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The International Commercial Arbitration in BRICS: toward a common framework for dispute resolution

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The International Commercial Arbitration in BRICS: towards a common framework for dispute resolution

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Towards the BRICS Common Centres for Dispute Resolution

List of abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
AFSA	Arbitration Foundation of Southern Africa
ASEAN	Association of Southeast Asian Nations
BAA	Brazilian Arbitration Act 1996
CAJAC	China-Africa Joint Arbitration Centre
CCMA	Commission for Conciliation, Mediation and Arbitration of South Africa
CCP	Chinese Communist Party
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Convention on Contracts for the International Sale of Goods
CMAC	China Maritime Arbitration Commission
CRA	Contingent Reserve Arrangement
DCA	Domestic Commercial Arbitration Law 2015
FDI	Foreign Direct Investments
FTAC	Foreign Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
IAA	South African International Arbitration Act 2017
IBA	International Bar Association
ICA	International Commercial Arbitration Law 1993
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
IMF	International Monetary Fund
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
NDB	New Development Bank
NPC	National People's Congress
PPPs	Public – Private Partnerships
SCA	Supreme Court of Appeal
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SPC	Supreme People's Court
STJ	Superior Tribunal of Justice
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNSC	United Nations Security Council
VIAC	Vienna International Arbitral Centre
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Introduction

BRICS made their first official appearance in the global scene in 2009, after the first Summit among the then four countries of the group -Brazil, Russia, India, and China- took place in Yekaterinburg (Russia). Although the BRICS was first referred to the investment opportunities of the emerging economies, the BRICS group went far beyond its original concept. The regular meetings of the leaders of the BRICS countries, in the last fourteen years, have turned the initial idea into a multilayered platform of cooperation, which now includes a varied cooperation areas that range from trade and investments, international security, terrorism, to health and the environment protection, energy, agriculture, sustainable development, protection of natural resources, education, ultimately making up a collaboration that is not only concerned with the economic or commercial fields, but that involves also the more scientific and cultural ones and which is getting progressively more institutionalized.[1]

Thanks to their influential and remarkable progress in promoting local currencies (for de-dollarisation purposes), regional FDI, and regional trade, the BRICS economies have emerged and have taken a new space in the twenty-first century. Intra-BRICS trade has already nearly tripled over the last decade, supported by the increase in intra-regional trade for all member countries.[2] It is also true that the block's large markets have not realised their full potential yet, therefore trade integration can undoubtedly be better off and reach higher rates in the future. The BRICS governments have set up a series of initiatives precisely to address the issue and find ways to increase intra-BRICS trade.[3] Four stand out: regular

[1] Giulia Formici, 'The Role of the BRICS Group in the International Arena: a Legal Network under Construction' [2019] Third World Thematics: A TWQ Journal 459.

[2] A recent study on contract law in BRICS confirms that trade ties among the member countries are already extremely thick. In fact, the figures provided by the reporters show that China is the main commercial trading partner for both imports and exports to all the other BRICS countries. Trade relations among Russia, India and Brazil are also quite considerable. As for South Africa, trade volume between the African country and the other BRICS countries is still rather modest and would surely need a little shove. See Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries* (Springer 2022).
It is critical to mention that the COVID-19 pandemic has severely affected intra-BRICS trade and investment and its effects are not currently encapsulated in the reported data.

[3] An examination of the BRICS Joint Statements and Declarations shows various references and pledges to promote trade, investment, and economic cooperation among these countries. In April 2011, for instance, the now BRICS issued a Declaration in which they stated that they 'agreed to continue further expanding and deepening economic, trade and investment cooperation among our countries' see III BRICS Summit, Sanya Declaration (Sanya, 2011) point 26. Along these lines, The Contact Group on Economic and Trade Issues (CGETI) was founded and developed with various aims, including promoting trade, investment, and economic cooperation among the BRICS, and further encouraging trade and investment links to support industrial complementarities, sustainable development, and inclusive grow. The "BRICS Economic Cooperation Strategy" and a "Framework of BRICS Closer Economic Partnership," designate steps to 'promote intra-

meetings between BRICS trade ministers, and BRICS competition authorities, the BRICS cooperatives forum, and a BRICS Business Forum.

In a perspective where commercial and financial flows among the BRICS countries are expected to steadily increase over time, it will be inevitable to deal with conflicts. Disputes are unavoidable occurrence in international transactions as they are generally caused by differences in commercial and legal expectations, culture, traditions, political implications, and geographic locations.[4] This is particularly true especially for BRICS, because of the evident distances in terms of legal systems, languages, and legal cultures -to name a few- among its member countries. Thus, investors and trade partners operating within the BRICS premise are going to need a fair, flexible, and reliable dispute resolution mechanism capable of bridging the said distances and ensuring their international disputes to be efficiently and readily resolved. Besides, amicable means of dispute settlement allow the parties to maintain a healthy relationship over time, which is crucial considering the long-lasting partnership the BRICS are seeking to uphold.

Along these lines, the BRICS Legal Forum[5] has extensively worked throughout the years insisting on the fact that the BRICS economic cooperation will inevitably call for a common legal framework that will allow commercial and financial transactions to be performed efficiently, together with a simple, quick, and reliable system of dispute resolution, promoting and protecting at the same time, the diversity of each member country's legal culture. The BRICS Legal Forum has played a prominent role in the field of dispute resolution, heavily contributing to the creation of the BRICS Centers of Dispute Resolution. It was, in fact, during the second BRICS Legal Forum, in October 2015, that the Shanghai Centre of BRICS Dispute Resolution was established, thus paving the way for other BRICS centres to be created in the following years.[6] Such centres shall provide arbitration services,

BRICS economic, trade, and investment cooperation' see VI BRICS Summit, Fortaleza Declaration (Fortaleza 2014) point 20. More recently, in November 2019, the BRICS parties signed a Memorandum of Understanding among BRICS Trade and Investment Promotion Agencies (TIPAs). For more on the bilateral trade relations among BRICS see Bas Hooijmaaijers, 'The BRICS Countries' Bilateral Economic Relations, 2009 to 2019: Between Rhetoric and Reality' [2020] Sage Open 1 <https://journals.sagepub.com/doi/full/10.1177/21582440211054128> accessed 23 January 2024.

[4] Boris Kozolchyk, *Comparative Commercial Contracts: Law, Culture and Economic Development* (2nd edn, West Academic Publishing 2014).

[5] The BRICS Legal Forum was created in 2014, after a meeting held in Brasilia. During the X BRICS Summit in Johannesburg in 2018, it was included in the group's official and sectorial meetings with the goal of making it a long-term instrument of legal cooperation for the BRICS countries. The BRICS Legal Forum aims to promote integration among the BRICS countries and achieve infrastructure investments that will allow for integrated legal-economic development. It paves the way for the achievement of the BRICS objectives through the application of appropriate legal principles, international decision-making procedures and dispute resolution mechanisms, relationships with and participation in various international organizations, and the possible establishment of common institutions. The Legal Forum website is available at <https://bricslegalforum.org/> accessed 23 January 2024.

[6] III BRICS Legal Forum, New Delhi Declaration (New Delhi 2016).

thereby reflecting a practice already in place among traders in BRICS, which confirms that "with reference to contractual disputes resolution, there is a general understanding that arbitration is the mostly used instrument for the settlement of commercial disputes".[7]

The setting up of a system of BRICS dispute resolution centres (which, at present, are nothing more than arbitration centres) one located in each of the BRICS countries, entails that, potentially, all of the five countries' arbitration laws may find application before, during, and after the arbitration proceedings, either intentionally (e.g., the parties choose to apply one of the five national laws to the arbitration agreement or to the arbitration proceedings), or incidentally (e.g., during the proceedings the arbitral tribunal needs national courts' support to seek enforcement of interim measures or to compel witnesses to take part in the proceedings). As a consequence, the creation of the BRICS arbitration centres will inevitably call for a certain degree of harmonization among the BRICS at two main levels:
1) at BRICS arbitration laws, in terms -at least- of arbitrability, allocation of jurisdiction, powers granted to the arbitrators to issue interim measures and interim relief along with the requirements to serve as arbitrator under the national law, impartiality and independence standards, the extent to which a Court can intervene during the proceedings, recognition and enforcement of the awards, especially in the use of the public policy defence;
2) among the BRICS centres themselves regarding matters as institution building, the drafting of the arbitral rules, list of arbitrators, model clause, fees, and other related issues.

Though being a less radical technique if compared to legal uniformation or legal integration, legal harmonization requires some changing in the domestic provisions of the countries at issue in those crucial respects where they are most dissimilar in order to make them all coherent, or to update them through reform.[8] Therefore, while respecting the particularities of the various national legal systems, harmonization provides an opportunity to reduce differences in selected areas and to enhance legal cooperation between the countries,[9] which fits perfectly with the BRICS group cooperation strategies. Nonetheless, in order to detect the said distances and spot how the BRICS countries are different or alike in the use of arbitration and in the application of the arbitral laws, a heavy preparatory study of each country's implementation of international arbitration must be carried out before addressing how, whether or in what respects should they adapt in a view of establishing a common, efficient, and working dispute resolution forum. The study of international commercial arbitration in and among the BRICS already promises to be a complex one. In

[7] Mancuso and Bussani (n 2) 360.
[8] Salvatore Mancuso, 'Creating Mixed Jurisdictions: Legal Integration in the Southern African Development Community Region' (2011) 6 Journal of Comparative Law 146.
[9] ibid.

fact, the cooperation in the field of arbitration fits within the dynamics of the BRICS as a group, which *per se* is somewhat atypical within the international cooperation landscape.

In the attempt to unfold the intricacy of the subject, touching nonetheless all the sensitive issues that the topic requires, the thesis will be developed in three parts.

The first part will provide some general knowledge about the BRICS formation, namely its historical background, the main areas of cooperation and objectives pursed, the definitory issues caused by the ambiguous nature of the group, its cooperatives schemes, and its prospects in relation to the economy and the role of arbitration.

The second and possibly most challenging part of the thesis is dedicated to the comparative analysis of the five BRICS arbitral laws according to the methodology presented in detail in the dedicated section. Since, as previously stated, BRICS cooperation in the field of dispute resolution through arbitration will require a certain degree of harmonization among the BRICS national laws, this section investigates whether such an arrangement is indeed a factual alternative for BRICS by studying arbitration first within the national contexts of the five countries, and then by bringing together the respective experiences to draw a final comparative overview. The information collected through the comparative analysis should serve as a foundation to build up a harmonized BRICS approach to arbitration, as it highlights how the BRICS have adopted a similar or rather a distinguished approach to the very same arbitration related subject-matters. It will be shown, for instance, how some of the BRICS countries provide for the mandatory application of certain rules or lack important legal concepts of arbitration that are contrarily recognized and operative in others as that of the legal "seat". It will be also discussed how very similar set of norms transposed from international sources as the UNCITRAL Model Law, or the New York Convention have in fact been interpreted by the courts of the five countries and how should they adjust to work synergically and coherently to achieve shared objectives in arbitration. What emerged from the comparative analysis among the five arbitral laws should serve to close normative gaps in the national legislation and improve some of the existing provisions based on the positive examples from international and other national laws. The findings may also be used for future research as well as be used in practice.

In fact, the comparative analysis should also be the regarded as the starting point for drafting the BRICS arbitral rules for the centres, that are neutral, shared, and suitable for all the BRICS States. For this reason, the present work is intended to be more than a theoretical exercise -which is nonetheless fundamental- counting also on a practical implication. The aim should be that of producing and drafting rules that are effectively BRICS, meaning that

they result from a combination of the various approaches of BRICS to arbitration, and not a simple imitation of the stronger model.

The third and final part of the thesis will focus on BRICS arbitration. To begin with, this section will tackle the reasons that lie behind the choice of BRICS to create separate centres for BRICS dispute resolution and will proceed by describing how these centres should adjust and coordinate in order to work synergically and offer the same level of services in all the BRICS countries. In fact, as "a work in progress", the BRICS centres of dispute resolution still suffer from important limitations and inconsistencies, which may hinder their effective functioning in the future, if not properly addressed. Therefore, this section aims at making suggestions on how to improve the overall architecture of the centres, describing what are the necessary steps the centres should make in order to work properly, serve their purposes and be successful in a market already dominated by several and well-established arbitral institutions.

Such an in-depth analysis proved to be helpful to detect the flaws of international arbitration, which can only come to the surface with a change in the perspective and by looking at it with the eyes of emerging and developing countries. Therefore, in a way, the present study complements the overall picture of international arbitration, taking to the table all relevant experiences, and pointing out how arbitration should adjust to work better worldwide.

PART I
Introducing the BRICS

Chapter 1. What is BRICS? Definitory issues

In 2001, the then chief economist of Goldman Sachs, Jim O'Neil, first brought forward the idea of BRICs.[10] In the analytical report of global investment of his company, he forecast that China, Russia, India, and Brazil, the four emerging markets with promising economic development, would catch up with– and by 2050 overtake – the G7 countries (the USA, Japan, Canada, France, Italy, Germany and the United Kingdom) in terms of total GDP.[11] However, the following creation of the group as it is commonly known, resulted from the clear political will of BRICS governments.[12] In 2006, the first informal meeting of the foreign ministers of Brazil, Russia, India, and China took place at the margins of a United Nations General Assembly to discuss the potential of a future cooperation among their respective States. Three years later, shortly after the 2008 economic crisis, the BRICs was officially inaugurated with its first summit in Yekaterinburg, Russia. South Africa joined the group during the Sanya summit, upon Beijing's invitation, in 2011. The result was a new acronym strengthened with an upper-case S, bringing together the five fastest-growing emerging economies distinguished by high rates of economic development and a high-degree of export orientation, which according to Goldman Sachs experts had, in the long term, the potential to become the most dominant economic actor in the world.[13] From its inception, the five countries have been meeting regularly once a year, alternating themselves in the hosting of the summit.[14]

On August 24th, 2023, at the Johannesburg Summit, the BRICS have announced the welcoming of six more countries: Argentina, Egypt, Ethiopia, Iran, Saudi Arabia, and the United Arab Emirates,[15] among which three are heavyweights of oil-producing countries namely, Saudi Arabia, Iran, and the Emirates. The enlargement would be effective from January 1rst 2024. Nonetheless, in the end of November 2023 Argentina has formally

[10] This thesis uses both versions of the acronym: BRICs and BRICS. The first version has been used to designate the group until its enlargement to South Africa, which entailed a change in the initial shape of the acronym that now sees a capital S to denote, precisely, the new BRICS country.
[11] Jim O'Neill, 'Building Better Global Economic BRICs' (2001) Goldman Sachs Global Economics Paper no 66 < https://www.goldmansachs.com/intelligence/archive/building-better.html> accessed 23 January 2024.
[12] Flavio Damico, 'Previous History: From a Market Acronym to Political-Diplomatic Dialogue', in Renato Bauman and others, *BRICS: Studies and Documents* (FUNAG 2017) 53.
[13] Maria Zakharova and Vladimir Przhilenskiy, 'Experiences of Legal Integration and Reception by the BRICS Countries: Five Passengers in a Boat (without a dog)' (2018) 5 BRICS Law Journal 4.
[14] Damico (n 12).
[15] XV BRICS Summit, Johannesburg Declaration (Johannesburg 2023) point 91.

declined the invitation to join the group. Such a change of heart comes after Mr. Milei, a populist right-wing supporter, won the November elections with radical pledges to overhaul the South American nation's ailing economy.[16]

Returning to the discourse concerning the five original countries, the striking pace at which the BRICS economies had grown and were expected to grow represented a solid basis from which they could have legitimately requested to have a greater say in global governance. Indeed, 'the flourishing economic self-confidence of the BRICS found expression in an increasingly political assertiveness.'[17] Besides, remarkably large population and size of territories other than the economies of the BRICS States make them different from others and worth of a special attention. Considering the recent BRICS enlargement, the countries making up the group represent now 47% of the world's population (about 3 billion of people); they account for 36% of the world's GDP and amount to an extremely large portion of territory, which covers about 30% of the entire earth (40 million km^2)[18] and control 41% of global oil production. Therefore, their cooperation proves the desire to make the voice of an important part of the world.[19]

Since the beginning, the political goals of these States were clear. As the joint statement issued at the end of the first meeting in Yekaterinburg reads: '*We [the BRICS] are committed to advance the reform of international financial institutions, so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable, and more diversified international monetary system*'[20] and further agree, at point 15 of the same statement, to cooperate '*to build an harmonious world of lasting peace and common prosperity'*.[21]

[16] Mr. Milei explained in a letter sent to the leaders of Brazil, Russia, India, China, and South Africa, that the decisions taken by the preceding government had been revised as his government's foreign policy 'differs in many ways from that of the previous government'. Robert Plummer, 'Argentina Pulls Out of Plans to Join BRICS Bloc' (*BBC*, 29 December 2023) <https://www.bbc.com/news/world-latin-america-67842992> accessed 23 January 2024.

[17] Andrew F Cooper and Asif B Farooq, 'BRICS and the Privileging of Informality in Global Governance' (2013) 4 Global Policy 428.

[18] World Economic Outlook Database (*IMF*, 2023) <https://www.imf.org/en/Publications/WEO/weo-database/2023/October> accessed 23 January 2024.

[19] As it will be stressed in the next paragraph, the choice of including South Africa to the cooperation resulted in fact from the BRICs desire to have a more planetary dimension to assert in the appropriate fora. The very nature of this choice was thus very political, signaling that the BRICs was certainly more than a gathering of States sharing parallel economic and financial aims. Lucia Scaffardi, 'BRICS, a Multi-Centre "Legal Network"?' (2014) 5 Beijing Law Review 140.

[20] I BRICs Summit, Joint Statement of the BRICs Countries' Leaders (Yekaterinburg 2009) point 3.

[21] ibid point 15. See also X BRICS Summit, Johannesburg Declaration (Johannesburg 2018) point 5.

The financial institutions the BRICS refer to are the so-called Bretton Woods institutions: the International Monetary Fund (IMF) and the Word Bank. Established in the aftermath of the Second World War, these institutions were found to be over dominated and overrepresented by the Western countries, especially by the United States and the European Union countries. What the BRICS lament the most is that their economic weight is not reflected in the voting share distribution within the said institutions, which has always been significantly low. Theoretically, financial institutions are supposed to periodically adjust to meet the economic changes that occur in the international scene. But since change was slow in coming, BRICS advocated (and still do) for a more democratic and fairer representation.

The World Trade Organization (WTO) and the United Nations Security Council (UNSC) have also been at the forefront of the BRICS countries' reform agendas. While China and Russia both have permanent seats at the UNSC, Brazil, India and South Africa have argued for a more representative body that reflects the current global, political, and economic landscape[22]. During the 10th BRICS Summit in Johannesburg in 2018, the BRICS also agreed on collaborating for inclusive growth and shared prosperity in the fourth industrial revolution, which is another landmark of their desire to intervene and gain prominence in today's global political and economic development.[23]

What further and distinctly emerges from the brief quotations mentioned above is the strong willingness of the five countries to coordinate and have a positive impact at the global level, wanting to represent not only their respective States, but the Global South[24] as a whole. The choice of including South Africa to the BRICS group, as well as the further enlargement announced in 2023, fall precisely within this political ambition. Indeed, by encompassing the African continent, the BRICS group secured itself with a more planetary dimension to spend in the appropriate *fora*. Moreover, South Africa represents a major geopolitical reference point, as it has stood for developing African countries within the G20, not to mention that it is also a founding member of the United Nations. From a more intra-BRICS perspective, the opening up to South Africa, a country with which China has established

[22] Even though there is no agreement as on who should occupy an expanded UNSC.

[23] X BRICS Summit, Johannesburg Declaration (Johannesburg 2018) point 1; Charis Vlados and Dimos Chatzinikolaou, 'BRICS and Global Restructuring: Notes for the Near Future' (2020) 6 Management and Economics Research Journal 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602585> accessed 23 January 2024.

[24] "Global South" refers broadly to the regions of Latin America, Asia, Africa, and Oceania. Together with other terms as "Third World" and "Periphery," it has traditionally described areas outside of Europe and North America, and that are typically (but not always) low-income countries. "Global South" serves as more than just a simile for undeveloped regions. It refers to a long history of colonialism, neo-imperialism, and disparate economic and social transformation that maintains significant disparities in living conditions, life expectancy, and resource availability. Over the last decades, the concept has become more sophisticated, shifting the focus away from development or cultural diversity towards geopolitical relations of power. Nour Dados and Raewyn Connell, 'The Global South' (2012) 11 Sage Journals 12.

important political interests and energy-related investments over time, and which also offered room for development to India and Brazil, certainly contributed to the choice of this particular African country over others.[25]

Some scholars have interpreted the BRICS formation as an attempt to provide a counterpoint, or even a challenge to the existing institutions and to the dominant role played by the US and the dollar.[26] However, as Armijo and Roberts point out, "the BRICS' preferences, singly and jointly, for global governance turn on reform and evolution, not revolution".[27] Supporting this view, an Indian diplomat argues that "(our) views (are) more non-West, than anti-West."[28] In fact, the BRICS did not positively implement a defiance towards the existing status quo, as they have never truly disengaged from the universal institutions they wanted to reform. Indeed, the institutions created by the BRICS (the New Development Bank[29] (NDB) and the Contingent Reserve Agreement (CRA) should be

[25] From a purely economic perspective, other emerging countries in the African continent would have been better suited to the included in the BRICS (e.g., Nigeria), but they could not have ensured to the group with the same political stability, and doubtless not with the same geopolitical appeal as South Africa, on the topic Scaffardi (n 19); Jim O'Neill, *The Growth Map. Economic Opportunity in the BRICs and Beyond* (Penguin Books 2011). The enlargement of the group to South Africa also poses questions as to whether and how the BRICS may expand in the future. The answer is not quite predictable, considering that the criteria used to include the new country to the group are blurry and consist of a mix of political and economic considerations. Moreover, the fact that Soth Africa was welcomed to the group upon Beijing's invitation is certainly a relevant indicator and it may have played a role in the selection process.

[26] According to Duggan, the emergence of BRICS signals a direct challenge to the current global governance: 'The rise of the BRICS and the 2008 global financial crisis have fuelled a new round of debates concerning the sustainability of transatlantic norms, idea, and institutions, which have dominated global governance. The BRICS are seen to represent a new force in defining the rules of the games of global governance and have changed the agenda and approach to global institutions.' Niall 'BRICS and the Evolution of a New Agenda within Global Governance', in Marek Rewizorski (ed), *The European Union and the BRICS: Complex Relations in the Era of Global Governance* (Springer 2015). 11-15. According to Hooijmaaijers 'the BRICS emerges as a power that challenges Wester-dominated multilateral organizations'. Bas Hooijmaaijers, 'China, the BRICS, and the Limitations of Reshaping Global Economic Governance' (2019) 34 The Pacific Review 27. And again, to Vlados and Chatzinikolaou, "the monopoly of Western democracies in the construction of International Institutions Now Faces Actual Rivals", implicating in this sense that they have to confront with the BRICS. Vlados and Chatzinikolaou (n 23). According to Petrone, 'the emergence of the BRICS countries has undoubtedly represented an upheaval to this situation, if not a major challenge'. Francesco Petrone, 'A Specter is Haunting the West (?): the BRICS and the Future of Global Governance' (2020) 9 The Rest: Journal of Politics and Development 20–32 <https://therestjournal.com/2019/03/22/a-specter-is-haunting-the-west-the-brics-and-the-future-of-global-governance/> accessed 23 January 2024.

[27] Leslie Elliott Armijo and Cynthia Roberts, 'The Emerging Powers and Global Governance, Why the BRICS matter', in Robert Looney (ed), *Handbook of Emerging Economies* (Routledge 2014).

[28] Indrani Bagchi, 'BRICS Summit: Member Nations Criticize the West for Financial Mismanagement' (*The Times of India*, 30 March 2012) <http://timesofindia.indiatimes.com/india/BRICS-summit-Member-nations-criticizes-the-West-for-financial-mismanagement/articleshow/12462502.cms> accessed 23 January 2024.

[29] The NDB is a financial institution established through the intergovernmental agreements reached by the BRICS during their sixth Summit held in Fortaleza on July 15th, 2014. The Bank, operating since 2016, is headquartered in Shanghai, whereas a branch for the African area has been opened in Johannesburg in 2017.

considered complementary rather than alternative to the existing ones. In fact, the NDB and the CRA were created to consolidate the economic relations within the BRICS states, "to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging markets and developing economies (…)".[30] The Bank also cooperates with international organizations and other financial entities and provides technical assistance for projects. In a nutshell, the NDB would fill the gaps that the old ones could not cover. Rather than serving the BRICS interests only, by using less stringent criteria for the issuing of loans, the Bank is supposed to meet the financial demands of those countries in need of infrastructure and other investments, without having to comply with intrusive conditionality requirements as it happened with the IMF and World Bank.[31]

In a way, this relates with a concept and a goal that lies particularly at heart of BRICS, which is the pursuit of multipolarity as opposed to unipolarity. The idea they bring forward is that the world witnesses now various poles of economic growth that should be reflected in the international political arena. The coming world order the BRICS ought for is inclusive of all States, where all countries are to be treated as equal members of the international community. Hence, the key to the BRICS' international influence is "the power of the superpowerless world."[32] The group, in sum, does not propose itself as a 'block' or a new pole that challenges the hegemonic one in power. Rather, it sees itself as part of the collective of powers rising together. It calls on the fact that less and emerging countries should have better representation at international level, thus asking for a reform of the international institutions to cope with this democratic deficit.[33]

It is no coincidence that we started talking about BRICS in a period of crisis of the Western democracies, both economically and politically. The 2008 crisis shed a light on the

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The NDB has a starting capital of 50 billion dollars and will rely on a strategic Fund of reserve capitals (Contingent Reserve Arrangement establishing a Contingent Currency Pool—CCP), in order to cope with possible currency crises and with the short-term liquidity crises. A third element in the BRICS' financial architecture is the creation of a single payment system, "BRICS Pay", to rely less on the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system. As part of the effort to build a common system for retail payments and transactions among member nations, the BRICS intend to launch a dedicated cloud platform that will integrate their national payment systems. An online wallet with access to these payment systems will be developed, as well as a mobile application similar to Apple Pay that can be installed on smartphones for purchases in any of the five BRICS countries, regardless of the currency in which the payment and money in the buyer's account are denominated. Due to the recent sanctions imposed on Russia because of the Ukrainian war, Russia has called on the BRICS group of emerging economies to extend the use of national currencies and integrate payment systems.

[30] VI BRICS Summit, Fortaleza Declaration (Fortaleza 2014) point 11.

[31] Amaia Sánchez-Cacicedo, 'The NDB: Not Just Any Emerging Bank' (*CPD Blog*, 14 April 2015) <https://uscpublicdiplomacy.org/blog/ndb-not-just-any-emerging-bank> accessed 23 January 2024.

[32] Kalypso Nicolaidis, 'The power of the Superpowerless', in Tod Lindberg (ed), *Beyond Paradise and Power: Europeans, Americans and the Future of a Troubled Partnership* (Routledge 2004).

[33] Mihaela Papa, 'BRICS as a Global Legal Actor: from Regulatory Innovation to BRICS Law?', in Lucia Scaffardi (ed), *The BRICS group in the spotlight* (Edizioni Scientifiche Italiane 2015) 17.

need for a reform of international governance institutions, particularly in the financial sphere, to reflect the new multi-polar setting, which now sees the rise of the developing world.[34] In this sense, it becomes possible to better understand the desire and ambition of BRICS to become the voice of the developing countries, of the Global South, and to raise the demand to be better represented, counterbalancing the US–European Union (EU) monopoly of power.[35]

BRICS represents a great opportunity not only as a platform from which to stand up and to speak up to the world, but also as a venue to create networks of cooperation among the member countries. In this regard, a true escalation occurred. Whereas the formal declaration issued at the end of the very first summit had only 16 articles, the following summits expanded the dimension and scope of the joint agenda along with the subsequent declarations, which got longer, including several items and areas of cooperation.[36] The BRICS collaboration covers now a wide range of matters: from trade and finance to energy, sustainability, science and technology, outer space, innovation, education, health, security, counterterrorism, climate change, corruption, physical culture, and sport. Frequently, the BRICS also expresses opinions and support during war episodes, as it was the case of the war in Iran or Syria,[37] thus displaying its deeply political dimension.

As a conglomerate of States, the BRICS cannot be defined as an international organization. Indeed, the BRICS lacks the traditional elements generally required to be classified as such: it does not have a constitutive treaty nor a charter, headquarters, fixed secretariat (either physical or virtual), nor it has dedicated staff or funds to finance its activities.[38] Generally, international organizations are equipped with a stable institutional apparatus. Their bodies are mostly made up of representatives of States (which gives an «intergovernmental» dimension to the organization), and more rarely from individuals acting in their capacity.[39] Decision-making methods are commonly by majority (possibly qualified or weighted: e.g., art. 27, par. 3, UN Charter); as for more «sensitive» issues, decisions are generally taken by unanimity, whereas the BRICS working methods are

[34] Damico (n 12).
[35] Formici (n 1).
[36] Damico (n 12).
[37] V BRICS Summit, Durban Declaration (Durbain, 2013); VI BRICS Summit, Fortaleza Declaration (Fortaleza 2014). Adriana Erthal Abdenur, 'Rising Powers and International Security: the BRICS and the Syrian Conflict' (2016) 1 Rising Powers in Global Governance 109 <https://rpquarterly.kureselcalismalar.com/quarterly/rising-powers-and-international-security-the-brics-and-the-syrian-conflict/> accessed 23 January 2024.
[38] Adriana Erthal Abdenur and Maiara Folly, 'The New Development Bank and the Institutionalization of the BRICS' (2015) 3 R/evolutions: Global Trends & Regional 66 <https://revjournal.org/adriana-erthal-abdenur-maiara-folly-the-new-development-bank-and-the-institutionalization-of-the-brics/> accessed 23 January 2024.
[39] This is the case of courts or bodies with purely secretarial/ executive or organizational functions.

essentially consensus-based.[40] Thus, similarly to other groups as the G20, they regularly produce consensus on joint state actions with highest global impact.

International forums as the, G8, G20, or the Arctic Council that do not have all the features of an international intergovernmental organization, are usually defined as quasi organizations (from Greek "quasi" – pseudo), para-organizations, or as informal international institutions. These forms of concerted action between States represent a weaker form of an organization. Rather than being based on an international treaty or agreement containing their constitution, they rely upon a political declaration, which is respected by the participating States having an interest in bringing about the summit consultations, which usually deal with economic, commercial, or financial issues.[41] They have neither a formalized organizational structure, nor the right to make legally binding decisions, and ultimately, they do not have international legal personality. In this sense, the BRICS is closer to a G-group rather than to an organization.

Considering all the above, it is possible to understand even more how, despite the importance of the economic and financial dimensions that characterize the BRICS cooperation, and notwithstanding the impact of the Economic Strategic Partnerships mentioned before, one would be mistaken in defining it as an "Economic Integration Organization".[42] Other than requiring the traditional criteria to qualify as an organization (which the BRICS already lacks), an economic organization would require the transfer of sovereign competence on economic matters by its member States, which does not occur in the BRICS. This is because, even though the BRICS countries are characterized by a considerable level of State intervention in the economy,[43] they all have such different economic structures that would make it impossible for them to enter an economic organization with each other. Moreover, even if the BRICS economies are all growing fast, they are not doing so at the same pace. In fact, the BRICS economies are situated at very different stages of development and rely on different sources for their growth, with Brazil specializing in agriculture, South Africa and Russia in commodities, India in services, and China in manufacturing.[44] Moreover, China is known for its low tariffs for manufactured products; India is protectionist when it comes to goods and South Africa, while relentlessly

[40] BRICS, 'New Delhi Declaration', New Delhi, India, 2021, point 5: "We reiterate our commitment to preserving and further strengthening the consensus-based working methods in BRICS at all levels which have been the hallmark of our cooperation".
[41] These forms of concertation are often referred to also as "Summit organizations".
[42] "Economic Integration Organizations" can be understood as a subtype of international organizations.
[43] Michele Carducci, 'Il BRICS Come "Legal Network" e le sue implicazioni costituzionali' in *Costituzione, Economia, Globalizzazione. Liber amicorum in onore di Carlo Amirante* (Edizioni Scientifiche Italiane 2013); Scaffardi (n 19) 146.
[44] Katarina Kralikova, 'BRICS: Can a Marriage of Convenience Last?' (2014) 13 European View 243.

enforcing its black economic empowerment and local content, is becoming increasingly protectionist too. Also, 'when it comes to GDP per capita, Russia and Brazil are champions compared with the other members, while India has a very long way to go before catching up with the others.'[45]

Defining the BRICS as an economic integration organization would not only be incorrect, but also extremely reductive. As mentioned before, the cooperation among the BRICS involves also non-economic fields, such as education, counterterrorism, or poverty and faces deeply political issues, albeit, one must admit, the most successful achievements of BRICS have occurred in the financial field, with the establishment of the NDB and the CRA in 2014.[46]

In the mind of its creators, BRICS was intended to be a loose mechanism of international cooperation, characterized by informality and flexibility of both instruments and intents. Only a flexible approach would have enabled the group to encompass their differences and fix shared aims without resorting to binding and well-established legal means of international cooperation, but using more 'delicate' tools and diplomatic mechanisms, which would have allowed them to achieve their goals with less financial and other costs.[47] As Nikolas Gvosdev writes: 'One of the advantages of the BRICS process is that it remains a loose association of states with somewhat disparate interests, so no effort is made to force a common position when the BRICS states cannot agree on one. But these states have also found a way to disagree on some key issues (…) without torpedoing the entire enterprise.'[48]

This strategic cooperation style characterized by adaptability was particularly important for the creation and preservation of the group, through which member states work to find those areas where they are likeliest to find a common ground. Such a flexibility entails a process of negotiation and accommodation rather than rigidly following a prior agreed-upon template, and it allows for greater agility in the formulation and implementation of their joint commitments.[49] Indeed, the group's cooperation is not built on hard law measures or on the renunciation, even partial, of their prerogatives. Rather, BRICS member countries play a significant role within it; they continue to be strong and centralized countries whose

[45] ibid.
[46] VI BRICS Summit, Fortaleza Declaration (Fortaleza 2014).
[47] Tatiana V Luzina and others, 'The International and Legal Framework for Transregionalization of Trade and Economic Cooperation of the BRICS Countries' (2018) 21 European Research Studies Journal 166 <https://ersj.eu/journal/1370> accessed 23 January 2024.
[48] Nikolas Gvosdev, 'The Realist Prism: What the U.S. Can Learn from the BRICS' (*World Politics Review*, 22 June 2022) <https://www.worldpoliticsreview.com/articles/12087/the-realist-prism-what-the-u-s-can-learn-from-the-brics> accessed 23 January 2024.
[49] Abdenur and Folly (n 38).

power and authority is clearly reaffirmed through BRICS. The fact that decisions, joint statements, or ministerial meetings are taken by the highest level of the national governments, results in a strong affirmation of the role of the single state,[50] which never disappears and is always well recalled.[51] Conversely, the increased activity of the BRICS countries on the global stage automatically increases the influence of the countries that participate in the group.[52]

In todays' world, international cooperation appears to be more and more characterized by informality. There are a lot of entities and State forums that do not have all the features of an international organization but make a great contribution to the development of international relations and, often, of international law.[53] Agreeably, the BRICS falls within this latter category of international actors. The critical thing with BRICS lies in this continuous tension between a very high degree of informality and institutionalization tendencies, which raises doubts as if BRICS might be experiencing a transition period into becoming an international organization, or if this is a perpetual situation that makes it extremely different from other international cooperation experiences. As a matter of fact, occasionally, the States involved in an international forum are quite satisfied with the uncertainty of its status (e.g., G8) but, some other times, states' formations born under the informality sign, get progressively institutionalized, up to becoming full international organizations. To make an example, the Association of Southeast Asian Nations (ASEAN), has long been an international quasi-organization before turning into an organization. ASEAN was first established in 1967 with the Bangkok Declaration. A decade later, in 1976, the ASEAN Secretariat was established, indicating that a strengthening of the institutional framework was occurring, and finally, 40 years after its establishment, ASEAN adopted its Charter and turned into a full organization, officially acquiring international legal personality.

[50] Formici (n 1).

[51] It is worth noting how the BRICS never refer to the countries that are part of the group as "member states" or "member countries". They usually imply the terms "BRICS countries". This represents a relevant hint in the analysis of BRICS' self-understanding. The language used is simple and detached from the traditional and legal one. "Member states" or "member countries" are expressions commonly used to refer to States that are parties to an organization or to a convention and which are, consequently, legally bond to that organization or convention. This reminds of a formalized, legally bonding group. The avoidance of using such terms, may thus derive from the underling idea on which BRICS is based: a flexible and informal structure that comes with no costs in terms of legal commitment.

[52] Alexander Yakovlevich Kodintsev and others, 'International legal and Economic Aspects of Interaction of the BRICS countries and the Organization of Economic Cooperation and Development in Modern Conditions' (2020) 3 European Journal of Law and Political Sciences 7.

[53] Aslan Abashidze and others, 'Legal Status of BRICS and Some Trends of International Cooperation' (2016) 9 Indian Journal of Science and Technology 1 <https://indjst.org/articles/legal-status-of-brics-and-some-trends-of-international-cooperation> accessed 23 January 2024.

Arguably, for the BRICS, some steps in this direction were apparent in 2014 when they established the two financial institutions, the NDB and the CRA,[54] and when in 2015, during the Ufa BRICS summit, the BRICS Heads of States discussed the possibility of establishing a joint website that could have been regarded as a virtual secretariat.[55] However, such a proposition never became a reality. Therefore, whereas some years ago we could have legitimately believed that a true transformation of BRICS was occurring, now we have reasons to abandon such an idea. Indeed, the BRICS member states have not shown any recent sign of willingness to commit themselves into a joint BRICS organization. The most likely scenario is that BRICS will continue to have a very informal shape and will be used strategically by its member States as a platform of coordination to act at global level. To do this, they do not need to be an international organization and to be vested of international legal personality. They are not seeking to conclude international treaties, to send diplomatic missions, or to interact and acquire rights and duties towards third parties or other international organizations, they are trying to accomplish a global reform. However, all of this would also mean that group cannot legally stand as one in the international scene, and therefore other global players still have to deal with each of the BRICS states individually and on a bilateral basis.[56]

To sum up, the BRICS countries did not create a new entity which can act autonomously and independently from its member States, as it is the case of the United Nations, to make an example, who "has a life on its own." The BRICS fundamentally is the "total of its parts," and its States are the driving forces of the cooperation. Within the BRICS, the member countries agree on common issues and decide upon what positions they share, but then, this choice is singularly -and not collectively- implemented by the member States in the pertinent forum. The purposes and goals established by BRICS during the summits and meetings are the same for all its members, but the way each state acts to meet these goals could vary, respecting each state's unique character, which is not denied or ignored by BRICS as a group. Outside the NDB, the BRICS remains a *sui generis* or non-formal forum of international cooperation. Its members are driven by the desire to bargain together and

[54] The NDB and the CRA were created by formal treaties, under international law, and at least the NDB certainly has international legal personality.
[55] VII BRICS Summit, Ufa Declaration (Ufa 2015) point 74: "We welcome the signing of the MoU on the Creation of the Joint BRICS Website among our Foreign Ministries […] We will explore the possibility of developing the BRICS Website as a virtual secretariat".
[56] Kralikova (n 44).

change international reality directly and without the formalism and institutional hinderances of an international organization.[57]

[57] Andrè Thomashausen, 'Is BRICS becoming an international organization?' (*IOL*, 28 July 2018) <https://www.iol.co.za/news/is-brics-becoming-an-international-organisation-16291598?msclkid=004e5fafa7a911ecb8fae7ba9369477> accessed 23 January 2024.

Chapter 2. Legal aspects of BRICS

The BRICS never truly attempted to define themselves from a legal perspective. Since, at no time, they have adopted a charter or a treaty, there is no official and coherent definition of BRICS in a legal sense. Very few references in the BRICS declarations pertain the legal aspects and prospects of the group, and the wording used on this wise has always been vague and open to interpretation. Such scattering mentions about the legal dimension of BRICS define it as a 'platform for dialogue and cooperation,'[58] a 'strategic partnership',[59] and again as a 'forum'[60] leaving the strictly legal margins of the group out of the discussion. More than providing a legal foundation, such definitions appear to specify the mission of the BRICS and its general design. A more complete description of a future legal understanding of BRICS can be found in the 2013 Durban declaration, where it is stated that: 'We [the BRICS] aim at progressively developing into a full-fledged mechanism of current and long-term coordination on a wide range of key issues of the world economy and politics (…)'.[61] The characterization given here is still rather abstract. Doubts remain as to what, such full-fledged mechanism of coordination is supposed to mean, and how should this translate into practice. The wording of the sentence seems to suggest the aiming at an evolution of the BRICS experiment. One may interpret it as an open door to the establishment of an organization. However, this remains merely an assumption because, as mentioned, the BRICS countries do not seem to have any interest in engaging in a proper organization.[62] They have always refrained to do so, supposedly on purpose.

The BRICS, in fact, do not simply continuously forget about laying down the legal basis of their cooperation. On the opposite, it seems to be a conscious and informed choice that perfectly goes along with the initial idea and operation style of such group. The BRICS need flexibility and adaptability to work out. A strict legal commitment would have bound them to the pursuit of specific goals, depriving them with the possibility to change the missions and scopes of the group to adjust to their changing needs, and to do so in the easiest way, without having to renegotiate each time the terms of their cooperation. Moreover, the BRICS is based on the consensus of its member countries, which is reiterated during the summits. A larger membership also means greater challenges to reaching consensus and adds new layers of complexity. But thanks to the loose basis they equipped the group with,

[58] IV BRICS Summit, New Delhi Declaration (New Delhi 2012) point 2; III BRICS Summit, Sanya Declaration (Sanya 2011) point 6.
[59] VII BRICS Summit, Ufa Declaration (Ufa 2015) point 1; X BRICS Summit, Johannesburg Declaration (Johannesburg 2018) point 5; IX BRICS, Xiamen Declaration (Xiamen 2017) point 5.
[60] III BRICS Summit, Sanya Declaration (Sanya 2011) point 2.
[61] V BRICS Summit, Durban Declaration (Durban 2013) point 2.
[62] More on this topic shall be discussed in the next paragraph..

the BRICS countries always retain the choice not to renew their consent and detach from the group whenever this is not convenient to them anymore. This is also the result of the heterogeneous composition of the group. It is indeed not too unlikely that tensions or incompatibility within its members arise, given a certain set of objectives. Therefore, not giving a legal basis to their formation, and by not legally binding them to the group, the BRICS countries have essentially kept an "emergency door" to use whenever they wish to leave the group, as the cost of staying gets higher or the group ceases to be considered advantageous and beneficial. It may come a time when the democracies of the group, for example, no longer desire to be associated with the other two authoritative regimes. At the same time, such a legal oversight allows the BRICS to remove a member state under certain circumstances, similarly to what happened with the exclusion of Russia from the G8 after the Crimea events.

It is evident that the link that binds the BRICS states together is different from the bond between the EU member-states, to make an example. The BRICS is inherently a non-homogeneous group,[63] which can be regarded as a peculiar element that differentiates it from the 'common constitutional traditions' formations such as the EU. Indeed, the BRICS lacks the classical logic behind the coming together of states: they do not share traditions, common history, culture, or values. What they share is objectives, political and economic ones. Paradoxically, their lack of constitutional homogeneity becomes a strong global competitive advantage because it does not produce the costs of structural adjustment required by any process of integration. Nonetheless, on some occasions, such a lack of homogeneity within the group had bad repercussions on the accomplishment of common political goals, as for example in 2012, during the discussions about the presidency of the World Bank, when BRICS members failed to unite and campaign for the Nigerian or Colombian candidates, thus leading to the appointment of the American nominee.[64] Missing a coherent and cohesive cooperation for the enhancement of common interests at the UN level,[65] the group was ultimately incapable to reach its goal.

