens and interests from judicial decisions. The adoption of this criterion may reflect an expansion of individualism and liberalism.

The U.S. might have managed to find a way to expand its political and legal "jurisdiction" through an informal alternative dispute resolution method, to better protect its own citizens and interests all over the world. One could read this broad conceptualization of foreign arbitral awards embedded in §202 together with the economic and political situation of the U.S. as a sovereignty expansion to better serve its citizens. This could even be the seed of a different approach to sovereignty on an international level, as the laws of one country can be freely adopted in another through international commercial arbitration.

[129] *But see* Bergesen v. Joseph Muller Corp., 710 F2d. 929 (2d Cir. 1983). This case was the first to address the non-domestic criterion. This leads us to the consideration that this criterion has no extensive pragmatic value, as it was not argued many times in American legal history.

[130] PLS 00078 - 1992 Projeto de Lei (Cf.: "Bill") - Senado Federal (Cf.: "Senate") - Senador

One possibility is that the country was so focused on solving particular problems of arbitration, that little attention and discussion were directed to this issue.[131] Under this assumption, the issue would have been considered to be a minor one.[132] The theoretical possibility of overlooking this criterion will always exist, but it is hard to believe that competent scholars and practitioners ignored or misunderstood the non-domestic criterion.[133]

That leads us to the hypothesis that there was a conscious decision on the criteria to be adopted. This decision might have been made with full or partial understanding of the concept of the non-domestic criterion. First, we examine the hypothesis of a partial understanding of the criterion.

The decision on the criterion might have been made under confusion between the concepts of the terms foreign and international,[134] related to the jurisdictional theory.[135] As a result, we would have a criterion — the territorial one — that would better protect the country from what it sees as the sovereign decisions of other jurisdictions.[136]

Brazil then will view as foreign arbitral awards those that are issued outside of its boundaries, since the jurisdictional and the sovereignty issues are both based on territory.[137] In order to keep the definition of foreign arbitral award consistent with the jurisdictional theory and the national legal system, the territorial criterion was the only natural choice.

With the jurisdictional element coming from the authority of a sovereign State, this would be sufficient to make an award a domestic one, if the arbitration takes place in Brazil. On the contrary, if an arbitral award is issued in any other sovereign State, the jurisdictional connection between both the State and the award is assumed and, therefore, the award has to be considered as a foreign one. This rationale will apply independently of the choice of law or the nationality of the parties;[138] thus, for Brazil, there could never be a purely international award.

This partial understanding relies on a misunderstanding of the modern theory of international commercial arbitration(contractual-autonomous), while adopting the outmoded jurisdictional theory. Although there might have been a full

Marco Maciel, p. 26.

[131] None of the Brazilian literature researched by the author approached this issue in a significant manner, if at all. Even the BAL bill's discussions do not include any relevant argument about the choice of the geographical criteria.

[132] Guido F. S. Soares, *Arbitragens Comerciais Internacionais no Brasil*,641 REVISTA DOS TRIBUNAIS 32 (1989). The author talks about this issue as *slightly* relevant.

[133] This assumption is based on the reputations enjoyed by the leading international and commercial law scholars and practitioners that were the authors of the project that originated the BAL. Some of them already wrote major law articles analyzing the New York Convention, such as Carlos Alberto Carmona and Selma M. Ferreira Lemes.

[134] As seen in Chapter III.B.2.

[135] Carlos Alberto Carmona, *Arbitragem e Jurisdiçao*, 145 JURISPRUDÊNCIA BRASILEIRA 25.

[136] Irineu Strenger, *Aplicacao de Normas de Ordem Publica nos Laudos Arbitrais*, 606 REVISTA DOS TRIBUNAIS 10 (1986).

[137] *Id.*

[138] CAMARA, *supra* note 109 at 122.

understanding of the non-domestic criterion, that theory would have conflicted with the conception of the institution based on old theories and concepts.

Another hypothesis is that the drafters relied on the Spanish Arbitration Law. The Spanish Arbitration Law adopts solely the territorial criterion.[139] Brazil used this law as one of the major resources to build the BAL. Hence, Brazil might have adopted the same criterion without too much questioning or to respect the systematic interpretation of the BAL. Consequently, the decision might have been made under an only partial understanding of its consequences.