But the BRICS have another global competitive advantage: they made up a cooperation without any clause of conditionality. Unlike formal institutions, there is no

[63] Michele Carducci and Anna Silvia Bruno, 'The BRICS Countries between Justice and Economy, Methodological Challenges on Constitutional Comparison' (2014) 2 Sociology and Anthropology 46.
[64] Maria Raquel Freire, 'Political Dynamics within the BRICS in the Context of Multilayered Global Governance', in Marina Larionova and John Kirton (ed) *BRICS and Global Governance* (Routledge 2018).
[65] Bas Hooijmaaijers and Stephan Keukeleire, 'Voting Cohesion of the BRICS Countries in the UN General Assembly, 2006−2014: A BRICS Too Far?' (2016) 22 Global Governance 389 <https://www.jstor.org/stable/44860967> accessed 23 January 2024; Georgy Toloraya and Roman Chukov 'BRICS to be Considered?' (2016) 11 International Organizations Research Journal 97

attempt to negotiate nor to impose binding rules or codes of conduct nor there is any strict follow-up mechanism for the implementation of common policies.[66] There are convergences that affect each country legal system but, while the EU requires new member states wishing to enter the organization to strongly review their legal systems, the BRICS group has been using what may be described as "soft policy transfer", which typically refers to the adoption or emulation of policies and practices between countries or regions, often with an emphasis on learning and adapting rather than enforcing strict regulatory frameworks.[67] This process generally involves the exchange of ideas, knowledge, and best practices without necessarily imposing a rigid, one-size-fits-all approach.

In view of a legal definition, it is worth to stress out once more that the BRICS has not set up a group whose goal is to revolutionize or overturn global governance.[68] It aims at the creation of long-term cooperation plans to tackle common challenges with gradual and joint processes. In other words, the BRICS states do not want to work against the international organizations but act within them and to produce a change "from the inside." As a matter of fact, in their declarations, BRICS have repeatedly affirmed their support to the UN, the Bretton Woods institutions, and the G20 - to which they always acknowledge an important role. In parallel with this activity, they have created two financial institutions that, as previously mentioned, are not supposed to challenge the current ones but complement the existing efforts of multilateral and regional financial institutions for global growth and development.[69] Yet, these instruments exemplify the evolution of BRICS' global governance functions and its capability to build something together as a group, [70] regardless the legality of their cooperation. This could be considered as a clear example of how, sometimes, the substance goes beyond the form. The legal construction of BRICS may be blurry and malleable but, on some occasions, it proved to be capable of getting things done.

Literature definitions of BRICS may help us with getting a clearer image of the group. Since there is no official definition of BRICS, scholars and academics who study it tend to define it in different manners, depending on the perspective they have adopted, and under which lens they have studied such an atypical subject. Being a *sui generis* formation, developed on many different areas and levels of cooperation, and having both an internal and an external dimension, - each pursuing different aims - the definition of BRICS may change. The literature abounds with examples.

[66] This feature distinguishes the BRICS declarations from other summit's communiqués.
[67] Scaffardi (n 19).
[68] ibid.
[69] VI BRICS Summit, Fortaleza Declaration (Fortaleza 2014).
[70] John Kirton, 'Explaining the BRICS Summit Solid, Strengthening Success' (2015) 10 International Organisations Research Journal 9.

Those who have privileged the observation of the internal dimension of BRICS - which thus primarily looks at the intra-BRICS cooperation- defined it as a 'legal network',[71] or as a 'platform of dialogue and cooperation'.[72] This latter expression is also frequently used by the BRICS themselves. Words such as 'platform' and 'network' are excellent to explain the way these five countries cooperate with each other. They evoke a clear image of a venue where it is possible to work in conjunction and share projects and solutions; where the 'nets' among the disparate countries involved are built through legal borrowings, soft policy transfers, exchange of best practices and know-how and with the creation of soft forms of cooperation, such as think-tanks and forums. From this point of view, the internal dimension of the BRICS results in a clear, varied, and coherent system of cooperation. Scholars as Carducci, Bruno, Scaffardi -the firsts who brough forward the idea of the BRICS as a 'legal network'- have the merit to straighten how the cooperation among the BRICS occurs, especially under a legal perspective. Carducci and Bruno dig deeper their analysis of BRICS as a 'not equal' phenomenon based on multiple interstate dynamics and characterize it as a 'hybrid' subject that results from the fuzzy logic[73] practiced in comparative law to understand how very different complex systems can live together through serial similarities, further asserting how the future of the global institutionalism is probably marked by such forms of 'hybridism'.[74]

The BRICS phenomenon can also be described by stressing the external purpose of the group. Under this perspective, the BRICS has been defined in many ways. For starters, it has been qualified as a 'cross-continental pressure group'[75] or as a 'platform that allow[s] for the pursuit of principles of world order',[76] which aims at obtaining a stronger and more influential voice in the global arena, rather than being an exclusive model, opposing and contrasting the Western one. Other scholars defined it as a 'coalition of convenience',[77]

[71] Carducci (n 43); Scaffardi (n 19).
[72] Rostam Neuwirth, "BRICS Law": An Oxymoron, or from Cooperation, via Consolidation, to Codification?', (2019) 6 BRICS Law Journal 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3482307> accessed 23 January 2024; Salvatore Mancuso, 'Contract law in the BRICS countries: a Comparative Approach', in Rostam Neuwirth (ed), *The BRICS-Lawyers' Guide to Global Cooperation* (CUP 2017) 221-246.
[73] To learn more about the use of the fuzzy logic Serena Baldin, 'Riflessioni sull'uso consapevole della logica fuzzy nelle classificazioni fra epistemologia del diritto comparato e interdisciplinarità' (2012) 10 Revista General de Derecho Público Comparado 1 <https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=411179&d=1> accessed 23 January 20204.
[74] Carducci and Bruno (n 63).
[75] Michael Emerson, 'Do the BRICS Make a Bloc?' (*CEPS*, 30 April 2012) <https://www.ceps.eu/ceps-publications/do-brics-make-bloc/> accessed 23 January 2024.
[76] Cedric de Coning, and others 'Conclusion: 'Coexistence in between World Order and National Interest' in Cedric de Coning and others (eds) *The BRICS and Coexistence. An Alternative Vision of World Order* (Routledge 2014).
[77] Papa (n 33) 23. Sarah E Kreps, *Coalitions of Convenience: United States Military Interventions after the Cold War* (Oxford University Press 2011).

which is generally framed as 'temporary alliance or partnering of groups to achieve a common purpose or to engage in joint activities'.[78] Its purpose is to confer legitimacy to individual states' pursuit of multipolarity and share global responsibilities.

Using an institutionalist approach, Abdenur and Folly referred to the BRICS as a 'platform of convenience'. To these authors, the BRICS created a normative platform able to influence the rulemaking process in global development[79]. And again, in their analysis, Larionova and others, include the G7, G8, G20, and the BRICS all in the same category and define them as 'Plurilateral Summit Institutions',[80] thus giving significance to the key role such groups may play in affecting global governance. The BRICS has also been described as an 'informal international organization' because "its members have an explicitly shared expectation about its purpose and participate in regular meetings, but not have an independent secretariat, headquarters, or permanent staff".[81]

There is not just a single definition that is the correct one. In an ultimate analysis, the BRICS seems to remind of a Rorschach picture. Being so blurry but adaptable, it is open to different interpretations, and eventually, everyone sees something different in it. The BRICS countries themselves have different understandings of it and on how they may 'use' the group for different purposes. Russia probably sees BRICS as a geopolitical counterweight to the eastward expansion of the Atlantic system, whereas China most likely participates in the forum because it recognizes BRICS as an important vehicle for fashioning governance systems in which its political influence is commensurate to its growing economic heft.[82]

Agreeably, the most indicative legal definition we can attribute to the BRICS is the one suggested by the international law, ascribing the BRICS the qualification of informal international quasi-organization. Such a definition is capable of describing the reform and innovation-oriented character of the BRICS, its primarily function as dialogue forum and cooperation platform, as well as its institutionalizing tendencies in the forms of the NDB and CRA, and yet indicating the lack of the traditional elements that may properly qualify it as an international organization. In such manner the non-binding and flexible character of the group is preserved as well.

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[78] Papa (n 33).
[79] Abdenur and Folly (n 38).
[80] Marina V Larionova and others, 'Global Risk Governance and G20, G8, and BRICS Capabilities', in Maria V Larionova and John J Kirton (eds) *The G8–G20 Relationship in Global Governance* (Rutledge 2015).
[81] Papa (n 33); See also Felicity Vabulas and Duncan Snidal, 'Organization without Delegation: Informal Intergovernmental Oragnizations (IIGOs) and the Spectrum of Intergovernmental Arrangements' (2013) 8 Review of International Organizations 193.
[82] Samir Saran, 'The next ten years of BRICS - will the relationship last' (*World Economic Forum*, 3 October 2017) <https://tufbrics.org/tilda/en/page17607 15.html> accessed 23 January 2024.

The brief review just conducted above, which arises from the necessity to legally classify the BRICS phenomenon, makes it clear how the search for a proper definition is highly affected by a determination of the activities and actions of the group, their objectives and impact in the international scenario, which eventually results in different and diverse descriptions of this five-country grouping.

Furthermore, as it was pointed out by Formici, 'a study of BRICS represents a task not only for political but also law scholars: understanding this phenomenon from the legal angle is crucial since the group is reforming and reshaping the law as well'.[83] The BRICS proved to be an imitable model and an exemplar alternative to the hard EU regional structure, and in fact, the BRICS model has been reproduced by other regional players.[84] The persistence of the BRICS acronym, indeed, inspired the formulation of other groups, such as the N-11 ('Next Eleven' refers to the eleven most promising developing economies after the BRICS); the CEMENT (Countries in Emerging Markets Excluded by New Terminology); and, more recently, MINT (Mexico, Indonesia, Nigeria and Turkey).[85] These States understood the positive impact that informal dialogue and cooperation could have globally, without giving up part of their sovereignty in certain fields and without starting a process of 'homogenization' of their fundamental and economic structures.

[83] Formici (n 1).
[84] Carducci and Bruno (n 63).
[85] Damico (12).

Chapter 3. The BRICS cooperation strategies

When approaching the study of BRICS, one cannot but notice the striking heterogeneity of its member States. It comes naturally to question how such different countries, with very distinctive economic structures, socio-political backgrounds, legal set-ups, cultures, languages, and traditions, could make a cooperation among them work (for quite a long time now) even in spite of the internal political tensions that yet have occurred between some of its members.[86] In fact, the BRICS countries try to move beyond these tensions through regular meetings and enhanced dialogue. On this subject, the coordination strategy adopted by the group becomes relevant and deserves a further examination.

The decision-making process within the BRICS occurs at two main levels: the level of coordination among the heads of States and the inter-ministerial cooperation. The coordination among the heads of State takes place within the Summits themselves. On this occasion, the BRICS leaders exchange their views on common international issues of concern,[87] and at the end, they generally release joint statements and declarations.[88] It should be noted that such official statements are not just the product of the discussions that occurred during the summits, but they are supported by heavy preparatory work carried out by groups of representatives from each of the member country before the summit takes place. Thanks to this process of intense exchange, BRICS Heads of State and government share common positions in their summits, which in turn set the course for the BRICS.

The second level of cooperation is the inter-ministerial one. It consists of regular meetings among BRICS ministries on key areas of interest (e.g., BRICS foreign ministers' meeting, BRICS health ministers' meeting, BRICS trade ministers' meeting), whose work is generally later acknowledged during the summits and in the final declarations.

Such degrees of cooperation -which are to be considered as in continuous communication and to be mutually influenced- differ from each other in method and scope[89]. The aim of the summits is to affect or, at least, to influence global dynamics and to advance proposals to reform global governance, whereas the inter-ministerial level aims at encouraging economic, political, and cultural integration among the BRICS themselves.

[86] This refers particularly to the border political and military hostilities between China and India over Tibet and the Asiatic region of Kashmir, among others.
[87] Typically, the host country is responsible for setting the agenda and identifying the main issues to be addressed at the Summit. The BRICS also has a rotating presidency that coordinates the implementation of the decisions taken by its leaders.
[88] It is also very common for them to sign Mutual Understanding Agreements (MuA) i.e., documents that do not create rights and obligations under international law among its signatories, for example between governmental agencies, state-owned banks and ministries traditionally not involved in the classical international legalization process.
[89] Scaffardi (n 19).

Therefore, if the first level is used to shape the external dimension of BRICS and represents the platform from which the BRICS talk to the rest of the world, displaying their concerns and ambitions, the second one aims at improving the quality of intra-BRICS cooperation.

Next to these rather widespread ways of cooperation, the more interesting and innovative aspect of the BRICS regards the adoption of other collaborative instruments, which are more informal and involve many different types of actors, especially from the civil society. These softer forms of international cooperation consist of the creation of think-tanks, networks, and forums, generally put in place by experts, academics, young people, and students belonging to the different BRICS countries, promoting the exchange of best practices and know-how, and facilitating legal flows and policy transfers.[90] It is worth noting that these intra-BRICS activities, realized among the five States, are often integrated within the decisions concerning the BRICS' external actions.[91]

More formal than the ones just mentioned, the Sherpa meetings are another fundamental landmark in the BRICS decision-making and cooperation process. During these meetings, the "sherpas"[92] and "sous-sherpas" (senior officials of the member countries' foreign ministries who are in permanent contact) prepare the leaders' meetings, conduct a review of the progress achieved over the past year and the progress of BRICS' joint actions, discuss the possible implementation of previous action plans and fix priorities and principles for the next annual summit.

As for the practical part of the economic cooperation, it mostly relies on the establishment of Action Plans and Economic Strategic Partnerships, which have become the institutional basis of the BRICS coordination.[93] These latter documents define the long-term benchmarks of the sectoral and general cooperation, to strengthen economic growth and increase the level of competitiveness of the BRICS economies in the international arena. As it can be noted in the 2017 Xiamen declaration, '[the] practical economic cooperation has traditionally served as a foundation of BRICS notably through implementing the Strategy for BRICS Economic Partnership and initiatives related to its priority areas […]',[94] making clear how Partnerships represent a topical moment in the BRICS cooperation. More recently,

[90] Formici (n 1); Scaffardi (n 19)
[91] Formici (n 1).
[92] The name Sherpas derives from the "Sherpa people," Nepalese ethnic groups. They serve as guides and porters across the Himalayas. Thus designated, the Sherpa groups clear and prepare the way for the head of States at the major Summit. Sherpas are generally quite influential even though they do not have the authority to make decisions over any agreement. Sherpas were already much in use relating to the G7 preparation. As for the BRICS, the first BRICS Sherpa meeting was held in 2019 under the Presidency of Brazil in Curitiba, Brazil.
[93] The BRICS Economic Partnership 2021-2025 was approved in the New Delhi Declaration. XIII BRICS Summit, New Delhi Declaration (New Delhi 2021) point 3.
[94] XII BRICS Summit, Xiamen Declaration (Xiamen 2017) point 8.

in November 2019, the BRICS parties also signed a significant "Memorandum of Understanding among BRICS Trade and Investment Promotion Agencies (TIPAs)".[95]

It is through this particular 'all-dimensional and multilayer cooperation'[96] process that BRICS succeeded in "bridging" their distances, and positively use their differences to improve their collaboration. Indeed, the exchange of experiences -generally shared through the more unofficial venues- gains in terms of 'richness of solutions, strategies, and final outcomes.'[97]

[95] For intellectual honesty, it is necessary to note that, apart from the declarations issued at the end of the annual summit meetings and some ministerial meetings, BRICS provide "little or no information about the actual outcomes" of the parties' interactions. This represents a relevant issue when conducting research on BRICS.
[96] Xiamen Declaration (n 93) point 2.
[97] Scaffardi (n 19).

Chapter 4. The group's prospects, dispute resolution and the role of arbitration

To conclude this general introduction on BRICS, it would be appropriate to briefly reflect on what are the prospects of the group, how it may or may not evolve in the future and what role dispute resolution may play in it, especially in the form of arbitration.

So far, the BRICS has shown high resiliency not only towards adverse global events, but also towards the internal turmoils that yet have occurred during the last years -especially between China and India-, building together a set of solid financial and transactional architectures, managing to keep multilateral economic relations distinct from the purely political bilateral ones.

Many scholars have attempted to predict the future of BRICS. For instance, Shapenko, Nureyev, Korovin and Ontoev[98] already in 2014 and then again in 2018 have proposed four potential future paths for BRICS, positing that they progressively may: 1) maintain their club form and use it to discuss a global agenda, which is however formulated by other countries and supranational alliances; 2) increase in its ability to influence the global agenda using political integration tools such as expanding its membership and building a political alliance; 3) step up economic growth and trade between the BRICS countries by way of intensifying their economic integration, and eventually build up a full-fledged economic union; 4) bring about a further political and cultural integration obtained by a previous boost in the integration of the economic field, which can be used to achieve sufficient global competitive edge to finally address global problems faced by all of the humanity. Several political and economic integration activities would need to be implemented in each scenario for it to turn into reality. Initiatives like lowering trade barriers, providing more connections between the commodities, labour, and capital markets, or establishing supranational organizations and free trade zones with other nations may all be included in the economic toolbox.[99] However, as asserted by the authors themselves: "there is little chance that the 'Big Five' will be able to realize its full potential",[100] thus suggesting that the BRICS will likely attempt to improve its status but will not be capable of achieving the fourth stage of their case scenario (the union). This would be partially proved by the fact that already in 2017, prior to the summit in Xiamen, the Chinese government attempted to reach out to the other BRICS governments to assess the interest in discussing a BRICS-wide

[98] Andrey Shapenko and others, 'Imagine BRICS: Four Scenarios of the Future' (2018) 22 <https://ssrn.com/abstract=2814752> accessed 23 January 2024. On the theorization of the BRICS future see also Manuchehr Shahrokhi and others, 'The Evolution and Future of the BRICS: Unbundling Politics from Economics' (2017) 32 Global Finance Journal 1.
[99] Andrey Shapenko and others ibid.
[100] ibid 29.

trade agreement, but the other member countries preferred not to prioritize the debate. Rather, policy makers limited themselves to focusing on bureaucratic issues such as visa and customs procedures, promoting more frequent flights and shipping connections and use of each other's currencies in intra-BRICS trade.[101] Nonetheless, the recent 2023 developments tell us that BRICS is changing and has now moved from the first of the case scenarios to the second one, as its membership has in fact expanded to welcome five new States namely Iran, Saudi Arabia, the United Arab Emirates, Ethiopia and Egypt to strengthen their political and economic alliance. The expansion signifies a growing alignment of geopolitical and economic agendas within the BRICS and can certainly boost their goals in lessening their dependency on the dollar, as many of the oil producers and exporters have already agreed to sell oil in yuan and rupees. The profile of the new members suggest that the system is headed to something beyond traditionally "acceptable" in the eyes of the West as it involved States like Iran. At the same time, the incorporation of U.S. allies such as the United Arab Emirates and Saudi Arabia alongside countries ambivalent or opposed to the United States could frustrate efforts at deepening cooperation between member-states.

In fact, not all observers of BRICS have been optimistic about the group's prospects, particularly those who emphasize internal conflicts and contradictions among its member countries as, according to their belief, these issues may eventually lead to the end of cooperation.[102] It is yet to be seen whether and how the BRICS will prove them wrong. Nonetheless, BRICS should not underestimate, nor ignore what highlighted by the most sceptics. A winning strategy would involve commencing to implement a progressive agenda that addresses their imbalances and the potential risks while reinforcing the inner ties of their union, as the internal frictions may in fact be their Achilles' heel.

Reasonably, the future of BRICS cannot be separated from economic considerations. Regardless of their collective potential and individual members' power, the sustainability of BRICS (as for any international organization for that matter) is indeed dependent on how

[101] Oliver Stuenkel, *The BRICS and the Future of Global Order* (2nd edition, Lexington Books 2020).

[102] In his Report, Marcos Degaut stresses that the BRICS members' social, political, economic, and diplomatic disparities could prevent the BRICS from proving a coherent and effective strategic alliance. In fact, the analysis concludes that the BRICS are not likely to deliver a new international system. Marcos Degaut, 'Do the BRICS Still Matter?' (*A Report of the CSIS Americas Program*, October 2015) <https://www.csis.org/analysis/do-brics-still-matter> accessed 23 January 2024; Harsh V Pant, 'The BRICS Fallacy' (2013) 36 The Washington Quarterly 91; Sharma Ruchir, 'Broken BRICS: Why the Rest Stopped Rising' (2012) 91 Foreign Affairs 2; Mohammed Nuruzzaman, affirms that the BRICS group's ability to challenge or threaten the US-led world order is seriously hampered by the group's internal makeup, political and ideological heterogeneity, its inability to develop a collective world order appealing to the larger international community, and lack of strong convergence in foreign policy goals and preferences. Mohammed Nuruzzaman, 'Why BRICS Is No Threat to the Post-war Liberal World Order' (2020) 57 International Studies 51.

well it can respond to modern challenges.[103] The evolution of the global context, together with the main trends in international relations, also exert a major impact on BRICS and its prospects[104]. The US confrontation with China and Russia (especially in the form of trade wars) is the first of such trends, along with the Covid-19 pandemic and the ongoing Ukrainian war, which is putting a strain not only to the Russian-West relations, but also on the BRICS-West ones. As the war drags on and Moscow gets progressively sanctioned and more isolated, BRICS has certainly acquired a renewed value, especially for Russia. Increasingly distanced from the Western nations, BRICS need their reciprocal support not only politically, but also economically, accelerating common aims as de-dollarization, alternative payment system, and oil and gas sales.[105] It is during this period of global crisis that expanding economic cooperation between the BRICS countries thus becomes even more salient.

One may wonder how would dispute resolution and arbitration fit in the picture. Although often underestimated, better dispute resolution contributes to create a better business climate and, as a consequence, it improves the attractiveness of a country.[106]As it has been noted, "economic development requires not only predictable and fair rules to govern business activities but that these rules are actually enforced", [107] for which commercial dispute resolution is an important factor.[108] Besides, to implement a dispute resolution system that is as impartial as possible is also crucial to avoid any political fallout, leaving business actors alone to the resolution of private disputes, excluding the need to having to call on their home government to the detriment of bilateral and multilateral

[103] Stuenkel (n 101).

[104] The paragraph does not consider the impact and position of BRICS in the international relations, as this would require an in-depth knowledge of IR theories and a dedicated scientific analysis that would go far beyond the scope of this thesis and would merit a separate consideration. Realists, constructivists, functionalists, they may all read the evolution of BRICS differently. For more on the BRICS and the future of global governance with an IR perspective, Stuenkel (n 101).

[105] To cope with the sanctions issued by the Western countries upon the Russian invasion of Ukraine, Russia has taken some measures to continue selling oil and maintain at least some of its revenue. Among other things, it has begun selling it at heavily discounted prices to countries such as China and India. Specifically, Indian imports of Russian oil increased tenfold in 2022, and continued to grow in 2023, according to estimates made by the Bank of Baroda, one of India's public banks. The large increase in Indian imports has allowed Russia to offset some of the economic losses due to the drastic reduction in oil imports from European countries, its main buyers until the beginning of the invasion of Ukraine. 'Russia says oil sales to India soared 22-fold last year' (*Ajazeera*, 18 March 2023) <https://www.aljazeera.com/news/2023/3/28/russia-says-oil-sales-to-india-soared-22-fold-last-year> accessed 23 January 2024.

[106] Philip McConnaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' (2013) 1 Peking University Transnational Law Review 9 <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2717374> accessed 23 January 2024.

[107] Jason Fry, 'Arbitration and Promotion of Economic Growth and Investment' (2011) 13 European Journal of Law Reform 390.

[108] Andreas Baumgartner, 'Commercial Dispute Resolution: Unlocking Economic Potential Through Lighthouse Projects', in Peter Quayle and Xuan Gao (eds) *International Organizations and the Promotion of Effective Dispute Resolution* (Brill 2019).

political relations among BRICS, which are also the most fragile ones. This latter point can be better explained by recalling how traditionally, international trade and investment disputes have been settled by the WTO's Dispute Settlement Body, provided that they involved a duty imposed by WTO agreements or free trade agreements. Such an option is still available for international trade transactions within the BRICS premise. However, the WTO's dispute resolution mechanism only gives standing to its members. This means that businesses and people from a member country cannot file a complaint against another member country directly; they can only persuade their government to do so. Following the said dispute resolution pathway, companies would have to call on their home governments to intervene diplomatically in foreign countries, thus paving the way for a state-to-state conflict which, especially in the BRICS context, where the political relations between some of its the member states are already delicate, should be duly avoided. In addition, to date, the WTO Appellate Body is still in a state of impasse. Therefore, it is expected that the WTO members will either agree to renounce to the second instance before the Appellate Body, or temporarily defer the disputes to alternative appeal proceedings, such as arbitration. Not by chance, the BRICS might consider providing arbitration services not only for commercial disputes but also in case of investments disputes, which again have been historically addressed within the WTO.

It is worth recalling that in the field of dispute resolution, in recent years, Chinese lawyers and judges have developed a novel idea called "legal diplomacy", which aims to infuse legal awareness and consciousness into China's diplomatic work, converting diplomatic issues into legal issues, and handling foreign affairs with legal approaches, thus contributing to legitimize China's foreign policy. Legal diplomacy should thus convey the disagreements into the strictly legal dimension, proving for a peaceful and rational dispute settlement to ultimately achieve the establishment of a harmonious world order.[109]

Disputes are in fact damaging, expensive, and time consuming. The lengthy litigation system with typical court settings has proven to be too burdensome for private persons, companies, industries, and investors, ultimately making the establishment of an arbitration tribunal system the primary tool for resolving disputes and to recognize and enforce the awards accordingly. International arbitration represents the best possible alternative for BRICS. As a flexible and adaptable means of dispute settlement, international arbitration

[109] For more on Chinese law diplomacy Zhang Wenxian and Gu Zhaomin, 'China's Law Diplomacy: Theory and Practice' [2013] Global Review 48; Harriet Moynihan, 'China's Evolving Approach to International Dispute Settlement' (*International Law Programme of the Chatham House*, 29 March 2017) <https://www.chathamhouse.org/sites/default/files/publications/research/2017-03-29-chinas-evolving-approach-international-dispute-settlement-moynihan-final> accessed 23 January 2024.

can be shaped by BRICS to meet their unique needs.[110] In international trade, as well as in domestic contexts, traders and business partners are already widely recognized for their propensity to forgo using formal legislation and to stay out of court[111]. The same is true for the BRICS countries, where there is a widespread understanding that arbitration is the mostly used instrument for the resolution of commercial disputes[112].

Taking actions for the prevention of such disputes and resolve them as early and in an efficient way would thus benefit BRICS, their collective economies, and their multilateral political relations. Under this perspective, effective dispute resolution becomes a precondition to successful economic development, which not only seems to be the direction the BRICS are pointing, but that also represents the one path that would allow them to efficaciously face current global challenges.

It is quite clear then, that international arbitration can assist BRICS in fostering their economic growth and political success. However, to achieve such a goal, arbitration must be supported by a domestic legal framework that is in line with the one provided to transnational commerce by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention), which entails that arbitration must be allowed to largely work independently from official regulatory and judicial interference. According to McConnaughy, as a general rule, (1) the more reliably a country's national courts honour written arbitration agreements and refuse to hear claims within the scope of an arbitration agreement, (2) the more clearly defined and limited the possible occasions of judicial involvement in arbitration proceedings, and (3) the more reliably a nation's national courts recognize and enforce arbitration awards without reviewing or "second guessing" the merits of the award, the better the business climate and reputation of the nation[113].

On this wise, some BRICS States may be called to revise and modernize their arbitration legislations to meet the new global standards. China has already started to take some steps in this direction in the view of creating a reliable and effective dispute resolution environment within the Belt and Road Initiative. The same is true for India that has amended its laws on arbitration following the agenda of the government on the 'ease of doing

[110] The topic is better discussed in Chapter 4.
[111] On the topic Stewart Macaulay, 'Stewart Macaulay, 'Non-Contractual Relations in Business: a Preliminary Study' (1963) 28 American Sociological Review 55; Paul R Milgrom and others, , 'The Role of Institutions in the Revival of Trade: the Law Merchant, Private Judges, and the Champagne Fairs' (1990) 2 Economics and Politics 1; See also Mauro Bussani, 'Strangers in the law: lawyers' law and the other legal dimensions' (2019) 40 Cardozo Law Rev 125 <https://papers.ssrn.com/sol3/papers.cfm?abstractid=3953139> accessed 23 January 2024.
[112] Mancuso and Bussani (n 2).
[113] McConnaughay (n 106).

business'[114]. However, this is not enough. To succeed, the BRICS will have to collectively cooperate, fulfill the said standards, and harmonize their arbitration laws accordingly. A solid basis already exists as many BRICS' arbitration legislations are inspired by the UNCITRAL Model Law. But many are the uncovered points that the BRICS still have to agree on.

What argued so far, proves the importance of the next discussions, which will focus in detail on the arbitration legislations of the individual BRICS countries, ultimately seeking for a common ground on which the BRICS can work to create a strong dispute resolution system. This innovation would have many additional important internal and external implications that may affect the future of the group and that, consequently, should be properly regarded. For what concerns the internal dimension, the effective creation of the BRICS Dispute Resolution centres would represent another major step in the BRICS institutional building (just as it was the case for the NDB, but this time in the field of Alternative Justice) thereby reinforcing the inner ties of the BRICS cooperation. As for the external dimension, a recognized system of BRICS Dispute Resolution would be a great display of soft power, which passes broader messages about its overall political and legal stability. The BRICS arbitral infrastructure would thus strengthen the position of the BRICS as leader and reference point in the Global South, bolstering their quest to achieve shared objectives in global economy and politics.

[114] Mancuso and Bussani (n 2).

PART II
Arbitration in the BRICS countries

Each legal system has unique characteristics that influence how arbitration law is conceived, created, and applied. In fact, despite the principle of freedom of contract, arbitration cannot fully escape the formal court system or government policies. This explains the decision to introduce each of the BRICS countries legal systems -in their very essential features- before turning into the full examination of the respective arbitral laws. The brief introduction on the BRICS legal systems has been restricted to the main changes occurred in the official law during the 19th and 20th century. This is not because BRICS nations' historical roots and informal law layers have not had an impact on today's legal systems, on the opposite. Nonetheless, such an impact is least seen on the countries' arbitration framework, which is characterized by the official state regulatory intervention and international sources of law.

On the other hand, the study will include references to the legal culture and tradition of the BRICS countries associated with the use of alternative means of dispute settlement, as they often determine what goals and values are associated with dispute resolution, thus influencing dispute resolution procedures choices. To make an example, the Chinese mixed-modes of dispute resolution, such as "Med-Arb" or "Arb-Med",[115] where arbitration and mediation procedures are combined and in which the same adjudicator can "switch hats" in the course of resolving the dispute and become, depending on the necessity, a mediator or

[115] In legal scholarship, these terms refer to the order in which the arbitration and mediation stages take place. Therefore, "Med-arb" and "Arb-med" are not to be used interchangeably. In "Med-arb," the parties attempt to mediate from the outset of their dispute, and then enter arbitration proceedings for unsuccessful mediation or to address unresolved issues or matters. By contrast, in "Arb-med" and "Arb-med-arb", the combined procedure begins as an arbitration and in the course of such arbitration, the parties decide to have the arbitrator settle the subject matter through mediation based on the applicable arbitration rules or *lex arbitri*. Here, the mediation stage starts, and the arbitrator attempts to settle the dispute as a mediator. The second arbitration stage arises afterwards for two reasons: 1. Mediation is successfully ended, and a full settlement has been reached. Therefore, the arbitration resumes to translate the successful agreement into a "consent award". The point of giving the settlement in the form of an award, is to benefit from the provisions on the recognition and enforcement of foreign awards under the New York Convention, which allows for the easy circulation of the awards. 2. Mediation was only partially successful and consequently, arbitration is resumed to settle the remaining matters. In both cases, the arbitrator ceases to act in his capacity as a mediator and resumes the role of arbitrator for the last stage. For more on the subject Tai Heng Cheng, Anthony Kohtio, 'Some Limits to Apply Chinese Med-Arb Internationally' (2009) 2 New York Dispute Resolution Lawyer 95 <https://ssrn.com/abstract=1536497> accessed 23 January 2024; Bobotte Wolski, 'Arb-med-arb (and MSAs): A Whole Which Is Less than, Not Greater than, the Sum of Its Parts' (2013) 6 Contemporary Asia Arbitration Journal 249 <https://ssrn.com/abstract=2397649> accessed 23 January 2024; Jacob Rossof, 'Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings' (2009) 26 Journal of International Arbitration 89; Weixia Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese ArbMed(-Arb) and Its Global Implications' (2019) 29 Washington International Law Journal 117 <https://ssrn.com/abstract=3511882> accessed 23 January 2024.

an arbitrator, could not be understood without making reference to the Chinese legal culture and its legal tradition.[116]

This work follows the classification of legal systems offered by the University of Ottawa's JuriGlobe, according to which Brazil and Russia fall into the category of "civil law monosystems", China is a "mixed system of civil law and customary law", South Africa is a "mixed system of civil law and common law", and India is a "mixed system of common law, Muslim law and customary law".[117] The analysis will start from the legal systems participating in the civil law group (Brazil and Russia) and then moving to mixed jurisdictions, from the least to the most oriented to common law (China, South Africa, India), thus departing from the alphabetical order of the BRICS acronym.

Such a classification is preferred because it allows to better stress how the common law and the civil law traditions have an influence on the approach to dispute resolution and on the administration of arbitration itself, along with the parties' expectations on the conduct of such proceedings. Suffices to mention here how the role of courts in defining the law, the importance of oral argument and testimonial evidence, as well as the role of the parties in the production of evidence distinguish the common law systems, whereas the continental or civil law systems are more founded on strict adherence to the codified law, systematized by a specific legislative will. Civil law systems are more based on the judge's conduct of the process, and characterized by extremely bureaucratic and formal nature of evidential law, and the predominance of writing in the process.[118]

Once the legal system has been introduced, the focus will shift to the analysis of international arbitration in the envisaged country, offering an in-depth discussion of the main laws, rules and case law that govern arbitration thereto. It is worth stressing that, unlike ordinary state laws, the arbitral law and, specifically, the one governing international arbitration, is primarily intended for international readers and users, whether they be parties,

[116] "Arb-med" procedures are widely used for the resolution of domestic commercial disputes, as they better respond to the Confucian imperative to promote social harmony through means of dispute settlement that are less adversarial and more amicable. In this context, the use of mediation is even more encouraged than arbitration or litigation.

[117] University of Ottawa, JuriGlobe World Legal Systems <http://www.juriglobe.ca/eng/sys-juri/index-syst.php> accessed 23 January 2024. The same classification has been used in a recent work of BRICS contract law cited before, Mancuso and Bussani (n 2). Rather than adopting the view that mixed legal systems are mixture of civil law and common law (adopted by Palmer), the University of Ottawa's Juriglobe clearly embraces a broader notion of mixed jurisdictions, such as the one advocated by Örücü. On the topic Vernon Palmer, 'Two rival theories of mixed legal systems' in Esin Örücü (ed), *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill 2019) 19–52; Esin Örücü, 'General introduction' in Esin Örücü *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill 2010) 1–18. On these debates Jaque du Plessis, 'Comparative law and the study of mixed legal systems', in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2006) 474–501.

[118] On the topic Siegfried Elsing and John Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18 Arbitration International 59.

lawyers, or arbitrators[119]. Indeed, the language and the structure used for the drafting of the national arbitral legislations show resembles in all the five countries, which also makes them easier to harmonize. To this end, the analysis of the five arbitral legislations will be conducted following the same pattern of investigation areas, which have been carefully selected in view of a communal approach and shared use of arbitration among the BRICS countries via the BRICS Dispute Resolution centres. Each country-analysis will be thus structured as follows:

A general overview on arbitration

For each country, a preliminary analysis will be made to provide information on the use and development of domestic and international arbitration, identifying the main sources of the arbitral law, with a special focus on whether the arbitral text was influenced by international legal sources as the UNCITRAL Model Law. The paragraph also acknowledges whether the country at issue has adhered to the New York Convention or to any other relevant Convention or Treaty in the field of international arbitration.

Arbitrability

In arbitration doctrine, the term arbitrability is used to address whether a certain dispute can be submitted to arbitration. Arbitrability is a complex issue, extremely intertwined with a country's public policy. The matters capable of being submitted to arbitration vary widely from a legal system to another, although the concept of arbitrability has expanded considerably in recent decades as a consequence of a general policy favouring arbitration. Even the most arbitration-friendly legal systems recognize that disputes that do not involve an economic interest cannot be submitted to arbitration. The arbitrability of the dispute is the indispensable premise to any arbitration, but it may also have an impact on the recognition and enforcement of the award. As arbitrability varies, it must be clarified what subject-matters are intended to be arbitrable in the envisaged country.

The arbitration agreement

The beating heart of arbitration cannot but be the arbitration agreement. As a matter of fact, the arbitration agreement concluded by the parties gives exclusive jurisdiction to the arbitrators to the decide on the merits of their dispute and to issue an award with *res judicata* effects, which is final and binding on parties. However, for the arbitration agreement to be

[119] Gerold Herrmann, 'The UNCITRAL Arbitration Law: A Good Model of a Model Law' (1998) 3 Uniform Law Review 483.

valid and enforceable, it must comply with certain validity requirements provided in the relevant law (which may be the law chosen by the parties or, commonly, the law of the seat of arbitration) which also establishes the form that the arbitration agreement may assume (e.g., arbitration clause or submission agreement) to be defined as such. The paragraph also specifies whether the country at issue welcomes the principle of separability of the arbitration agreement from the main contract, which entails that the parties may choose different sets of laws governing respectively the main contract and the arbitration agreement.

Jurisdiction and kompetenz-kompetenz doctrine

Intrinsically related to the validity and separability of the arbitration agreement, this paragraph discusses the issue of the allocation of jurisdiction and whether the country at issue has welcomed and applied the *kompetenz-kompetenz* doctrine, which answers the question of who should decide upon the existence of a valid arbitration agreement, and what behaviour should the national Courts adopt when faced with a jurisdictional challenge when the parties have priorly agreed to arbitrate the dispute.

Arbitrators and arbitral institutions

The paragraph dedicated to the arbitrators and the arbitral institutions sets out the requirements (if any) that are deemed to be necessary under the national law to serve as arbitrator, tracing independence and impartiality standards endorsed by the national legislation along with the enlisted methods for appointing or dismissing the arbitrators. It must be underlined that the arbitrators' appointment is a matter of procedure, and as such, may vary depending on the procedural rules chosen by the parties and on the arbitral institution administering the case. Consequently, the rules contained in the national laws are to be understood as default provisions to apply when the parties have not selected specific procedural rules. The paragraph also gets a glimpse on the most important arbitral institutions operating within the country's jurisdiction, and the necessary licenses and requirements to administer arbitration thereto.

The arbitral procedure

Lingering on the purest procedural aspects that characterize arbitration, the paragraph on the arbitral procedure discusses the very procedural steps of arbitration: from the commencement of the proceedings, the appointment of the arbitrators, the applicable procedural rules and their relation to local mandatory laws that may call for application, to the conduct of the evidentiary phase and the correlated cooperative or hostile relationship

between the arbitral tribunal and the national courts (especially in terms of courts' support or hinderance towards the tribunal's requests, orders and decisions). Once more, given the parties' freedom to select the procedural rules, such references are to be applied in case the parties fail to choose ones.

Confidentiality

This paragraph discusses the level of confidentiality that the parties may apply to the proceedings and to the award, and if are there any mandatory local laws the provide for publicity in specific cases.

Choice of law

Another major and decisive aspect of an arbitration is that of the choice of law. This paragraph tackles how broad or limited is the choice of the parties, under the national law, to select a state or a non-state law for resolving the merits of their dispute, and what is the most common approach used to resolve choice-of-law issues in case the arbitration agreement is silent on the matter.

Language

This paragraph assesses whether the parties are free to choose the language (s) applicable to the proceedings and what are the most common choices, especially in relation to national requirements of translation of evidence and documents.

The seat of arbitration

The present paragraph investigates how the notion of the seat of arbitration is conceived in the analysed country and whether the national law or case law provide for a clear-cut distinction between the concepts of the legal 'seat', 'place' and 'venue' of arbitration, assessing whether and how the parties or the arbitral tribunal generally act on them. The paragraph also discusses whether the country in question could make an appealable arbitral seat and for what reasons.

The award

From the paragraph devoted to the arbitral award on, the analysis moves to the award and post-award phases. First of all, the paragraph at issue disposes about the issuance of the award and whether the national law fixes specific time limits on this regard. It also describes the requirements provided in the national law for issuing a valid and readily enforceable

award. Moreover, the paragraph investigates what types of awards that are recognized under the national law and what implications could this entail on the enforcement of foreign awards that do not fall within the said categories.

Challenging an award

This paragraph discusses how a resistant party may challenge an award by listing the grounds available under the national and international law to set aside or annulling an award.

Recognition and enforcement of arbitral awards

This paragraph deals with the recognition and enforcement procedures that follow the rendering of an award. Therefore, it will investigate what grounds may be raised by the resisting party or by the enforcing court *ex officio* to refuse the recognition and the enforcement of a foreign arbitral award. Such a discussion is useful to establish how the courts of the country at issue have interpreted the provisions contained in the New York Convention and whether the country at hand has a positive or negative record in giving effect to foreign awards, thus assessing what is the country's general attitude towards foreign arbitral decisions.

Public policy

This last paragraph attempts to draw the lines of the country's public policy, putting it in relation to the "international public policy" standard endorsed by the New York Convention, and assesses how such ground has been used or abused to resist the enforcement of arbitration agreements and foreign awards, which in turn shows the approach and confidence a country puts into arbitration.

The decision to carry out the analysis in this manner is motivated by the pursued aim of giving a rather complete image of how arbitration is conceived, conducted, and administered in each of the BRICS countries before ultimately compare the five different experiences on the same benchmark areas. The information thus collected should, on the one hand, provide the reader with the relevant data on each of the five jurisdictions both at declamatory and operational level, and on the other, serve as a starting point for the comparative analysis. In fact, only once the said topics have all been duly investigated for the five countries, it will be possible to systematize the information collected and dispose it in a final comparative overview where to highlight commonalities and differences.

Certainly, the present work does not presume to be exhaustive. The matter of international arbitration is in fact massive and characterized by many specific features, aspects, and implications. Too many, to be all taken into consideration in a PhD dissertation. A separate inquiry should, for example, be devoted to investment arbitration and investor-State arbitration, specifically when State-owned enterprises are involved in the dispute, which is a frequent occurrence in China or Russia or to third-party founding and third-party involvement in the proceedings. It was thus paramount to restrict the object of the present study, limiting it to the general and most essential features of private international commercial arbitration within BRICS. No consideration is given to adjoining fields, such as those of investment law, public contracting, and company law.

Chapter 1. Brazil

1.1 The Brazilian legal system

Brazil is a Latin American powerhouse. Notwithstanding its over 200 million inhabitants, the world's fifth largest territorial extension, and a thriving economy, the country remains a minor player in the international political dynamics.[120]

The Brazilian State is a rather new state. It is a federal Republic, politically and administratively comprising twenty-six states and one federal district. Although each state has its own constitution and court system, the Union alone has the authority to enact laws governing all aspects of civil and commercial matters.

Despite its political independence acquired in 1822 and its extraordinary natural resources, Brazil has remained trapped between a persistent economic bondage and a succession of authoritarian regimes that have delayed the achievement of any democratic aspiration for more than a century and a half. In this context, the Brazilian legal culture has remained dependent on the legal culture produced in Europe and in the United States, both in theoretical categories and normative structures.[121]

Of the five countries, Brazil is certainly the most aligned with the civil law legal tradition (also due to its colonial past). Positive legislation is indeed considered as the primary source of law, albeit some "sprinkles of common law".[122] The 1988 Federal Constitution, which is the supreme law of the State, and the 2002 Civil Code are regarded as the most important pieces of legislation in Brazil, followed by Consumer Protection Code (Law No 8.078 of 1990), which provides several rules for B2C contracts and the antitrust legislation[123], the 1942 Introductory Act to Brazilian Law (Decree Law No 4657 of 1942) and the 1996 Arbitration Act (Law No 9.307 of 1996).[124]

Differently from the 1916 Civil Code, which was largely inspired by pre-existing Portuguese legislation, as well as by the French, Italian, German and Spanish codifications,

[120] Andityas Soares de Moura Costa Matos and Marcelo Maciel Ramos, 'Brazilian Legal Culture: From the Tradition of Exception to the Promise of Emancipation' (2016) 29 International Journal for the Semiotics of Law 753 <https://link.springer.com/article/10.1007/s11196-015-9449-2> accessed 23 January 2024.
[121] ibid.
[122] Fernando Eduardo Serec and Antonio Marzagao Barbuto Neto, 'Brazilian legal system: civil law sprinkled with common law elements' (*Lexology*, 17 July 2018) <https://www.lexology.com/Commentary/litigation/brazil/tozzinifreire-advogados/brazilian-legal-system-civil-law-sprinkled-with-common-law-elements> accessed 23 January 2024.
[123] Originally enacted with Law No 8.884 of 1994, now replaced by Law No 12.529 of 2011.
[124] Marta Infantino, 'Commercial Contract Law in the BRICS: A Comparative Overview' in Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries* (Springer 2022) 13-45.

and which embraced a classical liberal approach to contract law, rooted in the principles of freedom of contract and of no interference from the statutory law,[125] the 2002 Code relies more heavily on the German and Italian traditions and adopts a more socially oriented approach to contract law. It is based on greater state intervention to impose mandatory rules that cannot be excluded nor modified by the parties, with the ultimate goal of protecting the weaker party in the business relation thus restoring a proper balance in the parties' contractual relationship.[126] This explains the proactive attitude in relation to consumers and labour law contracts, which thereto raised some issues in the field of arbitration.[127]

The autonomy of the parties in Brazil has been at the centre of scholarly debate for some time, especially when the parties entered international commercial contracts.[128] That is because the Introductory Act to the Civil Code does not clearly affirm that the parties are free to choose the law applicable to transnational contracts, thus positing enforceability issues of choice-of-law clauses under Brazilian law. In fact, Brazilian courts have frequently disregarded the parties' autonomy in choosing the applicable law (and until recently even choice-of-forum clauses)[129] by invoking the public order exception under art. 17 of the Introductory Act and have imposed Brazilian law whenever a commercial contract was to be executed in Brazil.[130]

On the contrary, the 1996 Brazilian Arbitration Act (hereinafter BAA), which governs applicable law matters in arbitration cases, explicitly provides for the parties' freedom to choose the applicable law, "unless it violates good usages or public order".[131] The Act further provides for the 'law' in question not to be necessarily a state law, conferring the parties' faculty to choose "general principles of law, customs, usages and the rules of international trade".[132] This is probably due to the use of the UNCITRAL Model Law as the basis for the development of the Brazilian arbitration law. In point of fact, art. 28 (1) of the

[125] Mancuso (n 72); Luciano Benetti Timm, 'Contract law' in Fabiano Deffenti and Welber Barral (eds.), *Introduction to Brazilian Law* (Kluwer, 2011) 85.
[126] Mancuso (n 72).
[127] The topic shall be better discussed in paragraph 3.
[128] Umberto Celli and Ligia Espolaor Verones, 'Brazilian Report', in Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries* (Springer 2022) 69-134.
[129] Apparently, before the New Code of Civil Procedure was enacted in 2015, Brazilian courts tended to deem invalid parties' choice-of-forum agreements, due to the alleged mandatory nature of procedural rules on judicial competence. Art. 68 of the New Code finally provide for the validity of such agreements. Infantino (n 124).
[130] The new Civil Code introduced in 2002 in its article 421 states that "A liberdade de contratar será exercida em razão e nos limites da função social do contrato". Therefore, it endorses the parties' autonomy in the negotiations of the contract, identifying the social foundation of the contract as a limit to such a freedom; Infantino (n 124).
[131] BAA 1996 art 2 (1).
[132] ibid art 2(2).

Model Law uses the expression "rules of law" to indicate the legal standards applicable to the resolution of the case by the arbitral tribunal.[133]

Neither the Principles of International Commercial Contracts, in their 1994 edition, nor the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods (hereinafter CISG)[134] appear to have had any impact on contract law regulation in the Brazilian Civil Code. However, on its side, the ratification of CISG represented a step towards a greater endorsement of the principle of party autonomy for Brazil, especially due to art. 6 of the said Convention, according to which the contracting parties may specifically deviate from the Convention's provisions or even completely exclude its application from their agreement. In this sense, Brazil's ratification of the CISG was a glaring example of the freedom acknowledged to the parties by Brazilian law, specifically, in this case, to choose or not to choose the said Convention to regulate their contract[135].

Unless there is a valid arbitration agreement or choice-of-forum clause, commercial disputes typically fall under the purview of Brazil's state courts,[136] which are twofold: trials and appeals. The Superior Tribunal of Justice (hereinafter STJ), Brazil's highest federal court for all non-constitutional disputes, is the Court where decisions from the Appellate Courts can be pleaded, and it is the only competent Court over disputes involving the recognition and enforcement of foreign arbitral awards[137].

Typically, as for any other Civil Law country, Brazilian courts lack the official authority to make laws. Nonetheless, the new Civil Procedure Code of 2015 in its articles 926-927, along with the new art. 103-A of the 1988 Constitution (as amended in 2004) have introduced some common law features into Brazilian courts.

Already since the Sixties, the Supreme Federal Tribunal (Brazilian's Constitutional Court) and the STJ got accustomed to publishing '*súmulas'*, i.e., brief summaries of their rulings, which could have served as guidelines for appellate and lower courts. The binding nature of such guidelines was disputed until the 2004, when the new art. 103-A (introduced with the Constitution's revision), established that the '*súmulas'* issued by the Supreme Federal Tribunal "shall have binding effects on other bodies of the judiciary, direct and

[133] UNCITRAL Model Law art 8 (1) states that: 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules'. The Brazilian Arbitration Act has been influenced also by the New York Convention, by the Spanish Arbitration Act of 1988 and by the Inter-American Convention on International Commercial Arbitration, ratified with Decree No 1.902 of 1996.
[134] Brazil ratified the CISG in 2014 with Decree No 8.327/2014.
[135] Celli and Espolaor Verones (n 128) 70.
[136] Brazil's federal or state courts adjudicate civil and commercial cases. Whereas disputes involving the military, labour, and elections are decided by courts with special jurisdiction.
[137] Infantino (n 124).

indirect public administration, and at federal, state and municipal level"[138]; whereas articles 926 and 927 of the 2015 Civil Procedure Code enshrine the binding character of the Superior Tribunal of Justice's '*súmulas'* on infra-constitutional matters for appellate and lower courts. It is also accurate to say that even prior to the said legislative changes, '*súmulas'* established a "de facto stare decisis because adopting an opposing stance virtually ensured a reversal".[139]

The Brazilian legal system does have some peculiarities that may represent a challenge for foreign arbitrators and counsel. One of these peculiarities is the method for awarding costs and attorney fees. Brazilian litigants are responsible for all court-related expenses up until the trial court issues its final decision. In Brazilian litigation, the losing party is then obligated to pay the winning party's costs, including filing fees, process service fees, and court-appointed experts.[140] Attorneys' fees (*sucumbência*) will be fixed at between 10% and 20% of the total amount of the judgment, although they may be fixed at a lower rate in certain situations (e.g., when the claim is dismissed).

Although the provisions of the Civil Procedure Code, in principle, do not apply to arbitration, there is no doubt that its general principles do and, in any case, such principles create expectations on Brazilian parties to arbitration. The BAA 1996, for its part, is ambiguous when it comes to awarding costs, stating only that the arbitral award shall regulate the parties' responsibility for the costs and expenses of the proceedings, but it makes no explicit mention of attorneys' fees. The Arbitral rules of the most prominent arbitration institutions in Brazil are as vague. Given the lack of clear parameters in the law and arbitration rules on these issues, establishing criteria for the treatment of costs and attorney fees can be difficult. Even more so for common law practitioners who are accustomed to standard procedures on the subject.

In such a scenario, the parties should wisely address the issue upfront in the arbitration agreement or in the Terms of Reference, determining the criteria and jointly create the best model of costs allocation to the material case, or simply choose to refer to the rules laid down in the Civil Procedure Code, explicitly transposing them to the arbitration proceedings via the arbitration agreement.

[138] Brazilian Constitution 1988 (as revised in 2004) art 103-A 'O Supremo Tribunal Federal poderá, [...] aprovar súmula que, a partir de sua publicação na imprensa oficial, terá efeito vinculante em relação aos demais órgãos do Poder Judiciário e à administração pública direta e indireta, nas esferas federal, estadual e municipal [...]'.

[139] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way' [2005] Columbia Journal of Transnational 975, 967. A hot topic in arbitration is the new Civil Procedure Code provisions regarding binding precedents and its impact on the arbitrator duty to apply the Brazilian law.

[140] Brazilian Civil Procedure Code 2015 arts 82 and 85.

Before concluding, it is worth offering a brief analysis of the distinctive features inherent to the procedural aspects of Brazilian courts' proceedings. In Brazil, documentary evidence typically has more weight than oral testimony. When witnesses are included in the trial, the judge oversees questioning the witnesses who are providing oral testimony. While judges do permit questions from attorneys, they frequently rephrase them as they see fit. As a result, it is much more difficult to discredit statements made during the evidentiary hearings. Witnesses are rarely questioned for more than 15 to 30 minutes, and judges summarize the evidence in written minutes at the end of the hearing. There is no cross-examination as in typical common law procedures. As a civil law jurisdiction, discovery (or disclosure, as it is known in some jurisdictions) is not part of civil proceedings in Brazil[141]. Such an approach to procedural matters is heavily reflected in Brazilian arbitration, where the use of and reliance on written documents is preponderant over oral testimonies, and where discovery has found several hinderances and limitations.[142]

To conclude, the use of scholarly doctrine and the opinions of distinguished jurists are highly valued in Brazil, fully in keeping with the civil law tradition. When confronted with legal questions that cannot be resolved by a simple reading of statutory provisions, Brazilian judges are allowed to -and frequently do so-, refer to the writings of law professors,[143] which are regarded as typical authoritative sources, and which are often recalled in the final judgements.

1.2 A general overview on arbitration

Arbitration undoubtedly is the ADR technique that has gained the most traction in Brazil.[144] In fact, it is now the most widespread method of resolving disputes in the country, especially in the fields of corporate, and construction. The reason for this is the most typical: the

[141] Fabiano Deffenti, 'Litigation in Brazil: Unusual Features' (*Law of Brazil*, 21 October 2021) <https://lawsofbrazil.com/2021/10/21/litigation-in-brazil-unusual-features/> accessed 23 January 2024.
[142] The arbitral procedure in Brazil will be better discussed in the dedicated paragraph.
[143] Infantino (n 124); Stringer (n 139).
[144] The 2012 Resolution No. 125 enacted by the National Counsel of Justice, which aimed at implementing an adequate ADR system in Brazil, represents a landmark in the Brazilian approach to dispute resolution as because it opened up to new ways to resolve disputes out of court. Besides, it put a definitive end to the debate on the constitutional principle of "access to justice" by stating that it did not necessarily mean "access to the Judiciary", thus promoting Professor Sander's idea of a "multidoor Court house" to the benefit of the overall society. The idea behind Professor Sander's concept is to look at various forms of dispute resolution-mediation, arbitration, negotiation, and med-arb- and to consider whether it might be possible to create a taxonomy that would indicate which doors are appropriate to which types of disputes. See Frank Sander, 'Varieties of Dispute Processing' in Art Hinshaw and others (eds), *Discussions in Dispute Resolution: The Foundational Articles* (OUP 2021) 321. The multi-door courthouse is a straightforward concept, but it is puzzling to put into practice because it is not always easy to allocate certain cases to specific doors. Moreover, impose mediation or conciliation on parties who are in not in an amicable setting, would only frustrate the proceedings and be a waste of money and time as the parties would end up litigating the dispute in Court anyhow.

Brazilian court system became progressively overburdened, especially with the adoption of the new 1988 Brazilian Constitution and the connected emergence of "new rights" (such as consumer rights, human rights, and so on), resulting in a "judicialization of social life", which forced businesspeople in need of a timely and swiftly manner to resolve their disputes to look for more efficient solutions than courts litigations.

However, until the twentieth century, issues as the misinterpretation of the constitutional right to access to justice, and lack of a true culture in the use alternative means of dispute settlement, along with a variety of other factors related to the Brazilian historical background, obstructed the development of a working and efficient arbitration system in Brazil[145]. In particular, the individual right to "access to justice"[146] fixed by the 1988 Brazilian constitution has been interpreted for a long time as one's right to "access the judiciary", and therefore, as the legal right to file a claim in judicial courts.[147] The idea that developed from such an interpretation was that justice could only be achieved through the judiciary, which principle eventually guided the behaviour of conflicting parties, who would rather litigate in Court than attempting to resolve their controversies more amicably through alternative means of dispute settlement as mediation, conciliation, or arbitration.[148] As a result, the Brazilian judiciary was overloaded and expensive for the society. The courts were unable to render a swift decision, leaving the parties heavily dissatisfied.

Brazilian legislation did not promote arbitration, and somehow even hindered it, until the enactment of the current arbitration law in 1996.[149] To make an example, Decree 3.900/1867 provided that parties had to execute a submission agreement (*compromisso arbitral*) to explicitly avoid the jurisdiction of the State courts once a dispute arose, even if

[145] See Paulo Borba Casella and Eduardo Lorenzetti Marques, 'Brazil: Arbitration Act' (1997) 36 International Legal Materials 1562 < https://www.jstor.org/stable/20698745> accessed 23 January 2024.
[146] Brazilian Constitution 1988 art 5.
[147] Cristiane Dias Carneiro and others, 'Culture of Alternative Dispute Resolution (ADR) in Brazil: an Exploratory Study of Business Mediation from the Theory, Laws and Perception of Lawyers' (2022) 13 Beijing Law Review 356, 367; Josè Soares Filho, 'Acesso à Justiça no Brasil' (2013) 4 Revista de Direito Brasileira 592.
[148] Besides, Brazilian lawyers have been traditionally trained to litigate in courts and not to mediate or negotiate. According to a study conducted by Mariana Carvalho Alves in Rio de Janeiro, in 2016, the great majority of lawyers did not study ADR in Law School. It was only in 2018 that ADR disciplines became mandatory. Until then, the common approach of lawyers to litigation, in the adversarial system in place in Brazil, was that of "win or lose". Mariana Carvalho Alves, 'Mediação enquanto política pública: A percepção do profissional jurídico' (PhD Disseration, Escola Brasileira de Administração Pública e de Empresas 2016) <https://hdl.handle.net/10438/16213> accessed 23 January 2024.
[149] Prior to the enactment of the Arbitration Act in 1996, the main sources of law governing arbitration could be found in the Brazilian Civil Code 1916 (art 1037 ff), in the Civil Procedure Code of 1939 and its revised form of 1973 (art 1072 ff) , in International Treaties adhered to by Brazil, as the Geneva Protocol on Arbitration Clauses, signed on September 24, 1923 or other regional Conventions as the Panama Inter-American Convention of 1975 on International Commercial Arbitration and the Inter-American Convention on the Extraterritorial Viability of Foreign Judgments and Arbitral Awards, signed in Montevideo in 1979. J Jürgen Samtleben, 'Arbitration in Brazil' (1986) 18 University of Miami Inter-American Law Review 1.

they priorly agreed to arbitrate in the commercial contract, thus making the arbitral proceedings more difficult to establish and to commence, because a party who was not willing to commit to arbitration after the dispute arose, could easily file a claim in court, and have the court's jurisdiction prevail over arbitration. Additionally, Brazilian courts did not allow specific performance of the arbitration clause, therefore when the dispute came up, the parties could easily opt out of the arbitration, and the courts' jurisdiction would have taken once more precedence. Also, if a party refused to comply with the arbitration agreement set out in a contract, courts in Brazil could only award damages for non-compliance of a contractual clause, but they would never compel the parties for arbitration.[150] Another major obstacle to arbitration was the homologation rule, which was in place until the enactment of the arbitration Act. According to such homologation rule, an arbitral award in Brazil had to be "homologated" in a district court of justice in order to be fully valid, legally binding, and enforceable. The homologation procedure was supposed to be carried out through a civil lawsuit with the right to defence and the production of evidence and, as with any court proceeding bound by the due process of law clause, the final decision could take years to be realised. As a result, all of the benefits of arbitration were lost, particularly speed.[151]

The situation was even worse for foreign awards that had to pass through a "double homologation" (or double recognition) to be enforced. They were first required to be homologated by a court at the place of arbitration and then by Brazilian Supreme Court[152].

After a long period of military control, which lasted through the twentieth century, the new Constitution of the Federal State marked the beginning of a new era characterized by democracy and economic openness to the international market. This scenario, combined with the support of universities and commercial and industrial entities, prompted the government to form a working group to draft the Brazilian Arbitration law, which set the stage for arbitration in Brazil as we know it nowadays[153].

On September 23, 1996, the BAA, a modern arbitration-friendly legislation, was signed by the President as Law 9.307/1996. The BAA was inspired by internationally recognized sources for arbitration as the UNCITRAL Model Law,[154] the New York

[150] Carlos Alberto Carmona, 'A Arbitragem no Brasil, Em Busca de Uma Nova Lei' (1999)166 Jurisprudencia Brasileira 17-19.
[151] Luciano Benetti Timm and others, 'International Commercial Arbitration in Brazil' (2010) 1 Civil Procedure Review 10 <https://civilprocedurereview.com/revista/article/view/40> accessed 23 January 2024.
[152] ibid.
[153] Joaquim Tavares de Paiva Muniz, 'Current Framework of International Arbitration in Brazil' in Arthur W Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers 2012).
[154] The UNCITRAL Model Law was designed by the United Nations Commission on International Trade. It was intended to serve as a model of domestic arbitration legislation, harmonizing and making more uniform

Convention, the Inter-American Convention on International Commercial Arbitration,[155] but also by the Spanish Arbitration Law of 1988, though with the necessary adaptations to the Brazilian legal and arbitral needs.[156] Brazil is also a party to a series of relevant treaties within Mercosur countries, as the 1998 Mercosur International Commercial Arbitration Agreement; the Olivos Protocol for the Settlement of Disputes in Mercosur; the Buenos Aires Protocol of 1994; and the Las Leñas Protocol of 1992.[157] Such treaties constitute an important source of legislation for Brazilian arbitration and will come in to play later on, when discussing the recognition and enforcement of foreign arbitral awards in Brazil.

Among the many arbitration-friendly provisions, the BAA provides for the smooth enforcement of arbitration agreements, non-review of arbitral awards by the national courts and the enforcement of domestic arbitral awards without the requirement of court homologation, thus cutting down the major practical difficulties that had prevented arbitration from becoming a true alternative to State court jurisdiction in Brazil until the BAA was passed.[158] The BAA is also appreciable because of the large space it leaves to party autonomy.[159] Apart from very few mandatory provisions that apply to arbitrations involving "state entities"[160] under the BAA parties enjoy a considerable degree of discretion to choose the language, the procedural rules, the timeframe, the arbitrators, and so many other essential aspects of arbitration.

It is worth mentioning that, when the Arbitration Act was realised, Brazil had not signed nor ratified the New York Convention yet. This was due to some resistances coming from the Brazilian Executive and Legislative branches. In fact, Brazil ratified the New York

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the practice of international commercial arbitration. Full text of the UNCITRAL Model Law on International Commercial Arbitration 1895, with amendments as adopted in 2006, at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 23 January 2024. In many respects, the Brazilian Arbitration Act is similar to the UNCITRAL Model Law. The binding nature of the arbitration agreement, separability, competence-competence, the value placed on due process, and the requirement of reasoned awards are examples of features that are shared. The Model Law is also consistent with the structural elements of arbitration proceedings, such as the limitations on recourse and the reasons for annulling an award. On the other hand, it does not include a definition of international arbitration and adopts a territorial notion of domestic and foreign awards based on the location where they are rendered.

[155] Internally ratified through Decree No. 1.902, 9 May 1996. Antonio Tavares Paes Jr and Vamilson José Costa, 'ICLG – International Arbitration: a practical cross-border insight into international arbitration work – Brazil', (*CPT Costa Taver Paes*, 28 august 2019) <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/brazil> accessed 23 January 2024.

[156] Maruska Guerreiro Lopes, 'La Nouvelle Loi Brésilienne sur L'arbitrage', (1997) 37 Dalloz Affaires 1.

[157] Antonio Tavares Paes Jr and Vamilson José Costa (n 155).

[158] ibid.

[159] The BAA gives the parties broad leeway in constructing an arbitral agreement that meets their needs and interests. Andres Luis and others, 'Is Brazil an Arbitration-Friendly Jurisdiction?'(*Kluwer Arbitration Blog*, 6 January 2019) <http://arbitrationblog.kluwerarbitration.com/2019/01/06/is-brazil-an-arbitration-friendly-jurisdiction/> accessed 23 January 2024.

[160] This term encompasses the Union, states, municipalities, government agencies, government foundations, wholly owned state companies and state-controlled companies, although not all entities are subject to the same mandatory provisions.

Convention only on June 7, 2002, and finalized its internalization by means of Legislative Decree No. 4.311, on July 23, 2002.

This was due to the fact that for quite some time after the Arbitration Act was promulgated, there was an active debate concerning whether or not it was constitutional. Here, the discussion on the constitutional right to access to justice mentioned above comes into play. Many arbitral awards whose recognition was sough in Brazilian courts were in fact challenged on the ground that they violated the right to "access to justice"[161] provided by the Supreme law of the State, according to which no law can prevent a party from seeking judicial relief.

After years of debates, in 2001, the Arbitration Act was officially declared constitutional by the Brazilian Supreme Court.[162] The primary grounds for this decision were that the Law does not preclude any party from seeking relief in State courts. It is the parties themselves that consciously decide to exclude State courts' jurisdiction when they enter into an arbitration agreement. Therefore, the decision clarified that the parties could freely dispose of their patrimonial rights and waive their right to revert to national courts when they believe this is convenient to them.

Once the constitutionality of the Arbitration law was assessed, it was possible for Brazil to ratify the New York Convention, another historical milestone for Brazilian arbitration, which anyways had inspired the drafters of the BAA in view of its ratification.

Contrary to the UNCITRAL Model Law, the BAA does not distinguish between international and domestic arbitration. Therefore, the provisions contained in the legislation will apply equally apply. The only necessary distinction to be made concerns foreign and national awards, because depending on whether the award is rendered in or outside of Brazil, different set of rules will govern the recognition and enforcement procedures. The topic will be discussed more in detail in the dedicated paragraph below.

1.3 Arbitrability

Article 1 of the BAA deals with arbitrability in a wide sense, stating that "those who are capable of entering into contracts may use arbitration to resolve conflicts regarding freely transferable property rights". In its first part of the article ("those who are capable") refers addresses the capacity of the parties to enter a contract. A natural person must be first capable

[161] Such principle needs to be understood through historical lenses. Indeed, the aim of the Constitution was to prevent private tribunals, constituted during the military governments, where there were no guarantees of due process of law for the respondents, from rendering non-appealable decisions to the Judiciary.
[162] The decision was rendered by the Brazilian Supreme Court (Supremo Tribunal Federal) on AgRg em Sentença Estrangeira n. 5206-7.

of concluding a contract in order for it to be arbitrable in the event of a dispute. Under Brazilian conflict of laws rules, a person's capacity must be ascertained according to the legislation of his or her country of domicile.[163] Individuals domiciled in Brazil are deemed to be capable if they are above the age of eighteen, do not have illness or mental problems that may prevent them from understanding their acts, and that are able to express their will[164]. The incapacity of a natural person renders the contract null and void from the start (*ab initio*) or subject to annulment.[165] For what concerns legal entities, the capacity will fall on the representatives with due powers to enter arbitration agreements. Such powers are ascertained according to the bylaws or articles of the legal entity in question, which documents are generally open to the public.

The second part of Art. 1 deals with more in depth with the arbitrable matters referring to "freely transferable property rights", which are interpreted as disposable patrimonial rights that can be subject of a monetary quantification.[166] Non-pecuniary rights, which are those rights not directly linked to an economic evaluation, such as the right to life, physical integrity, or the name are considered non disposable and, consequently, non-arbitrable. Besides, the Brazilian Civil Code of 2002, expressly states that arbitral agreements cannot deal with questions of personal status, family rights and other non-pecuniary matters.[167] The list of non-arbitrable subject matters is not specified in the law, therefore it is not exhaustive, nor unanimous. However, there is a common understanding among scholars that neither hereditary rights, taxation, antitrust matters, insolvency, and bankruptcy, nor proceedings that would require the intervention of the Public Attorney's Office and collective rights[168] are deemed to be arbitrable in Brazil.

The 2015 reform of the 1996 Brazilian Arbitration Act preserved the general legal framework of arbitrability. Nonetheless, the new statute included provisions for the arbitrability of disputes involving the state or state-owned enterprises,[169] transposing into

[163] Introductory Law of the Civil Code 2002 art 7.
[164] Civil Code 2002 arts 3 and 4.
[165] Leonardo de Oliveira, 'Arbitrability under the new Brazilian arbitration act: a real change?' (2017) 33 Arbitration International 295.
[166] Pedro Antonio Batista Martins, *Apontamentos Sobre a Lei de Arbitragem* (Editora Foresnse 2008); Jose´ Maria Rossani Garcez, *Arbitragem nacional e internacional* (Belo Horizonte, Del Rey 2007).
[167] Civil Code 2002 art 852. In the same way, also the Civil Procedure Code art 92 states that the judicial authorities have exclusive competence over cases involving individuals' personal status and capacity.
[168] Tavares de Paiva Muniz (n 153).
[169] The questions concerning the arbitrability of disputes involving state entities and state-owned enterprises were strictly related to the issue of legal capacity. In the typical scenario, the state-owned company would have entered a contract that included an arbitration clause, thus consenting to arbitration. However, when a dispute arose, one of the arguments advanced by the state-owned company was that the matter could not be resolved through arbitration because the contract involved a public interest. As a result, the company allegedly lacked the capacity to arbitrate the dispute. The STJ ruled on this matter that when a state-owned company enters a

law the courts' practice that had emerged until then in relation to public entities and arbitration, company law and public administration. However, it established some mandatory rules providing that in disputes involving the state and state entities, the arbitrators cannot decide the matter *ex aequo et bono,*[170] the proceedings must always be public and at law.[171] Specific statutes also provided for arbitration in government concessions and public – private partnerships (PPPs). In this regard, the PPPs Act[172] sets some mandatory provisions by requiring the place of arbitration to be in Brazil and proceedings to be conducted in Portuguese.[173]

As many other jurisdictions, Brazil was faced with the controversial issue of arbitrability of labour law and consumers contracts. Brazilian law expressly allows for collective labour controversies to be solved in arbitration, but it does not deal with individual labour rights. The law does not explicitly forbid labour law from being arbitrable, however, the Brazilian Federal Constitution considers labour rights as non-disposable patrimonial rights and as just mentioned above, disposable patrimonial rights only are deemed arbitrable under the 1996 Arbitration Act and in its revised form.[174]

The 2015 Amendment to the BAA remains silent as to whether labour disputes are arbitrable[175], but the new Brazilian Labour Law, enacted in July 2017, expressly allows for the resolution of employment-related disputes through arbitration, provided that the employee expressly consents to the arbitration clause and earns more than BRL 12,202.12

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contract, it does not act in the public interest of the State (ius imperium), but is acting for a commercial gain, ius gestionis. Therefore, there is no violation owned company enters a contract, it does not act in the public interest of the State (ius imperium), but is acting for a commercial gain, ius gestionis. Therefore, there is no violation of the public interest. On the point, the STJ decision in *AES Uruguaiana Emprendimentos Ltda v Companhia Estadual de Energia Eletrica CEEE* REsp 612.439-RS (14 September 2006). De Oliveira (n 166); Tavares de Paiva Muniz (n 153).

[170] BAA 1996 art 2 (3) 'Arbitration that involves public administration will always be at law'.

[171] ibid.

[172] Law No. 11.079, which was passed on December 30, 2004, goes to public-private partnerships (PPP). In Article 11, subsection III, Law No. 11.079 allows arbitration agreements to be included in PPP contracts, as long as the arbitral seat is situated within Brazilian territory and the language of arbitration is Portuguese.

[173] A second level of requirements arises from regulatory provisions enacted by the federal and various local governments to provide guidance to their own officials. Noncompliance with such requirements does not render the agreement invalid or unenforceable, but it will ensure a smoother proceeding and avoid unnecessary disruptions.

[174] Nonetheless, once the employment contract is over, the rights acquired by the employee, as the right to compensation, may be negotiated in or out of court, because such a right has a patrimonial nature, and consequently, at least in theory, the dispute may be arbitrable. The case law regarding the arbitrability of labour disputes in Brazil is quite rich but not always coherent as it produced decisions both in favour and against their arbitrability. For more on the topic see De Oliveira note 160.

[175]The Amendment Bill to the BAA 2015 art 4 (4), contained the following provision regarding labour law: "individual labour contracts of employees acting as managers or statutory directors may provide for an arbitration agreement. This will be enforceable only if the employee submits a request for arbitration or expressly consents with a request for arbitration". However, such a provision received the presidential veto because apparently created an "undesired distinction between employees". The reasons for veto are sensible as the provision could have created uncertainty.

per month. As predictable, the Brazilian Supreme Court has been called to rule on the constitutionality of such a provision but has not answered on the matter yet.[176]

The arbitrability of consumers contracts have followed a similar path to labour law. Hence, there is still a certain degree of uncertainty on the subject. Consumer disputes are characterized by the same disproportionality between the parties as labour disputes. As a result, consumer regulations are of a public policy nature because they attempt to reduce the disparity between consumers and traders by establishing a mechanism to protect consumers from hostile practices. Arbitration could be detrimental to the consumer when it is included in an adhesion contract of which he is not aware of or in case arbitration is imposed on the consumer in "take it or leave it" transactions. There was a common understanding of a compatibility between arbitration and consumers contracts when it is the consumer to start arbitration. As a matter of fact, art. 4(2) of the 1996 BAA provided that in adhesion contracts, the arbitration clause will only be valid if the adhering party takes the initiative to start arbitration proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type. Still, the provision reported here did not resolve entirely the arbitrability matter of consumers disputes, as not all adhesions contracts are B2C transactions and vice versa. In fact, the 2015 Amendment bill attempted to improve the said provision by differentiating general adhesion contracts from consumers adhesion contracts, and singularly deal with the latter by providing that "In a consumer relationship, established by means of an adhesion contract, the arbitration clause will only take effect if the adhering party takes the initiative to file an arbitration proceeding, or to expressly agree with its institution".[177] However, the proposal received the presidential veto, reasoned by a lack of clarity about the form of consumer's consent.[178]

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[176] Rogerio Carmona Bianco and others, 'Arbitration Procedures and Practice in Brazil: Overview' (*Practical Law*, 1 May 2023) <https://uk.practicallaw.thomsonreuters.com/w-025-0922?contextData=(sc.Default)&transitionType=Default&firstPage=true#co_anchor_a159090> accessed 24 January 2024.

[177] The Amendment Bill to the BAA 2015 art 4 (3).

[178] To make the picture more complex, the Brazilian Consumer Protect Code 1990 states that mandatory arbitration clauses in consumer contracts are void as they are considered an abuse of power on the trader's part. (Brazilian Consumer Protection Code 1990 art 51(VII)7 'Any clauses that impose any of the following situations, among others, will be nullified: ... VII - determine the compulsory use of arbitration'). However, since the legal rule mentioned here only refers to "mandatory arbitration", there is no reason to believe that arbitration cannot be agreed upon in a non-binding manner in accordance with the premises established in the Arbitration Act. The courts' case law seems to point to the same direction, contributing to consolidate the idea that if the relief sought is the result of a violation of a consumer protection rule, the consumer should have the authority to decide whether the dispute should be arbitrated or not. On the topic De Oliveira (n 166); *CZ6 Empreendimentos Comerciais Ltda e Outros v Davidson Roberto de Faria Meira Junior*, REsp 1.169.841-RJ (6 November 2012); *CONAC – Construtora Anacleto Nascimento LTDA v Flavia Zirpoli Sobral*, REsp 819.519-PE (10 October 2007).

As deducible from the analysis conducted above, the matter of arbitrability in Brazil is still rather open. With respect to the 1996 Arbitration Act, the Reform of 2015 did in fact take a step ahead, clarifying a few questions about the arbitrability of state entities and public administration. However, issues concerning consumers contracts and labour law have not been quite resolved yet, and crucial related amendments failed to pass the presidential approval. Moreover, very often, the Arbitration Act has remained silent on the arbitrability of certain subjects, limiting itself to establishing what was not explicitly forbidden, thus contributing to exacerbate confusion. In fact, following the general principle according to which what is not explicitly forbidden is intended to be allowed, just because the law is silent on the arbitrability of a particular issue, it does not necessarily imply that the issue is non arbitrable. It is precisely this approach that have created uncertainty on the arbitrability of certain matters, suggesting that maybe this is not the right way to resolve arbitrability problems.

Perhaps, a different source of interpretation, such as the general principle of disposable patrimonial rights, should be used by the Courts to determine arbitrability.[179] Nonetheless, to ensure legal certainty, it would be of outmost importance for the Courts to have a coherent interpretation of the said provision and build up a well-established and clear caseload.

1.4 The arbitration agreement

What confers jurisdiction to the arbitrators and gives legality to the arbitral proceedings is the existence of a valid arbitration agreement between the parties. The said agreement must show some specific characteristics in order to be deemed valid, otherwise arbitration cannot be established, and the parties will have to resolve their dispute in court. In the event the arbitral tribunal has determined its jurisdiction on an invalid arbitration agreement, such invalidity may be claimed by the resistant party in the post-award phase, and the award rendered by the arbitral tribunal may be annulled by the national courts of the seat.[180]

It should be stressed here that the law that governs the arbitration agreement and its validity could vary. First of all, according to the principle of separability, which is perfectly endorsed by Brazilian law in art. 8 of the BAA,[181] the arbitration agreement is separable

[179] De Oliveria (n 166).
[180] New York Convention 1958 art V
[181] BAA 1996 art 8 (2) 'An arbitration clause which forms part of a contract shall be treated as an agreement independent from the other terms of contract. A decision that the contract is null, and void shall not entail ipso jure the invalidity of the arbitration clause'. In specific cases, however, the nullity of the contract might lead to

from the underlying contract which it is associated with. Consequently, it is possible for the parties to an arbitration agreement to decide for it to be governed by a different law than the one governing the main contract. If the parties fail to indicate the law applicable to the arbitration agreement, according to the New York Convention, validity should be assessed "under the law of the country where the award was made".[182]

Under Brazilian law the arbitration agreement is intended to be an autonomous contract from the main one, therefore such agreement must comply with the conditions for the validity of contracts prescribed in art. 104 of the Brazilian Civil Code: (i) the parties must be over 18 years old; (ii) the subject matter submitted to arbitration must be possible and legal[183]; and (iii) the form must comply with the applicable legislation. With regard to this last point, under Brazilian law, for an arbitration agreement to be valid it must be in writing.[184] A clause contained in the main contract (arbitration clause or *cláusula compromissória*) or in a separate document referring thereto (submission agreement or *compromisso arbitral*) is considered sufficient to form a valid arbitration agreement.[185] However, in adhesion contracts, as recalled above, Brazilian law provides that the arbitration clause will be valid only if the adhering party expressly agrees to arbitration via an attached written document, or if it signs or initials the corresponding contractual clause inserted in boldface,[186] presumably to ensure that the adherent party is aware of the arbitration clause and gives actual consent. On this wise, Brazilian law provides several hypotheses under which consent is considered vitiated, such as mistake,[187] deceit or malice,[188] duress,[189] state of danger,[190] unconscionability,[191] and fraud against creditors,[192] which apply also to the arbitration agreement.

The Brazilian Arbitration Act amended in 2015 includes specific provisions for arbitration agreements involving government parties. According to article 1 and 2 of the

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the nullity of the arbitration agreement, as in case of a contract signed by a minor or with false signature. See also Civil Code of 2002 art 104.

[182] New York Convention 1958 art V (1) (a).

[183] This requirement refers to the arbitrability issue mentioned in the previous paragraph.

[184] BAA 1996 art 4 (1): 'The arbitration clause shall be in writing, and it can be inserted in the main contract or in a document to which it refers." Such a requirement is a general rule, contained also in art II of the New York Convention, "Each Contracting State shall recognize an agreement in writing […]'.

[185] BAA 1996 art 3. The arbitration clause governs potential future disputes foreseen and addressed in the underlying contract. On the other hand, the submission agreement is signed by the parties after a dispute has arisen.

[186] BAA 1996 art 4(2); Tavares de Paiva Muniz (n 153).

[187] Civil Code 2002 arts 138 ff.

[188] Civil Code 2002 arts 145 ff.

[189] Civil Code 2002 arts 151 ff.

[190] Civil Code 2002 arts 156 ff.

[191] Civil Code 2002 art 157.

[192] Civil Code 2002 arts 158 ff.

BAA, the arbitration agreement must be signed by the government official who has the authority to enter into settlements on behalf of the government. This requirement does not apply to state controlled or state-owned entities.[193]

Apart from the exception of adherence contracts, the BAA provides only for post-disputes agreements to be signed by the parties and two witnesses before a notary public.[194] The submission agreement must also contain, according to Art. 10 of the BAA, under penalty of nullity: (i) name, profession and marital status, and domicile of the parties; (ii) name, profession and domicile of the arbitrator or arbitrators, or, if it is the case, the indication of the entities the parties made responsible of the arbitrator's appointment; (iii) the subject matter of the arbitration; (iv) the place in which the arbitration award will be rendered.

The law does not specify whether the arbitration agreement must be signed by the parties in order to be effective. In response to this issue, the Federal Court of Appeals ruled that tacit acceptance of the arbitration clause is sufficient, and that signature on the clause or on the contract in which it is contained is not required, as long as consent by both parties to submit the dispute to arbitration is evidenced by other circumstances.[195] To make an example, when requested to enforce a foreign arbitral award, the STJ found that the arbitration agreement was impliedly agreed by the respondent, even though the agreement was in a contract concluded by email and had no signature, because the defendant actively participated in the proceedings and did not object the jurisdiction of the arbitral tribunal in the first place.[196]

Furthermore, the arbitration agreement should contain some necessary information, such as the procedure for the commencement of arbitral proceedings,[197] the name of the arbitral institution chosen to administer the procedure or the appointing method the parties have chosen to select the arbitrator\arbitral panel, the applicable law to the merits of the dispute and, possibly also the language to be used during the proceedings and the seat of arbitration (which is particularly important under Brazilian law to assess whether the award is domestic or foreign for recognition and enforcement purposes).[198] A clause that does not

[193] Cesar Pereira, 'Brazil, Reference Arbitration 2020' (*Latin Lawyer*, June 2021) <https://latinlawyer.com/authors/cesar-pereira> accessed 24 January 2024.
[194] BAA 1996 art 9 (2).
[195] *Norsul v Sr. Hugo and others* REsp 1.569.422 – RJ (April 2016).
[196] *L'Aiglon v Têxtil União* STJ, SEC n 856 (18 May 2005).
[197] BAA 1996 art 5.
[198] BAA 1996 art 10: "The submission agreement must contain: The name, profession, marital status and domicile of the parties; The name, profession and domicile of the arbitrator or arbitrators, or, if applicable, the identification of the institution to which the parties have entrusted the appointment of the arbitrators; (III) The subject matter of the arbitration; and the place where the award shall be rendered. According to Article 11. The submission agreement may also contain the place or places where the arbitration will be held; if the parties so agree, the provision authorizing the arbitrators or arbitrators to decide in equity.

contain the essential information to start an arbitration is considered "empty".[199] In case a conflict arises in relation to the empty clause at issue, the parties will have to conclude a submission agreement enclosing all the necessary information regarding arbitration. If a party shows resistances to sign the submission agreement, the interested party can ask the court to summon the resisting party and sign the submission agreement before a state judge.[200]

1.5 Jurisdiction and *kompetenz-kompetenz* doctrine

Brazilian law upholds the *kompetenz-kompetenz* doctrine, according to which the arbitrators are entitled to establish whether the arbitral tribunal has jurisdiction to hear the case.[201] This means that, in principle, it is up to the arbitrators to rule upon the validity of the arbitration agreement. Specifically, art. 8 of the BAA establishes that "The arbitrator has jurisdiction to decide *ex officio* or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause".[202] Under Brazilian law, any aspect relating to the arbitration agreement's nullity, invalidity, or ineffectiveness must be argued as soon as the arbitration proceedings begin. If the interested party does not file a formal objection, the challenge may be defeated.[203] If such an objection is raised in good time but is rejected by the arbitral tribunal, the state courts may hear a challenge once the arbitral award has been rendered.[204]

Issues generally arise in case a party files a claim in court objecting the validity of the arbitration agreement and requiring the court to decide upon the arbitrators' jurisdiction before they had the chance to do so.

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[199] Such those vague clauses stating that "disputes arising out of this contract must be resolved by arbitration", without directions on which tribunal, which procedural law, etc…

[200] BAA 1996 arts 6 and 7.

[201] This is generally intended as the "positive effect of *kompetenz-kompetenz*", whereas the negative effects of the doctrine consists in establishing a presumption of chronological priority for the tribunal with respect to resolving jurisdictional questions. While the positive sides of *kompetenz-kompetenz* are quite universally recognized, the legal systems approach to the negative effects of *kompetenz-kompetenz* still vary. For an overview of other jurisdictions' approaches to the tribunal's competence-competence, see for example William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2007) 13 ICCA Congress Series 55 <https://ssrn.com/abstract=3019225> accessed 24 January 2024; John J Barceló III, 'Who decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational 1115 <https://scholarship.law.vanderbilt.edu/vjtl/vol36/iss4/2> accessed 24 January 2024.

[202] The STJ affirmed that 'the arbitral tribunal has jurisdiction to define the scope of the arbitration agreement, fortifying the positive effect of the *Kompetenz-Kompetenz* rule'. *Estado da Bahia vs DM* AgInt Nº 156.133 - BA (2017/0334832-7) (22 august 2018).

[203] BAA 1996 art 20.

[204] BAA 1996 art 20 (2). In accordance with the Brazilian Arbitration Act, any defects in the composition of the arbitral tribunal are reserved as grounds for a set aside action (BAA 1996 arts 32 (2) and 33), after the tribunal issues the award.

Under the New York Convention (art. II (3)) and the UNCITRAL Model law (art. 8 (1)), when a national court is seized from one of the parties who agreed to arbitrate, it has to refer the parties to arbitration, unless it finds that the arbitration agreement is "null, void or incapable of being performed". Questions arise as to whether the court should engage in a complete and full review of the facts and circumstances in which the agreement was reached, or it should confine itself to a *prima facie* review. In the first scenario, the court would carry on an exhaustive review of the agreement and decide on the jurisdictional matters. However, in doing so, the court operations would frustrate the arbitration proceedings, which signals a certain mistrust towards arbitration. In the second scenario, under the *prima facie* standard, the court would just ascertain a likelihood that the parties had agreed to arbitrate, and in that case, refer the parties to arbitration, leaving the possibility to assess jurisdiction with the arbitrators, according with the so-called "negative *Kompetenz-Kompetenz"* doctrine.