The last hypothesis presupposes a fully informed decision of the Brazilian Congress or of the authors of the draft bill to suppress the non-domestic criterion. This decision might have been taken on the opposite basis from the one explained above for the U.S. Instead of trusting the institution and trying to encourage its use, Brazil might be afraid of adopting international arbitration so completely. One of the aims of this work is to analyze Chapter VI in light of the most modern standards of international commercial arbitration.

In order to protect its sovereignty and its Judiciary, the BAL might have been drafted with the intent to restrain as much as possible the use of international commercial arbitration. Brazil fears that the institutionalization of arbitration under very attractive procedures would take too much work away from the courts.[140] Brazil's judiciary fears the competition because arbitration could stand as a threatening alternative to the power structure. As the jurisdictional and due process issues are very important to Brazil nowadays, and the new democracy values the judiciary as the guardian of people's rights, it may be hard even for the public to admit the sacrifice of rights that arbitration seems to demand.[141]

Another possibility would have been to have kept the criteria simple and objective,[142] where it would be very easy to distinguish the foreign from the domestic arbitral award.[143] The drafters might have contemplated no need for the establishment of another criterion to clarify the definition of foreign arbitral award. Furthermore, there might be other mechanisms to control the misuse of arbitration or there might be no concern with this issue. As a matter of fact, there is no definition of what constitutes a domestic award. In order to define domestic award one depends on the *a contrariu sensu* interpretation of the territorial criterion for foreign arbitral awards.

Another possibility, assuming a fully informed decision, depends directly on the fact that Brazil is not a signatory of the New York Convention. Thus, an award issued in Brazil to be enforced elsewhere would not profit completely from the New York Convention because of the reciprocity clause,[144] even though

[139] *Id.*

[140] Huck, *supra* note 99 at 29.

[141] Selma M. Ferreira Lemes, *Arbitragem, Princípios Jurídicos Fundamentais - Direito Brasileiro e Comparado*, 686 REVISTA DOS TRIBUNAIS 76-77 (1992).

[142] Carlos Alberto Carmona, *A Arbitragem no Brasil - Em Busca de uma Nova Lei*, 166 JURISPRUDÊNCIA BRASILEIRA 25.

[143] CAMARA, *supra* note 109 at 122.

[144] New York Convention, Article I(3) - "3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity

not all countries invoke this clause. In this case, it would not make any difference to have a foreign or a national arbitral award, because, in other countries, it would have to be submitted to different procedures than the ones established by the New York Convention. Brazil's citizens would not profit anyhow.

By not adopting the non-domestic criterion, Brazil chose to stick with its formalistic approach.[145] Brazil was also consistent by not choosing the non-domestic criterion, since it conflicts with the rationale of the jurisdictional theory. The historical fear of adhering to the international community might not be overcome, and only small measures might have been taken to change that situation of rejection of the institution of international commercial arbitration.

The territorial criterion for Brazil requires only that the award be issued in its territory.[146] The whole arbitration process can be conducted elsewhere, but if the award is issued in Brazil, it is considered a domestic one.[147] The place of the issuance of the award[148] determines the country of the award because the jurisdictional element pervades only the award and not the entire process.[149]

Although not incorporating completely the criteria of the New York Convention, the practical application of the non-domestic criterion proved in other countries not to make a big difference for the treatment of international commercial arbitration.[150] However, the theoretical implications of this decision may add an element to the understanding of the position of the BAL toward international commercial arbitration.

C. *The Brazilian Supreme Court*

Articles 35[151] and 36[152] of the BAL grant jurisdiction to the Supreme Court to homologate foreign arbitral awards. Some of the reasons for this were previously explained in chapter III.B.1. Here we view the situation from the point of view of the burden that the homologation requirement places on the Court. It is not, however, within the scope of this article to analyze the overall situation of the Supreme Court and the causes of its problems.

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declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

[145] Strenger, *supra* note 136 at 10.