On this wise, Brazilian legislation[205] and STJ case law[206] are perfectly in line with the international standards, providing for the application of both the positive and negative *Kompetenz-Kompetenz* rule, providing for a chronological priority of arbitrators to rule on their own jurisdiction in case a court is called to decide on jurisdictional matters.[207] When this is the case, apart from serious pathological arbitration agreements, for example when it is absolutely clear that the arbitration clause is non-existent, invalid or void,[208] the Brazilian courts would engage in a *prima facie* review, leaving powers to the arbitrators to decide first on their own jurisdiction.[209] The only serious allegation that would undermine the application of *Kompetenz-Kompetenz* in Brazil regards the forgery of the parties' signature. That is because without a valid signature, consent to arbitration could be at stake, especially in submission agreements. And yet, recently, when faced with a case that involved a potential forgery of the parties' legal representatives' signatures, the STJ understood that the *Kompetenz-Kompetenz* rule should prevail. According to Justice Villas Bôas Cueva, "only by expert evidence is it possible to assert the veracity of the documents and the signatures of the parties in the contract", which meant that "the issue had to be submitted to arbitrators, as

[205] Civil Procedure Code 2015 art 485 (VII) according to which "a judge shall not rule on the merits when (…) the arbitral tribunal confirms its jurisdiction" (i.e., the judge has to dismiss the case), and BAA 1996 arts 8(1) and 20 (to be interpreted *a contrario sensu*), on the topic Andre Luis Monteiro, 'The *Kompetenz-Kompetenz* Rule in Brazilian Arbitration Law' (*Kluwer Arbitration Blog*, 29 May 2019) <http://arbitrationblog.kluwerarbitration.com/2019/05/29/the-kompetenz-kompetenz-rule-in-brazilian-arbitration-law/> accessed 24 January 2024.

[206] In *SPPATRIM v BNE* the STJ ruled that 'as a consequence of the *Kompetenz-Kompetenz* rule, set forth in Articles 8 and 20 of Law n. 9.307/96, the Brazilian legislation on arbitration establishes a chronological priority rule in arbitral proceedings, allowing access to the courts only after the issuance of the arbitral award'. *SPPATRIM v BNE* REsp 1.614.070 – SP (26 June 2018).

[207] Monteiro (n 206).

[208] STJ CC 151.130-SP (20 February 2020).

[209] *Samarco v Jerson Cruz* REsp 1.278.852-MG (21 May 2013)

set forth in Art. 8 of the Arbitration Act" who, besides, are fully entitled to produce that sort of evidence, notwithstanding the fact that the case at issue involved a Brazilian state-owned company (CGTEE), and that the alleged irregularity had a public policy implication.[210]

In view of the principle of *Kompetenz-Kompetenz*, Brazilian Courts have also been reluctant to grant injunctions to suspend arbitration proceedings (the so-called "anti-suit injuctions"). This is because such injunctions would interfere with the arbitral proceedings and the rendering of the award, thus contravening to the very rationale behind the principle of *Kompetenz-Kompetenz*, which is to ensure that the arbitral proceedings are carried out smoothly.

1.6 Arbitrators and arbitral institutions

Brazilian law allows the parties to choose those persons regarded as possessing technical knowledge and experience to act as arbitrators and to the decide the merits of their dispute. But who can serve as arbitrator in Brazil? Are there any particular characteristics, as being a national of, or licensed to practice in Brazilian jurisdiction?

Art. 13 of the BAA establishes that "Any individual with legal capacity, who is trusted by the parties, may serve as arbitrator".[211] Therefore, under Brazilian law there is no general restriction for foreigners to be arbitrators in Brazil; there is no legal requirement regarding the arbitrator's nationality or licence to practice, nor they are required to be lawyers. [212] However, as normally happens, the law fixes some requirements of independence and impartiality[213] that the arbitrators must meet and binds them to the same duties and responsibilities incurred by court judges, as set up in the Code of Civil Procedure.[214] As a matter of fact, once appointed, the arbitrators have a duty to disclose any

[210] *KfW v CGTEE* REsp 1.550.260 – RS (3 October 2018).
[211] Besides active State judges, who cannot be appointed, pursuant to the Brazilian Civil Code, in general terms, people under the age of 18, of unsound mind and persons who have been declared unable to exercise their rights by a judge because of drug or alcohol abuse, or temporary mental illness, cannot exercise their civil rights. Therefore, they lack legal capacity.
[212]In fact, there is no requirement for the representation to be made by lawyers, and there are no restrictions for foreign lawyers to represent parties in arbitration in Brazil. Pereira (n 194).
[213] BAA 1996 art 13 (6) 'In performing his duty, the arbitrator shall proceed with impartiality, independence, competence, diligence and discretion.' And then again, BAA 1996 art 21 (2) establishes that: "The principles of due process of law, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected."
[214] Civil Procedure Code 2015 arts 144 and 145 provide for several grounds for recusal, many of them applicable to arbitrators. Most grounds are obvious and intuitive, but a few should be highlighted: the party is a client of the law firm of her spouse, partner or relative up to a third degree (niece or cousin), although represented by another lawyer in the firm; the arbitrator is a party to a lawsuit against the party or its counsel; the arbitrator is a close friend or an enemy of the party or its counsel; the arbitrator receives gifts before or after the commencement of the proceedings from a person who is interested in the matter, gives advice to the party about the subject matter of the case, or she supplies means to support the dispute; the party is a creditor or

circumstances likely to give rise to justifiable doubts as to their impartiality or independence.[215] In such a case, a challenge towards a potentially impartial arbitrator may be filed by the interested party to the arbitral tribunal, setting out its reasoning and pertinent evidence; if the challenge is accepted, the arbitrator shall be removed and replaced by its substitute as set out in Art. 16 of the BAA or in the rules of the arbitration institution chosen by the parties.

Impartiality is taken very seriously by the STJ, which imposes very strict standards to disclosure. Sometimes, such scrupulous approach resulted in a refusal to recognize foreign arbitral awards[216], as in the famous *Abengoa* case of 2017, when the STJ regarded the existence of a creditor-debtor relationship between the presiding arbitrator's law firm and one of the parties as a decisive fact, regardless of whether the arbitrator was aware of it or not. The utmost respect for the duty to disclose was later repeated in an Appellate Court decision ruled before the São Paulo State Court, which registered: "the requirement of strict compliance with the duty of disclosure must be maximum. Any and all personal or professional information capable of generating doubt on respect of the arbitrator's impartiality and integrity must be communicated immediately".[217]

The arbitral tribunal is appointed using any method agreed upon by the parties or in accordance with the rules of the arbitral institution they have chosen.[218] The standard procedure for naming an arbitral tribunal of three arbitrators is for each party to nominate one arbitrator and mutually agree on a third one. Alternatively, the parties may agree that the third arbitrator will be appointed by the two party-nominated arbitrators. If the parties cannot agree, the court decides how many arbitrators will constitute the arbitral tribunal and has the

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debtor of the arbitrator, her spouse or partner, or relative up to third degree in a direct line (great-grandmother or great-granddaughter); or the arbitrator has an interest in the outcome of the matter in favour of the party. BAA 1996 art 18 also establishes that 'An arbitrator is the judge in fact and in law, and his award is not subject to appeal or recognition by judicial court'.

[215]BAA 1996 art 14 (1) states that: "Prior to accepting the service, an individual appointed to serve as arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." In practice, even when the parties do not expressly agree, the IBA Guidelines on Conflicts of Interest are frequently used as a reference. Arbitrators consider them when making disclosures at the start or during the proceedings, and arbitral institutions use them as guidelines for resolving challenges. The very recent 2022 Bill proposed in July to newly amend the BAA would change the aforementioned provision on the arbitrator's duty to disclose, by requiring that "[…] the arbitrator shall disclose any circumstances likely to give rise to a *minum doubt* as to his impartiality or independence", along with the number of arbitrations in which he or she acts as single arbitrator, co-arbitrator, or chairman in order to avoid arbitration cases to concentrate in the hands of a few gatekeepers, generating delays in proceedings and opening the doors for an increase of set aside applications before Brazilian courts. For more on the topic see João Gabriel Campos, Leonardo Souza - McMurtrie, 'The Newest Proposal to Amend the Brazilian Arbitration Act: A Threat to Arbitration in Brazil?' (*Kluwer Arbitration Blog*, 29 August 2022) <http://arbitrationblog.kluwerarbitration.com/2022/08/29/the-newest-proposal-to-amend-the-brazilian-arbitration-act-a-threat-to-arbitration-in-brazil/> accessed 24 January 2024.

[216] *Ometto v Abengoa*, STJ No. 9.412/ US (19 April 2017).

[217] São Paulo State Court Appeal n. 1056400-47.2020.8.26.0100.

[218] BAA 1996 art 13 (3).

authority to appoint those arbitrators.[219] In accordance with the Brazilian Arbitration Act, any defects in the composition of the arbitral tribunal are reserved as grounds for a set aside action after the tribunal issues the award.[220]

Before the amendment of the 1996 BAA, the parties could only choose arbitrators, always in an odd number,[221] from the enclosed list provided by the arbitral institution they had chosen to administer their dispute (when they opted for institutional arbitration). With the 2015 reform, the parties may now choose, by mutual agreement, to waive the provision of the arbitral institution's rules that require the appointment of sole arbitrator, co-arbitrator, or chairman of the tribunal exclusively from the respective roaster of arbitrators.[222] Consequently, the parties are allowed by the law to select an arbitrator outside the list provided by the institution. If the parties fail to appoint an arbitrator, the nomination shall be made by the relevant arbitral institution, which acts as appointing authority. In case the arbitration agreement is silent on this issue, the requiring party may seize the competent court and request the State judge to designate the additional or sole arbitrator.[223]

Many institutions have criticized the amendment reported by the 2015 reform discussed above, arguing that the legislator cannot interfere with the activities of a private entity (arbitral institution), and that the roster of pre-approved arbitrators was designed to ensure the quality of the institution's service.[224] On the other side, such a change in the law is understandable considering that it reinforces the principle of autonomy of the parties and encourages the training and practice for new arbitrators, increasing the number of experienced persons that may be selected by the parties, and lessening potential conflict of interests that may arise during the arbitral proceedings.

The Brazilian market is very "institutionalized". Some of the most prominent institutional players in the market, who offer modern arbitration rules, are:

- the ICC;
- the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil Canada;
- the Market Arbitration Chamber;

[219] BAA 1996 art 13(2).
[220] BAA 1996 arts 32 (2) and 33.
[221] BAA 1996 art 13 (1) and (2). When the parties appoint uneven number of arbitrators, the arbitrators are authorized to appoint an additional arbitrator. Failing such agreement, the parties shall request the State Court which originally would have had jurisdiction to hear the case to appoint such arbitrator, following to the extent possible, the procedure established in BAA 1996 art 7.
[222] BAA 1996 art 13 (4).
[223] BAA 1996 art 7(4).
[224] Felipe Sperandio, 'Brazil: The Brazilian Arbitration Act 2015 – What's Changed?' (*Mondaq*, 26 June 2015) <https://www.mondaq.com/brazil/arbitration-dispute-resolution/407550/the-brazilian-arbitration-act-2015-what39s-changed> accessed 24 January 2024.

• the Business Mediation and Arbitration Chamber – Brazil;

• the Chamber for Conciliation, Mediation and Arbitration CIESP-FIESP; and

• the Fundação Getúlio Vargas Chamber of Conciliation and Arbitration.

These institutional players, along with the major Brazilian law firms specializing in arbitration, contribute to Brazil's thriving arbitration scene. They organize conferences on a variety of domestic and international topics, as well as academic and social events (as the arbitration moots) for Brazilian arbitration practitioners. They also host online events and trainings, promote publications, and participate in international exchanges to disseminate the use of arbitration in Brazil and to encourage discussions with specialists on current issues in arbitration.

Foreign arbitral institutions are fully authorized to administer arbitrations in Brazil and no special license is required under the national law. There is no official registration or accreditation system for arbitral institutions, whether domestic or international. On the other hand, the presence of permanent activities in Brazil that distinguish it as a business location, may subject the institution to local regulations concerning local taxation.

Apart from these little implications, nothing in the legislation indicates that there are hinderances to the establishment and development of an arbitral institution that is not entirely Brazilian.

1.7 The arbitral procedure

According to art. 19 of the BAA, the arbitral proceedings are deemed to be initiated when all the arbitrators (or the sole arbitrator) have accepted the appointment. This date is of outmost importance as it is the starting day for counting the term for issuance of the arbitral award, which according to art. 23 of the BAA, should be of six months, unless the parties have fixed a different date in the arbitration agreement. However, during the course of the arbitration, the parties and the arbitral tribunal may also agree to extend the said period.[225]

As a matter of practice, to initiate the proceedings it is necessary to file a request for arbitration to the other party. Such notice of arbitration may be more or less detailed: it may only include a brief reference to the claim and the relief sough or consist of a more complete statement of the claims and the circumstances of the case;[226] it depends on the procedural

[225] BAA 1996 art 11.

[226] Such a provision is more in line with the Brazilian legal culture where the *petiçao inicial* (initial petition) that starts a lawsuit must point out facts and legal arguments of the claim, the relief sough and evidence the plaintiff is willing to present. Civil Procedure Code 2015 art 282.

rules adopted by the parties.[227] The response of the counterparty, once served, is crucial because this is the moment when a resistant party may raise procedural objections regarding the validity of the arbitration agreement, the competence of the arbitral institution, the lapse of the limitation period to claim a right or the existence of *res judicata,*[228] as provided by art. 8 of the BAA mentioned above. Such preclusion rule aims to ensure any possible flaw that may affect the arbitration later on, to be addressed as soon as the proceedings start. Moreover, according to a common interpretation of art. 8, if the interested party does not raise any objections on the validity of the arbitration agreement when the proceedings commence, he will not be entitled to bring about claims on the existence of a valid arbitration agreement in court once the arbitral award has been issued.

Some arbitral institutions provide that, once the arbitrators have been appointed, the parties along with the arbitrators, sign a document called "terms of reference",[229] which is the equivalent to what Brazilian law understands as a "submission agreement", to define the subject matter of the dispute, and address upfront, procedural matters.[230]

The parties are free to agree on the rules that the tribunal will use to conduct the proceedings, which can be a pre-established set of rules provided by an arbitral institution or be entirely determined by the parties[231]. If the parties fail to agree on the procedural rules, the arbitrators will determine the rules applicable to the procedure. Often, when this is the case, arbitrators choose to apply the law of the seat (*lex loci arbitri*).[232] This approach is based on a specific understanding of the New York Convention[233] and the Panama Convention[234], which state that the recognition and enforcement of a foreign arbitral award may be refused if the arbitral procedure was not in accordance with the arbitration agreement, or in case of its silence on the matter, with the law of the country where the arbitration took place. Therefore, in order to make the award more readily enforceable such approach is the preferred one.

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[227] The ICC Rules, to make an example, require a more detailed request for arbitration. ICC Rules 2021 art 4 (3).
[228] Tavares de Paiva Muniz (n 153).
[229] For a reference ICC Arbitration Rules 2021 art 18.
[230] Tavares de Paiva Muniz accurately describes the benefits associated with the use of Terms of Reference before commencing the proceedings. Tavares de Paiva Muniz (n 153) 122-123.
[231] See Art. 21 (1) BAA; Rogerio Carmona Bianco and others (n 176)
[232] It is worth mentioning here that the law in question is the arbitration legislation of the seat, and not the code of civil procedure. Therefore, in this case, the Brazilian Arbitration Act as amended in 2015 would apply to the proceedings. However, not only the *lex arbitri* will regulate matters internal to the arbitration, such as the composition and appointment of the tribunal, the requirements for the arbitral procedure and due process, and the formal requirements for an award, but it also the external relationship between the arbitration and the State Courts, as well as the broader external relationship between arbitration and public policies of that place, which include several matters such as the arbitrability of the dispute.
[233] New York Convention 1958 art V (d).
[234] Panama Convention 1975 art 5 (1) (d).

In conducting the proceedings, the arbitral tribunal must adhere to core principles of Brazilian law, such as principles due process, equal treatment of the parties and independence of the arbitrators.[235] The Federal Constitution of 1988 assures the parties to any type of process to full defence and proper response,[236] which principles consequently apply also to any arbitration seated or taking place in Brazil. Other than observing the said basic standards, there are no mandatory rules that apply to the arbitral procedure, therefore the parties, along with the arbitrators will conduct the proceedings the way they believe is the most suitable to their needs, as long as they comply with the guidelines set forth by the BAA and the Brazilian Constitution.

At the request of the parties or on their own motion, the arbitrators can take depositions, hear witnesses, carry out expert examinations (both of party-appointed experts and tribunal-appointed experts) and determine the production of any other evidence deemed appropriate. The taking of evidence is an area where civil and common law differ greatly, and this may cause cultural clashes between the parties and arbitrators who have such different backgrounds.[237] In theorical terms, the parties may agree to conduct the discovery in the common law manner, however, in practice, it is questionable whether under the Brazilian legal system it would possible.[238] This is because discovery is likely to be held to go against well-established principles of Brazilian Civil procedure, as the fact that parties are not compelled to produce unfavourable evidence[239] unless it is strictly necessary and determined by the decision maker, or that the parties have privacy concerning private documents, and that the burden of proof is on the claimant.

This explains why the IBA Rules on the Taking of Evidence in International Arbitration are gradually gaining traction in Brazil, particularly in proceedings involving a legal or natural person from a common law system. Similarly, the 2018 Rules on the Efficient Conduct of International Arbitration Proceedings (also known as Prague Rules) have been discussed as an option in international arbitrations conducted in Brazil[240].

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[235] BAA 1996 art 21(2).

[236] Brazilian Constitution 1988 art 5, LV Full defence has to be interpreted as the opportunity for the parties to present their case, produce the necessary evidence, and have the chance to challenge the other party's allegations. See Joaquim de Paiva Muniz, Ana Tereza Palhares Basílio, *Arbitration Law of Brazil: Practice and Procedure* (2nd edn, Juris Publishing 2016).

[237] On the differences between civil and common on the taking of evidence, Giorgio Bernini, 'The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems' in Lawrence W Newman and Richard D Hill (eds) *The leading arbitrators' guide to international arbitration* (3rd edn, Juris Publishing 2014) 269-306.

[238] Brazilian law does not allow for discovery as intended in common law nations as a broad-based, lawyer-controlled search for tangible or digital evidence. Tavares (n 153).

[239] Penal Code 1940 art 342 defines perjury as the false deposition of witness, expert, accountant or translator, but does not mention the party.

[240] Rogerio Carmona Bianco (n 176)

Unless the parties have specifically agreed to a particular discovery process, in Brazilian arbitrations the parties commonly rely on the documents they already possess. Also, witnesses are not required to issue prior written statements, except for parties' agreements or the arbitral tribunal's orders.

To obtain evidence, the arbitral tribunal may seek assistance from state courts[241]. For example, the arbitral tribunal may request the court to summon a witness who has refused to attend a hearing voluntarily.[242] Any such requests from the arbitral tribunal to a local state court are made via an arbitral letter (*carta arbitral*),[243] which is a document that formalizes the dialogue of cooperation between the tribunal and national courts. In this way, the courts make available their inherent coercive powers to enforce the tribunal's decisions or orders, as request a bank (third party) to freeze a party's bank account or to compel a witness to attend an arbitration hearing. However, in doing this, the national courts should not challenge nor revise the tribunal's decision but limit their role to perform or determine the performance of a given act requested by the tribunal.

By means of arbitral letter the arbitrators can grant interim relief or preliminary orders[244] to protect the parties' rights and the integrity of the arbitral proceedings. The request for an interim measure will be directed to the arbitrators if arbitration proceedings have already started, as stated in art. 22-B (1) of the BAA,[245] which gives arbitrators exclusive authority to award temporary relief. However, there are two circumstances in which the courts might have the authority to provide temporary and preliminary relief during an arbitration: a. the arbitral tribunal's jurisdiction may have been expressly limited by the parties, prohibiting it from granting preliminary relief or interim remedies; b. the situation calls for immediate relief, but the arbitral tribunal is not available to provide it in a timely manner.[246]

Prior to the appointment of the arbitrators, under Brazilian law, parties may seek an interim measure in courts.[247] Once the appointment takes place, the arbitrators have the authority to confirm, modify, or reverse any such judicial decision, whether granted or

[241] Not just any state court, but the court that would originally have jurisdiction to try the case (Civil Procedure Code 2015 arts 22-C and 237 IV). There is no general rule that grants jurisdiction over arbitration-related applications to specific courts found in all parts of Brazil. However, in the State of São Paulo, there are courts specialised in arbitration matters to which all arbitration-related applications must be made. Certain authors criticize this provision because the original venue may in fact not be the most suitable court fore requesting urgent and coercive measures. Tavares de Paiva Muniz (n 153).
[242] BAA 1996 art 22.
[243] BAA 1996 art 22-C.
[244] BAA 1996 art 22 (2).
[245] BAA 1996 art 22-B Sole paragraph.
[246] Antonio Tavares Paes Jr and Vamilson José Costa (n 155).
[247] BAA 1996 art 22-A.

denied by the courts.[248] If the party against whom the interim measure was granted fails to comply with the arbitral decision voluntarily, the interim measure can be enforced in court.[249]

1.8 Confidentiality

Generally, confidentiality of the arbitration proceedings and the arbitral award characterizes arbitration in contrast with litigation in state courts, which is normally open to the public. However, the BAA does not specifically deal with confidentiality in any part of the legislation. It only imposes on arbitrators a duty not to disclose to the public information about the proceedings, unless authorized by the parties.[250] On the other hand, it is worth recalling that arbitrations involving state entities must always be subject to publicity,[251] according with the principle of transparency.

The Arbitral Rules may include a specific duty of confidentiality, while others as the ICC Rules are silent on the matter. In general terms, anyhow, publicity is the rule in Brazil, while confidentiality has to be understood as an exception. Parties should therefore better address the issue upfront, agreeing on the level of confidentiality to apply to the proceedings and to the arbitral award that will be issued, by making express provision for this in the arbitration agreement or the *compromisso arbitral*, or ultimately by concluding a confidentiality agreement.

1.9 Choice of law

Given a fixed set of facts, the outcome of an arbitration may be entirely dependent on which law or rules of law the arbitrators apply to the merits of the dispute. In such a case, the parties can truly dictate the outcome of arbitration by specifying in advance which rules or laws will apply to contract validity and enforcement issues.[252]

Pursuant to the BAA, the parties are free to choose the rules of law applicable to the merits of the dispute, provided that they do not violate Brazilian public policy and good morals.[253] The parties may choose to subject the resolution of the dispute either to state or

[248] BAA 1996 art 22-B.
[249] Andres Luis and others (n 159).
[250] BAA 1996 art 13 (6).
[251] BAA 1996 Art 2(3).
[252] Craig M Gertz, 'The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage' (1991) 12 Northwestern Journal of International Law and Business 163, 169.
[253] BAA 1996 art 2 (1).

non-state laws,[254] as the general principles of law,[255] commercial usages and customs,[256] international business rules[257] and *lex mercatoria.*[258] The parties may even instruct the arbitral tribunal to resolve the dispute *ex aequo et bono* or as *amiable compositeur*. Both terms have been construed to mean that the tribunal does not have to strictly apply legal rules, but it can render a decision based on the principles of reasonableness and fairness.[259] Most modern arbitration rules and laws permit arbitrators to decide matters in this way, as the Brazilian law at issue or the ICC Arbitration Rules, provided that the parties have expressly authorized them to do so,[260] and that the decision is not against the nation's public policy. However, *ex aequo et bono* arbitrations are not common in Brazil, mainly due to cultural problems and in view of the uncertainties related to this method of judgment,[261] in particular, the absence of a legal system as reference, which makes the outcome of a dispute unpredictable, and which may encourage compromise verdicts, or permit entirely arbitrary awards.

It is interesting to note that traditionally Brazilian law has been less flexible regarding the freedom of parties to select the law applicable to commercial contracts. Indeed, as previously mentioned, the 1942 Introductory Law to the Civil Code, which sets forth the conflict of law rules and which governed arbitral proceedings until the enactment of the Arbitration Law in 1996, provided that contracts must be governed by the laws of the country

[254] In the majority of cases, the parties prefer to select a national substantive law (e.g. the English law) to govern the merits of their dispute. This is due to the fact that commercial parties want their contracts to be governed by a legal system that is comprehensive, predictable, accessible and commercially focused. See Gary B Born *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2747.

[255] This concept refers those moral and logical features that form the foundation and the spirit of a legal system. Examples of general principles are the concepts of good faith, prohibition of unjust enrichment and so on. It is mentioning the stagger work conducted by several international organizations in the creation of a reliable set of uniform international principles, as the "Principles of International Commercial Contracts" carried out by UNIDROIT and published in 2004. With a similar purpose, it has been recently published an interesting study on the "Principles of contract law in BRICS", which aims at finding common grounds in the BRICS approach to contracts. The work is not finished, and the elaboration of such principles is yet to come. However, such an endeavour may represent a huge step ahead in the BRICS cooperation and serve as a basis to revolve intra-BRICS arbitral disputes. Mancuso and Bussani (n 2).

[256] Brazilian law defines trade usages as "the ordinary, uniform, habitual procedure adopted in the performance of a given commercial transaction. A usage becomes a custom when it is generally accepted as an unwritten but binding rule among a group of professionals, given a certain activity", Tavares de Paiva Muniz (n 153).

[257] The term encompasses international treaties on commercial law, such as the Vienna Convention of 1980 on Contracts for the International Sale of Goods, as well as bodies of widely accepted business principles as the UNIDORIT Principles mentioned above.

[258] BAA 1996 art 2 (2). *Lex mercatoria* is a concept created to cover non-state sources of international commerce. The Brazilian law does not make an express reference to lex mercatoria and there is no precedent in Brazil on the subject, so far. However, as a combination of general principles of law and trade usages it may fall within the other categories expressed in art 2 (2) of the BAA, and thus considered applicable under the Brazilian system.

[259] BAA 1996 art 2. On the topic Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, CUP 2012) 77.

[260] As in the ICC Rules 2021 art 21 (3) or LCIA Rules 2020 art 22 (4).

[261] Tavares de Paiva Muniz (n 153).

where the contract was signed (*lex loci celebrationis*[262]), supported by the doctrine's opinion that parties could not have chosen a different law than the one indicated by the conflict of law rule. The fact that with the Arbitration Act the parties were allowed to depart from such a strict rule, signalled a change in the Brazilian legal system, which then showed a dual regime for the choice of law: on the one hand, if the contract was not subject to arbitration, the governing law would be the law of the country where the contract was concluded; on the other hand, if the contract included an arbitration clause, the parties may have chosen the applicable law, provided that there was no violation of public policy[263]. This well explains why the use arbitration clauses had grown in international agreements in Brazil following the enactment of the Arbitration Law in 1996.

In case the arbitration agreement is silent on the law applicable to the substance of the dispute, the arbitrators should choose the law they deem to be most appropriate to resolve the case. The tribunal's authority to decide the matters of the applicable law in absence of parties' agreement is generally contained in the national procedural laws or in the rules of the institution under which the arbitration is conducted[264]. The arbitrators may specifically be required to employ the so called "*voie indirecte*" method, which consists of applying conflict of laws rules to make the determination of the applicable law. In this case, the provisions contained in the Introductory Law to the Civil Code will apply, and therefore contract will be subject to the law of the country where it was signed, while if each party signs the contract in a different jurisdiction, the law of the place where the proponent resides shall apply[265]. Otherwise, the arbitrators may be given enough discretion to decide directly which law they believe is the most appropriate to the case, without going through any conflict of laws analysis. This latter method is generally referred to as "*voie directe*" but is less used in Brazilian arbitrations.

1.10 Language

Parties are free to choose the language to apply to the proceedings. The Brazilian Arbitration Act does not provide for any mandatory rule that applies to the choice of language (apart form when state entities are involved, in that case the proceedings must be held in

[262] This criterion is now mostly replaced in Private International law by the law of the country with which the contract has the closest connection.
[263] Stringer (n 139).
[264] Doug Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties' (2014) 26 Singapore Academy of Law Journal 911.
[265] Introductory Law to the Civil Code 1942 art 9 (2).

Portuguese),[266] and it is thus common to use the English or the Spanish language whenever one of the parties is a non-Portuguese speaker.

Notwithstanding the fact that language is not mandatorily required in the arbitration agreement, the parties should better address the issue and determine the language taking elements as the language of future arbitrators and counsels (who have to be fluent in the language of the proceedings) and the applicable law into account, because a strange combination of language and applicable law may make it difficult to find a suitable arbitrator (e.g., the applicable law is the Brazilian law and the language chosen is Chinese).

Generally, all documents introduced during the proceedings must be translated into the language of arbitration, unless the parties agree otherwise, and all parties are fluent in the language used. Brazilian law requires all documents originally in a foreign language to serve as evidence to be translated into Portuguese by a sworn public translator[267]. Such provision could be burdensome for the parties who may avoid all related issues by waiving the said requirement in the arbitration agreement and rely only on unofficial translations. However, the waiver must be done in advance, before the starting of the proceedings.

If the arbitration agreement does not include any references to the language to be used to conduct the proceedings, the arbitrators will decide the matter. Institutional arbitration rules generally contain provisions that the arbitrators can use to determine the applicable language. The ICC Arbitration Rules, for instance, provide that the arbitrators shall give "due regard to the circumstances, including the language of the contracts"[268] to the determine the applicable language.

1.11 The seat of arbitration

Parties are free to choose the seat of arbitration[269] under Brazilian law, except for cases involving state entities.

The seat is one of the most important aspects of an arbitration and should be always clearly indicated in the arbitration agreement and in the final award.

[266] This applies to all concessions and PPP agreements, as well as other arbitrations with the federal government in the areas or ports, airports, highways and railways (Decree 10.025 2019).
[267] Civil Procedure Code 2015 art 157.
[268] ICC Rules 2021 art 16.
[269] The seat of arbitration is the place where arbitration is legally located. Therefore, the seat is not the geographical place of the proceedings, but is instead a purely legal concept, which links the arbitration to a national legal system and to its procedural law. In theory the place of the actual proceedings and the seat of arbitration may be different. However, in practice, most arbitrations take place, largely or completely, in the territory of the seat.

The parties should choose the seat cautiously for many reasons. First of all, because it determines the nationality of the award, which is an important factor under Brazilian law, as an award is deemed to be national or international depending on whether it was issued in Brazil or abroad.[270] Moreover, in case of enforcement, foreign decisions will depend on the exequatur before the STJ, while for domestic awards, the Arbitration Act does not provide any longer for their homologation.

Moreover, the procedural law of the seat finds subsidiary application during arbitration. The more flexible and redefined is the procedural law of a given country, the more it appears suitable to the parties. Brazilian procedural law in this regard is appreciable, as it is in fact flexible and leaves enough spaces for parties' intervention.

The *lex arbitri* also governs the relationship between arbitration and national courts. The parties to an arbitration generally look for places where there is a low level of interference of state courts. This is certainly the case of Brazil, which courts have demonstrated on several occasions their pro arbitration attitude, e.g., not issuing anti-suit injunctions. The same is true regarding the efficiency and independence of the judicial system,[271] which should allow for interim injunctions or protective measures before and during the course of an arbitration, which once more is the case for Brazil.

Also, the existence of judicial appeal or judicial ratification of the arbitration decisions play an important role in determining the seat of arbitration because it anticipates the finality of the award and, under the Brazilian legal system, the arbitral award is not subject to appeal.[272]

The seat may play an important role on matters relating to the enforcement and recognition of the arbitral award. The fact that, for instance, the place where the arbitration was seated is signatory to the New York Convention, as the place where the enforcement is sough, would certainly entail that the enforcement procedures will be relatively faster and smoother. Not for nothing, before the ratification of the New York Convention in 2002, Brazil was almost never chosen as seat of arbitration, whereas after that date, the cases of arbitral disputes seated in Brazil increased steadily.

Brazil is also party to local Conventions on enforcement of arbitral awards as the Panama and Montevideo Conventions with the member countries of the Organization of American States and the Buenos Aires and the Las Penas Protocol with the Mercosur

[270] BAA 1996 art 34 Sole paragraph.
[271] The Judiciary has a proportion of the budget revenues of the government and judges are not appointed by the executive except in the Supreme Court and are well paid. See Maria Dakolias, 'Court Performance Around the World: A Comparative Perspective (1999) 2 Yale Human Rights and Development Law Journal 87.
[272] BAA 1996 art 3.

countries, which make enforcement procedures easier and more expeditious in the relevant countries by means of letter rogatory.[273]

When the parties fail to dictate the seat of arbitration, as it must be clear by now, the arbitrators will determine the seat, according with the procedural rules.

Considering what just said, Brazil makes a great seat for arbitration, for many reasons. From the flexibility and adaptability of the procedural rules and the space left to party autonomy in the determination of arbitration, to the arbitration friendly attitude of Brazilian courts showed in the application of the *kompetenz-kompetenz* doctrine that favours and entrusts the arbitrators with jurisdictional choices and the overall non-interference policy. The viewpoint which prevails among teachers, researchers and attorneys that study and work in the field of arbitration is that the Judiciary in Brazil has been duly supporting arbitration, particularly in the interpretation and application of the BAA[274].

Moreover, Brazil's membership in a network of major local and international conventions instils confidence in the parties in a smoother procedure for the recognition and enforcement of foreign awards, representing yet another critical advantage.

1.12 The award

With the award, the arbitral proceedings come to an end.[275] As for the arbitration agreement, the arbitral award must meet some requirements in order to be valid. Under the Brazilian Arbitration Act, arbitral tribunals can issue both partial[276] and final awards[277]. An award must be in writing[278] and include: the names of the parties; the factual and procedural background of the dispute; the grounds for the decision; the decision itself, including the reasons for an award made in equity by an arbitral tribunal; the date and place where the decision was rendered;[279] and the signatures of the arbitrators.[280] The award must be signed

[273] "Letter rogatory" or "letter of request" ("*carta rogatória*") is a means of service requested in case a Brazil-based company or individual is to be served with foreign process and for a foreign court process to be affected.
[274] Lucas Meias and others, 'International Commercial Arbitration in Brazil' (*Lexology,* 15 September 2022) <https://www.lexology.com/library/detail.aspx?g=ea85ffb8-995a-495d-95ca-cbc6bbab3679> accessed 24 January 2024.
[275] BAA 1996 art 29 'The rendering of the arbitral award marks the end of the arbitration […]".
[276] Partial awards dispose of portions, but not all, of the parties' claims in arbitration, leaving the other part of the claims for further consideration and resolution in future proceedings. Therefore, they refer to the substantive claims of the disputes, e.g., award damages for a particular breach of contract. Moses (n 259).
[277]BAA 1996 art 23 (1).
[278] BAA 1996 art 24.
[279] Place and date of the award have significant legal consequences, including determining the forum for an annulment action and the relevant enforcement regimes. The date in which the award is issued is relevant especially for the running of statutory time limits for the challenge of the award and for determining when the award begins having *res judicata* effects under applicable national law.
[280] BAA 1996 art 26.

by each member of the tribunal. If one or more arbitrators cannot or does not wish to sign the award, the chair of the arbitral tribunal must certify such fact. This is because the arbitral award amounts to a judicial instrument, therefore it has to follow all the necessary legal requirements to be enforced. Moreover, the BAA in its art. 24 (2) allows for a dissenting arbitrator to render a separate decision. It would be interesting to understand the role that such dissenting opinions may play within the institution where it was rendered, and for Brazilian arbitration in general.

Most developed arbitration laws, as the Brazilian one, require a reasoned award. This is because reasoning is regarded as an essential component of the judicial and adjudicative processes of arbitration. It is intended to limit the decisionmakers' power (reducing the risk of arbitrary or careless decisions), to improve the quality of the decision-making process (by requiring thoughtful, diligent analysis), and to provide the parties with the opportunity not only to be heard, but also to know that their submissions have been considered and how they have been disposed of.

According to art. 30 of the BAA, the parties may submit a request for clarification of the award within five days of receiving it in order to correct clerical, typographical, and minor errors or clarify any dimness, doubt, or contradiction of the award - the applicable arbitration rules may provide other deadlines and details.

During the proceedings, the parties may end up settling their dispute. In that case, the arbitral proceedings will terminate. At the request of the parties, the arbitral tribunal may record the settlement in the form of an award on agreed terms,[281] which has the same effect as any other award made by an arbitral tribunal and therefore, must comply with the requirements mentioned above, contained in art. 26 of the BAA.

Finally, the arbitral award shall decide the parties' duties regarding costs and expenses for the arbitration.[282] The parties can priorly decide in the *Compromisso Arbitral* how future costs of the arbitration will be borne (including the arbitrators' fees and the parties' legal fees).[283] It is common for Arbitral rules to contain provisions that address costs allocation, which the parties may directly apply to their case. In general terms, it is the winning party that is entitled to recover its costs from the losing party. However, if the winning party is only partly successful, its recovery may be limited to those costs attributable to the extent of its success.

[281] BAA 1996 art 28.
[282] BAA 1996 art 27.
[283]BAA 1996 art 11.

The tribunal must also ensure that the award does not exceed the scope of the arbitration agreement because, as discussed later in this chapter, the award's enforcement may be refused on this basis. To summarize, arbitrators must take the time to carefully draft the award, meet all of the legal requirements of form and content as specified by the arbitral rules, make a clear presentation of the award's substance, and ensure that the award does not exceed the scope of their authority.[284]

Some institutions, such as the ICC, scrutinize every award before it is communicated to the parties to ensure that it is in accordance with the arbitral rules. This scrutiny may result in changes in form and recommendations for changes in substance, but the final decision remains in the hands of the arbitrators and cannot be reviewed. Such scrutiny improves the quality of the award rendered and encourages arbitrators to draft the award properly in the first place.[285]

1.13 Challenging an award

Consistently with the basic objectives of the arbitral process, most international arbitral awards are voluntarily complied with by the parties, who generally seek to put a definitive end to their dispute.[286]

Nonetheless, there are some situations in which one or both parties reject the arbitrators' decision, either for tactical reasons or out of a genuine sense of injustice and refuse to comply with the arbitral award.[287] At this point the resisting party may seek to annul or set aside the award in the arbitral seat, according with the annulment provisions contained in the national law of the seat or, he may attempt to resist the enforcement of the award within the jurisdiction where the enforcement is sought by the winning party.[288]

Under Brazilian law, an award can be challenged through annulment or as a means of defence in judicial enforcement proceedings.[289] In the case of annulment proceedings, the party seeking to challenge the award must lodge its application before the competent court within 90 days of notification of the award or the decision on the request for correction and clarification.[290]

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[284] See Julian D M Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
[285] Moses (n 259).
[286] Born (n 254) 2898.
[287] ibid.
[288] Moses (n 259) 204. See also Born supra note 259, p. 2909.
[289] BAA 1996 art 33 (3).
[290] BAA 1996 art 33 (1).

Art. 31 of the BAA provides the following grounds for annulment: a) the arbitration agreement is invalid; b) the award was rendered by someone who could not serve as arbitrator; c) the award does not meet the formal requirements set forth in art. 26 of the BAA; d) the award exceeds the scope of the arbitration agreement; e) the award was rendered as a result of unfaithfulness, extortion or corruption; g) the award was not rendered within the agreed timeframe or within six months of the commencement of proceedings; h) the award does not comply with the procedural principles of full defence, proper response, equal treatment of the parties, and impartiality and independence of the arbitrators.

The provisions set forth in art. 31 are mandatory and exhaustive. Consequently, the parties cannot agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law, neither expand the scope of appeal nor agree on new methods for judicial revision of the award.

The list of grounds provided by the BAA to annul an award may look extensive, however it is absolutely in line with the international standards provided also in the New York Convention, which are limited to basic jurisdictional, procedural, and formal grounds to ensure that the proceedings took place fairly, in respect of the due process standards and both parties' wishes. The merits of the dispute do not form object to request the annulment of the award.

The same ground enlisted in art. 31 to seek the annulment of the award, may be used by the interested party who will look for the award to be set aside as described in articles 32 and 33 of the BAA. Therefore, the Arbitration Act should not – in theory – allow any other issue to give rise to the annulment of an arbitration award. The STJ has, however, admitted an additional situation, allowing that in cases in which the arbitral award violates public policy to be challenged and set aside, notwithstanding public policy not being provided for under art. 32 of the Brazilian Arbitration Act. The interpretation of the STJ was that the "action for annulment of an arbitral award must necessarily be based on one of the specific hypotheses contained in art. 32 of the BAA, although it is possible to give them a reasonably open interpretation, with the purpose of preserving, in all cases, public order and due process of law and substantial, inextricable from judicial control".[291]

1.14 Recognition and enforcement of foreign awards

The main instrument that allows for the easy circulation of awards worldwide is the New York Convention on the recognition and enforcement of arbitral awards. However, it is not

[291] STJ REsp 1660963- SP (2 August 2021)

sufficient to check whether a country is signatory to the said Convention to be certain that national courts will recognize and enforce foreign awards with no further objections. That is because, first of all, states may adhere to the Convention with reservations and second, the national Courts still exercise discretion to refuse the awards on the limited and exhaustive grounds listed in art. V of the Convention, among which public policy may play a crucial role.

It is worth clarifying that recognition and enforcement procedures do not take place simultaneously. A foreign arbitral award will not be executed in Brazil and produce effects unless it has been previously recognized by the competent court.[292] Since 2004, the STJ is the competent court to hear recognition procedures[293] and conduct the necessary formal examination of the foreign awards.

The legal framework applicable to the recognition of foreign arbitral awards in Brazil includes three types of legal norms: (a) federal statutory provisions,[294] (b) treaty provisions,[295] and (c) the Internal Rules of the STJ, which art. 216-A to X contain the requirements and procedural steps for the recognition of foreign arbitral awards within the Court.

The BAA differentiates between national awards and foreign awards on the basis of a geographic criterion (*ius soli*).[296] In this sense, in May 2011 the STJ concluded that an award issued in Rio de Janeiro on an arbitration under the ICC Rules and therefore administered by an international institution (the ICC) was in fact a national award on the basis of the said geographical criterion. By extension, all the awards rendered by foreign institutions on Brazilian territory are considered national under the purposes of the BAA, and therefore, do not need to be recognized by the STJ. Enforcement may be sought at Federal Courts.

Such geographic rule has received some criticism for failing to consider some important aspects of international trade such as the nationality of parties to the contract, the place of performance, and the nature of the underlying agreement. Moreover, the wording

[292] This is a mandatory rule of Decree-Law No. 4657/1942 and of the Brazilian Code of Civil Procedure 1973.
[293] Constitutional Amendment No. 45 of December 30, 2004, shifted this authority from the Federal Supreme Court to the Superior Court of Justice.
[294] The main federal statutes that contain rules on the recognition and enforcement of the awards are the Decree-Law No. 4.657/1942, the BCCP, and the BAA (specifically, Articles 34–40).
[295] As already mentioned several times in the course of this dissertation, Brazil is party to several important International Treaties, as the New York Convention, Panama Convention or the Montevideo Convention. However, the considering that the STJ has so far virtually only dealt with provisions of the New York Convention, and that parties hardly ever rely on other treaty sources, reference will be made exclusively to this latter treaty, which provisions are entirely transposed in the BAA.
[296] Art. 34 of the BAA, sole paragraph: "A foreign award is considered to be an award rendered outside the national territory."

of the legal provision is complained for being too vague in defining foreign awards as those awards "made outside the national territory", without including any other specifics as to whether such a place has to be interpreted to be the seat of arbitration, the place where the award was in fact signed or where deliberations occurred, which places do not necessarily coincide.[297]

The request for the recognition of a foreign arbitral award must be filed before the STJ, be addressed to the Chief Justice of the STJ, be signed by a lawyer duly registered with the Brazilian Bar Association, observe the formal requirements set out in the relevant pieces of legislation (Internal Rules of the STJ, the New York Convention, the BAA, the Brazilian Code of Civil Procedure, art. 15 of Decree-Law No. 4.657/42) and be accompanied by proof of payment of court fees.[298]

According to art. IV (1) of the NYC, art. 216-C and D of the STJ's Internal Rules, and art. 37(1) of the BAA, the plaintiff must attach to its request the original or a certified copy of the foreign arbitral award, which must be duly certified by the Brazilian Consulate in the place where it was given,[299] and if written in another language, it must be translated into Portuguese by an official or sworn translator, together with the original arbitration agreement or a duly certified copy, accompanied by a certified translation.

There is no express requirement in the Internal Rules of the STJ, in the Brazilian Code of Civil Procedure, BAA or the New York Convention that the plaintiff must attach to the request a copy of the applicable arbitration rules. However, on many occasions during the recognition procedure, the STJ required a duly translation of the rules that had been applied to the arbitral proceedings.[300] The same is true for the attachment of the contract when the arbitration agreement takes the form of a clause. In that case there is no rule requiring the contract to be provided by the plaintiff when filing a request for recognition, and yet the STJ has asked for a copy of the main contract containing the arbitration clause, because the contract was "a relevant document to demonstrate the relief being recognized and serves the purpose of clarifying the terms of the foreign judgment".[301] Therefore, it is

[297] Leonardo de Campos Melo, *Recognition and Enforcement of Foreign Arbitral Awards in Brazil- A Practitioner's Guide* (Kluwer Law International 2015).
[298] According to the Brazilian Code of Civil Procedure to initiate court proceedings in Brazil, a foreign plaintiff must post a bond guaranteeing future payment of any loss of suit fees that may be awarded, in the event that the foreign plaintiff does not own real estate in Brazil (Code of Civil Procedure 2015 art. 155). However, the STJ has ruled that, because the BAA and the STJ's internal rules do not contain a similar provision, there is no need for the foreign applicant to post such a bond when dealing with the recognition of foreign judgments.
[299] When there is a treaty in force which provides for an expedited procedure for the exchange of letters rogatory between two countries (as it is the case of the Las Penas Protocol) certification by the Brazilian Consulate will not be necessary, as decided by the STJ, SEC No. 2.133/PT (10 October 2007).
[300] STJ, SEC No. 4.980/GB (19 August 2010); STJ, SEC No. 6.761/GB (9 November 2011); STJ, SEC No. 10.643/JP (6 October 2014).
[301] STJ, SEC No. 10.643/JP (19 November 2014) p. 8.

advisable for a party who files a claim for recognition in Brazil to provide the Court at least with these other non-mandatory documents, anticipating the potential requests of the Court and thus avoiding any loss of time during the proceedings, albeit demanding *de facto* additional evidence requirements to the plaintiff would be against the New York Convention, which aim is provide a simple recognition procedure.

Once the application for recognition has been filed and all evidence has been presented by the plaintiff, the STJ will issue an order for service of process via a letter of order (*carta de ordem*) to the Federal Court at the trial level with personal jurisdiction over the defendant, i.e., the court of the place where the defendant has its domicile or headquarter, as provided under the Brazilian Code of Civil Procedure. Once served, the defendant will have fifteen days to submit a written response.[302] In case the defendant wants to resist recognition, he has to prove that at least one of the grounds listed in art. V of the New York Convention occurred, namely that:

(a) The parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;[303] or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[302] STJ Internal Rules (Regimento Interno do Superior Tribunal de Justiça) 2016 art 216-H.

[303] As long as the plaintiff provides the court with evidence that the defendant has been properly notified according to the terms of the arbitration agreement or to the terms of the procedural law of the arbitration seat, the BAA sets out that the burden will be on the defendant to prove lack of good service. In the case law of the STJ, the great majority of cases where lack of proper notice was invoked by the defendants resulted in the recognition of the award because the defendants failed to meet their burden of proof.

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[304]

The abovementioned provisions were basically entirely transposed into the BAA, with minor differences. For instance, while the New York Convention's provision in letter d) applies to the whole procedure (including the commencement), the BAA only refers to the commencement of the arbitral proceedings and does not provide for any subsidiary application of the law of the seat in cases where the parties had failed to choose the applicable rules to the proceedings the way the New York Convention does. Since the BAA provision is more favourable than the one set out in the New York Convention, a party seeking for recognition should be subject to the said provision, as specified by the New York Convention itself. As a general rule, in fact, the New York Convention's provisions are not to "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon"[305] thus suggesting that a party should be availed to dispose of a more favourable treatment under the national law where recognition is sought, whenever it is the case.

For what concerns the ground provided in letter e) there is a tendency in Brazil not to recognize awards that have been set aside at the seat, due to a literal interpretation[306] of the New York Convention.

It is worth pointing out that none of the said defences is based on merits' defects. Indeed, the award cannot be objected on its substance, nor its merits may be reviewed by the court during the recognition process; rather, the only permitted defences focus on the integrity of the proceedings and formal or jurisdictional matters.

The only chance for the resisting party to relitigate the same cause of action settled in arbitration would be with a successful procedure to annul the award at the seat. Otherwise, the substantive choice of the arbitrators cannot be rediscussed.

If a recognition request has been challenged by the defendant, the STJ may take several months in order to issue a final decision on the matter. Although the Court's timetable

[304] The BAA, in turn, provides that only a court of the country in which the award was made has jurisdiction to set it aside. BAA 1996 art 38(VI).
[305] New York Convention 1958 art VII (1).
[306] Other jurisdictions, as the French one, commonly recognize and enforce awards that have been set aside in the seat, especially if they were set aside for reasons of non-arbitrability of the subject matter or for reason related to the local public policy. See Rashda Rana, 'The Enforceability of Awards Set aside at the Seat: An Asian and European Perspective' (2017) 40 Fordham International Law Journal 813 <https://ir.lawnet.fordham.edu/ilj/vol40/iss3/5> accessed 24 January 2024.

has improved from 2011 up until now, prior to that date, it could also take years for the Court to decide to recognize the award or to refuse it. That is because the STJ (who became the competent court for recognition only in 2004) was unaccustomed to dealing with the wide range of issues involved in foreign award recognition proceedings. As a result, almost every contentious issue brought before the court to be decided collectively prompted at least one Justice to request the case records in order to thoroughly review them, with proceedings resuming only weeks or even months later. As the STJ case law consolidated, the average time to issue final decisions gradually decreased, so that almost all recognition proceedings filed since 2012 have been decided in less than seventeen months[307].

After the STJ recognizes the foreign arbitral award, the decision becomes *res judicata* and, according to the BAA, has the same legal status as a judgment issued by a State Court[308]. At this point the interested may party ask the STJ to issue a writ of enforcement[309], which will be attached to the enforcement file as a mandatory document and may proceed with the filing of a request for enforcement of the award before a Federal Court at the trial level.

In order for the enforcement judge to easily recognize the specifics of the relief sought by the plaintiff, the plaintiff must also attach to its request a statement of calculation that must point out in detail all the items that are being enforced[310].

Although recognition applications are not time-barred, enforcement proceedings are. Courts in Brazil have long held that when the law provides a time limit for exercising a specific right (statutory limitation period for initiating proceedings), once a *res judicata* decision is rendered, the winning party has the same amount of time to initiate enforcement proceedings. For example, if the law states that a tort victim has three years to file a claim for damages, the party will have the same three-year period to file an enforcement action following the rendering of a *res judicata* decision[311].

1.15 Public policy

Art. V (2) of the New York Convention introduces two more defences against recognition and enforcement of foreign awards, which the Court may raise *sua sponte*. Essentially, they

[307] De Campos Melo (n 297) 107 – 122.
[308] BAA 1996 art. 31.
[309] STJ Internal Rules (Regimento Interno do Superior Tribunal de Justiça) 2016 art 216-N; Code of Civil Procedure 2015 art. 848.
[310] Code of Civil Procedure 2015 art 614 (II).
[311] 'The statute of limitation for the filing of enforcement proceedings is the same as that for the filing of the original lawsuit, according to Ruling No. 150 of the Federal Supreme Court' See STJ, AgRg Ag 1.395.337/PR, Second Chamber, Reporting Justice Mauro Campbell Marques, decided on May 19, 2011. On the topic De Campos Melo (n 297) 107 – 122.

are both aspects of public policy and relate to whether the subject matter of the dispute is capable of settlement by arbitration[312] (arbitrability) and whether the recognition and enforcement of the award would violate the public policy of the enforcing state[313]. For what concerns arbitrability, paragraph 1.2 already discussed the subject matters that are deemed to be arbitrable under Brazilian Law, upon which such defence shall be assessed. Therefore, the focus is now directed towards the public policy ground.

Notwithstanding the fact that the wording of the New York Convention's provision refers to the public policy of the country where recognition is sough,[314] many courts decisions in various countries and distinguished commentators on the New York Convention have held that Art. V(2)(b) actually refers the international public policy,[315] which is in line with the attempt of the Convention's drafters to create a pro-enforcement atmosphere for international commercial arbitration. Just as national public policy, international public policy is a broad concept, difficult to define. Significant examples of cases of manifest outrage against international public order would be judgments that recognize the applicability of slavery, civil death, racial discrimination, and severe violations of due process of law.[316]

The BAA as well provides for the public policy ground for refusing recognition in its art. 39(2), however here the reference is expressly made to the Brazilian public policy.[317] Therefore, when examining the award, the Brazilian Court may refuse its recognition because it violates Brazilian public policy, rather than the international public order, although a narrow construction of the public policy defence is encouraged.

As it is common, the laws of Brazil do not define public policy. It is up to the courts, with the support of legal commentators and scholars, to decide what such public policy is and what its limits are. In accordance with the utility of the Convention, the interpretation of the public policy exception implies that *exequatur* may only be denied when it violates the State's "most basic notions of morality and justice".[318]

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[312]'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country' New York Convention 1958 art V (2) (a).

[313] New York Convention 1958 art V (2) (b).

[314] ibid 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … The recognition or enforcement of the award would be contrary to the public policy of that country'.

[315] De Campos Melo (n 297).

[316] Aprigliano Ricardo de Carvalho, *Ordem Pública E Processo: O Tratamento Das Questões De Ordem Pública No Direito Processual Civil* (Atlas 2011) 54-55.

[317] BAA 1996 art 39 (2) provides that: 'Recognition or enforcement of a foreign arbitral award will also be refused if the Superior Court of Justice finds that: According to Brazilian law, the object of the dispute cannot be settled by arbitration; The decision violates national public policy'.

[318] Carolina Barreira Lins, 'Arbitration and Public Policy in Brazil: A Study Based on 'Lula Case' (2016) 4 Panorama of Brazilian Law 223.

According to scholar Guilherme Peña Moraes, "The public policy, according to Private International Law, works as a principle of protection of a certain legal order, preventing the recognition of a foreign judgment that violates fundamental principles of the venue [before which recognition is sought]. It must be stressed that public policy comprises political, legal, moral, and economic aspects of all established State. The public policy is assessed according to the average sensitivity or mentality of a certain society, in a certain time and place. In sum: the public policy is the group of principles implicitly or explicitly incorporated in the national legal order, which, for being necessary for the survival of the State and its own character protection, prevent the application of a conflicting foreign law, even if determined by a conflict of law rule".[319]

However, as well stated by renowned Judge Nancy Andrighi, "It is not any kind of breach of local law that implies violation of public policy. The STJ may carry out a deep analysis of the contents and/or justice of the foreign decision only if it finds an infringement of fundamental values of Brazilian legal culture".[320]

In this sense, the Superior Court of Justice has decided that "despite the high degree of indeterminacy of the concept of 'public order', it must comprise the entire range of principles and values incorporated in the internal legal order, with high degree of normativity, therefore, which prove to be fundamental to the State, which is why they are mandatory under foreign law (as a condition of effectiveness) and, by extended interpretation, by the arbitration court".[321]

In *Indutech SPA v Algocentro Armazéns Gerais Ltda* for example, the STJ refused to recognize a foreign arbitral award based on a violation of a parochial provision of the BAA dealing with formal requirements for the manifestation of consent. The STJ determined that the main contract and its appendix, as well as the appointment of the arbitrator on Algocentro's behalf, lacked the defendant's signature or initials, and that the defendant had thus not effectively provided its consent to arbitrate. The circumstances of the case configurated as a violation of the principle of party autonomy and thus interpreted as a violation of Brazilian public policy.[322]

In *Thales Geosolutions Inc. v Fonseca Almeida Representações e Comércio Ltda*, the STJ drew up a list of legal areas based on the views of leading Brazilian commentators and scholars, which should shed some light on current known boundaries of Brazilian public

[319] Such interpretation was recalled by Justice Luiz Fux in its dissenting opinion regarding *GE Medical Systems Information Technologies Inc. v Paramedics Electromedicina Comercial Ltd*. STJ, SEC No. 854/US, dissenting opinion of Justice Luiz Fux (19 December 2006) 21-22.
[320] See STJ, SEC 4.024/EX (7 August 2013)
[321] *GSC Administração E Participações S.Astj v CAP* STJ, REsp 1660963/ SP (26 March 2019)
[322] *Indutech SPA v Algocentro Armazéns Gerais Ltda* STJ, SEC No. 978/GB (17 December 2008).

policy, namely: (1) Constitutional Law; (2) Administrative Law; (3) Procedural Law; (4) Criminal Law; (5) Judicial Organization (court structure, hierarchy, etc.); (6) Tax Law; (7) lois de police; (8) the laws protecting the incapable; (9) laws providing for the organization of the family; (10) laws providing that certain acts are valid only if certain formalities are observed; (11) laws regulating currency, wages, and marital property regimes.[323]

Moreover, Brazilian public policy seems to englobe also offences towards "Brazilian sovereignty", which was fixed by art. 17of Decree-Law No. 4.657/1942,[324] and that was used massively by the Federal Supreme Court and the STJ in the recognition procedures of foreign judgements.[325] Since the list of grounds disposed in the New York Convention is intended as a closed list, non-modifiable by the adhering states, such ground could not be added as separate from the public policy one mentioned before, as this would have violated the Convention's conditions.[326]

In almost all of the modern cases involving foreign arbitral awards decided by the STJ with alleged violations of Brazilian sovereignty have been based on the existence of parallel lawsuits before Brazilian national courts or foreign judicial courts, and the question of how these interact with pending recognition proceedings before the STJ. In Brazil, this issue has been the subject of extensive and lengthy debate, and the case law of the Federal Supreme Court and the STJ was rather inconsistent.

The same goes for the refusal of recognition in case of violation of the dignity of the human person, which is a fundamental right guaranteed in art. 1 (III) of the Federal Constitution, and which results from the historical affirmation of fundamental human rights in Brazil. Once more, such ground is intended as part of the Brazilian public policy and may be used only in this sense.

To conclude, public policy is an important ground for defence that a jurisdiction can dispose of to reject a foreign decision that may offend or violate its principles, norms, and basic and fundamental interests. It also serves a limit to the otherwise boundless freedom of the parties, especially in arbitration. The STJ has virtually narrowly construed all of the grounds for denying recognition of foreign arbitral awards under the New York Convention

[323] See STJ, SEC No. 802/US (17 August 2015).
[324] Article 17, Decree-Law No. 4.657/1942: "The laws, acts, and judgments of other country, as well as any declaration of will, will not have any legal effects in Brazil if they violate sovereignty, public policy, and good moral conduct."
[325] De Campos Melo (n 297).
[325] STJ, SEC No. 854/US (16 February 2011).
[326] Noteworthy mentioning that when Brazil ratified the NYC it undertook the obligation, before the other contracting States, to adopt its provisions in full (save for a few reservations, not adopted by Brazil), and not to take internal measures that could hinder its effectiveness.

and the BAA, which is why approximately 90% of the foreign arbitral awards brought for recognition in Brazil have been recognized[327].

[327] De Campos Melo (n 297).

Chapter 2. Russia

2.1 The Russian legal system

Russia is a federation of eighty-five states, regions, territories, and cities. Each state has the power to enact its own constitution and legislation,[328] however, as prescribed in the 1993 Federal Constitution,[329] the Federal Government alone has the power to enact "civil, civil-procedural and arbitration-procedural legislation", which therefore will apply equally throughout the Federation.[330]

Russia is typically identified as a civil law country. A systematic reception of Roman and civil law became possible through the study of the Western legal texts during the eighteenth, nineteenth, and twentieth century.[331] Russia has indeed a code-based legal system, whose civil legislation, particularly the 1913 Draft of the Civil Code, was modelled upon the European codes, especially the German one.[332] In the same manner, the organization of judicial review (albeit being very complex) closely mirrors that of Western European civil law countries. By the 1917 Revolution, the civil law tradition was well established, and it still characterizes today's Russian legal system, along with a marked post-Soviet legacy resulting from the years of socialism that have distinguished Russia in the twentieth century.

Although some have placed Soviet law within the civil law traditions, others have advanced the idea of a distinct "socialist" legal tradition based on criteria other than those typically taken into consideration by comparativists. Already R. David in his classification of legal families distinguished the families of common law and civil law from the law of the socialist countries, in which elements such as political ideology and the economic system become fundamental landmarks.[333] The Soviet Union's legal system was indeed part of a state that had socialized all means of production, established complete state control over all facets of social life, and that was ruled by the Marxist "vanguard communist party"

[328] Russian Federation's Constitution 1993 art 5 (2). State legislation shall however conform to the Russian Federation's Constitution and laws, according to Articles 15 (1) and 76 of the Russian Federation's Constitution 1993.
[329] The 1993 Russian Federation's Constitution was adopted by a popular referendum and is now considered to be the supreme law of the land. Russian Federation's Constitution 1993 art 15 (1).
[330] Russian Federation's Constitution 1993 art. 71, letter (n); Russian Civil Code 1994 art 3 (1).
[331] Peter B Maggs and others, *Law and Legal System of Russian Federation* (6th edn, Juris Publishing 2015).
[332] Such influence was still evident (although less clearly, since private property had been abolished in 1917) in the first Civil Code of the Russian Soviet Federated Socialist Republic (SFSR) of 1922 (*Grazhdanskiy Kodeks* RSFSR 1922).
[333] René David, *Les grands systèmes de droit contemporains* (Dalloz 1964).

ideology.[334] From 1928, the Soviet state assumed full control over industries and agricultural production; it abolished private property (with the only exception of "personal" properties that citizens needed for their own use or consumption) and introduced the planned economy. In such a scenario, it comes easy to understand how most of private and commercial law disappeared. Indeed, traditional civil law contracts were unnecessary to the planned economy. Instead, contractual relations between the state production entities were governed by a new set of rules that emphasized the role of the state plan. Foreign trade was put under the State's monopoly and disputes arising out of transnational contracts were subject to the exclusive jurisdiction of Soviet arbitral bodies, such as the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, established respectively in 1930 and 1932.[335]

Principles as party autonomy and rule of law would find no space in the Soviet legal system. In line with the Marxist thought, law was not but a tool to be used in the building of communism.[336]

The Constitution itself played a very different role within the socialist state, especially if compared with the traditional significance that civil law countries attribute to it. All of the soviet Constitutions were in fact considered as instruments of the communist ideology.[337] Stalin himself discussed in his "Report on the constitution draft" (with reference to the 1936 Constitution) how the Russian understanding of a constitution was to be different from that of the bourgeois, by stating that the term "constitution" was to be intended as "foundation" and its role was to acknowledge the present achievements and the workers' fights that brought to that point, which coincided with the establishment of socialism. On the contrary, the bourgeois' constitution was not but a program, a mere declaration of the intents of future achievements.[338]

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[334] Gordon Smith, *Reforming the Russian Legal System* (CUP 1996); on Soviet law Olimpiad Ioffe, *Soviet Civil Law* (Martinus Nijhoff Publishers 1988).

[335] Infantino (n 124).

[336] Law played a subsidiary role to the economy in Marx's analysis of the capitalist society. In his thought law merely reinforced the interests of the owners of the means of production, whose interests are represented through political, legislative, executive, and judicial institutions of the state. Smith (n 334).

[337] During its existence, the Soviet Union had three different constitutions: the 1924 Constitution of the Soviet Union – adopted on 31 January 1924 ("Lenin Constitution"); the 1936 Constitution of the Soviet Union – adopted 5 December 1936 ("Stalin Constitution") and the 1977 Constitution of the Soviet Union – adopted 7 October 1977 ("Brezhnev Constitution"). The constitutions were adopted by the Ordinary Legislative Assembly and repealed any previous incompatible rule.

[338] In his report on the Constitution draft, Stalin states that '[…] In drafting the new Constitution, the Constitution Commission proceeded from the proposition that a constitution must not be confused with a program… Whereas a program speaks of that which does not yet exist, of that which has yet to be achieved and won in the future, a constitution, on the contrary, must speak of that which already exists, -of that which has already been achieved and won now, at the present time. A Program deals mainly with the future, a constitution with the present'. The English text is available at <https://soviethistory.msu.edu/1936-2/stalin-

The "Second Russian Revolution" of 1991 resulted in fundamental changes of the country's legal system.[339] With the enactment of the "Fundamental Principles of Civil Legislation of the USSR and the Union Republics" (which would have served as the legal basis for the draft of new Civil Code) most of the economic and political influences of Marxists thought were removed, the equality of participants in the commercial market restored and new forms of contracts were made available to the new business actors.[340] Nonetheless, contract law was still criticized for being too severe, especially by practitioners. Not without reason, Russian companies tried to subordinate their most significant transactions to foreign jurisdictions[341] - exacerbating forum shopping phenomena- and preferred to subject major deals to foreign laws (mainly English law), because of the inconvenience of Russian law for doing business.[342]

The 1993 Constitution proclaimed the goal of establishing a State based on the rule of law. It also provided strong guarantees for individual human rights, in line with internationally recognized human rights standards. Another major development was the institutionalization of democracy and the constitutional government, even though the traditional authoritarian style continued to pose threats to the emerging democratic government.[343] Private property was secured by the late Constitution and a new Civil Code, drafted on the Western European model, restored the importance of civil and commercial law for the emerging free market economy. Attempts to dismantle the socialist welfare have been a major problem to reformers. Many crucial improvements have been made, but despite the massive privatization, the government's role in the economy is still visible, especially if compared to of other civil law countries' experiences.[344]

The Russian Civil Code is one of the most important pieces of legislation, containing the major and most important civil norms. The 1994 Civil Code covers both private and commercial law. It clearly bears the influence of civil law, particularly German law, visible in the choice to divide the Code into a general and a special part, or in the inclusion of contracts (both bilateral and unilateral) in the broader concept of obligations, and the use of

constitution/stalin-constitution-texts/stalin-on-the-draft-constitution/> accessed 24 January 2024; Antonio Gambaro and Rodolfo Sacco, *Sistemi giuridici comparati* (3rd edn, UTET 2008).

[339] Maggs and others (n 331)

[340] Civil Code 1994 art. 2 provided identical rules for all participants regardless of whether they were companies or private persons; On the point also Maria Yefremova, and others, *Contract law in Russia* (Hart Publishing 2014).

[341] Gennadij A Borisov and others, 'The place of the Russian Legislation in the Modern Legal Systems' (2018) 5 Revista Publicando 822.

[342] ibid.

[343] Maggs and others (n 331)

[344] On Russian economic reforms Anders Aslund, *How Russia became a Market Economy* (Brookings Institution 1995).

the term "*Rechtsgeschäfte*", whereas the length, style, and level of detail of its provisions and the number of rules regarding state contracts are signs of the Russian Socialist past.[345]

The Code does not seem to have been influenced by the CISG Convention, notwithstanding the Russian ratification of the said Convention in 1991. On the other side, European legislation, especially the 1980 Rome Convention on the Law Applicable to Contractual Obligations and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (subsequently repealed and replaced by the Regulation (EU) No 1215/2012) seem to have had a noticeable impact on Russian conflict of law rules (which are contained in the Civil Code) [346]. Accordingly, in case a contract involved a foreign element, it was admissible under the Civil Code, that the parties could choose the applicable law, which had to be in any case a state law. The use of non-state laws was never allowed.[347]

Rather than leaving commercial disputes to the general jurisdiction, a separate system of commercial courts with the goal of assuring expert adjudication of new types of disputes arising among business and entrepreneurs was created. The translation of the Russian name for these courts -*arbitrazhnye sudy*- into the English "arbitral courts" may however be misleading, especially considering the broader arbitration topic that forms the object of the present work. As a matter of fact, such arbitral courts did not refer to the system of private arbitration in which the parties consent to have their dispute resolved by an arbitrator of their choice, according with a template of agreed-upon set of procedural rules. *Arbritazh* is a system of specialized courts articulated in circuit, appellate and cassation, with general jurisdiction over litigations between corporations and with exclusive jurisdiction over Intellectual Property and bankruptcy matters, to which such commercial courts will apply the substantive law provided by the civil code.[348] No choice of law nor procedural rules was allowed to the parties. Therefore, *arbitrazh* courts are to be understood as a quasi-judicial body to be kept distinguished from private international commercial arbitration.

Civil Courts at district and regional level have residual jurisdiction over all fields that do not fall under the jurisdiction of commercial courts (for example, contract disputes arising out of B2C and C2C transactions)[349]. Some minor disputes are even resolved at local level by the Justice of Peace. Both the systems of civil and commercial courts were headed by the

[345] Infantino (n 124).
[346] The third part of the Russian Civil Code 1994, adopted by Federal Law No 146-FZ 2001, contains conflict of laws rules.
[347] Civil Code 1994 art 1210.
[348] Federal Constitutional Law on Commercial Courts in the Russian Federation No 1-FKZ 1995. Maggs and others (n 331).
[349] Federal Constitutional Law on Courts of General Jurisdiction in the Russian Federation No 1-FKZ 2011.

Supreme Court of the Russian Federation, which served as the appellate and cassational review court for decisions taken by lower courts.[350] Alongside the Supreme Court, an independent Constitutional Court and a Supreme *Arbitrazh* Court (which was the top Court of the *Arbitrazh* system) were established. The Supreme *Arbitrazh* court was abolished in August 2014 under the Federal Law No. 186-FZ of 28 June 2014 on the Introduction of Amendments into the *Arbitrazh* Procedural Code of the Russian Federation, with effect as of 6 August 2014. With the abolishment of the Supreme *Arbitrazh* Court, the Supreme Court of the Russian Federation became the supreme judicial body with jurisdiction over civil, criminal, administrative and other types of cases, as well as economic disputes, thus absorbing those cases that were previously within the Supreme *Arbitrazh* court's jurisdiction.[351]

Even though, as for any civil law country, legal precedents are not legally binding on lower courts, the Supreme Court's decisions represent a particularly authoritative source. In addition, the Supreme Court has inherited from the Soviet apex courts the function of issuing 'explanations', which are advisory opinions unrelated to any actual case or controversy, delivered to clarify how to interpret and apply the law and which are treated as binding by lower courts.[352] The Supreme Court also publishes selections of its major decisions, which serve as a guide for lower courts regarding the Supreme Court's trends.

Legal scholarship is not formally included in the sources of law, as in many other civil law countries, and courts avoid citing doctrinal sources. Nonetheless, commentators' opinions are regarded as authoritative by lawyers and judges, and legal scholars are frequently involved in the drafting of new laws.[353]

To conclude, the comprehensive political, legal, and systemic reforms that have occurred from the 1990s have reunited the Russian legal system with the civil law family. However, the Soviet and Imperial past left a mark on Russia's legal system, differentiating it from the other civil law experiences, along with other cultural, religious, and moral values. Such legacy does not affect only the content of rules and legislation but also the underlying attitude towards the law and how it should be shaped and enforced.

[350] The Supreme Court is the highest court on non-constitutional matters under art 126 of the 1993 Federal Constitution.
[351] Federal Law No. 186-FZ 2014.
[352] For more on the topic Maggs and others (n 331) __
[353] Maggs and others (n 331); Vladimir Orlov, 'Legal Sources and Interpretation in Russian Civil Law' (2019) 5 Athens Journal of Law 117 < https://www.athensjournals.gr/ajl/v5i2> accessed 24 January 2024.

2.2 A general overview on arbitration

Russia's disputing culture is not a very researched topic. Nonetheless, it is safe to say that Russia does not seem to have a deep culture of using alternative means of dispute settlement.[354] Arbitration is certainly more entrenched in Russian history compared to other ADR methods as mediation[355] or conciliation. Nonetheless the use of arbitration is privileged to settle international commercial disputes involving foreign counterparts, whereas its domestic use is still rather limited.

Arbitration has a long and complex history in Russia. It dates back to the XIV century,[356] and is closely intertwined with the development of the *treteiskii sud,*[357] which original term literally means "the court of the third person".

Throughout the years, arbitration and its use has changed and has assumed different shapes depending on the address of the political power and the changes on the relevant legislation that eventually affected arbitration as the Civil Code, the Code of Civil Procedure and all the different Statutes, Rules and Regulations that were created and amended to govern arbitration from time to time. The present paragraph only traces the major points in the history of Russian arbitration, with a special focus on today's situation as a more extensive analysis would fall outside of the scope of this work.

During the nineteenth century, under Imperial Russia, there was a widespread use of the arbitral "tribunals of conscience", which resolved disputes on equitable considerations rather than on the law and were disciplined by the Regulation on Arbitration Courts of 1831, which became a cornerstone for the development of domestic arbitration in Russia. However, it was not uncommon for the interested parties to start fictitious, staged arbitrations, especially in the real estate field, in an effort to prove the ownership of a certain

[354] The reasons for such a lack of an ADR culture may be several, also in consideration of the monolithic hierarchical structure of the political power in the Russian society, whereby there has never been a need for negotiation or compromise between various societal segments. See Harold J Berman, *Justice in the USSR: The Interpretation of Soviet Law* (Harvard University Press 1974); Lazarev, points out how one of the main reasons for the unpopularity of Alternative Dispute Resolution in Russia is the lack of knowledge among lawyers about the types and possibilities of ADR. Sergey Lazarev, 'The Main Reasons for the Unpopularity of Alternative Dispute Resolution in Russia' (2020) 420 Advances in Social Science, Education and Humanities Research 127 <https://www.atlantis-press.com/proceedings/ick-20/125937327> accessed 24 January 2024.

[355] Arrieta López, 'Alternative Dispute Resolution Mechanisms in Colombia and Russia: Conciliation and Mediation' (2021) 26 Justicia 128.

[356] Ibidem; Ilya Kokorin, 'Arbitration Reform in Russia: Will Russia Become More Arbitration-Friendly?' [2017] Artikelen 50 <https://www.researchgate.net/publication/319314885_Arbitration_Reform_in_Russia_Will_Russia_Become_More_Arbitration-Friendly> accessed 24 January 2024.

[357] The Treteiskii Court Statute of 15 April 1831 governed the *treteiskii* court system. Such Statute under its art. 1367 provided that all persons having the right to dispose freely of property could refer existing disputes to one or an odd number of arbitrators by mutual agreement. The *treteiskii* agreement had to be registered with a notary or Justice of the Peace Court (art 1374), and the final decision taken by the *treteiskii* court was not appleable. See Ikko Yoshida, 'History of International Commercial Arbitration and its Related System in Russia' (2009) 25 Arbitration International 365.

estate or to avoid paying the fees associated with the transfer of real estate ownership through arbitration proceedings.[358] What it is typical of the Russian experience with arbitration, and with ADR in general, is in fact its misuse, especially in the domestic settings.

As for international commercial arbitration, which dealt exclusively with disputes between merchants, a true development occurred during the second half of the nineteenth century. Merchants from all over Europe, including Berlin, Hamburg, Liverpool, and London, reached out to the Arbitration Commission at the Kalashnikov Grain Exchange in St. Petersburg for assistance in resolving their disputes. This proves the high quality of commercial arbitration in Russia, thanks to its speed in the resolution of conflicts, along with the qualified arbitrators capable of resolving complex commercial issues.

Arbitration survived the Soviet period, when the legal system rejected many bourgeois legal institutions,[359] albeit being extremely limited in its domestic use by the 1918 Decree on the *Treteiskii* Court and the Regulation on Arbitration Tribunals issued in October 1924, by which private parties could agree to arbitrate civil disputes only, and such disputes had to be already in place when the agreement to arbitrate was made, entailing that the parties could not convene to refer to arbitration any dispute that might have arisen among them in the future.[360] Such a system opposed the then international practice, which already recognized agreements to arbitrate future disputes.

Surprisingly, arbitration became the preferred method for dispute resolution on the part of the Soviet government to avoid litigation in foreign courts. This explains the several bilateral and multinational treaties on international commercial arbitration signed by the Soviet government with European countries[361] and the Eastern bloc,[362] which are still in force in the modern Russian federation.

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[358] Andrey Kotelnikov and others, *Arbitration in Russia* (Kluwer Law International 2019) 1 – 16.

[359] During the early stages of the Soviet regime, all existing courts were disbanded due to their bourgeois characteristics. The entire judicial system had to be re-established in the context of socialistic thought at the time. Yoshida (n 357).

[360] Article 1 of the 1918 Decree on the *Treteiskii* Court provided that all disputes of civil cases could be subject to the jurisdiction of the *treteiskii* court except cases subject to special courts or cases relating to labour contracts, cases on social insurance and cases on criminal cases. These terms and provisions seem to follow the system of the *treteiskii* court under the 1864 Statute, with a difference on the appeal against the decision of the *treteiskii* court, which under the Decree, could be made to the local congress of judges within the period legislated by law. Also, Article 2 of the 1924 Statute on the *Treteiskii* Court, Appendix to the 1923 Civil Procedure Code provided that an agreement to submit to arbitration all disputes which may arise in the future did not deprive parties of the right to apply to the proper court under the general rules of the 1923 Civil Procedure Code.

[361] To make an example, the European Convention of 1961 that provided unified rules on arbitration especially on matters as the appointment of arbitrators, selection of the place of arbitration and the form of arbitration proceedings in cases where the parties could not agree.

[362] For instance, the 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific, and Technical Cooperation was significant because it prescribed arbitration as the only means of settling disputes arising from relations of economic, scientific, and technological cooperation among the socialist countries.

During the socialist period, the systems of the *'treteiskii* court' and the 'arbitration court' and the respective terms, were used almost interchangeably. A clear differentiation between the two occurred when arbitration, under the Foreign Trade Arbitration Commission (FTAC), was separated from the *treteiskii* court -which was primarily used for domestic economic dispute resolution- and when the system of international commercial arbitration became independent from the 1923 Civil Procedure Code.

In the early days of the USSR regime, there were in fact two arbitration commissions. The first was the "Arbitration Commission", established by the Supreme Soviet of National Economy in April 1922 to deal with economic disputes among state economic institutions, and the second one was the "Foreign Trade Arbitration Commission", founded as attached to the All-Union Chamber of Commerce and Industry on 17 June 1932 to deal with disputes arising from foreign trade between Soviet economic organisations and foreign firms,[363] alongside the "Maritime Arbitration Commission" established in 1930 at the All-Union Chamber of Commerce, which became another Russian long-standing and authoritative arbitral institution. The "Arbitration Commission" evolved into the present-day "Arbitration Court" under the 2002 Law on the *Arbitrazh* Courts of the Russian Federation, while the "Foreign Trade Arbitration Commission" became the "International Commercial Arbitration Court" (hereinafter ICAC) under the 1993 Law on the International Commercial Arbitration. As previously mentioned, the *Arbitrazh* courts is a quasi-judicial system that handles economic disputes, whereas the Foreign Trade Arbitration Commission was a properly permanent arbitral institution that administered arbitration proceedings on the basis of a valid arbitration agreement and dealt primarily with disputes arising from international trade.

From the beginning of the 1990s, a liberal model of arbitration dominated in Russia, requiring an increasing number of arbitration services. However, the government had to adopt stricter rules on the creation and proliferation of arbitral institutions because of an illicit practice of commercial organizations to create centres only to solve issues by illegal means (the so-called "pocket arbitration" centres),[364] which contributed to the creation of a negative portrait of arbitration in Russia. In an attempt to redeem itself from such a distorted image of arbitration and foster a model that could be comparable again to the top arbitration institutions worldwide, free from the use of dishonest tactics, the Russian Federation's Ministry of Justice implemented an arbitration reform based on conservative principles - which led to the present-day Arbitration Act passed in 2015 after a series of working groups

[363] FTAC Statute 1932 art 1. Such Statute required the arbitrators to be appointed exclusively from among the members of the FTAC Commission. Until recently, this was one of the most serious concerns about arbitration in Russia for foreign businessmen.
[364] Kotelnikov and others (n 358).

and heavily criticized bills- and assumed a severe governmental oversight over the establishment and operation of arbitral institutions. Enough to mention that when the arbitration reform began there were, according to various estimates, between 2,000 and 3,000 permanent arbitration centres in Russia.[365] By the end of the reform, which was basically completed in November 2017, there were only four arbitral institutions left in the whole country: the Institute of Modern Arbitration and the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs; the International Commercial Arbitration Court; and the Maritime Arbitration Commission. It should be pointed out that these latter two institutions being "the creatures of statute" did not have to apply for a permit to exercise the functions of a permanent arbitral institution as required by the new arbitral law.

The application process for a permit to perform the duties of a permanent arbitral institution, was simplified by a subsequent statutory modification to Art. 44 of the Arbitration Act 2015 at the end of 2018. With such a modification, the requirements for foreign arbitral institutions with a well-known international reputation were also somewhat relaxed and the first international arbitral institution to obtain official permission to operate in Russia was the Hong Kong International Arbitration Centre (HKIAC) on 5 April 2019.

Along with the evolution of the arbitral institution, arbitral legislation went through three stages of development: Stage 1 (1992-2002) – the operation of Provisional Regulations on the Court of Arbitration for the Resolution of Economic Disputes; Stage 2 (2002-2016) – the legal regulation under the Arbitration Act 2002; Stage 3 (from 2016 onwards) – since the coming into force of the Arbitration Act 2015,[366] which aims in particular at intensifying State supervision over arbitration in order to prevent distortions and abuses of the arbitral law.[367]

It must be pointed out here that arbitration and the related legislation in Russia is still formally twofold, with domestic arbitration being governed by the Domestic Commercial Arbitration (hereinafter DCA) Law of 2015 and international arbitration being covered by the International Commercial Arbitration (hereinafter ICA) Law of 1993 as emended in its 2015 version. The ICA will govern all international commercial arbitrations, if the place of arbitration is in the territory of the Russian Federation. However, provisions of articles 8, 9, 35 and 36 (which refer respectively to stay of court proceedings in favour of arbitration; court applications for interim protective measures in support of arbitral proceedings; recognition and enforcement of awards) apply also where the place of arbitration is abroad.

[365] ibid 10.
[366] Such progression patter is proposed by Kotelnikov and others (n 358).
[367] On the point, Dmitry Dozhdev, 'Judicial control over arbitration in Russia' in Larry a DiMatteo and others (eds) *Cambridge Handbook on Jjudicial Control of Arbitral Awards* (CUP 2020) 304–318.

Moreover, some aspects regarding the arbitral procedures are now governed by the Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation" (hereinafter Federal Law on Arbitration), which applies to both domestic and Russian seated arbitrations.[368]

The UNCITRAL Model Law on International Commercial Arbitration, either in its 1985 or 2006 version, served as an inspiration for both the DCA and ICA laws, thus limiting the significance of the distinction between the two pieces of legislation. In fact, taking the UNCITRAL Model Law as example, Russia has incorporated into its domestic legislation international standards, promoting, and facilitating international arbitration, albeit with some minor deviations, which reflect specific features of the Russian historical legal development and national legal culture.[369]

Furthermore, Russia was one of first countries to sign the New York Convention on the recognition and enforcement of foreign arbitral awards in 1960, albeit with some reservations. As a matter of fact, when ratifying the New York Convention, the USSR made a reciprocity reservation in the following terms: "The Union of Soviet Socialist Republics shall apply the provisions of this Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment"[370]. The said Convention was then ratified by instrument of Decree of the Presidium of the Supreme Soviet of 10 August 1960 on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[371]

2.3 Arbitrability

Arbitrability is never a simple issue to address, and Russia makes no exception. Rather, it may be even more complex because, as mentioned above, the Russian legal system not only distinguishes between domestic and international arbitration (notwithstanding the fact that the two regulations are similar, being both inspired to the UNCITRAL Model Law), but the judicial market is also contended by the *Arbitrazh* courts, which are commercial courts with exclusive jurisdiction on specific types of disputes. Therefore, among the subject matters that are considered arbitrable, one has to establish which types of disputes can be resolved

[368] Federal Law No 382-FZ 2015 'On Arbitration (Arbitral Proceedings) in the Russian Federation' amended in 2019.
[369] Aleksander Komarov, 'Russian Report' in Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countrie*s, (Springer 2022) 135-185.
[370] This is specified on the official page of the New York Convention dedicated to Russia <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=604&opac_view=-1> accessed 24 January 2024.
[371] See Decree of the Presidium of the Supreme Soviet 1960 on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

in international arbitration, presumably with the intercession of an international arbitral institution; which are deemed to be domestic, and therefore resolved through Russian arbitration institutions; and finally, which are claimed under the exclusive jurisdiction of the *Arbitrazh* Courts. Not without reason, one of the most important sources of law to be considered when discussing international arbitration in Russia is in fact the *Arbitrazh* Procedure Code, which will be often recalled in the course of the present analysis.

Unless otherwise provided by a federal law, all disputes are deemed arbitrable in Russia.[372] Art. 1 (3) of the ICA Law broadly refers to arbitrability in the following terms: "The parties may agree to refer to international commercial arbitration the disputes between the parties arising out of civil law relationships in the course of carrying out foreign trade and other types of international economic relations, if the place of business of at least one of the parties is abroad, or any place where a substantial part of the obligations out of the relationship of the parties is to be performed or the place with which the subject-matter of the dispute is most closely connected are located abroad, as well as disputes arisen in connection with making foreign investments in the territory of the Russian Federation or Russian investments abroad".[373] The law does not specify the level of foreign participation required in a Russian company with foreign investments in order for a dispute to be resolved through international arbitration. In practice, then, even a minor foreign investment in a Russian firm can meet this requirement.

The scope of the said provision certainly seems wide, however, other provisions set out specifically in the *Arbitrazh* Procedure Code and in the Civil Procedure Code fix some boundaries to such a far-reaching arbitrability standard.[374] As a matter of fact, the ICA does not apply where specific legal provisions of the Codes prevent the use of arbitration or impose an alternative and compulsory dispute resolution method. Art. 33 of the *Arbitrazh* Procedure Code, for instance, indicates that bankruptcy, public acts, and collective actions, as well as certain types of corporate and IP disputes are subject to the exclusive jurisdiction of commercial courts.[375] In addition, according to Art. 22.1(2) of the Civil Procedure Code, disputes arising out of family relations, labour relations, inheritance relations, environmental damage, relations governed by public procurement schemes, privatisation of state and municipal property, compensation for damage caused to life and health cannot be submitted

[372] ICA Law 1993 art. 1(4); DCA Law 2015 art 1(3).
[373] ICA Law 1993 art. 1 (3).
[374] See articles 27 (where the jurisdiction of *arbitrazh* courts is determined) and 33 (which allows certain disputes under the jurisdiction of *arbitrazh* courts to be submitted to arbitration procedure) of the *Arbitrazh* Procedure Code. On the arbitrability of disputes in Russia Vladimir Orlov and Vladimir Yarkov, 'New Russian Arbitration Law' (2017) 3 Athens Journal of Law 257.
[375] *Arbitrazh* Procedure Code 2002 art 33.

to arbitration.[376] While certain types of cases are expressly reserved to state courts in the applicable laws, some other disputes resulted to be non-arbitrable out of the Courts' practice as concession disputes or disputes involving a public element.[377] Both the Supreme Court in its Review of Court Practice and the legislator confirmed in December 2018 that the public procurement prohibition would be interpreted narrowly and would not cover procurement contracts with Russian state-controlled companies. However, in accordance with DCA Law (as amended in December 2018) such disputes having their seat in Russia shall be administered by a "permanent arbitral institution",[378] under special arbitration rules.