[146] Carmona, *supra* note 142 at 25.

[147] *Id.*

[148] BAL, Article 26, IV, has as a requisite for the issuance of the award that it set out in the body of the award the place where it was made.

[149] G. Sauser-Hall, L'Arbitrage en Droit International Privé, Institut de Droit International, 44 (I), Annuaire 469, 1952, p. 516-524.

[150] *See* Bergesen *supra* note 129.

[151] "Article 35 - To be recognized or enforced in Brazil, the foreign arbitral decision has solely to be homologated by the Brazilian Supreme Court." (free translation)

[152] "Article 36 - The homologation, for the recognition or enforcement of foreign arbitral decision, shall apply Articles 483 and 484 of the Civil Procedure Code." (free translation)

In 1975, the Brazilian Supreme Court decided 9,000 cases per year. Today, the volume has increased by 300%. Last year the Supreme Court decided 28,000 cases. Each judge decided an average of 2,800 cases last year and some of them decided 4,000 cases. Just as a comparison, the U.S. Supreme Court decided 100 cases last year. Because of its excessive workload, the quality of decisions by the Brazilian Supreme Court is declining and many important cases are not being decided in a timely manner.[153]

The BAL places the mandatory recognition of foreign arbitral awards under the jurisdiction of the Supreme Court. This is achieved through a dubious structuring of the institution of arbitration and a disputed interpretation of the Constitution. The artifice of assimilating the arbitral award to the judicial decision had two consequences. One was the extinction of the requirement for the homologation of the national arbitral award and the other was the fitness of the mandatory recognition of foreign arbitral awards under the jurisdiction of the Supreme Court.

There are two doctrines in Brazil regarding the jurisdiction of the Supreme Court in relation to the recognition of foreign arbitral awards. One was supported by the jurists that helped draft the BAL and became the official interpretation of the law; another, the one contrary to the Supreme Court jurisdiction that considers this jurisdiction unconstitutional. Both have flaws.

The theory that considers constitutional the Supreme Court's jurisdiction over the homologation of foreign arbitral awards, rests on the legal construction of the BAL. The BAL affirms that the Supreme Court has jurisdiction over homologation. In addition, the BAL creates mechanisms[154] to make this article constitutional under Article 102, I, h of the Brazilian Constitution.

Those who assert the unconstitutionality of the Supreme Court jurisdiction, rely basically on two arguments. First, they clearly distinguish between arbitral awards and court decisions, thus refuting the assimilation artifice of the BAL. Secondly, they argue that foreign executory titles, under the Civil Procedure Code, do not need homologation at all,[155] since they are already enforceable. The first critique runs up against the historical fact that Brazil has never attached itself to a single concept, using simultaneously either award or decision. The problem with the second critique is the acceptance of the jurisdictional theory, under which the arbitral decision is a sovereign act and therefore dependent upon the Supreme Court homologation.

These two problems with the critiques demonstrate that it is superficial and not well supported. The critiques do not attack the theoretical basis of the BAL; accordingly, they are not able to point out the real problems or to present real solutions.

A third and different understanding of the Supreme Court jurisdiction would also consider it as undesirable, even if the constitutionality of the construction

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[153] Eduardo Oinegue, Exaustos Meritíssimos, 1488 Revista Veja 108/109 (Mar. 26, 1997).

[154] As seen in Chapter II.A.2., one of them is the transformation of the arbitral awards into a judicial decisions.

[155] Civil Procedure Code, Article 585, §20.

created by the BAL is assumed.[156] To assume that the BAL was designed to ensure the jurisdictional respect for the monopoly of the Judiciary and the jurisdiction of the Supreme Court does not necessarily entail approval of its mechanisms or intentions.

Many arguments against the Supreme Court having jurisdiction over the recognition of foreign arbitral awards go beyond a first analysis of the BAL. First could be that the mere legal assimilation of the arbitral award to a judicial decision and of the arbitrator to a judge may change the legal world, but it does not change the facts. The BAL may have been an attempt to conceal the authority given by the parties to the arbitrators and the contractual legitimacy of the arbitral award by imposing a jurisdictional empowerment and legitimacy to the arbitration process. That the BAL assimilates the jurisdictional theory, does not mean that in fact international commercial arbitration loses its autonomous element.

Second, the fact that the BAL empowers arbitrators and awards within the monopoly of its jurisdiction does not mean that other countries will do the same. Therefore, the foreign award may never have been assimilated to a decision for jurisdictional purposes in the foreign country. The process may have been totally autonomous, and Brazil will be requiring a jurisdictional fiction that becomes one more burden on the recognition and enforcement of foreign arbitral awards. This means that Brazil will assume that a foreign arbitral award has a jurisdictional content, when in reality it has none. The foreign award may have no jurisdictional element because the country that was supposedly responsible for attributing legitimacy to it, operates under the contractual-autonomous theory. Thus, this foreign country never conferred on the award its national jurisdictional powers.

Third, as the scope of the BAL is restricted to private rights,[157] why should a political court like the Supreme Court have original jurisdiction over its homologation? International commercial arbitration is a private method of dispute resolution; there are rarely public issues involved. There are hardly any fundamental or constitutional rights implicated[158] and on top of that, the BAL only accepts appeals on the formal elements of the arbitration procedure that originated the arbitral award.[159] There is no reason for the country to put one more burden on an already overloaded Supreme Court.

If the award is a private one, why should the highest political court of a nation waste its time going over it? There is materially no jurisdictional element in the foreign award, despite the jurisdictional theory adopted by the BAL. The problem here is basically one of design of institutions. The Constitution explicitly lists the areas over which the Supreme Court has jurisdiction to give

[156] This position, only to bring a new hypothesis to the discussion, does not accept the constitutionality of the BAL, because it opens a huge precedent for constitutional amendment without democratic participation.

[157] Article 1 of the BAL.

[158] The few issues involving constitutional or fundamental rights could be related to due process, to be analyzed under a formal revision process.

[159] Arts. 32 and 33 of the BAL.

the best design and function for the institution. Even with all the attention given by some Constitutional articles to the matter, the Supreme Court has more work than it can handle. The BAL gives the Supreme Court more work and more responsibilities and powers than it can handle efficiently.

As already mentioned, the foreign arbitral award can only deal with private rights. The Supreme Court was designed to decide upon the most important constitutional issues of the nation, not upon private and commercial disputes. The BAL for no apparent reason tries to insert the responsibility for homologation of foreign arbitral awards under the Supreme Court jurisdiction. By doing so, the BAL seems to go against the public and political role of the Supreme Court and the advantages of international commercial arbitration. The BAL apparently creates an artifice to bypass the constitutional restriction[160] and creates many other problems for the encouragement of international commercial arbitration.

Even the defense of national sovereignty through public policy[161] does not justify the referral of homologation to the Supreme Court. As will be seen in greater detail, public policy in Brazil deals with the respect for the legal institutions and for the principal values of the country, which should be the duty of every single court.

Finally, we see that in spite of the consistency of the BAL, homologation presents many structural problems. The BAL, by conferring jurisdiction for the recognition and enforcement of foreign arbitral awards on the Supreme Court, demonstrates that Brazil was not ready to take a full step in the direction of ending its isolationism. The BAL leaves one with the impression that Brazil wasted a great chance to change its approach to arbitration and the international community.

D. *The Validity of Foreign Arbitral Awards*

Articles 37 to 39[162] of the BAL cover the issues of how to recognize and enforce a foreign arbitral award and, consequently, when recognition and

[160] The restriction of the roles of the Supreme Court already laid down in the Article 102(h) of the Federal Constitution.

[161] Negi Calixto, *Contratos Internacionais e Ordem Publica*, 701 REVISTA DOS TRIBUNAIS 45 (1994).