An exhaustive and clear list of arbitrable matters is extremely important as it enhances predictability of the Courts' practice. For this reason, the latest reform of Russian arbitration law aimed at providing a coherent and definite record of the disputes that cannot be referred to arbitration, reinstating what just described above.

For what concerns consumers contract, which in the Brazilian experience were found to be a hot topic in relation to which the legislation and practice is still uncertain, Russian law does not seem to provide any special protection of consumers. In the absence of a statute requiring mandatory protection by state courts, there is no reason to rule out the arbitrability of disputes arising from consumer contracts as a matter of principle.

2.4 The arbitration agreement

As the UNCITRAL Model Law,[379] Russian law understands an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".[380] By entering into an arbitration agreement, the parties commit to refer some specific matters to the arbitrators' decision, thus granting jurisdictional powers to private individuals (the arbitrators) and waving, at the same time, their own right to have the dispute resolved by a state court.

[376] Civil Procedure Code 2002 art 22 1(2); Evgeny Raschevsk and others, 'Commercial Arbitration: Russia' (*Global Arbitration Review*, 19 May 2023) <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/russia> accessed 24 January 2024.
[377] Kokorin (n_356).
[378] ibid.
[379] UNCITRAL Model Law 1985 art 7.
[380] ICA Law 1993 7(1) reads as follows: 'Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship or a part thereof, regardless of whether or not the legal relationship is of a contractual nature. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement'.

The agreement to arbitrate may take both the form of a clause included in the main contract, or that of a separate agreement submitted by the parties once the dispute has arisen[381]. However, the ICA Law[382] and the New Law on Arbitration of 2015[383] stipulate that certain issues can only be resolved by "express agreement" of the parties. This means that in order for such an issue to be validly agreed upon, the parties' agreement must be expressly stated in the text of the arbitration clause, rather than being addressed in the arbitration rules to which the arbitration clause refers to. Issues that can only be addressed by parties' "express agreement" encompass excluding the possibility of referring to the state courts for assistance with the tribunal's formation and challenging the tribunal's ruling on jurisdiction in the state courts; conducting arbitration without an oral hearing; and excluding the possibility of setting aside the final award.[384] In other words, the parties can freely agree on the said matters, but they manifestly have to do so in the arbitration agreement.

Russian law recognises the separability of the arbitration clause that forms part of a contract, which consequently shall be treated as an agreement independent from the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement.[385] Wherefore, the fact that the main contract may be invalid does not invalidate the arbitration clause as a matter of law.[386]

The separability principle also entails that the validity of the arbitration agreement may be assessed on a different law from the one applicable to the main contract,[387] and that the arbitration agreement must conform with the general validity requirements of contracts, hence, there must be no flaw in either party's will or authority to sign the agreement.[388]

The ICA Law provides for some mandatory rules applicable on the validity of the arbitration agreement. First of all, the arbitration agreement must be in writing.[389] Such formal requirement will be satisfied if the parties either sign the document containing the

[381] ICA Law 1993 art 7(1).
[382] ICA Law 1993 art 7(13).
[383] Federal Law No. 382-FZ 'On Arbitration in the Russian Federation' 2015 arts 2 (13) and 7 (12).
[384] Sergev Yuryev, 'International Arbitration Law and Rules in Russia' (*CMS Law*, 20 august 2020) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/russia> accessed 24 January 2024.
[385] ICA Law 1993 art 16(1) reads as follows: "An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Issuing an arbitral award on the invalidity of the contract shall not of itself entail the invalidity of the arbitration agreement". The same provision applies also to domestic arbitration, DCA Law 2015 art 16 (1).
[386] ibid. This is a necessary condition for the arbitral tribunal's authority to rule on its own jurisdiction, as it will be discussed in the next paragraph.
[387] In case the parties do not agree on a specific law, the validity of the arbitration agreement shall be determined by the law of the forum. This entails that Russian conflict of law rules will govern the issue of the applicable law. Maggs and others (n 331).
[388] The validity (invalidity) of the contract is regulated by the rules on validity of transactions contained in Russian Civil Code 1994 arts 166-181.
[389] I CA Law 1993 art 7(3).

agreement, or an exchange of letters, telexes, or other means of telecommunication provides a record of the parties' agreement for further use.[390] In case the agreement is contained in an email exchange between the parties, the information contained therein must be available for further use and the arbitration agreement must be concluded in accordance with the requirements of law for a contract entered into by means of exchange of documents via electronic form.[391] It is evident that the information contained therein must be verifiable and accessible for subsequent reference.[392] The arbitration agreement can also be included in the rules of a trading platform or clearing rules.[393] In case of corporate arbitration, in must be included in the company's charter and signed by the shareholders.[394]

The existence of an agreement to arbitrate may nevertheless be conclusively proven even in the absence of a written agreement, if the parties submit their statements of claim and response to a dispute without further contesting the arbitral tribunal's jurisdiction.[395] On the other side purely oral agreements to arbitrate are not allowed.

Russian arbitral law does not provide for a comprehensive list of elements that should be included in the arbitration agreement. However, as a general rule, an arbitration agreement should be carefully drafted and be as exhaustive as possible. An unclear wording renders the arbitration agreement incapable of being performed and, consequently, unenforceable.[396] It is always advisable to check an arbitration clause to ensure that its provisions are not self-contradictory, that it correctly spells the name of an arbitration institution (if any) and is not one-sided. Moreover, parties should point out the arbitration seat in their arbitration agreement, to avoid Russian courts to confuse the place of the arbitration proceedings with the real seat of arbitration (arbitration *situs*), keeping in mind that some kinds of disputes (i.e., the majority of Russian corporate disputes) are obligatorily grounded in Russian *situs*. That is because the concept of an arbitration seat (*mesto*

[390] ibid.
[391] ICA Law 1993 art 7(4). It is worth mentioning that in the Russian Federation the use of electronic means as regards international commercial contracts is regulated by the UN Convention on the Use of Electronic Communications in International Contracts (New York, 2005) which was ratified by the Russian Federation in 2014.
[392] Sergey Kurochkin, 'New Arbitral Legislation in Russia' [2017] Russian Law: Theory and Practice 141 <https://ssrn.com/abstract=3214534> accessed 24 January 2024.
[393] ICA Law 1993 art 7 (6).
[394] ICA Law 1993 art 7 (7). An appropriate reference in the Rules of Organized Biddings or Clearing Rules duly registered with the Russian Central Bank also constitute a valid arbitration agreement. Kurochkin (n 392).
[395] ICA Law 1993 art 7 (5). Moreover,
[396] Vladimir Khvalei and others, 'Arbitration Procedures and Practice in the Russian Federation: Overview Practical' (*Practical Law*, 1 December 2021) <https://uk.practicallaw.thomsonreuters.com/Document/Ib9aa1ab61c9a11e38578f7ccc38dcbee/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true#co_anchor_a753421> accessed 24 January 2024.

arbitrazha) has received insufficient attention in Russian legislation or court jurisprudence to develop a reliable approach to the matter.

Furthermore, it should be stressed that unilateral (optional) arbitration clauses, which allow only one of the parties to choose the venue for dispute resolution, are considered void by Russian courts.[397] When this is the case, the interested party would be able to apply to a competent state court bypassing the terms of the arbitration agreement.

Finally, to be valid, the disputes that are referred to arbitration in the parties' agreement must be arbitrable. It is always a good choice for parties to be guided by a model clause suggested by the arbitral institution or entirely transpose it in their contract when opting for arbitration.

Numerous court cases that examine the existence and integrity of arbitration agreements have been reported, as well as arbitral awards, which are frequently challenged in State courts on alleged flaws in the arbitration agreement. Inaccurate or incomplete naming of an arbitration institution and a lack of references to the precise set of procedural rules of an institution are two of the most common and sensitive arguments presented to object the validity of the arbitration agreement or the arbitral award. What is more, Russian courts convene that a specific arbitral institution, not just its rules, should be referred to in the arbitration agreement for this to be found operative and enforceable.[398]

The 2015 arbitration reform appears to be grounded in a solid pro-arbitration approach in interpreting and applying the arbitration agreements, as it explicitly states that "when interpreting an arbitration agreement, any doubt must be construed in favour of its validity and enforceability." Such a strong presumption of validity and enforceability of an arbitration clause should make the ground firmer in Russia for the domestic and international business community to trust and effectively use Russia as an ADR forum.[399]

2.5 Jurisdiction and *kompetenz-kompetenz* doctrine

Art. 16 (1) of the ICA Law acknowledges the right of the arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, thus endorsing the (positive) *kompetenz-kompetenz* doctrine.[400]

[397] *Novolipetsky Metallurgicheskiy Kombinat v Maksimov*, VAS Ruling No. 15384/11 (28 June 2011); *ZAO Russian Telephone Company v Sony Ericsson Mobile Communications Rus LLC*, VAS Ruling No. 1831/12 (19 June 2012); Kokorin (n 356).

[398] 'Arbitration in Russia' (*Russian Arbitration Association)* <https://arbitration.ru/en/dispute-resolution/arbitration-in-russia.php> accessed 24 January 2024.

[399] Kokorin (n 356).

[400] ICA Law 1993 art 16 (1) reads as follows: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement […]'.

Unlike the Brazilian arbitration law, which expressively gives the arbitrators powers to rule upon the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause, Russian law forces us to deduce it from the remaining part of art. 16, which provides for the separability of the arbitration agreement from the main contract, thus entailing that its invalidity shall not affect the arbitration agreement and consequently the tribunal's jurisdiction, by stating that "Issuing an arbitral award on the invalidity of the contract shall not of itself entail the invalidity of the arbitration agreement". Such a predisposition inevitably signifies that the arbitral tribunal have assessed its good jurisdiction and ruled upon the contract it is related to when the objection to the arbitration agreement is raised.

On this latter aspect, the ICA Law provides that any objections to the arbitral tribunal's jurisdiction must be raised no later than the submission of the statement of defence on the merits, regardless of whether the objecting party has appointed or participated in the appointment of an arbitrator.[401] In fact, it appears that Russian case law, at least to a certain degree, follows a logic that resembles the English doctrine of estoppel, according to which, if a party participates in the arbitration proceedings but objects them only at the enforcement stage, there is a strong case to be made that these actions constitute an abuse of rights. This was confirmed in the *Izhvodokanal* case, when the court determined that, in consideration of the behaviour adopted the party during the proceedings and their choice to object arbitration only at the enforcement stage, was an abuse of rights.[402]

In line with the international standards, the *kompetenz-kompetenz* rule indicated by art. 16 is supported by articles 148(1)(5) of the *Arbitrazh* Procedure Code and 222 of the Civil Procedure Code, which dictate the termination of proceedings if a party turns to a state court in breach of an agreement to arbitrate, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[403] In such a scenario, Russian Courts will likely engage in a *prima facie* review of the case, albeit with a special attention to formalities. They will particularly look at the correct designation of the arbitral institution inserted in the arbitration agreement, before compelling the parties to arbitration. It is not rare for Russian courts to deny the enforcement of an award on the

[401] ICA Law 1993 art 15 (2).
[402] Kokorin (n 356); See also Eugenia Kurzynsky-Singer, 'Estoppel in Russian law' (2018) 3 German-Russian Law Review (DRRZ) 128 <https://ssrn.com/abstract=3184793> accessed 24 January 2024.
[403] As provided under the New York Convention 1958 (art II (3)) and the UNCITRAL Model law 1985 (art. 8 (1)).

ground that the institution was not "precisely" named.[404] The parties can also seek damages caused by a breach of an arbitration agreement based on the general rules of contract law. However, under Russian law (if applicable), the standard of proof for damages and their quantum is high, which could discourage the parties from seeking for any compensation for damages.

The Russian legal system went through a period of instability in the last few years, during which state courts did and still do their best to control arbitral tribunals in the way they believe is the most appropriate to implement the rule of law.[405] Sometimes this results in an excess in the attention devoted to formalities, some other times the approach used is more relaxed and permissible as for the alternative arbitration clauses that, in other contexts, could have been understood to be too generic and too unreliable to be enforced.

2.6 Arbitrators and arbitral institutions

In principle, according to the ICA Law, anyone can act as an arbitrator.[406] The parties to an arbitration may, on their own will, set up some qualifying requirements for choosing an arbitrator, whereas the law establishes minimum mandatory requirements for domestic arbitration in terms of personality and qualification.[407] Some public officials specified by law as judges, military men, employees of law enforcement organs, customs officials, and notaries, for example, are precluded from acting as an arbitrator due to their public status. Also, the rules of a permanent arbitral institution will likely include the qualifications and other requirements for arbitrators to operate within the said institution and to be included in its list of arbitrators.[408]

There is no requirement for an individual to be a Russian national or to be licensed to practice in Russia to serve as an arbitrator in international arbitration proceedings seated

[404] Natalya Doronina and Natalia Semilyutina, 'Interpretation and Application of the New York Convention in the Russian Federation' in George A Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards, The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 803; Patricia Nacimiento and Alexey Barnashov, 'Recognition and Enforcement of arbitral awards in Russia' (2010) 27 Journal of International Arbitration 295, 300 <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/27.3/JOIA2010016> accessed 24 January 2024.

[405] Doronina and Semilyutina (n 404).

[406] ICA Law 1993 art 11(1) precisely provides that 'No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. The parties are entitled to agree that arbitrators are to meet additional requirements, including requirements to their qualification, or that a dispute be resolved by a particular arbitrator or particular arbitrators'.

[407] The qualifying requirements for arbitrators in domestic settings are fixed in Art. 10 of the DCA Law.

[408] Federal Law on Arbitration 2015 in Russia art. 45(4) is also applicable to Russia-seated international commercial arbitrations. The ICAC Regulations on Organizational Principles of Activity 2017 also contain general provisions on arbitrators including the requirements as to their impartiality and independence and their specialist knowledge in settling disputes.

in Russia. What is more, under the ICA Law, unless the parties have agreed otherwise, nationality cannot be used to disqualify a potential arbitrator.[409] As a result, foreign nationals can be freely appointed to serve in Russian-seated international arbitral proceedings.

Russian law and legislation particularly care about providing the highest impartiality and independence standards for both arbitral institutions (in terms of avoiding conflict of interests within the institution's staff) and the arbitrators. In point of fact, art. 12 (1) of the ICA Law provides that "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Such a provision remains valid throughout the proceedings. Therefore, as soon as new circumstances arise that may hinder the impartiality requirement, arbitrators are obliged to duly report it to the arbitral tribunal. Whatever event that brings about a connection between the party and an arbitrator, even the participation in conferences organized by either party (or its counsel) must be disclosed.[410]

Following the approach of the Model Law, parties shall have to prove their justifiable doubts as to the arbitrator's lack of impartiality or independence. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware of after the appointment has been made[411] that may also refer to his lack of qualifications required by the agreement of the parties.[412] However, a party is precluded from challenging its own party-appointed arbitrator if the circumstances giving rise to the challenge were known to the party at the time of his appointment.[413] In the event that an arbitrator's mandate is terminated, the ICA Law requires that the appointment of a substitute arbitrator is made in accordance with the same procedure used to appoint the one that is being replaced.[414] It is common for parties and arbitrators to refer to the IBA

[409] Ibidem.
[410] *OAO NK Rosneft v Yukos Capital S.a.r.l* Supreme Arbitrazh Court Ruling No. A40-4577/07-8-46 (2007) Rosneft sought to annul four awards issued by the International Court of Commercial Arbitration of the Moscow Chamber of Commerce. One of the grounds for setting aside the Awards was the involvement of Yukos Capital's nominated arbitrator, who had spoken at a conference organized and sponsored by the law firm representing Yukos Capital. The Supreme Arbitrazh Court, in deciding to annul the awards, emphasized that arbitrators should disclose their connections to legal counsel at the time of their appointment. In *Rietumu Banka* Russia courts denied recognition and enforcement of an award rendered in arbitration proceedings administered by the Court of Arbitration of the Association of Latvian Commercial Banks because the claimant was a member of the said Association. Such a link was sufficient for Russian courts to cast doubts upon the impartiality of the appointed arbitrator and to refuse to recognize and enforce the award. Supreme *Arbitrazh* Court, Ruling No. 305-C16-3881 (17 May 2016).
[411] ICA Law 1993 art 11(2).
[412] ICA Law 1993 art 12(2).
[413] ibid. Under both the ICA and the DCA Laws (article 13), procedure for challenge replicates the one provided by the Model Law.
[414] ICA Law 1993 art 15.

Guidelines on conflict of interest to ensure the highest standard of neutrality and autonomy. Moreover, in 2010 the ICAC issued its own Rules on Impartiality and Independence, which closely follow the IBA Guidelines.

The ICA Law provides that the parties to an arbitration agreement are free to determine the number of arbitrators, which should be uneven in any case. If they cannot agree of a number, the law provides for the arbitrators to be three.[415] The parties may appoint the arbitral tribunal directly or through appointing authorities to whom they have delegated their appropriate rights by agreement. In the absence of agreement between the parties on a procedure for appointing an arbitrator in a three-judge arbitration court, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall name the third one. In case the parties fail to designate the arbitrators, or in case the two arbitrators already appointed are incapable of choosing the third arbitrator, it shall be a state court or the arbitral institution who shall act as appointing authority, which of the two will depend on the provisions contained in the applicable procedural rules chosen by the parties.

Courts are required to appoint an impartial and independent tribunal and to follow the wishes of the parties in terms of an arbitrator's qualifications when appointing the arbitrators. In practice, however, the appointment procedure may face serious challenges because there are no guidelines for issues as conflict checks, negotiating and approving arbitrators' fees, and dealing with other administrative matters that are usually handled by arbitral institutions.[416]

An arbitration agreement may deprive state courts of both the power to appoint arbitrators and consider applications to challenge them. However, this is only possible in arbitration administered by an approved arbitral institution.[417]

The transparency of arbitration institutions was a hotly debated topic in Russia for a very long time. To untangle the situation, the legislator placed a certain emphasis on the issues surrounding the creation and operation of arbitration institutions. Indeed, as mentioned in a previous paragraph, Russian law went through a period of strict revision of the arbitral institutions operating in the country, and only a few were granted the authorization to operate. As a result of the 2015 Arbitration Reform, a new system of licensing for "permanent arbitration institution" appeared.[418]

[415] ICA Law 1993 art 10.
[416] On this point Kokorin (n 356).
[417] ibid.
[418] 'The Rules for Granting Permission to Act as a Permanent Arbitration Institution' and the 'Regulations for Deposition of the Rules of a Permanent Arbitration Institution' ratified by the Russian Government in June 2016. It should be noted that a permanent arbitral institution is an autonomous body created to regularly administer arbitration and is independent from the parent organization.

Since the reform, an arbitration institution could only act on the basis of a special permission which the parent organization must receive from the Russian Government. Such a permission may be granted upon the recommendation of a special body – the Council for the Improvement of Arbitration[419]- based on the "widely accepted international reputation" criterion. Awards issued in arbitration proceedings administered by Russian unlicensed arbitral institutions are considered to have been issued in violation of the arbitration procedure stipulated in the Federal Law on Arbitration in Russia (Art. 52(15), Federal Law on Arbitration in Russia), which qualifies as a ground for the setting aside the arbitral award (art 233(4), Civil Procedure Code).

So far, four foreign arbitral institutions have obtained a permission to operate in Russia namely, the HKIAC, the Vienna International Arbitral Centre (VIAC), ICC, and the Singapore International Arbitration Centre (SIAC), which are all internationally renewed arbitral centres.

2.7 The arbitral procedure

With the entry into force of the Federal Law on Arbitration in 2015 the regulatory framework for international arbitral proceedings has changed.

Arbitral proceedings in respect of a particular dispute are deemed to commence on the date on which the respondent receives the claimant's request for arbitration. Such a rule may be altered according to the parties' will or because the rules of an institutional arbitration provide otherwise. To make an example, the ICAC still follows a litigation model where to commence proceedings, it is necessary to submit a statement of claim on the claimant's part.[420]

The parties enjoy considerable autonomy under Russian law in deciding and shaping the rules applicable to the proceedings. In this sense they may adopt a set of procedural rules made available by an arbitral institution, and amend them when this is possible, or tailor made the proceedings' rules as they see fit. By using the so called "direct agreement" or "express agreement", under Russian law, the parties may make crucial determinations, as

[419] Public officials, eminent academics, and members of the business community come together to form the Council for the Improvement of Arbitration, which in turn has been formed by the Ministry of Justice of the Russian Federation.

[420] ICAC Rules 2017 art. 8(1). The actual date of commencement in ICAC arbitral proceedings is either the date on which the statement of claim is delivered to ICAC or, if sent by post, the date on which the statement of claim is recorded as having been posted. ICAC Rules 2017 art 8(2).

refuse to conduct oral hearings or eliminate the court's powers to resolve some issues of assistance as the appointment of arbitrators or challenge procedures.[421]

For what concerns evidence, the parties to arbitration may agree on the use of the IBA Rules on the Taking of Evidence in International Commercial Arbitration or other forms of "soft laws" as the Prague Rules. Many Russian arbitration practitioners even took an active role in drafting such Rules, while one of the leading Russian institutions, the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs, signed the Prague Rules in December 2018. Having said that, in large arbitrations, the IBA Rules still remain the main source of soft law on the taking of evidence.

If the parties fail to agree on procedural rules, the arbitral tribunal may, subject to the mandatory provisions of the ICA Law, conduct the proceedings in a manner it considers appropriate, including making decisions on "the determination of the admissibility, relevance, materiality and weight of any evidence".[422] Without fail, arbitration shall be conducted on the basis of "essential principles of independence and impartiality of arbitrators, dispositive regulation, adversarial proceedings and equal treatment of the parties" as fixed by art. 18 of the Federal Law on Arbitration.[423]

The production of documents, witness testimonies, and expert statements are generally used in international commercial arbitration and represent the most widespread types of evidence in Russian arbitrations. The ICA Law includes provisions specifically dealing with experts appointed by the arbitral tribunal. Unless otherwise agreed by the parties, an arbitral tribunal has the authority to appoint one or more experts to report to it on specific issues and require a party to produce (or provide access to) documents, goods, or other property for inspection.[424] The ICA Law also states that, unless otherwise agreed by the parties, a tribunal-appointed expert must participate in a hearing after delivering his report, at the request of a party (or if the arbitral tribunal deems it necessary), where the parties can ask questions to the said expert or present their own expert witnesses to give evidence on the points at issue.[425]

Even if there is no express agreement, the arbitrator can order a party to the arbitration to disclose documents. Nonetheless, the documents that the parties must make available to the other party and/or the arbitrator are not covered by any specific requirement. If any party fails to submit documentary evidence, the tribunal can continue the proceedings and make

[421] ICA Law 1993 arts 7(13), 11 (5) and 16 (3).
[422] ICA Law 1993 art 19; Federal Law on Arbitration 2015 art. 19 (2). ICAC Rules 2017 art. 26 (2).
[423] Federal Law on Arbitration 2015 art 18.
[424] ICA Law 1993 art. 26 (1).
[425] ICA Law 1993 art 26 (2).

an award based on the available evidence.[426] Furthermore, there are no provisions enabling the arbitrator to compel a non-party to the arbitration to appear at the hearing to give evidence, or to produce evidence to be used in the arbitration. Besides, by definition, the arbitrators are private persons who lack any coercive, self-enforcement powers. For this reason, arbitration tribunals are not in the position to employ important tools needed for effective dispute resolution, calling for the support of state courts. The scope and process for state court assistance in matters of taking evidence are outlined in detail in art. 74.1 of the Russian Commercial Procedure Code and the Civil Procedure Code, which aims to give the institution of arbitration quick and efficient ways to gather evidence in Russia. Prior to the arbitration reforms of 2015, court assistance was only available for enforcement and interim measures.

A state (*arbitrazh*) court where the sought-after evidence is located may be asked for help by an arbitral tribunal administering a Russian-based arbitration or by the party to the arbitration duly authorized by the tribunal.[427] Such a request must specify the circumstances that need to be clarified and the proof that needs to be gathered. The evidence must fall into one of the following three categories to be granted: (1) Written records, (2) physical proof, (3) additional records and materials (e.g., photos, videos).[428] The law excludes judicial assistance from witness testimony, depositions, and on-site inspections (such as those of a construction site). Such a restriction may result from the Russian civil law tradition, which still emphasizes written submissions and an inquisitorial procedure, and which may represent a serious limit for parties willing to adopt a "common law" approach to the taking of evidence. Not forbidden in principle, but puzzling to put in practice.

The *arbitrazh* court may refuse to render assistance (within 30 days form the request) if it finds that granting the motion would violate third parties' rights or compromise commercial, banking, or other confidential information that protects those rights[429]. The court's dismissal may also occur if the court ascertains that a motion for assistance in obtaining evidence is being made with respect to a non-arbitrable dispute. Such court's denial is not appealable.

The Regulation on interim and conservatory measures in Russian arbitration has also been updated, however the revised UNCITRAL Model Law provisions related to interim measures have not been implemented. Therefore, currently, the law provides that the arbitral

[426], ICA Law art. 25; Federal Law on Arbitration 2015 in Russia art 28.
[427] ICA Law 1993 art 27 states that 'an arbitral tribunal in arbitration administered by an approved arbitral institution or a party to such arbitration with the consent of the tribunal may request from a competent court of the Russian Federation assistance in taking evidence'.
[428] Kokorin (n 356).
[429] Commercial Procedure Code 2010 art 47 (1).

tribunal may, at the request of a party, grant the interim measures it deems necessary.[430] There is no specific list of interim measures that are available to the tribunal. However, one should note that, while Russian arbitration law does not prohibit such interim measures as security for costs and anti-suit injunctions, the practice is very scarce. Consequently, it is still uncertain whether courts may be willing to issue such measures.[431]

The tribunal's interim measures do not bind third parties or become automatically enforceable. This is why it may be more efficient to seek provisional measures instead. Furthermore, as previously stated, because the relevant provisions of the 2006 UNCITRAL Model Law have not been implemented in Russia, the court would not recognize or enforce a decision of a foreign-seated arbitral tribunal on provisional measures.[432]

The Federal Law on Arbitration in Russia has brough with it another interesting novelty in Russian arbitration landscape, providing for the application of the mediation procedure to a dispute submitted to arbitration,[433] thus allowing for a sort of mixed mode of dispute resolution, where mediation and arbitration are combined but distinguished. In fact, although mediation is permitted in Russia, it shall be conducted by entities other than the arbitration commission. Either party may file a motion with the arbitral tribunal to use the mediation procedure. Once the motion has been filed, both parties must submit to the arbitral tribunal a written agreement on the mediation procedure that satisfies the requirements of Federal Law No. 193-FZ dated July 27, 2010 "On the Alternative Procedure for the Settlement of Disputes Involving a Mediator (Mediation)". During mediation, the arbitral proceedings are stayed and shall adjourn when the procedure has been concluded, either in case it was successful or not.[434] Generally, such suspension time will not be considered in the time of the proceedings. If the parties settle the dispute referred to arbitration successfully by mediation, their final agreement may, at the request of all the parties to arbitration, be confirmed as an arbitral award on agreed terms. As such, the final award will have to comply with the validity requirements provided in art. 33 of the Federal Law on Arbitration, which shall be discussed down below.

[430] ICA Law 1993 art 17 (1).
[431] Alexander Vaneev and others, 'Russia' (*Global Arbitration Review*, 3 December 2020) <https://globalarbitrationreview.com/review/the-european-arbitration-review/2021/article/russia#footnote-020> accessed 24 January 2024.
[432] ibid.
[433] According to the Federal Law on Arbitration 2015 art. 49 (1) 'Mediation procedure may be applied at any stage of arbitration'.
[434] ICAC Rules 2017 art 32 'When a mediation agreement is submitted to the arbitral tribunal, the arbitral tribunal shall render an order on the conduct of a mediation procedure and suspension of the proceedings. The suspension period shall not be included in the time of the proceedings.'

2.8 Confidentiality

The ICA Law does not contain an express confidentiality provision. On the other side, art. 28 of the Federal Law on Arbitration, which applies to domestic arbitration and to international commercial arbitrations seated in Russia,[435] provides for arbitration to be confidential, unless otherwise agreed by the parties or disposed of by the federal law.[436] The parties can agree on the confidentiality of the proceedings in the arbitration agreement, including by reference to the relevant arbitral institution's arbitration rules. Typically, arbitration agreements and applicable institutional rules stipulate that arbitration and awards shall not be public.[437]

Arbitrators and the employees of a permanent arbitral institution may not disclose the information that became known to them during the arbitration, without the consent of the parties.[438] On this matter, in ICAC proceedings, there is an obligation on the arbitrators, case reporter, experts and ICAC Secretariat to keep confidential any information that they become aware of by virtue of the arbitral proceedings.[439] Importantly, unless otherwise expressly agreed by the parties, this obligation of confidentiality extends to the parties in dispute.

2.9 Choice of Law

The parties to an international arbitration under Russian law enjoy considerable freedom in choosing the law or rules of law applicable to the merits of the dispute, which is one of the main advantages generally associated with the use of arbitration.

According to art. 18 of the ICA Law, "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of any state shall be construed as directly referring to the substantive law of that State and not to its conflict of laws rules".[440] The first thing to note from the abovementioned quotation is that in the same way as the UNCITRAL Model Law,[441] Russian law refers to the possibility of choosing "rules of law", generally interpreted as signifying that the contract can be subjected also to

[435] General Provisions of the Federal Law on Arbitration 2015 art 2 states that 'The provisions of Articles 7(7.1), 39 and 43, and Chapters 9 to 12 hereof shall apply to the administration of arbitration not only of domestic disputes, but also of international commercial arbitration with its seat in the Russian Federation'.
[436] Federal Law on Arbitration 2015 art 21 (1).
[437] Raschevsky and others (n 376).
[438] Federal Law on Arbitration 2015 art 21 (2).
[439] ICAC Rules 2017 art 45 (3).
[440] ICA Law 1993 art 18.
[441] UNCITRAL Model Law 1985 art 28 (1) 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute […]'.

a non-national choice-of-law. Therefore, the law chosen by the parties does not necessarily have to be part of a particular legal system or take the form of a national law. The parties may indeed choose to rely on trade usages, national rules of law, transnational law, *lex mercatoria* (the law merchant), general principles of law or other examples of soft law as the UNIDROIT Principles. However, non-national choice-of-law formulations are subject to inevitable and undesirable uncertainty that very often prevents the parties from choosing them and rather opting for more predictable and certain national laws.

Moreover, art. 18 of the ICA Law addresses an important and recurrent question in the determination of the substantive law in arbitration, that is whether the reference to a legal system (e.g., "the laws of State A") in a choice-of-law clause refers to the substantive rules of the chosen system, or to its conflict of laws rules. When this latter interpretation is adopted, a separate conflict analysis is required in order to identify the applicable law, (notwithstanding the choice-of-law agreement contained in the contract) which may also lead to unpredictable results, as the parties may not be able to foresee the law that shall apply to their dispute after the conflict of laws analysis. The use of the chosen law's conflict rules is generally referred to as *renvoi* and, given the earlier discussion, it is understandable how it may represent a serious problem for the parties to an international commercial arbitration. Just as the UNCITRAL Model Law,[442] to avoid any misunderstanding, Russian law addresses the issue upfront excluding the conflict of law rules of a State when the parties indicate a national law in the applicable law clause.

When the parties fail to choose the substantive law and there is no indication thereof in the arbitration agreement, "The arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".[443] This means that the arbitrators are not generally granted the faculty to choose "directly" the applicable law (which was a viable alternative in the Brazilian law just described above) but such a choice must result from a conflict of law analysis. This provision may however raise some doubts as there are no fixed criteria for the arbitrators to assess what system's conflict of law rules to apply. It must be a case-by-case approach, and the result will change according with the specific circumstances. In all cases, paragraph 3 of art. 28 of the ICA Law goes on by stating that the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

[442] UNCITRAL Model Law 1985 art 28 (1) '[…] Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules'.
[443] ICA Law 1993 art 28 (2).

The choice of the arbitral tribunal may fall on the application of the conflict of laws rules of the Russian Civil Code under which the relevant existing legislation is used to establish the governing law to be applied by international commercial arbitrators (i.e., Russian international treaties and the ICA Law). Under the Civil Code, should the parties fail to choose the governing law, the law of the country where a main executor under a contract is located shall be applied.[444] This creates uncertainty for the parties because their substantive rights and obligations may differ significantly depending on the applicable law. As a result, it is always preferable for the parties to include an express choice of law provision in their contract.

2.10 Language

The parties may agree on a single or multiple languages to be used in the proceedings.[445] By and large, the same remarks mentioned before on the variables to take into consideration (as the language of the arbitrators combined with the applicable law) when choosing the applicable language are relevant here. In the absence of an agreement between the parties, the arbitral tribunal shall determine the language or languages to be used. Unless otherwise specified, such agreement or determination shall apply to any written or oral submissions made by the parties, to any hearings, and to any awards, decisions, or other communications issued by the arbitral tribunal.[446]

For what concerns the production and translation of documentary evidence, according to the ICA Law, there is no mandatory rule that requires the arbitral tribunal to order the translation of documents into the language or languages of the arbitration. However, in the appropriate circumstances, the arbitral tribunal may order any evidence submitted by the parties to be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[447] The Russian Federation's Constitutional Court has ruled that documents in a language other than the language of the arbitration do not jeopardize any of a party's constitutional rights, provided the arbitral tribunal does not object to such documents.[448]

[444] Civil Code 1994 art 1211 par 3. In determining the applicable law, Russian law follows the doctrine of 'characteristic performance', which means the performance that is characteristic of a particular type of contract. Given the different types of contracts, such key element cannot be the same in each type.
[445] ICA Law 1993 art 22(1).
[446] ICA Law 1993 art 22(1).
[447] ICA Law 1993 art 22 (2).
[448] *Voshod*, Constitutional Court of the Russian Federation, Case No 1310-0-0 (19 October 2010).

Many arbitral institutions as the ICAC, make Russian the default language of proceedings, holding that, in line with the general principles, the parties are free to agree on a different language.[449] Furthermore, the ICAC Rules state that documents (other than written evidence) submitted by the parties in the arbitral proceedings must be in the language of the arbitration, the contract, or the parties' correspondence, whereas written evidence must be submitted in the original document's language.[450]

The ICAC Rules, like the ICA Law, allow ICAC (whether on its own initiative or at the request of a party) to request that documents submitted in a language other than the language of the arbitration be translated at the expense of the party submitting such documents.[451]

2.11 The seat of arbitration

Under Russia law, parties are free to choose the seat of arbitration according to their preferences. Such a decision should be clearly stated in the arbitration or submission agreement and certainly should be also contained in the final award. Failing such agreement, the seat of the arbitration shall be determined by the arbitral tribunal, taking into account the circumstances of the case and the convenience of the parties.[452] The arbitral institutions' Rules may provide for default provisions of the seat when the parties did not make an express choice. For instance, when this is the case, the ICAC Rules provide for the seat of the arbitration to be Moscow, although the parties or the arbitral tribunal may agree to hold hearings and other sessions in a place other than Moscow with the agreement of the ICAC Executive Secretary.[453]

As recalled before, the seat plays a crucial role in arbitration for many reasons. Russia may make a good seat for international arbitration, albeit with some drawbacks. To start with, Russian seated arbitrations can only be administered by duly licensed and authorized "permanent institutions", as a result of the 2015 Arbitration Reform. The scope of such institutions' rights and limitations can vary. Although the procedure for obtaining Russian government approvals does not appear to be onerous, it is unclear whether prominent foreign arbitration centres will be willing to go through it.

Judicial assistance to Russian-seated arbitrations has been enhanced with the Arbitration Reform allowing tribunals to request the Courts' support in the taking of

[449] ICAC Rules 2017 art 22 (1).
[450] ICAC Rules 2017 art 22 (2).
[451] ibid.
[452] ICA Law 1993 art 20 (1).
[453] See Art 21 (3) of the ICAC Rules 2017.

evidence, specifically in obtaining material, physical evidence, and documents. However, compared to other seats, the courts will not assist tribunals with obtaining other categories of evidence or witness statements, which may represent an obstacle to the parties willing to rely heavily on oral testimony.

On the other hand, Russian law has showed some interesting and highly valuable pro-arbitration features, as the possibility granted to the parties to make some crucial decisions on the conduct of the hearings, the award or the recourse to state courts, by means of "direct agreement", which could certainly be regarded as a great advantage, along with the parties' considerable scope in the shaping of the procedural rules,[454] the endorsement of (positive) *Kompetenz-Kompetenz* doctrine and the strong validity assumption fixed in the ICA Law regarding the arbitration agreement, which should secure a faster enforcement of the arbitration agreement. On the recognition and enforcement front, Russia is a member to the New York Convention (admitting with reservation), and to the Moscow Convention, which should allow for an easy and more expeditious recognition and enforcement procedures of the award rendered in one of the member states.

2.12 The award

Under Russian law arbitration terminates with the award, as it is usually the case.[455] Art. 32 (2) of the ICA Law lists some other grounds that may mark the end of the arbitration proceedings apart from the award, as in case the claimant withdraws his claim, the parties agree on the termination of the proceedings, or the arbitral tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible.[456]

As for the arbitration agreement, there are some requirements of form and substance that the award must comply with in order to be valid and enforceable. The ICA Law requires an award to be made in writing and signed by the arbitrator (s). If the arbitral tribunal has more than one arbitrator, the signatures of the majority of the arbitrators will suffice, provided that any missing signatures are explained.[457] As many modern arbitral legislations, Russian law requires the award to state the reasons upon which it was based -in order to avoid any arbitrary decisions-, to report whether the claim is allowed or denied, and to state

[454] It is interesting to note in this regard that the ICA Law 1993 dictates the rules but considers almost in all cases the possibility that the parties "may choose otherwise". This is of great importance for parties looking for a seat for their arbitration, as the mandatory rules they will be bound to comply are only few.
[455] ICA Law 1993 art. 32 (1).
[456] ICA Law 1993 art 32(2).
[457] As a general rule, any decision must be taken my majority of arbitrators, unless the parties agree otherwise. See Art. 29 of the ICA Law 1993. See also Art. 31 (1) of the ICA Law 1993.

the amount of the arbitration fees and costs, and their allocation among the parties.[458] Unreasoned awards shall not be enforceable in Russia. Moreover, the award must contain the date and the place of arbitration, which will have important consequences for the identification of the nationality of the award,[459] the national courts where the award can be annulled or set aside, and to start counting the time period for any request for corrections.

The ICA Law also provides for each party to receive the award in its original form signed by the arbitrators.[460] Once received, the parties will have thirty days to request the arbitral tribunal to correct any errors in computation, any clerical or typographical errors or any errors of similar nature in the award, unless otherwise provided by the applicable procedural rules.

Parties may also request the arbitral tribunal to give an interpretation of a specific point or part of the award. If granted, the interpretation must be ultimately contained in the final award.[461] The request for correction or interpretation of the award must be made with notice to the other party within 30 days of receipt of the full version of the arbitral award (unless other are the terms agreed by the parties to the arbitration).

The Federal Law on Arbitration enlists some additional requirements for the awards issued by "permanent arbitral institutions", as the composition of the arbitral tribunal and the procedure of its constitution; names and locations (residencies) of the parties to arbitration; the basis for the tribunal's jurisdiction; the claims, objections and motions of the parties; and factual background of the case, the evidence upon which the decision has been made, and the legal norms that guided the arbitration in the making of the final decision.[462]

Evidently the need to oversee and invigilate the activities carried out by foreign arbitral institutions reason the additional requirements discussed above, which are very meticulous, and cover everything about the arbitration, from the assessment of the good jurisdiction of the tribunal to the evaluation of evidence and the legal norms used to reach a final decision.

It should be stressed here that Russian law only recognises final awards. Recognition and enforcement of acts of international arbitral tribunals referred to as either "orders" "partial awards" or "interim awards" decided during or after the merit-based arbitral proceedings, cannot be qualified as final arbitral awards and thus will not be allowed in Russia. It is different when the parties have reached an agreement during the course of the

[458] ICA Law 1993 art 31 (2).
[459] ICA Law 1993 art 31 (3).
[460] ICA Law 1993 art 31 (4).
[461] ICA Law 1993 art 33 (1).
[462] Federal Law on Arbitration 2015 art 34 (2).

proceedings. In that case, the arbitrators may turn the settlement agreement into an "award on agreed terms", which is an award for all purposes, with the same status and effects as an award on the merits of the case. Consequently, it must comply with the aforementioned validity requirements.[463] International arbitrations seated in Russia are not limited in time for rendering awards. It usually takes up to six months to deliver an award from the date of the hearing or the date of the final submission.

As stated in the law itself, "The parties and the arbitral tribunal shall make all efforts to ensure that the arbitral award is legally enforceable".[464] As a general rule, permanent institutions as well as domestic ones should carefully look at the drafting of the award, to make sure that all requirements fixed by the law and by the parties are sufficiently satisfied, that the award addresses all claims and does not exceed its scope, that the wording is clear and costs well allocated.

2.13 Challenging an award

A party to an arbitration has the right to file a claim in the competent Russian Court to set aside the award. The grounds for setting aside arbitral awards are not to be found in the Arbitral Law nor in the Federal Law on Arbitration, but they are provided for in Art. 233 of the Commercial Procedure Code and Art. 421 of the Civil Procedure Code. The award can be set aside if the party making the application can prove any of the following:

- One of the parties to the arbitration agreement that formed the basis for the resolution of the dispute by the tribunal was under some incapacity.
- The arbitration agreement that formed the basis for the resolution of the dispute by the tribunal is not valid under the law to which the parties have subjected it, or (failing any indication of a choice of law) under the law of the Russian Federation.
- The award deals with a dispute not contemplated by or falling within the terms of the arbitration agreement, or it contains decisions on matters outside the scope of the arbitration agreement, provided that where such decisions on matters outside the scope of the arbitration agreement can be separated from the rest of the award, only the part of the award not falling within the scope of the arbitration agreement may be set aside.
- The composition of the arbitral tribunal or the arbitral procedure did not comply with the parties' agreement or federal law.

[463] Federal Law on Arbitration 2015 art 33 (2); ICA Law 1993 art 30.
[464] Federal Law on Arbitration 2015 art 38.

• The party against whom the award is being enforced was not given proper notice of the arbitrator's appointment, or of the time and place of the arbitration hearing or was otherwise and for a valid reason unable to present their case.

Moreover, a commercial court may set aside an award *ex officio* if it finds any of the following:

• The dispute resolved in arbitration is not arbitrable under federal law; or

• The award is contrary to Russian Federation public policy.

The exact same grounds are provided for by the New York Convention in art. V (1) and (2). If the part of the award that is contrary to Russian Federation public policy can be separated from the part that is not, then only the part that is contrary to Russian Federation public policy can be set aside. Such application must be submitted to the court of first instance within three months from the date of issuance of the award to the party and this application shall be considered by a judge sitting alone. If the court rules to set aside the award, the party is entitled to appeal against such a decision within a month to the court of cassation (second appeal) -the *Arbitrazh* court of the relevant court district. If the cassation court leaves in force the ruling to set aside the award, such resolution can be appealed to the Supreme Court of the Russian Federation as a court of second and final instance. However, the chances of success before the Supreme Court are statistically very low.