[162] Article 37 - The homologation of the foreign arbitral decision will be requested by the interested party, with the initial brief fulfilling the requirements of the procedural law, pursuant to the Article 282 of the Civil Procedure Code, and shall necessarily supply the following:

I - the original arbitral decision or a duly certified copy, notarized by the Brazilian consulate and accompanied by an official translation;

II - the original arbitration clause or a duly certified copy, accompanied by an official translation. Article 38 - The homologation for the recognition and enforcement of the foreign arbitral decision can only be denied, if the defendant brings evidence on the following:

I - the parties at the arbitration agreement were under some incapacity;

II - the arbitration agreement was 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;

III - 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, because of due process violations, was

enforcement can be refused. These articles seem to be a direct translation of Articles IV and V of the New York Convention.

On the other hand, the wording does not imply a harmony of concepts and standards. In this connection, it is interesting to analyze the concept of public policy, since among the standards used by the BAL in these articles, public policy appears to be the most ambiguous. The ambiguity of this standard might result in a totally different understanding and consequently a different application, creating unpleasant surprises to foreigners and nationals who do not share the Brazilian understanding of the concept.

In general, despite some differences in the arrangement of the issues and a couple of minor changes, Articles 37 to 39 are a Portuguese version of Articles IV and V of the New York Convention. Therefore, aside from the public policy issue, there is no need to do a comparative analysis of the statutes.

Public Policy

Although the principle in the New York Convention is to refuse enforcement of an award that goes against "the public policy of that country", there is no doubt that the intention of the drafters of the New York Convention was to create a pro-enforcement atmosphere for international commercial arbitration[163]. This implies that the drafters intended to encourage a narrow construction of the public policy defense.[164]

The U.S., following the New York Convention, established in its own courts the interpretative line that the recognition and enforcement of foreign arbitral awards should only be denied when it would cause the violation of the "most basic notions of morality and justice."[165] Therefore, the public policy concept does not involve national political interests or their protection.

In Brazil, the concept of public policy is still the subject of many controversies. Public policy is an ambiguous concept, particularly in relation to international acts. Fortunately for the sake of international commercial

otherwise unable to present his case;

IV - the arbitral decision was made disrespecting the limits of the arbitration clause and it was not possible to separate the exceeding part from the part of the decision which contains decisions on matters submitted to arbitration;

V - the composition of the arbitral authority or the arbitral proceedings was not in accordance with the agreement of the parties;

VI - the award has not yet become binding on the parties, or has been made void or suspended by a competent authority of the country in which, or under the law of which, the award was made. Article 39 - The homologation for the recognition and enforcement of a foreign arbitral decision may also be refused if the Supreme Court finds that:

I - the subject matter of the difference is not capable of settlement by arbitration under the Brazilian law;

II - the homologation would be contrary to the national public policy.

[163] Parsons & Whittemore Overseas Co., Inc v. Société Général de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

[164] *Id.* The court says that both the Geneva Convention and the 1958 Convention's ad hoc committee draft advocated the expansion of the public policy exception. Thus, the only explanation for its absence in the New York Convention was a change of perception of this exception.

[165] *Id.*

arbitration, Brazil does not interpret this concept as a protective instrument for national political interests. Also called the social order,[166] public policy has as a core definition the respect for the legal institutions and for the basic values of Brazilian society.[167]

E. *Procedural Requirements*

This issue is regulated in BAL Articles 39,[168] and 40.[169] These articles reveal how much importance Brazil places on formalism, while demonstrating some flexibility on this issue.

Article 40 is actually a very good provision for the recognition and enforcement of foreign arbitral awards, though unnecessarily included in the BAL as it already appears in the Civil Procedure Code. The Civil Procedure Code guarantees the right stipulated in Article 40 of the BAL on a national level. Therefore there should be no need for the inclusion of this article.

This repetition of principles raises some questions. Since the Civil Procedure Code supplements the BAL, it establishes the principles needed to resolve problems not covered by the BAL. The principle laid down in the Article 268 of the Civil Procedure Code[170] covers exactly the same subject as does Article 40 of the BAL. The homologation process does not have any relevant legal particularity under Article 40. Consequently, the recognition and enforcement of foreign arbitral decisions should not require any different treatment from the one provided by the Civil Procedure Code or raise any suspicion that it would require such different treatment.

This article might demonstrate the fear of the legislature of the continuation of past Supreme Court practice toward arbitration. The Supreme Court had, in the past, refused many homologation claims on the basis of formal defects. The reiteration of the principle would work as a double guarantee for the Congress that the Supreme Court would not try through interpretation to bypass the intention of the BAL.

Similar reasoning might apply to Article 39. This is also a very good rule for the sake of international commercial arbitration, especially in relation to its

[166] Calixto, *supra* note 161 at 46.

[167] *Id.* at 46-49.

[168] The sole paragraph of the Article 39 states: "Sole paragraph. Service on the party resident or domiciled in Brazil, performed according to the arbitration clause or the procedural laws of the seat of the arbitration procedure, will not constitute a violation of public policy. This includes the acceptance of service by mail, with the due evidence of receipt, whenever it allows the Brazilian party enough time for the exercise of the right for defense." (free translation)

[169] "Article 40. The refusal of the homologation for the recognition or enforcement of foreign arbitral decisions, for formal defects, will not be an obstacle for the interested party to reinstate the claim, once the formal vices are corrected." (free translation)

[170] Article 268 of the Civil Procedure Code states: "With the exception of Art. 267 (V) the termination of the process without a decision on the merits of the case does not prevent the plaintiff from reinstating the same claim. However, the initial brief will not be examined without the proof of payment or the deposit of the expenses and the lawyer's fees."

history in Brazil.[171] Taking into consideration what was said about public policy in the previous chapter,[172] public policy would embrace the basic legal institutions and values of a society.

There are two possible reasons why service — that is to say, the summoning to participate in the proceedings — was explicitly excluded from a violation of the public policy in an homologation case. The first is that, by including this rule in Article 39, the BAL assumes the form of service is an element of public policy, although through that article an exception is created. The other possible reason is connected to history and takes into consideration the large number of refusals of homologation based on formal service requirements.

Finally, the inclusion of these two provisions at the end of Chapter VI of the BAL works as a shield against frivolous refusals for homologation claims. The problems that arise from this measure are the consequences to the legal system of including formal service requirements in a public policy spectrum and the need by the Congress to limit the action of the Supreme Court (although the homologation requirement is maintained by the BAL).

The good side of these measures is that they might reflect a newly developed maturity in law-making in Brazil. This maturity would take into account Brazilian history and reality whenever a law is drafted, even when it relates to a statute inspired by international treaties, and would thus break the tendency of merely copying good international or foreign statutes that do not respond to Brazilian needs.

V. PROPOSAL TO ENHANCE INTERNATIONAL COMMERCIAL ARBITRATION IN BRAZIL

As stated in the introduction of this article, this chapter does not pretend to provide solutions for all the problems of the BAL. Some of the contradictions and inconsistencies of the BAL, together with its differences from the New York Convention, may well be intentional. In that last sense, this proposal becomes a proposal to reform the institution in Brazil.

One of the easiest and most pragmatic proposals would be, independently from the seat of the arbitration, to have the award issued in Brazil. The whole international arbitral procedure may take place outside of Brazil so long as, at the end, the arbitrators physically issue the award in Brazil. This would be a solution worked at the boundaries of the BAL, since the territorial criterion applies only to the country of issuance of the award and not to the country where the proceedings take place, if they are different.

In this way, the homologation process would not be required, because the award would be considered a national one. If the award is considered a national one, under Article 18, there is no need for homologation. Despite the cost of flying the arbitrators to Brazil just to issue the award, there is the advantage of avoiding the burden of going through the Supreme Court. The downside of this

[171] As seen in Chapter II.A of this article.
[172] Chapter IV.E.

proposal is that it is probably a non-ethical solution to the obstacles the BAL imposes on international commercial arbitration, though it is not illegal.

Another proposal is that Brazil become a party to the New York Convention. By signing it, Brazil would adopt the most modern statute in recognition and enforcement of foreign arbitral awards, one that has proved to be efficient and valuable in many countries. There will be other side benefits to this option as a considerable step toward the international context of arbitration and the international recognition that Brazil might receive from signing this treaty.