The parties may even exclude completely the possibility to set aside the award by making an express provision in the "direct agreement" between them.[465]

When considering casing involving setting aside procedures, Russian courts have no right to go through the substance of the dispute by reviewing the merits of the award or double-checking the factual background established by the arbitral tribunal.

One of the most frequent grounds for setting aside arbitral awards rendered in Russia is the award's offence of Russian public policy. It is however preferable not to delve into the subject now because the final paragraph will deal specifically with the interpretation and use of the public policy exception in the Russian context.

2.14 Recognition and enforcement of foreign arbitral awards

Recognition and enforcement of foreign arbitral awards in Russia is regulated by Chapter 31 of the Commercial Procedure Code and Chapter 45 of the Civil Procedure Code, depending on the parties involved (e.g., legal or natural persons) and the nature and subject matter of the dispute (whether it is of commercial or non-commercial nature). Under Russian law, as

[465] ICA Law 1993 art 34 (1).

commonly occurs, recognition and enforcement are two separated procedures, where recognition is the necessary step to obtain the enforcement. Recognition itself is not automatic and entails a special procedure (*exequatur*). Once a final arbitral award is rendered, a party has a three-year period to apply to a competent Russian court for *exequatur*.[466] The Arbitration Procedural Code of the Russian Federation (No. 95-FZ of July 24, 2002) as amended provides that the *Arbitrazh* courts of Russia have jurisdiction to recognize and enforce decisions of foreign courts and foreign arbitration awards, unless the dispute deals with non-economic matters. In that case, the enforcing role shall be played by courts of general jurisdiction.[467] Because Moscow hosts the majority of arbitrations in Russia, the *Arbitrazh* court of Moscow City (a first instance court) and the *Arbitrazh* court of Moscow Region (a court of cassation appeal) hear a greater number of arbitration-related cases. Both courts thus have an extensive experience in dealing with challenges to and enforcements of arbitral awards.

Fully in line with the provisions contained in art. IV of the New York Convention, to which Russia was one of the first states to adhere, the application of a party seeking for recognition and enforcement of a foreign award in Russia must be supported by the authenticated original award and the arbitration agreement or by certified copies thereof. If either of these documents is made in a foreign language, certified translations into Russian must also be provided.[468] The amended art. 243 of the Commercial Procedure Code gives a court one month (rather than three months) to consider an *exequatur* request. If a Russian court rules in favour of recognizing and enforcing an arbitral award, it issues a *writ of execution* (*ispolnitelniy list*). Within three years from the recognition and enforcement ruling, this writ must be filed at the debtor's place of residence or location or, if the place of residence or location is unknown, at the place where the debtor's assets are located, with the Russian Bailiffs Service, which essentially shall be in charge of finding the debtor's assets. Failure to meet the stated deadlines, namely three years for requesting exequatur and three years for filing the writ with the Russian Bailiffs, may seriously hinder (if not make it impossible) the enforcement of a valid arbitral award.[469]

In 2015 a special procedure for the recognition of foreign awards (without further enforcement) was introduced into Russian Law, providing for recognition of foreign arbitral

[466] Commercial Procedure Code 2010 art. 246; Code of Civil Procedure 2002 arts 411(9) and 416(1). The three-year period may appear to be a rather short time frame if compared to other standards, as the Dutch one, which from provides for a 20-year period. Dutch Civil Code 1838 art 3:324.
[467] Peter J Pettibone, 'The scope of the public policy exception to the recognition and enforcement of foreign arbitral awards in Russia' (2014) 25 The American Review of International Arbitration 105.
[468] ICA Law 1993 art 35 (2); New York Convention 1958 art IV (1).
[469] Kokorin (n_356).

awards without any courts proceedings when the award does not require to be later enforced, unless the interested party wants to object it. In that case the party shall have a month to do so from the date he learns about the award.[470]

A party willing to object the recognition and the enforcement of the arbitral award shall have to prove that at least one of the grounds listed in art. V of the New York Convention, which are essentially transposed into art. 36 of the ICA Law, applies. The said grounds trace back the ones to be used in a set aside action, which have already been recalled. Among the grounds for refusing recognition and enforcement of arbitral awards the lack of independence and impartiality of the arbitrators is certainly one of most common.[471] It has already been discussed how the stringent impartiality and independence requirements fixed by Russian law, especially after the 2015 Reform, have hindered the enforcement of foreign awards. This was the case of the *Rietumu Banka*, when the Supreme *Arbitrazh* Court refused to recognize and enforce an award rendered in arbitration proceedings administered by the Court of Arbitration of the Association of Latvian Commercial Banks. The claimant was in fact a member of the said Association, and this element was enough for Russian courts to question the impartiality of the appointed arbitrator and to refuse recognition and enforcement of the award.[472]

It is also common for Russian courts to be faced with what has been defined as "Russian torpedo", which refers to the strategy of contesting the underlying transaction in Russian state courts (often on corporate grounds, such as a lack of shareholder approval), while arguing the case in parallel arbitration proceedings. In the *Rosgazifikatsia* case for example, Supreme *Arbitrazh* Court refused to enforce an award of the Arbitration Institute of the Stockholm Chamber of Commerce because it relied on an agreement, which was later found invalid by a Russian state court. The enforcement court determined that enforcing the arbitral award would result in two contradictory judgments with equal legal force, which had to be avoided.[473]

In addition to being party to the New York Convention, Russia has also signed other important Conventions on the recognition of foreign arbitral awards as the European Convention of 1961, which limits the grounds for refusal of recognition and enforcement of international arbitral awards covered by it, and the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation of 1972. Art. IV of the latter Convention sets forth that the awards

[470] ICA Law 1993 art 35 (3) as revised in 2015.
[471] Dozhdev (n 367).
[472] Supreme Arbitrazh Court Ruling No. 305-C16-3881 (17 May 2016).
[473] Supreme Arbitrazh Court Ruling No. 305-C16-1939 (11 April 2016).

shall be recognised without any further procedure and shall be subject to enforcement in any country party to the Convention in the same manner as judgments passed by the state courts of the country of execution and that have come into legal force.[474]

Nowadays, Russian courts annually consider 50 to 70 applications to obtain recognition and enforcement of foreign arbitral awards under the New York Convention. Presumably, the rest of the awards are complied with voluntarily. When handling a situation of enforcement of a foreign arbitral award in Russia, one must contemplate an assistance of experienced local counsel at the very outset of the proceedings because this situation requires a diligent approach and knowledge of all formal and procedural requirements of the state courts.[475]

Based on statistical data, about 80% of applications for the recognition and enforcement of foreign awards are being granted in Russia.[476] This means that generally the attitude of the courts to international arbitration is favourable, but there is still room for improvement. In fact, one should rather look at the cases that have been rejected rather than those that have been recognized to truly see the drawback and to identify where the improvement should be made.

2.15 Public policy

The public policy ground is traditionally used in private international law when the recognition and enforcement of a foreign judgement or award may violate the general principles and basic values of the enforcing legal system. Considering that all legal systems tend to understand and apply the public policy defence in different manners, it is interesting to note how the public policy exception has been constructed and applied in the Russian experience.

As expected, there are no pieces of Russian legislation that define the terms “public policy” and “public order”, nor are specified therein any circumstances that would raise a public policy issue. As underlined by Pettibone, the scope of the public policy exception in Russia must be then derived from the Supreme Commercial Court instructions to lower commercial courts and reported decisions.[477] Notwithstanding the fact that, as a civil-law country, Russia does not follow the precedent, reported decisions, particularly of appellate courts, are useful in determining the scope of Russia’s public policy exception.

[474] Moscow Convention 1972 art IV
[475] Russian Arbitration Association (n 398)
[476] Kokorin (n 356).
[477] Pettibone (n 476).

However, because Russian commercial courts have been inconsistent in applying the public policy exception in cases brought to recognize and enforce foreign arbitral awards, the Supreme Commercial Court's Presidium has issued instructions to guide these courts on public policy matters. These instructions take the form of anonymous illustrated cases without citation, intended to provide lower courts with practical guidelines. As such, the instructions are not binding in principle, and should serve as recommendations for specific situations. The natural consequence of this is that future cases with different fact patterns may not be covered by the said instructions and call for a new interpretation and application of the public policy exception.

Until not long ago, the most comprehensive definition of "public policy" in Russia was contained in Clause 29 of Information Letter No. 96 of the Supreme *Arbitrazh* Court's Presidium dated 22 December 2005, which broadly defined public policy as basic Russian law principles involving "equality of the parties in civil relations, good faith behaviour of parties, and proportionality between the extent of civil liability and the consequences of a culpable breach"[478]. Such basic principles are intended to form the basis of the Russian state economy and politics. In this sense, lower commercial courts have broadly applied the public policy defence refusing to recognize and enforce arbitral awards that could have adversely affected state budget, antitrust regulations, and bankruptcy matters.

To make an example, in *Stena RoRo AB v OAO Baltiysky Zavod*, the Commercial Court of St. Petersburg and the Leningrad Region refused to recognize and enforce an award of an arbitral tribunal at the Stockholm Chamber of Commerce, which sentenced the respondent, Baltiysky Zavod, to pay liquidated damages to the Swedish company Stena RoRo for breach of contract. The court determined that Baltiysky Zavod was a strategic company, and that enforcement of the award against it could have resulted in its bankruptcy, which consequently would have been detrimental to the State's sovereignty and security. For this reason, the enforcement of the award would have been contrary to Russian public policy.[479]

The most recent pronouncement on the scope of the public policy exception in Russia is to be found in the Presidium of the Supreme Commercial Court's Information

[478] Supreme *Arbitrazh* Court's Presidium Information Letter No. 96, 2005 clause 29.

[479] *Stena RoRo AB v OAO Baltiysky Zavod*, Presidium of the Highest Arbitrazh Court A56-60007/2008 (13 September 2011) The decision was affirmed on appeal to the Federal Commercial Court for the North-Western District but was reversed by the Presidium of the Supreme Commercial Court. However, in dismissing the case, the Supreme Commercial Court did not address whether the bankruptcy of a Russian company as a result of enforcing a foreign arbitral award against it would constitute a violation of public policy. The intermediate appellate court (the Federal Commercial Court for the North-West District) dismissed this argument simply as "mistaken".

Letter No. 156, dated February 26, 2013, which in fact aimed at narrowing down the scope of the public policy exception through a discussion of twelve cases. From a quick survey, it appears that the 2013 Letter cited with apparent approval the court's reasoning that the public policy defence in the context of art. V(2)(b) of the New York Convention and articles 243 and 244 of the Civil Procedure Code has been applied where: the enforcement would violate fundamental legal principles which are of particular social and public importance and lay at the heart of the economic, political and legal order of the State; when the award entailed actions directly prohibited by Russian imperative norms (art. 1192 of the Russian Civil Code); and in cases such actions violated the sovereignty or security of the state, affected the interests of major social groups, and breached the constitutional rights and freedoms of private parties.

Notwithstanding the fact that such a definition still seems too vast, Case No. 4 of the 2013 Information Letter proves that the public policy exception is an independent ground for resisting enforcement in Russia, not a "catch-all" ground to broadly include anything that would violate the fundamental principles of Russian law. Case No. 4 involved an allegation that the failure to give proper notice of the arbitration proceedings violated Russian public policy. On that occasion, the court held that improper notice of the arbitration proceedings was itself a separate ground for non-recognition under art. V (1) of the New York Convention, and therefore should not be addressed as a public policy issue. In this sense the case stands for the proposition that the public policy ground should not be applied in any case, but only in particular circumstances that the same letter attempts to better define when it refers to the public policy. However, the claim of procedural irregularities, especially in case of lack of due process may be conflated with the public policy exception.

Chapter 3. China

3.1 The Chinese legal system

China is one of the oldest civilizations in the world.[480] In the last 200 years, the Chinese legal system has served as a potent tool for safeguarding social order, preserving national unity, and fostering cross-cultural understanding. As of today, the legal system serves the construction of a socialist nation under the rule of law with Chinese characteristics, keeping track with globalization and the changes of modern Chinese society.[481]

The Chinese legal system has been heavily influenced by the socialist thought coming from Russia and the civil law tradition, upon which the Soviet model itself was founded.[482] Chinese scholars long wished to follow the European tradition of codification and create a codex that regulated a comprehensive part of the law in a systematic way, without contradictions. It is worth mentioning that the first permanent system of codified laws could be already found in imperial China with the compilation of the *Tang Code* in 624 a. C., later followed by those of the *Song* or *Ming* dynasties. The imperial Codes, however, were mainly concerned with criminal law and administration, and not at all with civil law. Thus, mainland China truly turned into being a civil law jurisdiction since the beginning of the Republic.[483]

The People's Republic of China was founded in 1949 by the Chinese Communist Party (hereinafter CCP). The normative act that marked the moment of transition from the revolutionary era to the establishment of socialist legality was the issuance of the first Constitution, which was adopted on September 20, 1954. The institutional shape defined therein would be at least partly preserved in the subsequent Constitutions of 1975 and 1978 and fully taken up by the 1982 Constitution, which is currently in force. The Constitution incorporated the main principles of the Soviet system, the most important of which was the Communist Party's preeminent leadership role. Although the Charter provided for a separation between the sphere of the State and that of the Party, in fact, the political will of the Party overlapped with the laws of the State and was often confused with them. The CCP thus began to exercise a systematic control, only partially formalized, over the selection and activity of the civil service personnel that still forms the foundation of China's institutional

[480] Xiaobo Dong, Yafang Zhang, *On Contemporary Chinese Legal System* (Springer, Singapore 2023).
[481] Xiaobo Dong, Yafang Zhang, 'Chinese Legal System' in *Chinese Legal Translation and Language Planning in the New Era* (Springer, Singapore 2023).
[482] Infantino (n 124) 24-29.
[483] Jacques Henri Herbot, 'The Chinese New Civil Code and the Law of Contract' (2021) 7 China-EU Law Journal 39.

organization, requiring that the main managerial functions in the administration, courts, army, public enterprises, and so on, be entrusted to persons "agreeable" to the party[484]. Still today the CCP plays a central role in the operation of the Chinese government at all levels. That is because most of the government officials are also CCP members. As a result, even if the law specifies certain conditions, through its influence over government officials, the Party may greatly influence how the government implements or otherwise follows the law. Consequently, there are significant transparency issues regarding governmental decision-making[485].

Among the major changes introduced into the Chinese legal system with the first socialist Constitution were, of course, those related to the economic structure, specifically the collectivization of the means of production and the introduction of the Soviet-style centralized planning, which had profound and lasting effects on the Chinese socio-economic system. Many contract regulations were thus enacted, specifying the kinds of transactions that were allowed, the parties that could conduct business, and the procedures for enforcing contracts.[486] In 1958, after the schism from Moscow, Mao launched the first major campaign of ideological mobilization and radical collectivization of the economy that took the name of "Great Leap Forward", permanently discarding the formalistic Soviet conception of socialist legality. Over the past few decades, China's legal system has been rebuilt in a way that has generally abandoned ideological requirements and begun a massive effort to import laws from western legal systems and internationally accepted practices, particularly those that deal with economic management as a means of luring foreign investments.[487]

Modern China is a unitary and highly centralized State. All powers flow from the central government in Beijing. According to the 1982 Constitution, the legislative power lies exclusively with the National People's Congress (NPC), which practically works through its Standing Committee[488]. Essentially, the NPC sits atop China's political power structure. As supreme organ of the State, the NPC has the authority to issue binding laws across China, appoints the President of the nation, the Premier (the head of the State Council, China's cabinet), and the presidents of the Supreme People's Court and the Supreme People's Procuratorate (the national prosecutorial agency). The role of the Chinese judiciary is similar to that of Russian courts, as evidenced by the reference to the Supreme People's Court's Provisions on private international law. Ordinary civil courts, which are divided into four

[484] Renzo Cavalieri, 'Il Diritto Cinese: un'evoluzione Millenaria' (2015) 8 Sulla Via dei Catai 29.
[485] Liu Jingjing, 'Overview of the Chinese Legal System' (2011) 41 Environmental Law Reporter 10885 <https://www.elr.info/articles/elr-articles/overview-chinese-legal-system> accessed 24 January 2024.
[486] Infantino (n 124)
[487] Cavalieri (n 484).
[488] Chinese Constitution 1982 art. 58.

levels: county courts, intermediate courts, high courts, and, at the top, the Supreme People's Court (hereinafter SPC), hear disputes involving contracts; however, ordinarily, no more than two instances—one trial and one appeal—are permitted. There is no *stare decisis* doctrine, rather judges are required to strictly apply the law without any interpretative or creative intervention, because the power to make and interpret the law officially rests solely with the NPC and its Standing Committee.[489] The SPC has in fact a crucial role, not only because it performs the judicial function but because it supervises and guides lower courts through Interpretations, Provisions, Replies, and Decisions, which are legally binding texts.[490] Additionally, the SPC publishes collections of its own case law (the so-called "Gazette" cases), which are regarded as a significant secondary source of law, and a selection of "guiding cases" from the Court itself and other courts, which although not legally binding, are to be considered by courts while making decisions on related matters and may even be cited by them, but not as the foundation for their decisions. Legal scholarship is not regarded as one of the sources of law, just like in Russia. However, legal doctrine frequently serves as a guide for lawmakers when creating new legislation and frequently serves as the foundation for the arguments made by judges.

Due to the recent economic reform, the economic administration has become progressively more decentralized, causing Beijing's inability to effectively monitor the use of local government authority in many instances. For this reason, local governments now enjoy a significant amount of *de facto* autonomy in a wide range of activities.[491]

Finally, the Chinese Constitution allows the two special administrative regions of Hong Kong and Macao to have a different legal system from that of mainland China and consequently, to issue special rules. This comes from the colonial past of the two regions, which are now in fact respectively influenced by English and Portuguese law.[492] For this reason, when dealing with China's legislation, the reference will be towards mainland China, leaving aside the two special administrative regions.

A key milestone in the evolution of contemporary Chinese law was the PRC's accession to the World Trade Organization in 2001, which imposes standards for the

[489] Infantino (n 124).
[490] Infantino (n 124).
[491] Jingjing (n 485); Donald Clarke, 'Introduction: The Chinese Legal System since 1995: Steady Development and Striking Continuities' (2007) 191 The China Quarterly 555. <https://ssrn.com/abstract=247050> accessed 24 January 2024.
[492] Chinese Constitution 1982 art. 31; the 1990 Basic Law of the Hong Kong Special Administrative Region and the 1993 Basic Law of the Macao Special Administrative Region. On the peculiar legal systems taking place in Hong Kong and Macau, Ignazio Castellucci, 'Legal hybridity in Hong Kong and Macau' (2012) 57 McGill Law Journal 665 <https://lawjournal.mcgill.ca/article/legal-hybridity-in-hong-kong-and-macau/> accessed 24 January 2024.

administration of justice including fairness, independence, and effectiveness, as well as transparency and accessibility of the law.[493]

The German and Japanese Civil Codes, the CISG, the UNIDROIT Principles, along with the 1996 UNCITRAL Model Law of Electronic Communication of the United Nations Commission on International Trade Law were all referenced in the then Contract Law and now Book III of the Civil Code. All the continental characteristics are blended with laws governing the State's control over party autonomy, specifically allowing administrative oversight of contracts, and requiring that they uphold "public order" and "good morals" for them to be valid.[494]

3.2 A general overview on arbitration

When discussing arbitration in China, a premise must be made. The Chinese culture is indeed deeply influenced by Confucianism, which is one of the most influential philosophical thoughts, with roots in traditional customs and a goal of maintaining stable social relationships.[495] Accordingly, Confucianism discourages conflicts and promotes social harmony through means of dispute settlement that are less adversarial and more amicable.[496] In this context, the use of conciliation and mediation is even more incentivized than arbitration or litigation. Chinese people would in fact regard at direct and confrontational behaviour as rude and offensive.[497]

In keeping with the traditional Chinese notion of harmony, identifying potential sources of conflict, and addressing them as soon as possible is frequently regarded as an important duty for those in positions of authority. This clarifies why consultations and conciliations are extremely valued within Chinese law and often precedes any arbitration or litigation. The Chinese preference for conciliation, in particular, is reflected in the current Law of the People's Republic of China on Arbitration (hereinafter Arbitration Law), whose art. 49 states that "After an application for arbitration has been made, the parties may settle on their own. If the parties reach a settlement agreement, they may request the arbitration tribunal to render and arbitration award based on the settlement agreement; or alternatively, they may withdraw their application for arbitration".[498] Essentially, arbitration ends up being

[493] Pitman B Potter, *The Chinese Legal System, Globalization and local legal culture* (Routledge 2001).
[494] Chinese Civil Code 2021 art.143.
[495] Johan Billet, 'Opening Remarks on Chinese Arbitration' in *Chinese Arbitration, A selection of Pitfalls* (Maklu, Antwerpen, 2009) 11-17.
[496] Besides, paying respect and saving the face are examples of crucial elements within this philosophic thought.
[497] Billet (n 495).
[498] PRC Arbitration Law 1994 art 4.

regarded more as a phase in a continuum of dispute resolution processes that include consultation, negotiation, conciliation or mediation, arbitration, and finally court litigation.[499] The hybridization of such different methods, in the forms of mediation-arbitration (med-arb), arbitration-mediation (arb-med) is extremely frequent, contrasting with the most common practice which, outside China, provides for a rigid separation of the dispute resolution procedures.

When the PRC was established in 1949, the new government naturally adhered to the traditional Chinese approach towards dispute resolution,[500] making the non-litigious methodology the most common and used one.

The arbitration system created by the PRC was twofold: one dealt with domestic disputes and the other handled disputes that involved a foreign element. The latter was not but an imitation of the then dominating Soviet model, imported by China in 1956, in an attempt to promote foreign trade. In this sense, the arbitration system governing domestic disputes -which still favoured the use of a mix between arbitration, conciliation, and mediation- was different from the one applicable to foreign-related disputes, which for a change was more in line with international practice and customs.[501] This explain why it is usually stated that China has adopted a "dual-track system".[502]

In 1956, the China Council for the Promotion of International Trade established -upon the Russian model- two specialized arbitral bodies in charge of handling disputes with a manifested international dimension, namely the Foreign Trade Arbitration Commission -which was renamed in 1988 as China International Economic and Trade Arbitration Commission (CIETAC)[503]- and the China Maritime Arbitration Commission (CMAC) set up in 1958. The jurisdiction of the CMAC was originally confined to disputes involving salvage, collisions and charterparties, but it was subsequently extended to cover all types of maritime disputes.[504] Originally, CIETAC and the CMAC, like the Soviet prototypes, operated solely on the basis of their own regulations and statutes for many years, in the

[499]Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration*, (Kluwer Law International 2011) 343 – 393.
[500] Guiguo Wang, *Wang's Business Law of China* (4th edn, LexisNexis Butterworth 2003).
[501] The preamble of 'Decision concerning the establishment of a foreign trade Arbitration Commission within the China Council for the promotion of International Trade' issued by the Chinese Government Administration Council, clarifies the aim pursued by adopting such a new system for arbitration, by stating that: "With a view to settling disputes that may arise in relation to foreign trade through arbitration, it is *necessary* to set up an arbitral body within a social organization concerned with foreign trade."
[502] Weixia Gu, 'China's Arbitration: Restricted reform' in Guanghua Yu (ed), *The Development of the Chinese Legal System, Change and Challenges* (Routledge 2011); PRC Arbitration Law 1994 Chapter VII; Wang Wenying, 'Distinct Features of Arbitration Law in China: An Historical Perspective' (2006) 23 Journal of International Arbitration 64.
[503] Notwithstanding the fact that CIETAC was born practically as a government body, it progressively became more independent, and it has built up a good reputation among foreign traders and investors.
[504] Wang (n 500)

absence of any general regulation of arbitration and arbitration proceedings, or even any systematic regulation of civil procedure (the first provisional Civil Procedure Code did not enter into force until 1982).[505]

In addition to the CIETAC and the CMAC, local arbitration commissions have been established in the major Chinese cities (e.g., the Beijing Arbitration Commission, or the Shanghai Arbitration Commission).[506] Although the law makes it clear that the arbitral commissions are not government agencies, nor do they have a subordinate relationship with government agencies or among themselves,[507] it provides for the establishment of such arbitral commissions "in municipalities directly under the Central Government and in cities that are the seats of the people's governments or provinces or autonomous regions"[508] and, unlike typical Western arbitral tribunals, these commissions do have some quasi-sovereign functions.[509] Although these commissions were established to hear domestic disputes, they also hear international disputes now, if so agreed by the parties.[510] However, the arbitration commissions remain very close to the government, and in some cases, the Chinese courts are given jurisdiction to settle issues that arise during arbitration proceedings before the local commissions; besides, foreign arbitrators do not have a place in these commissions. Local protectionism and political influence are common problems. This explains why parties that share such concerns often prefer to choose a foreign arbitration institution (if possible) or a reputable, foreign-related arbitration commission (such as CIETAC).

All the above contributes to clarify why the Chinese arbitration system has many characteristics that ultimately distinguish it from the "Western" and non-Chinese ones. As Johan Billet puts it, in the Chinese system, arbitration is a "state-sponsored" method of dispute resolution, which is different form ordinary Courts, but that nonetheless derives its authority from the State and not from the parties.[511] The Chinese provision is thus elaborated in a view to "protect the legitimate rights and interests of the relevant parties and to guarantee the healthy development of the socialist market economy".[512] By opposite, Western

[505] Gabriele Crespi Reghizzi, 'L'Arbitrato in Cina' (2015) 8 Sulla Via dei Catai 91.
[506] It is generally acknowledged that the phrase 'arbitration commission' used in the PRC Arbitration Law actually refers to the 'arbitration institution', which is more frequently used. Commentators have determined that the reference to an 'arbitration commission' in article 10 of the PRC Arbitration Law refers to an arbitration institution that has been established in the PRC. See for example, Jingzhou Tao and Clarisse Von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions' (2007) 23 Arbitration International 310.
[507] PRC Arbitration Law 1994 art 14.
[508] PRC Arbitration Law 1994 art 10.
[509] Kidane (n 499).
[510] Notice of the General Office of the State Council on Several Issues that Need to be Clarified to Implement the Arbitration Law of the People's Republic of China 1996 art. 3.
[511] Billet (n 495)
[512] PRC Arbitration Law 1994 art 1.

arbitration law is based on the concept of autonomy of the parties, which emphasises the parties' positive freedom to agree and to create a private system of dispute resolution for reasons of convenience and efficiency.[513]

With the Chinese economic boost and its opening up to foreign investments, the arbitration system had to be adapted to meet foreign parties' needs and expectations. In fact, in recent years, Chinese law has improved to increasingly respect the parties' choices. Therefore, the two models mentioned above (the domestic and foreign-related one) may even converge at some point in the future, but as for now, Chinese law continues to demand a significant degree of "official" involvement at least in domestic arbitration processes.

As for the main sources of arbitral law, Mainland China has not wholly adopted the UNCITRAL Model Law therefore, it cannot be deemed as an UNCITRAL Model Law country; however, it has incorporated some of the core principles of the Model Law as those regarding party autonomy and separability of arbitration agreements.[514] The two most important sources of arbitration law in China are now to be found in the PRC Civil Procedure Law of 1991, and the PRC Arbitration Law of 1994, which still provides different tracks for domestic, "foreign-related" and international arbitral proceedings, to which different legal provisions may apply. For this reason it is worth clarifying that by "domestic arbitration" the law means the arbitration conducted in Mainland China that involves domestic parties and a domestic subject matter; "foreign-related arbitration" is essentially treated as a special form of domestic arbitration and relates to arbitration conducted in Mainland China that has a transnational dimension, i.e., when the disputes involves one or more 'foreign-related elements'[515] such as a foreign party, a foreign subject matter, etc; finally, "international arbitration" refers to arbitrations conducted outside Mainland China, including arbitration in the SARs of Hong Kong and Macau and in the Taiwan Region.[516]

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[513] Billet (n 495) 12.

[514] Audrey Chen, 'Doing Business in China: Overview' (*Practical Law*, 1 August 2021) <https://uk.practicallaw.thomsonreuters.com/> accessed 24 January 2024.

[515] The term 'foreign-related arbitration' is not defined in the PRC Arbitration Law, but the term 'foreign interest' is defined elsewhere in PRC legal literature. SPC Interpretation on the Application of the Civil Procedure Law, in effect since 4 February 2015 art 577, and SPC's Interpretation on Several Issues Relating to the Application of the People's Republic of China Law on Foreign-Related Civil Relations (I), in effect since 7 January 2013 art 1, both state that a dispute involves a 'foreign interest' when: one or both parties are foreigners, foreign entities or foreign organisations; one or both parties have their habitual residence outside the territory of the PRC; the legal circumstances relating to the conclusion, modification or termination of a contractual relationship took place in a foreign country; the subject matter of the dispute is located in a foreign country; or there are other circumstances under which a case may be deemed a foreign-related dispute.

[516] Ernst Yang and others, 'China, Trends and Developments' (*Chamber and Partners*, 24 August 2023) <https://practiceguides.chambers.com/practice-guides/international-arbitration-2023/china/trends-and-developments> accessed 25 January 2024.

The SPC uses judicial interpretations and replies to regulate and guide lower courts' application of the law in terms of how far they can assist and intervene in arbitration proceedings and on the enforcement of arbitral awards.

The Arbitration Law of 1994 was China's first national arbitration law, which ended the era of arbitration without a systematic legal machinery and continues to serve as the foundation of the country's arbitration legal system. It was initially passed in 1994 and underwent minor revisions in 2009 and 2017. The Ministry of Justice published a draft amendment to the Arbitration Law in July 2021 for public comment.[517] This draft includes, among other things, some interesting change proposals as the extension of arbitrable disputes, such as those involving intellectual property, sports, and antitrust matters; it proposes to introduce the concept of "seat of arbitration" and to endorse the "Kompetence-kompetence" doctrine; to allow for a higher level of party autonomy by, for example, removing the requirement to choose an "arbitration commission" as a necessary component for a valid arbitration agreement; to give parties the freedom to choose the location of arbitration and even to introduce ad hoc arbitration as a new method of conducting foreign-related arbitrations.[518] Such changes are widely regarded as a positive indicator that China's arbitration legislation is adopting best practices in international arbitration in an attempt to make China a more attractive seat of arbitration for international users. However, as of august of 2023, the draft amendment was still awaiting further review and approval by China's supreme legislative authority, the National People's Congress.

Finally, the New York Convention of 1958 to which China has adhered to in 1987, also represents an important source of arbitration law, specifically for enforcing arbitral agreements and foreign arbitral awards. The said Convention was nevertheless adopted with a reciprocity reservation and a commercial reservation, which entail that awards will be recognized only if they were made on the territory of other contracting States and in respect of differences arising out of legal relationships, whether contractual or not, which are considered commercial under Chinese law,[519] with the exclusion of investment disputes involving investors and foreign States.

[517] The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on July 30, 2021.
[518] Fan Kun, 'The 2021 Proposed Amendments to the Arbitration Law of China: A New Era of Arbitration?' [2021] ICC Dispute Resolution Bulletin 21 <https://ssrn.com/abstract=401698> accessed 25 January 2024.
[519] The phrase commercial legal relationships refers specifically to: relations concerning economic rights and obligations arising out of contract, tort or relevant provisions of law, including disputes concerning the sale and purchase of goods, lease of property, contracting for project work, processing arrangements, technology transfer, equity joint ventures, contractual joint ventures, exploration and exploitation of natural resources, insurance, financing, labor, agency, consultancy services and transportation by sea, air, railway or road, as well as product liability, environmental pollution, accidents at sea and ownership, but not including disputes between foreign investors and government bodies. Wang (n 500).

3.3 Arbitrability

Articles 1 and 2 of the Chinese Arbitration Law provide the scope of arbitrable matters in mainland China. Under art. 2 "disputes over contracts and disputes over property between citizens, legal persons, and other organizations that are equal subjects of the law may be submitted to arbitration". According to Chinese practice, the phrase "equal subjects" denotes a lack of a superior-subordinate relationship between the disputing parties within the administrative structure, such as that which exists between a government department and a business that is connected to it.[520] Essentially, art. 2 deems all disputes with a commercial nature to be suitable for arbitral resolution, while art. 3 vividly excludes administrative disputes, labour disputes,[521] and personal rights such as marriage, adoption, guardianship, child maintenance, and inheritance.[522]

According to art. 12, paragraph 1(11), of the Administrative Litigation Law and Article 11, of the SPC's Interpretation of the Administrative Litigation Law, administrative disputes that result from agreements between the government and private parties regarding rights and obligations under administrative law are not subject to arbitration. Whether or not PPP agreements should be treated as administrative agreements is a hotly contested topic. Some argue that disputes arising from PPP agreements are unresolvable administrative matters. However, in several cases, the SPC has avoided an all-or-nothing approach, distinguishing between consensual aspects of the agreement, where the private party and the government are on equal footing, and administrative aspects of the agreement, where the government is exercising its public function and authority (disputes over the former being arbitrable).[523]

The arbitrability of disputes involving intellectual property rights, antitrust civil disputes or securities regulation may also be the subject of specific discussions. The scope of arbitration under art. 2 of Chinese Arbitration Law does not explicitly include "antitrust claims", however, the public nature of Antitrust Law relates to public interests (particularly the interests of average consumer) that go beyond the privity of contract, rendering

[520] ibid.

[521] According to art 77 PRC Arbitration Law 1994, labour-related disputes, and disputes over contracted management in agriculture within the agricultural collective economic organisations shall be subject to arbitration governed by other special legislation.

[522] As stated in the PRC Arbitration Law 1994 art 3: "the following disputes shall not be submitted to arbitration: 1. Disputes over marriage, adoption, guardianship, child maintenance and inheritance; and 2. Administrative disputes falling within the jurisdiction of the relevant administrative organs according to law".

[523] Zhang Shouzhu and others, 'China' (*Global Arbitration Review*, 27 May 2022) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/china> accessed 25 January 2024.

competition claims inappropriate for arbitration.[524] The SPC has nonetheless, decided differently on the arbitrability of antitrust civil disputes that arose from horizontal or vertical monopoly agreements. It was in fact opined that anti-trust disputes arising from a distributor agreement are subject to the arbitration clause laid down by the said agreement.[525] More legislative but also judicial clarity is certainly required to define the types and scope of antitrust cases that are or are not arbitrable under Chinese law.

The general approach to determining whether a dispute is arbitrable continues to point at the examination of its subject matter. In most cases, the decision to arbitrate a dispute rests with the arbitral institution, but as stated in articles 17 and 20 of the Arbitration Law, which will be discussed more in depth in the next paragraph, the People's Court shall have the final say in deciding whether a dispute can be arbitrated if one party requests the arbitration institution while the other party requests the court.

Apparently, in one case only arbitrability was invoked as a ground to refuse the enforcement of a foreign award, namely in *Wu Chunying v Zhang Guiwen,* when the SPC denied the enforcement of an arbitration award granted by the Mongolian National Arbitration Centre as it involved inheritance matters,[526] which as mentioned, are not considered to be capable of being resolved through arbitration in China, and consequently, coherently with the New York Convention provisions,[527] the SPC could legitimately oppose its enforcement.

Finally, as previously noted, the amendment draft to the Arbitration Law could potentially expand the scope of arbitrable matters, therefore it is necessary to keep track of the latest developments.

3.4 The arbitration agreement

The indispensable pre-requisite for any arbitration is the existence of a valid arbitration agreement, which under Chinese law is intended as "arbitration clauses stipulated in the contract, and agreements to refer to arbitration that are concluded in writing before or after a dispute arises"[528] as a separate, stand-alone arbitration agreement. Under the law of the PRC, "in writing" includes by letter, telegram, telex, fax, electronic data interchange and

[524] Qingxiu Bu, 'The arbitrability of antitrust disputes: a Chinese perspective' (2022) 10 Journal of Antitrust Enforcement' 303.
[525] *Huili v Shell* Supreme People's Court No 47 (29 August 2019).
[526] *Wu Chunying v Zhang Guiwen* Supreme People's Court No 33 (02 September 2009)
[527] New York Convention 1958 art. V (1) (e).
[528] PRC Arbitration Law 1994 art 16.

email.[529] Reference to an arbitration clause in standard terms and conditions is sufficient if the general terms and conditions have been properly incorporated into the contract.[530]

According to the art. 16 of the Arbitration Law, "an arbitration agreement shall contain the following particulars: (1) the parties' intention to apply to arbitration; (2) matters to be arbitrated; and (3) a designated arbitration commission".[531] Any arbitral agreement that includes unclear provisions or lacks one of the said requirements is deemed to be incomplete and needs to be implemented by the parties through a supplementary agreement.[532] If such an agreement cannot be achieved by the parties, the original arbitration agreement is considered invalid.[533] The expression of the intention to arbitrate is typically simple to ascertain, but occasionally it is necessary to look at the unique circumstances of the case. For instance, if the parties enter several contracts that are all valid and stipulate different dispute resolution procedures at the same time or later, the court must determine what the parties' true intentions were. Moreover, it is very common in contracts involving a Chinese counterparty to find in the arbitration agreement the parties' commitment to mediate or negotiate before arbitration. It is generally accepted that pre-arbitration procedures do not affect parties' intent to arbitrate.[534]

The third requirement, that there be a designated arbitration commission, has been heavily criticized as being at disagreement with the international trend embodied in the UNCITRAL Model Law, and in fact demanding a pre-selected arbitration commission is uncommon in the majority of jurisdictions. This statutory requirement alone has rendered numerous arbitration agreements null and void in China. For example, the SPC ruled in an appeal that the arbitration agreement, which stated that "any unresolved matter should be submitted to local arbitration agencies for arbitration", was invalid because the parties failed to reach a supplemental agreement or choose the "local arbitration agencies".[535]

The Draft Amendment adopts a different, "more relaxed" approach to this issue.[536] Indeed, the new definition for a valid arbitration agreement provided by the Draft

[529] PRC Civil Code 2020 art 469.
[530] PRC Civil Code 2020 arts 496 and 497.
[531] PRC Arbitration Law 1994 art 16.
[532] PRC Arbitration Law 1994 art 18.
[533] ibid. On this point Guo Xiaowen, 'The validity and performance of the arbitration agreements in China' (1994) 11 Journal of International Arbitration 51. The author describes a case where the parties named a non-existent arbitration institution in their contract and thus the arbitration agreement was held unenforceable.; Tao and von Wunschheim (n 506) 310.
[534] Yifei Lin (ed), *China Arbitration Yearbook (2021)* (Springer, 2021).
[535] Supreme People's Court No 11 (2006)
[536] Mariana Zhong, 'Validity of Arbitration Agreement: A New Relaxed Approach in the Draft Amendment to PRC Arbitration Law' (*Kluwer Arbitration Blog*, 19 September 2021) <https://arbitrationblog.kluwerarbitration.com/2021/09/19/validity-of-arbitration-agreement-a-new-relaxed-approach-in-the-draft-amendment-to-prc-arbitration-law/> accessed 25 January 2024.

Amendment only contains a substantive requirement (the parties' intention to arbitrate) and a formality requirement (that the agreement shall be in writing).[537] It has left behind the other two statutory requirements relating to the specific matter for arbitration and a designated arbitration commission. Such an approach is much more in line with the "presumptive validity" endorsed by the New York Convention and the Model Law and would certainly enhance the enforcement likelihood of the arbitration agreements, if it is passed as it is.

To alleviate the Arbitration Law's stringent requirements regarding the validity of arbitration agreements, the SPC issued in 2006 its Interpretation on Several Issues Concerning the Application of the Arbitration Law (hereinafter the SPC's Interpretation), which provide, among other things, some guidance on potentially pathological arbitration agreements, as when the arbitration agreement only contains the arbitration rules without designating the administering arbitration institution -which, failing to comply with one of the requirements set by the Arbitration law, could potentially invalidate the arbitration agreement- stating that when the name of an arbitration institution is unclear but identifiable by the arbitration rules contained in the arbitration agreement, the arbitration institution is deemed to have been designated.[538]

Despite the Interpretation, there is still a risk that an arbitration clause that does not expressly designate the arbitration institution will be invalidated in practice as in the case *Automotive Gate FZCO v Hebei Zhongxing Automobile Manufacturing Co. Ltd*. (2011), when the Shijiazhuang Intermediate People's Court found the arbitration clause to be invalid because the parties agreed in the arbitration agreement to apply the ICC arbitration rules and that the arbitration would be held in China, but did not agree on a specific arbitration institution, thus failing to comply with the requirements fixed in art. 16 of the Arbitration Law.[539]

Along these lines, the possibility of using ad hoc arbitration seems to be excluded by the Chinese Arbitration law, although not expressly. In fact, the mandatory language of the said art. 16 is interpreted to mean that any arbitration agreement that does not specify a precise arbitral commission is void and cannot be enforced. Therefore, ad hoc arbitrations which, by nature, are not administered by any arbitral institution, are left out from the provision, and are not allowed to take place in China.[540] However, this does not necessarily

[537] Draft Amendment 2021 art 27.
[538] SPC Interpretation 2006 art 3.
[539] *Automotive Gate FZCO v Hebei Zhongxing Automobile Manufacturing Co Ltd*, Shijiazhuang Intermediate People's Court No. 00002 (6 July 2011).
[540] For businesses incorporated in the FTZs, the ban on ad hoc arbitration within the PRC was removed in 2016. Nonetheless, according to art 9 of the SPC FTZ Opinions, arbitration shall only be possible in disputes between

mean that China will not recognize or enforce arbitral awards rendered abroad within ad hoc arbitration proceedings. Indeed, if the provision for ad hoc arbitration is recognized in the State or territory where the arbitral award was rendered, or it is legal under the applicable law chosen by the parties to govern the arbitration agreement, the award will likely be recognized and enforced in China, following the New York Convention provisions.[541] In contrast, where parties to an ad hoc arbitration have designated China as the seat of arbitration and Chinese law as the governing law, recognition and enforcement under the New York Convention may be denied by a Chinese or foreign court on the grounds that China's Arbitration Law does not permit ad hoc arbitration.[542]

Naturally, as provided by art. 17 of the Chinese Arbitration law, in case the dispute falls within one of the categories considered to be non-arbitrable under art. 3 of the Arbitration law, the arbitration agreement will be considered null and void. The same occurs in case the parties lacked legal capacity to enter into such an agreement, and when the arbitration agreement is concluded under duress.[543] Also, in general, an arbitration agreement conferring the right to apply for arbitration only on one party but not on the other is considered unfair and invalid. Therefore, it is likely that a Chinese court will determine that a unilateral or optional clause is invalid.

The Chinese Arbitration law embraces the principle of severability, providing that an arbitration agreement is an independent contract between the parties, which shall not be affected by the amendment, rescission, termination, or invalidity of the main contract where it is contained.[544] The parties may choose the law applicable to the arbitration agreement and should do so in an explicit manner, as such law may not be the same law governing the main contract. In fact, according to the SPC Provisions, if the contract only specifies the law applicable to the contract and not the law applicable to determining the validity of a foreign-related arbitration agreement, the PRC People's Court will not consider the law applicable to the contract when determining the validity of the arbitration provision.[545] Furthermore, the SPC Provisions take an arbitration-friendly approach by providing that if the law of the place where the arbitration institution is located and the law of the place of arbitration have

residents of the free trade zone, as long as the arbitration body, its composition and procedures are specified. Opinions on the Provision of Judicial Safeguards for the Construction of China Pilot-Free Trade Zones, Conclusion of the Supreme Court 2016 No 34.

[541] Billet (n 495).

[542] Ribeiro João and Teh Stephanie, 'The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law' (2017) 34 Journal of International Arbitration 48.

[543] PRC Arbitration Law 1994 art. 17.

[544]PRC Arbitration Law 1994 art 19. The separately principle is supported also by clause 3 of the Supreme Court Resolution No. 53 (10 December 2019) and court practice.