Some more complex proposals involve the examination of internal conflicts in the BAL and with other codes. From those conflicts, new interpretations or amendments may arise with better provisions for international commercial arbitration. Some examples are the conflict of Articles 18 and 35 of the BAL in relation to the need of homologation only for foreign arbitral awards. Or the conflict of Article 584, III and 585, §2 of the Civil Procedure Code as to the status of foreign arbitral awards and the applicable procedures.

In connection with the misunderstanding of the concepts of "foreign" and "international" a specific proposal can be made. This would involve an understanding of the foreign element of the award not as having its source of legitimacy in another state, but only in being non-national to Brazil. The international character of arbitration would then be more easily transferred to the award, which would suffer less resistance from the Brazilian government. With this new perspective, Brazil could come to drop the homologation requirement for the recognition and enforcement of foreign arbitral awards.

VI. CONCLUSION

The BAL has solved some problems — *e.g.*, the double *exequatur* and the Brazilian formal service requirement — but others persist such as the requirement of homologation by the Supreme Court. International awareness of the BAL serves many economic and political interests and does bring about substantial improvements. On the other hand, it would be incorrect to say that through the BAL Brazil has joined the developed countries in terms of recognition and enforcement of foreign arbitral awards.

Chapter VI of the BAL is not the advancement in terms of recognition and enforcement of foreign arbitral awards that it may appear to be. The BAL has had an impact on the national aspects of arbitration. On the other hand, the step was not enough in the direction of the modernization of the institution. Indeed, the step made in enhancing the conditions for national arbitration may have occasioned the development or adoption of a theory that works against international commercial arbitration.

Presently, international commercial arbitration doctrine in Brazil seems to be an evolution of the national arbitration doctrine. There was no attempt to develop a separate doctrine for the recognition and enforcement of foreign arbitral awards. Therefore, even by relying on international treaties and conventions when drafting the BAL, Brazil seems to have picked only the

elements that were suitable to, and consistent with, national arbitration doctrine, while rejecting the more innovative aspects of international arbitration.

The reasons why Brazil took this course cannot be understood by a mere study of the legal aspects, since even the report on the draft BAL supports different views on the relevance of the international aspect. From here, we find ourselves at a point where no conclusions can safely be drawn, because the report on the BAL suggests intentions that differ considerably from the result that the BAL has brought about. There is a tension here between the real intentions of the Brazilian government and the results of the enactment of the BAL in relation to international commercial arbitration.

This tension can be explained in two basic ways. First, the results could have been achieved intentionally and the reasoning of the BAL might be only a mask for the real intentions of the government in relation to the international environment. Second, the mechanisms of the BAL were not appropriate to achieve the intended results, for various and independent reasons.

Without the political data necessary to confirm any assumption, the results achieved by the BAL demonstrate little more than that Brazil is a country engaged in a very slow and cautious opening process. This process was accelerated in 1996 by the signature of many regional treaties and the enactment of the BAL. Other interpretations could be advanced, but they lack support in specific data.

This study of the BAL also suggests a possible tension between the Supreme Court and the Congress. However, here again, there is not enough data to justify the thesis of a political battle or even to prove the existence of such a tension. If there really is, what are the differing positions? And is the BAL a victim or a conscious product of this tension?

The study of the BAL raises other interesting questions: whether Brazil is developing a new legislative technique involving international legal matters already covered by international statutes; the reasons for copying international treaties instead of signing them; the legal consequences of including formal service requirements in a public policy spectrum; and the need by Congress to limit the action of the Supreme Court (although the homologation requirement persisted in the BAL), among many others.

Therefore, the best that can be said of the BAL is that Brazil is now facing the problem and the institution of arbitration, including its international aspect, instead of avoiding these issues. No matter what the motivations or intentions were, the BAL is now a reality that people can work with, discuss and improve upon. It is an instrument, that despite some problems, improves the situation of arbitration in Brazil and might be a step in the direction of a full adoption of the most modern elements of the institution. As a legal instrument, it might be used for good or bad motives; this will depend on the Brazilians. As their product, it is their responsibility now to take the best out of the BAL, and by improving the statute, to make the best possible use of it.