[545] SPC Provisions 2006 art 13.

different laws and regulations on the validity of an arbitration agreement, the laws and regulations that find the arbitration agreement effective shall apply.[546]

It is worth specifying that the said requirements on the validity of the arbitration agreement are applicable only in case the parties have chosen the Chinese law to govern their arbitration agreement. Therefore, if the proper law governing the arbitration agreement is not PRC law, the above requirements will not apply.

3.5 Jurisdiction and *kompetenz-kompetenz* doctrine

In international arbitration practice, the validity of an arbitration agreement is usually determined by the arbitral tribunal. However, the PRC Arbitration Law reserves this question for resolution only by either the arbitration commission (and not the arbitral tribunal or the arbitrators' panel that make part to it) or the PRC People's Court,[547] which consequently means that Chinese law does not fully endorse the doctrine of *kompetence-kompetence* in its Arbitration law, neither in its positive connation, and on the top of that, it provides for a cumbersome mechanism to address jurisdictional issues. According to such system, where an objection to the jurisdiction is submitted before the arbitral tribunal, the latter must report it to the arbitration commission uncharged with the administration of the dispute and wait for the commission's decision before it can rule on the substance. The splitting workload of jurisdiction-ruling and merit-adjudication between the Commission and the tribunal not only unduly delays the proceedings but also makes the tribunal subject to the Commission.[548] Besides, as arbitration institutions are only supposed to provide case management services, this arrangement has sparked outrage among Chinese arbitration practitioners and academics.[549] In addition, each party can submit a request for a ruling on the validity of an arbitration agreement either to the arbitration commission or to a PRC People's Court. If simultaneously one party requests the arbitration institution to decide on a validity matter and the other party applies to the PRC People's Court for a ruling, the decision of the PRC People's Court shall prevail, [550] which in other words means that the arbitration commission's power is secondary to the court's power. In these circumstances, certain jurisdictions provide for their courts to refuse to determine the existence of a disputed arbitration agreement prior to the commencement of the arbitration proceedings, whereas in

[546] SPC Provisions 2006 art 14.
[547] PRC Arbitration Law 1994 art 20.
[548] Gu (n 502).
[549] Fu Panfeng, 'The Doctrine of Kompetenz-Kompetenz: A Sino-French Comparative Perspective' (2022) 52 Hong Kong Law Journal 259.
[550] Zhong (n 536).

PRC the approach is less clear.[551] In fact, PRC courts have adopted inconsistent decisions with Courts holding that the existence of an arbitration agreement is part of the question of validity and hence within the court's jurisdiction,[552] and other PRC courts which have referred these questions to the arbitral tribunal.[553] If the arbitration institution decides that the arbitral tribunal lacks jurisdiction over the case, there is no legal basis for courts to review that decision under Chinese law. It must be given mention to the recent, albeit extremely controversial, innovation introduced by some arbitral institutions as the Beijing Arbitration Commission, CIETAC and the Wuhan Arbitration Commission to authorise, in their arbitral rules, an arbitral tribunal to decide its own jurisdiction.[554] The legitimacy of such a modernization is extremely disputable as there is no provision in the law that allows arbitration commissions to delegate such authority to arbitral tribunals and further, because arbitration commissions retain a large portion of their discretion to rule on arbitral jurisdiction.[555]

The passing of the Draft Amendment may come in hand to resolve the situation, as it would transpose into legislation what the arbitral commission are de facto already doing. In fact, the draft endorses the *kompetenz-kompetenz* doctrine, giving the arbitral tribunal the authority to rule on its own jurisdiction and make decisions on issues such as the existence and validity of the arbitration agreement. In the meantime, it allows the arbitration institutions to make a preliminary decision on the issue prior to the formation of the tribunal itself. Moreover, it postpones a court's intervention by stating that a court shall not accept a party's request for confirmation of the existence or validity of an arbitration agreement unless the issue is referred to an arbitral tribunal or an arbitration institution.[556]

Where a party has failed to object to the validity of an arbitration agreement prior to the first oral hearing before the arbitral tribunal, or where an arbitration institution has made a decision on the validity of an arbitration agreement, the PRC People's Court shall not accept an application for a ruling on the validity of the same arbitration agreement and should dismiss the case.[557] If one party files a case in the People's Court in breach of an arbitration

[551] Tereza Gao, 'Uncertainty in How PRC Courts Deal with Challenges to Validity of Arbitration Agreements' (*Kluwer Arbitration Blog*, 8 April 2019) <https://arbitrationblog.kluwerarbitration.com/2019/04/08/uncertainty-in-how-prc-courts-deal-with-challenges-to-validity-of-arbitration-agreements/> accessed 25 January 2024.
[552] Wuhan Maritime Court No. 29 (2018).
[553] Guangzhou Intermediate People's Court No. 603 (2018).
[554] See BAC Arbitration Rules 2019 art 6. 54; CIETAC Arbitration Rules 2015 art 6. 55; Wuhan Arbitration Commission Arbitration Rules 2018 art 11.
[555] Panfeng (n 549); Zhang Yuqin, 'Kompetenz-Kompetenz in Commercial Arbitration and China's Improvement' (2018) 1 Journal of International Economic Law 125.
[556] Draft Amendment 2021 art 28.
[557] PRC Arbitration Law 1994 art 20 and the SPC Interpretation 2006 art 13.

agreement, the opposing party shall request the court to dismiss the case due to lack of jurisdiction. However, the People's Court would, on that occasion, review the validity and scope of the arbitration agreement. Once the People's Court holds that the arbitration agreement is valid, and the issue is forwarded to arbitration, the case shall be dismissed.

If neither party rises a challenge on the validity of the arbitration agreement within the said time limit, they are considered to have waived their right to do so and will not be allowed to raise the validity issue at the enforcement stage, as provided by art. 13 of the Interpretation. A different scenario takes place when, prior to the first hearing, one party institutes an action in the People's Court without declaring the existence of a valid arbitration agreement and the other party has not raised an objection to the People's Court's acceptance of the case. In such a circumstance that party shall be deemed to have renounced the arbitration agreement and the People's Court shall continue to try the case.[558]

In practice, Chinese courts follow the "validation principle" and are generally hesitant to invalidate an arbitration agreement, which would deprive the arbitral tribunal of jurisdiction. After all, a court may decide on its own that the arbitration agreement is valid. Nonetheless, when the decision seems to point to the opposite direction, the court must refer the case to a higher court and so on up to the SPC, if necessary, for review and approval, according to the unique reporting system,[559] which certainly means that it could take years to achieve a final decision.[560]

3.6 Arbitrators and arbitral institutions

The qualifications of arbitrators have been set out in detail in the Arbitration Law. According to art.13, arbitrators must meet one of the following conditions to be qualified as such: (1) they have been engaged in arbitration work for at least eight years; (2) they have worked as

[558] Civil Procedure Law 1991 art 278 and PRC Arbitration Law 1994 art 26. Moreover this position has been confirmed by the Opinion Concerning Questions of Implementing the Civil Procedure law, issued by the supreme People's Court on July 13th 1992, where the Supreme Court explained in item 148 that 'in the event that one party, when filing suit, fails to declare that there is an arbitration agreement, and after the People's Court has accepted the case, the other party enters a defense, the court shall be deemed to have jurisdiction of the case'.

[559] The SPC issued two long-awaited judicial interpretations (SPC Interpretation No. 21 and SPC Interpretation No. 22) in December 2017, which became effective on January 1, 2018, to regulate the judicial review procedures and the arbitration reporting mechanism. The reporting mechanism requires lower courts, which are normally tasked with considering arbitral awards in the first instance, to seek approval from higher people's courts, then the Supreme People's Court, before refusing enforcement of a foreign or foreign-related arbitral award or arbitration agreement, and, in certain circumstances, a similar duty in domestic arbitrations. On the Prior Report System mechanism and its reform Yves Hu and Clarisse von Wunschheim, 'Reforms on the "Prior Reporting System" — A Praiseworthy Effort by the PRC Supreme People's Court, or Not?' (*Kluwer Arbitration Blog*, 8 January 2019) <https://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/> accessed 25 January 2024.

[560] Gao (n 551)

a lawyer for at least eight years; (3) they have been a judge for at least eight years; (4) they are engaged in legal research or legal teaching and in a senior position; or (5) they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or equivalent professional levels. The Arbitration Law has no express provision on the nationality of arbitrators, but in practice, arbitrators are generally Chinese citizens.[561] Besides, the Law itself precises that in foreign-related arbitrations, foreign nationals with expertise in the law, commerce and economics, science and technology, and other fields may also be appointed as arbitrators[562] thus suggesting that in any other case the Chinese nationality for arbitrators is the rule.

CIETAC and all local arbitration commissions require arbitrators to be chosen from their respective panels of arbitrators, although CIETAC Arbitration Rules allow the parties to appoint arbitrators from outside its panel list under the approval of CIETAC's chairman.[563] In terms of the procedure for selecting arbitrators, both the Arbitration Law and the CIETAC Rules specify how arbitrators are to be chosen.

An arbitral tribunal may be comprised of one or three arbitrators, as agreed by the parties.[564] If the parties agree to have a single arbitrator, that arbitrator will be chosen jointly by the parties or nominated by the chair of the arbitration institution in accordance with the parties' joint mandate.[565] If an arbitral tribunal consists of three arbitrators, each party must choose an arbitrator or authorize the chair of the arbitration institution that is administering the arbitral proceedings to do so on their behalf. A third arbitrator will then be chosen jointly by the parties or nominated by the chair of the arbitration institution in accordance with the parties' joint mandate. The third arbitrator will preside over the proceedings.[566]

If the parties do not reach an agreement on the method of formation of the arbitral tribunal or do not select the arbitrators within the time limit specified in the applicable arbitration rules, the arbitrators will be appointed by the chair of the arbitration institution that is administering the arbitral proceedings.[567] In fact, if the parties' chosen method of selecting arbitrators fails, the default procedure for selecting and appointing arbitrators is found in the arbitration rules of arbitral institutions rather than in the PRC law.

The PRC Arbitration Law makes no mention of what happens if the parties cannot agree on the number of arbitrators. Depending on which institutional arbitration rules apply,

[561] Weigong Xu, Definition of Arbitration in China (2012) 30 Journal of Law and Commerce 107.
[562] PRC Arbitration Law 1994 art 67. Chen (n 514).
[563] CIETAC Rules 2005 arts 21 s 2 and 22 s 3.
[564] PRC Arbitration Law 1994 art 30.
[565] PRC Arbitration Law 1994 art 31.
[566] PRC Arbitration Law 1994 art 31.
[567] PRC Arbitration Law 1994 32.

this issue is resolved differently. The Arbitration Law and all other Chinese laws do not contain any clauses that permit the Court to get involved in the choice of the arbitrators. However, if the arbitral tribunal was improperly constituted or the arbitrators engaged in misconduct, the court may decline to enforce the award in a later stage.

An arbitrator shall be honest and impartial, according to art.13 of the Arbitration Law, and free from any conflicts of interest. Following the said provision, an arbitrator shall withdraw or be removed, according to art. 34 of the Arbitration Law, if he/she: is a party in the case or a close relative of a party or its representative; has any stake in the case; has some other relationship with a party or its representative that may affect his/her impartiality; or has a private meeting with a party or its representative, or accepts entertainment or gifts from a party or its representative. Apart from these general requirements set forth by the PRC law, major arbitral institutions also require arbitrators to comply with their arbitration rules and code of conduct. It should also be pointed out that, under art. 38 of the Arbitration Law, an arbitrator may even bear criminal liability if his conduct amount to serious breach of his duties as arbitrator. An example would be the violation of art. 34(4) of the Arbitration Law.[568]

A party may also request that an arbitrator be removed. However, to do so the requesting party has to adduce its reasons before the first hearing, or if the party learns about the conflict of interest only after the first hearing, the request for withdrawal must be made at the earliest before the end of the last hearing.[569] The decision to remove an arbitrator will be then made by the chair of the arbitration institution or, if the chair of the arbitration institution is serving as an arbitrator, the decision will be taken by the arbitration institution collectively.[570] Following the removal of an arbitrator, a replacement arbitrator is appointed. A party may request that the arbitral tribunal hear the dispute again after a replacement arbitrator has been appointed. The arbitral tribunal will decide whether the arbitral proceedings should be continued or restarted.[571]

The Arbitral Law dedicates its Chapter II to "Arbitration Commissions and the Arbitration Association", dictating how such commissions must be established and the necessary requirements for them to operate in China. As mentioned in a previous paragraph, arbitration commissions were born to deal with domestic arbitration; they may be established under the central government, or in provinces and autonomous regions. They all must be

[568] Wang (n 500).
[569] PRC Arbitration Law 1994 art 35.
[570] PRC Arbitration Law 1994 art 36.
[571] PRC Arbitration Law 1994 art 37.

registered with local governments at provincial level, in line with the Chinese practice of registration of enterprises without the status of a separate legal personality.[572]

The law is very specific about how such commissions must be composed of, namely: one chairman, two to four vice-chairmen and seven to eleven members, of which at least two thirds must be experts in the field of law, economy, and trade.[573]

The conditions that the arbitral commission must comply with for its establishment are listed in art. 11, according to which an arbitration commission must have: 1) its own name, domicile, and Articles of Association; 2) possess the necessary property; 3) have its own members; and 4) it must have arbitrators for appointment. In this sense, the arbitration commissions are required to uphold a list of arbitrators from which the parties can choose. Unlike arbitration institutions organised under previous laws, the PRC Arbitration Law of 1994 expressly provides for domestic arbitration institutions to be independent from administrative authorities. In fact, the 1994 PRC Arbitration Law aimed to reform arbitration in the PRC and transform it into a more commercial form of dispute resolution that is independent from judicial and administrative intervention. As a result, the structure of domestic arbitration institutions was changed, and all domestic arbitration institutions that did not comply with the provisions of the 1994 PRC Arbitration Law were abolished.

Following the entry into force of the 1994 PRC Arbitration Law, more than 200 domestic arbitration institutions have been established in the PRC, including the Beijing Arbitration Commission, Shanghai Arbitration Commission, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission and Wuhan Arbitration Commission.

In contrast to the organizational structure of domestic arbitration institutions, the PRC Arbitration Law mandates that foreign-related arbitration institutions be organized and established by the China International Chamber of Commerce, and should comprise a chairman, several vice-chairmen, and several committee members.[574]

A whole different situation applies to foreign arbitration institutions, i.e., those institutions that are established outside the PRC, as the International Chamber of Commerce. Because art. 10 of the PRC Arbitration Law stipulates that the establishment and operation of arbitration institutions are subject to the prior approval of the relevant administrative department of justice of the relevant province, autonomous region, or municipality directly under the central government, foreign arbitration institutions have been traditionally prohibited from operating in the PRC. This situation, however, has recently begun to change.

[572] Wang (n 500).
[573] PRC Arbitration Law 1994 art 12.
[574] PRC Arbitration Law 1994 art 66.

On July 27, 2019, the State Council of the People's Republic of China issued the Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone (hereinafter Shanghai FTZ), which allowed well-known foreign arbitration and dispute resolution institutions to set up representative offices in the Lingang FTZ in Shanghai and conduct arbitration with regard to civil and commercial disputes arising in areas as international trade, maritime trade, and investments[575]. Currently, representative offices have been set up by the HKIAC, the ICC, SIAC, and the KCAB. However, such new representative offices appear to have prioritized promotional activities and logistical support in organizing arbitration hearings, rather than managing cases seated in mainland China, perhaps as a result of the uncertainty related to many sensitive aspects as the nationality of the awards issued by foreign administered China-seated arbitrations.[576]

Beijing is also becoming more open to foreign arbitration institutions in addition to Shanghai. The Work Plan for A Deepening Comprehensive Pilot and New Round of Opening-Up of Services Sectors in Beijing and Building Comprehensive Demonstrative Area of Opening-up of State Services Sectors published by the State Council of China on September 7, 2020 states that foreign arbitration institutions will be permitted to establish business entities in Beijing's designated areas to offer arbitration services relating to civil and commercial disputes arising in the fields of international trade and investment.[577] The Ministry of Justice officially approved the establishment and start-up of the WIPO Shanghai Centre for Arbitration and Mediation on October 20, 2019. This was the first foreign arbitration institution established in China, handling its first intellectual property case involving a foreign country in July 2020.

3.7 The arbitral procedure

The Arbitration Law, the SPC Interpretation of Arbitration Law, the Civil Procedure Law, and the SPC Interpretation of Civil Procedure Law form the primary legal framework governing the conduct of arbitral proceedings in China. Moreover, by virtue of the parties' choice, the arbitration rules of arbitral institutions also apply to the conduct of arbitral

[575] Framework Plan 2019 art 4, reputable foreign arbitration and dispute resolution institutions may register with the Shanghai Municipal Bureau of Justice and the judicial administrative authority of the State Council and set up operations in the New Lingang Area of the Shanghai Pilot Free Trade Zone (Shanghai FTZ). Martin Rogers and Noble Mak, 'Foreign Administered Arbitration in China: The Emergence of a Framework Plan for the Shanghai Pilot Free Trade Zone' (*Kluwer Arbitration Blog*, 6 September 2019) <https://arbitrationblog.kluwerarbitration.com/2019/09/06/foreign-administered-arbitration-in-china-the-emergence-of-a-framework-plan-for-the-shanghai-pilot-free-trade-zone/> accessed 25 January 2024.

[576] ibid.

[577] Work Plan for Deepening Comprehensive Pilot and New Round of Opening-Up of Services Sectors in Beijing and Building Comprehensive Demonstrative Area of Opening-up of State Services Sectors 2020 art 8.

proceedings in China. The Arbitration Law provides general procedural steps in the conduct of arbitral proceedings, including application, composition of the tribunal, hearing, settlement, mediation, and the award.

The disputing party who wishes to start the arbitration proceedings, must submit a written application to the chosen arbitration commission, along with a copy of the arbitration agreement.[578] Art. 23 of the PRC Arbitration Law sets out the requirements for the request for arbitration, which should contain the following details: the parties concerned; the parties' legal representatives;[579] the parties' registered addresses; the claimant's arbitration claim and the facts and reasons on which that claim is based; and any evidence, sources of evidence, and the names and addresses of witnesses, if any. The arbitration commission must decide on whether to accept the case and notify the parties within five days of receiving the application. When the arbitration commission rejects a case, it is required to provide justification. If the application is accepted, the arbitration commission should notify the parties in accordance with its rules of procedure.[580]

Arbitrators are bound by the arbitration rules that the parties have agreed upon (typically the rules of the arbitration institution to which the disputes are submitted) as well as by Chinese laws that are applicable to the arbitration. As long as the agreement does not conflict with the mandatory procedural rules that apply to the arbitral proceedings, the parties are free to agree on variations to the standard institutional rules.

Under the Arbitration law, an arbitration may be conducted either by means of oral hearings or on document-only basis, if the parties so agree.[581] The arbitral tribunal conducts the oral hearings in accordance with the arbitration rules of the designated arbitration institution. Whether the proceedings should be conducted in a civil law or common law fashion is not specified. Either scenario is possible, including the arbitral tribunal requesting evidence from both parties and gathering evidence independently.[582] However, there will not typically be a common law-style discovery procedure. The parties may request expert witnesses, or the arbitral tribunal may make the request. It may be permitted for both parties' representatives to present arguments and ask questions of the other party's witnesses and experts.[583] In China's arbitration practice, witness statement is generally less persuasive than

[578]PRC Arbitration Law 1994 art 22.
[579] Under the CIETAC Arbitration Rules, a party can appoint either a PRC or a non-PRC national to act as its representative in the arbitral proceedings. CIETAC Arbitration Rules art 22.
[580] PRC Arbitration Law 1994 arts 24 and 25.
[581] PRC Arbitration Law 1994 art. 39
[582] PRC Arbitration Law 1994 art 43.
[583] Falk Lichtenstein, 'International Arbitration Law and Rules in China' (*CSM*, 29 July 2021) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/china> accessed 25 January 2024.

documentary evidence, which is the primary form of evidence. A mere witness statement in writing is given little weight unless the witness is cross-examined.[584]

Nonetheless, arbitral tribunals lack the authority to compel a party or a non-party to produce evidence, testify, or depose, therefore it would be difficult to carry out proceedings exclusively on such a basis. If, nonetheless, the evidence rules chosen by the parties so provide, the tribunal may require a party to produce documents it considers necessary. But in any event, non-parties are not bound to produce documents requested by arbitrators.

In practice, Chinese parties, arbitrators, and courts are more inclined to follow the principle that who makes the claim bears the burden of proof.

The arbitral tribunal may assume that a claimant has withdrawn the request for arbitration if he\she misses their scheduled appearance before the arbitral tribunal without good cause. When this is the case, the tribunal may impose a default award. If either party leaves a hearing before it is over, the same powers still hold.[585]

Either party may seek interim protective measures from a PRC arbitral tribunal. Orders preserving property and evidence are among the available interim protective measures. However, the arbitral commission in charge of the proceedings have no authority to order interim measures. Therefore, upon receipt of a request for the issuance of interim measures, the arbitration commission is obliged to refer the case to the PRC People's Court, which enjoys sole jurisdiction to issue such measures in accordance with the relevant provisions of the Civil Procedure Law.[586] Local courts may order the preservation of property or evidence, or they may direct a party to carry out or refrain from doing something if it appears that the: it will be impossible or difficult to enforce an arbitral award; evidence might be lost or challenging to find; without such safeguards, the rights and interests of parties will be harmed.

An application for property preservation can be made in foreign-related arbitrations to the intermediate people's court where the respondent resides or where the property is located. The intermediate people's court where the evidence is located must receive the

[584] Yang (516).
[585] PRC Arbitration Law 1994 art 42.
[586] Civil Procedure Law 1991 art 258; PRC Arbitration Law 1994 art 28; Draft Amendment arts 43 to 49 would give arbitral tribunals the authority to impose temporary restrictions during the arbitration. This includes the authority to impose specific performance and injunctions, the preservation of evidence and property, and any other urgent measures the arbitral tribunal deems necessary. The tribunal may also ask the court for help in enforcing the temporary orders it has made. The extent to which an arbitral tribunal may use this new power and the efficacy of interim measures ordered by an arbitral tribunal are still being investigated because only courts have the authority to take coercive enforcement measures.

application in order to preserve the evidence; such applications must be made to the basic people's courts rather than the intermediate people's courts in domestic arbitrations.[587]

As was previously mentioned, during the arbitration process, the parties may try to settle their differences through conciliation or mediation. However, differently from the Russian provisions, Chinese legislation provides that mediation shall be conducted by the court as a part of the arbitration dispute settlement and the judge can take on the role of the mediator. If a settlement is reached, the arbitration may be declared successful, and the parties can request the arbitral tribunal to base its decision on the settlement agreement. If the conciliation fails, the arbitration may be resumed, and the award should be issued in due course.[588]

3.8 Confidentiality

Unless the parties specifically agree otherwise, the arbitration is confidential.[589] The confidentiality obligation generally applies to the parties, arbitrators, witnesses, translators, experts, and all other parties involved in the arbitration.

There are a few situations where information relating to arbitration proceedings may be disclosed, including court proceedings, such as the review of the arbitral agreement's validity, the granting of interim measures, or the enforcement or setting aside of awards; in criminal or civil proceedings where the judicial authorities gather evidence that is related to the arbitration proceedings; and in limited circumstances where a listed company discloses arbitration cases in order to fulfill its obligation of disclosure. If the parties agree to a public hearing, the arbitration may proceed in public, except in cases involving state secrets.[590]

3.9 Choice of law

According to the Law of the People's Republic of China on the Application of Law in Foreign-related Civil Relations 2011 (also called 'Application Law', the codified conflict of laws rules in China) if the contract involves a foreign interest, the parties are free to agree on the governing law unless mandatory PRC law applies.[591] In fact, PRC law states that

[587] Chen (514).
[588] PRC Arbitration Law 1994 arts 49 and 51. Wang (n 500) 890-892.
[589] PRC Arbitration Law 1994 art 40, 'The arbitration tribunal may not hear a case in open sessions. But when parties concerned agree to have the case heard in open sessions, the hearing may be held openly, except cases that involve State secrets.'
[590] PRC Arbitration Law 1994 art 40.
[591] Application Law 2011 arts 3 and 4. In principle, the parties cannot choose a foreign law as the governing law if the subject matter is a purely domestic one (i.e. domestic transaction involving domestic parties only).

certain contractual transactions (and subsequent disputes arising from such transactions) must be governed by PRC law, even if the contract involves a foreign interest[592], such as a foreigner or a foreign entity. Contracts for Sino-foreign equity joint ventures, contracts for Sino-foreign cooperative joint ventures, and contracts for Sino-foreign cooperative exploration and development of natural resources to be performed on PRC territory are examples of such contracts.[593]

It is expressly provided in the Arbitration Law that arbitration will be based upon facts and conducted in accordance with the law and the relevant regulations, and the dispute will be settled on a fair and reasonable basis.[594] The primary reference to the "law", rather than to "rules of law" as in the UNCITRAL Model Law,[595] suggests that under Chinese law the merits of the dispute must be resolved through the application of a national law. The use of non-state laws, as the general principles of law, commercial usages and customs, international business rules and *lex mercatoria* is not contemplated. Furthermore, the parties cannot not instruct the arbitral tribunal to resolve the dispute *ex aequo et bono* or as *amiable compositeur*, because according to the relevant provisions, the arbitration award cannot be based on the principle of fairness and reasonableness alone; it needs to relate to the relevant laws or regulations.[596]

The PRC Arbitration Law is silent regarding the choice of the applicable substantive law in arbitration when the parties fail to designate one. Instead, arbitral institutions have addressed the issue by including specific language in their arbitration rules,[597] though not all the arbitral institutions in China have done so.[598] For instance, according to the CIETAC Arbitration Rules, in the absence of a choice of law agreement or when such an agreement conflicts with a legal requirement, the arbitral tribunal will choose the law that will apply to the merits of the dispute. The question that arises at this point concerns which approach would the arbitrators use to identify the applicable law among the *voie direct*, *voie indirect*,

[592] The definition of a "dispute involving foreign interests" in contained in article 1 of the SPC Interpretation mentioned above (n 515).
[593] An entity incorporated in China solely or partially by a foreign shareholder, including 16 October 2015 Dispute resolution and choice of law in China-related contracts a wholly foreign owned enterprise (WFOE), Sino-foreign joint venture, or Sino-foreign cooperative enterprise, is considered a domestic entity under PRC law. Accordingly, such an entity will not be deemed as a foreign party and will not be sufficient to render the transaction foreign-related.
[594] PRC Arbitration Law 1994 arts 7 and 8.
[595] UNCITRAL Model Law 1985 art 28 (1).
[596]Xu (n 561).
[597] Patrick Zheng and others, 'Navigating Conflict of Laws in International Commercial Arbitration in China' in Lei Chen and André Janssen (eds.), *Dispute Resolution in China, Europe and World* (Springer 2020) 209; Daniel Girsberger and Nathalie Voser, *International arbitration: comparative and Swiss perspectives* (3rd edn, Schulthess Verlag 2016) 341.
[598] For example, the current arbitration rules of Shanghai International Arbitration Centre, which do not contain any provision determining the law applicable to the substance of dispute.

and others and mixed approaches as the cumulative approach or the closest connection test[599]. It appears that in most cases, the arbitration rules of arbitral institutions in China have mainly adopted the approach of *voie directe*, also known as the direct application method, meaning to apply whatever law the arbitrator(s) deems appropriate, without having to through a conflict of laws analysis first.[600] The issue with the use of such a method is that arbitrators enjoy too much freedom and discretion in determining the applicable law to the dispute, especially when the arbitration rules do not impose any obligation on the arbitral tribunal to give reasons for the identification of the governing law (even though, according to many scholars and practitioners, there exists an implicit duty on arbitrators to give reasons on their decision on the applicable law). Moreover, when using the direct approach, it is not a given that arbitrators will completely ignore the conflict of laws rules of either the *lex arbitri* or the potential enforcement forum. Arbitrators, according to Worthmann, are always influenced by certain considerations that amount to *de facto* conflict of laws considerations and will almost certainly use some concepts of private international law.[601] In case the arbitral tribunal uses the PRC law's conflict of laws' provisions when there is not an agreed-upon choice of law, as a general rule, the law that is most closely connected to the foreign-related civil relationship shall apply. According to articles 2 and 41 of the Application Law, the law of the habitual residence of the party who had the obligation to carry out the portion of the contract that most closely reflects the characteristics of the contract, or another law most closely related to the contract, shall apply (where the parties did not choose the applicable law).

Some arbitral institutions as the Beijing Arbitration Commission, provide that the arbitral tribunal shall take into account "the relevant industry practices and trade usages" when resolving a case.[602] It is still unclear if this clause expressly endorses the use of *lex mercatoria*, transnational law, international trade law, or general legal principles. In that situation, the arbitration rules would in fact give the arbitral tribunal the authority to choose "rules of law" rather than any foreign national law.

Finally, the Application Law contains specific law provisions for disputes that are not contractual, determining which law must be applied in certain circumstances, such as in situations involving real estate property rights, negotiable instruments, and pledges.[603]

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[599] For more on this issue Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (3rd edn, Kluwer Law International 2015).
[600] Zheng (n 597).
[601] Beda Wortmann, 'Choice of Law by Arbitrators: the Applicable Conflicts of Laws System' (2018) 14 Arbitration International 97.
[602]Beijing Arbitration Commission Arbitration Rules 2015 art 69 (4).
[603] Application Law 2011 arts 36, 39 and 40.

3.10 Language

Chinese arbitration legislation does not contain any provisions governing the language to be used in arbitration proceedings, whereas according to the CIETAC Arbitration Rules (2015) where the parties have agreed on the language of arbitration, their agreement shall take precedence. In the absence of such an agreement, Chinese or any other language chosen by CIETAC, taking into account the specifics of the case, shall be the language of arbitration.[604] In fact, in the absence of an express agreement on the language of arbitration, certain major Chinese arbitration institutions' arbitration rules state that the language of arbitration shall be presumed to be Chinese. Therefore, the language of arbitration should be expressly agreed upon in the arbitration agreement to avoid any ambiguity and potential disadvantages. It is possible to agree to use other language(s) for the submission of documents, etc., without translation, while only deciding on one or a maximum of two languages for the conduct of the arbitration proceedings.[605]

3.11 The seat of arbitration

Chinese Arbitration law presently does not contain any provision relating to the notion of "seat of arbitration", nor any such definitions are contained therein. The only reference to the seat is in fact made with regard to a similar concept, that is "place of arbitration", which was first used in reference to the law that governs arbitration agreements in paragraph 58 of the Supreme People's Court Minutes (26 December 2005) and allowed the parties to establish the location of the arbitration. Art. 16 of the Supreme People's Court's Interpretation also states that the laws of the "place of arbitration" should be used if the parties have agreed on that location but have not yet agreed on the applicable law. However, nor the Supreme People's Court Minutes and neither the SPC's Interpretation took care of defining the "place of arbitration". A more recent provision, Art. 18 of the Law on Applicable Law in Foreign-Related Civil Matters (promulgated on October 28, 2010, and taking effect on April 1, 2011), states that if the parties cannot agree on the law governing the validity of the arbitration agreement, the law of "the location of the arbitration institution or the location of the arbitration shall apply". Nonetheless, this clause is silent on when to

[604] CIETAC Arbitration Rules 2015 art 81.

[605] Guag Li, 'Arbitration Agreement under Chinese' Law (*TaylorWessing*, 25 January 2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2023/01/arbitration-agreement-under-chinese-law> accessed 25 January 2024.

use the law of the arbitral institution's home country, when to use the law of the arbitration's location, and which of the two rules will take precedence in the event of a conflict.

Most developed jurisdictions use the 'territorial' standard to identify and determine the arbitration seat, as does the New York Convention itself.[606] However, according to a textual and holistic interpretation of art. 58 of the Arbitration Law and articles 237 and 274 of the Civil Procedure Law, Chinese law is considered to adopt an 'institution' standard rather than a 'territorial' one in determining what other jurisdictions regard as the seat and courts with regulatory, supervisory, and supporting powers and functions over arbitrations.[607] Such institution standard requires Chinese courts to consider whether the arbitration is administered, and the arbitral award rendered by a Chinese or foreign arbitral institution, rather than whether the arbitration is conducted, and the arbitral award is made on Chinese or foreign state territory. As it will be explained in the next paragraph, such an approach causes some issues when it comes to challenging, recognize and enforce the arbitral award.

To keep up with international practice, the 2012 CIETAC Rules have introduced the seat concept in art. 7 differentiating the seat from the place of the hearings and allowing the parties, at the same time, the freedom to agree on different places at their discretion. Where the parties have not agreed on the seat of arbitration, under CIETAC Rules, the seat is deemed to be the city where CIETAC (or its sub-commissions) is located, which could be a place inside Mainland China or, according with the latest review, a city other than the location of CIETAC and consequently located outside China. It is worth pointing out that arbitration outside Mainland China is permitted for foreign-related disputes only.

The change in CIETAC Rules represents a substantial innovation, considering how it impacts on the determination of the law governing the arbitral proceedings and the courts that will have supervisory jurisdiction over arbitration.[608] The *lex arbitri* has gained widespread acceptance in the Chinese arbitration community as being the law of the seat. However, there is a significant disagreement regarding the *lex arbitri* and the nationality of such arbitration proceedings and subsequent awards when they are conducted in China by foreign institutions.[609]

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[606] The International Council for Commercial Arbitration's Guide (2013) explains that the seat of arbitration is a legal, not a physical, geographical concept. Hearings, deliberations and signature of the award and other parts of the arbitral process may take place elsewhere. This of course is in line with Article 20 of the Model Law.
[607] Ke Hu and Xi Lin, 'Chinese Law or No Law: The Lex Arbitri for Arbitrations Conducted by Overseas Arbitration Institutions in Mainland China' (*Kluwer Arbitration Blog*, 9 September 2015) <https://arbitrationblog.kluwerarbitration.com/2015/09/09/chinese-law-or-no-law-the-lex-arbitri-for-arbitrations-conducted-by-overseas-arbitration-institutions-in-mainland-china/> accessed 25 January 2024.
[608] Gu (n 502).
[609] Ke Hu and Xi Lin (607).

Without any doubt, Chinese law should fill the present gaps that continue to create some crucial issues, especially for the determination of the type and nationality of the award (which will be discussed also in the next paragraph) either through legislation or judicial interpretations, clearly defining the place/seat of arbitration as a legal notion distinct from the place of the arbitration institution or the place where the arbitral tribunal may conduct hearings or deliberations.[610] The law should also settle that parties may agree on the place of the arbitration; make it clear that, in the absence of such a designation by the parties, the location of the arbitration may be chosen by the arbitral tribunal, the arbitration commission or ultimately by a Chinese Court. This would surely shed some light on Chinese arbitration and bring the Chinese legal system in line with the international standards.

3.12 The award

It is possible to identify four main types of arbitral awards that are enforceable in China, namely: Chinese domestic awards; foreign-related awards rendered in China; foreign arbitral awards rendered outside China and awards rendered in Hong Kong, Macau, and Taiwan. It is important to clarify such a distinction because each type of award is treated differently when it comes to challenge, recognition, and enforcement mechanisms,[611] as shall be discussed better in detail in the next paragraphs.

For what concerns the validity requirements, art. 54 of the Arbitration Law provides that the arbitral award must specify: the arbitration claim; the facts of the dispute; the reasons for the decision; the results of the award; the allocation of arbitration fees; and the date of the award. If the parties agree that the facts of the dispute and the reasons for the decision should not be specified in the award, such parts may be omitted.[612] The arbitral tribunal does not need to vote unanimously to make an award; instead, awards are made by majority decision.[613] Where a majority opinion cannot be reached, the award shall be decided according to the presiding arbitrator's opinion.[614] The arbitral award shall be signed by the arbitrators and be sealed by the arbitral institution. Dissenting arbitrators are allowed but are not required to sign the award.[615] During the arbitration, arbitral tribunals may make interim awards based on specific facts of the dispute that have emerged.[616] Chinese law does not

[610] As proposed in the Draft Amendment 2021.
[611] Gu (n 502).
[612] Art. 54 PRC Arbitration Law 1994.
[613] PRC Arbitration Law 1994 art. 53 Ibidem.
[614] PRC Arbitration Law 1994 art. 53 Ibidem.
[615] PRC Arbitration Law 1994 art. 54 Ibidem.
[616] PRC Arbitration Law 1994 art. 55 Ibidem.

provide for any statutory deadline for the tribunal to issue the award. However, rules of arbitral institutions frequently outline the deadline for the tribunal to render the award in order to conduct the arbitration and settle the dispute efficiently. For example, in the CIETAC Arbitration Rules, the award must be issued within six months of the date the arbitral tribunal was formed.[617] Moreover, as previously mentioned, the arbitral tribunal can recognize a settlement agreement reached by the parties to a conciliation occurred within an arbitration procedure by issuing an award that includes the terms of the said settlement or by issuing a written conciliation statement.[618] There are no specific legal restrictions on the types of remedies that the tribunal may award because Chinese law does not explicitly state them. In practice, the arbitral tribunal frequently grants the following types of relief: equitable remedies, such as specific performance, injunction relief, and declaratory remedies; legal remedies, such as damages, including compensatory damages and liquidated damages if they are reasonable in light of the expected/actual harm.

With the issuance of the award the arbitration proceedings are terminated.[619] The award becomes effective and legally binding on the day that it is made.[620] Within 30 days of receiving the award, the parties may request a correction if there are grammatical or mathematical errors in the decision or if the decision omits certain issues that must be resolved by the arbitral tribunal. The parties may even request a supplementary award if certain claims are entirely missing from the original award.[621]

According to art. 54 of the PRC Arbitration Law, the arbitral tribunal shall determine how the parties' legal fees will be allocated by the arbitral award. Arbitration fees, attorney fees, and other third-party costs like those for experts, appraisals, audits, notaries, translations, etc. are frequently included in the costs of legal proceedings.[622] The tribunal typically divides the costs of the litigation between the parties in accordance with their prior understanding. In the absence of such prior agreement, the tribunal will allocate costs in

[617] PRC Arbitration Law 1994; CIETAC Arbitration Rules 2015 art. 48
[618] PRC Arbitration Law 1994 arts 49 and 51.
[619] It is worth recalling that the arbitration proceedings may also come to a conclusion by default or by settlement agreement.
[620] PRC Arbitration Law 1994 art 57.
[621] PRC Arbitration Law 1994 art 56.
[622] According to the Arbitration Fee Collection Measures of the Arbitration Commission issued on July 28, 1995 by the State Council (as part of the 1994 PRC Arbitration Law) case acceptance fees and case handling fees are included in the arbitration costs. The costs associated with paying the arbitrators' compensation and keeping the arbitration institution operational are covered by the case handling fees, which also cover (i) the arbitrators' reasonable lodging, travel, and other expenses related to the arbitration case that they incurred while handling it during their business trips and hearings; (ii) Costs related to witnesses, expert witnesses, interpreters, and other personnel attending, including accommodation, transportation, and overtime subsidies; (iii) costs of consultation, evaluation, inspection, and translation; (iv) costs of copying and serving case materials and documents; and (v) any other reasonable costs that fall under this category and are the responsibility of the parties involved.

accordance with the "costs follow the event" principle. Specifically, the losing party will generally be responsible for paying the legal fees. The arbitral tribunal will calculate the percentage of each party's share of the legal costs based on the extent of each party's liability if either party only partially prevails in the case.

3.13 Challenging an award

Since the award is considered to be final and binding from the date of its issuance, an appeal against it made before an arbitral tribunal or a PRC People's Court is, in general, not permitted.[623] However, the interested party may try to raise his objections to the award filing an application to the competent Chinese courts for setting aside[624] the award or to seek the non-enforcement. The grounds for a party to contest an arbitral award are specified by Chinese law and are thought to be mandatory. As a result, parties cannot mutually agree to exclude or broaden the application of these grounds. The only reasons to resist an award can be find in the law. The Chinese arbitration law treats differently domestic and foreign-related awards when discussing the grounds for challenge, set aside or non-enforcement of the awards. Considering the object and purposes of the present study, the analysis will be mainly focused on the legislation over foreign-related awards.

For foreign-related awards, either party may file an application with the PRC People's Court within six months of receiving the award.[625] The PRC Civil Procedure Law's art. 274 outlines the grounds for setting aside, which are the following: 1) the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement; 2) the person against whom the application is made was not requested to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his opinions due to reasons for which he is not responsible; 3) the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or 4) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration institution. If the people's court determines that the execution of the said award would be against public policy, it shall rule to deny execution.[626] As it is clear from grounds just listed, in an application to set aside a foreign-

[623] PRC Arbitration Law 1994 art 9.
[624] The competent Court to hear about the challenge of an arbitral award is the intermediate people's court at the place where the arbitration commission located, PRC Arbitration Law 1994 art 58.
[625] PRC Arbitration Law 1994 art 59. The limitation period is reduced to three months under the Draft Amendment 2021 art 78. This significant reduction in the limitation period is consistent with the UNCITRAL Model Law 1985, as amended in 2006, and severely limits a part's right to set aside the arbitral award.
[626] PRC Civil Procedure Law 1991 art 274 provides that a court may refuse to enforce an award if it is against 'public interest'.

related award, the Intermediate People's Court will only review whether the relevant procedural requirements have been fulfilled and will not re-examine the merits of the dispute. On the contrary, a purely domestic award can be set aside upon substantial review of the merits of the case. This may occur if evidence is found to be insufficient or if the application of the law is found to be erroneous. Such a power lying in the Courts' hands is very peculiar of the Chinese system. Other legislations on the same matter do not provide similar powers and level of intrusion for Courts to revise the merits of the dispute, not even when the issue involves a domestic award. In fact, as a general rule, Courts are not granted the faculty to review the substance of the dispute. It is thus crucial for the parties to make sure that their arbitration is considered to be "foreign-related" under Chinese law and that the award involves "foreign elements" in order to limit the scope of judicial review.

To set aside an arbitral award, an application must be made to the Intermediate People's Court where the arbitration commission is located, and the court must assemble a collegiate bench to consider the request. It is noteworthy that the "non-arbitrable subject matter" is not listed as a ground for setting aside the award. This, however, does not mean that, in practice, Courts may find that when the award is rendered on a non-arbitrable subject matter it cannot be set aside.

The decision of Chinese courts to set aside or not enforce arbitral awards is governed by the internal reporting regime mentioned above. A ruling on the setting aside or non-enforcement of a foreign-related award or the non-recognition or non-enforcement of an award made outside of mainland China can only be made with the approval of the SPC. Whereas the approval of the Chinese High Court is sufficient to make such a ruling for a domestic award.

When dealing with the topic of challenging an award with either a request to annul or set aside the arbitral decision, the issue related to the lack of a true notion of the "seat of arbitration" and the Chinese apparent adoption of the 'institution standard' on this regard becomes evident. That is because, as mentioned already, it is internationally recognized that the only Courts that can annul or set aside an award are the those of the seat of arbitration. But if China implies an 'institution' standard to identify what it understood as the seat of arbitration, then such an approach causes some troubles at least in two situations: a) when the arbitration is conducted, and the award made, by a Chinese arbitration commission in the territory of a foreign state; and b) when the arbitration is conducted, and the award made, by a foreign arbitration institution in Chinese territory. In the first case, (a) according to the institution standard, an arbitration conducted by a Chinese arbitration commission abroad should be subject to the regulation and supervision of Chinese courts, which will ultimately

have also the power to set aside the award. Nonetheless, based on the territorial standard, the foreign court in the location where the Chinese arbitration is held (and the award made) may also claim regulatory and supervisory powers, including the power to set aside the award. As a result, there could be a conflict among the courts to carry out supervisory activities and a clash of jurisdictions.[627]

As for the second situation (b), according to the institution standard, an arbitration conducted and awarded by a foreign arbitration institution is not subject to the Chinese Arbitration Law or the Civil Procedure Law, which means that Chinese courts are unable to exercise their regulatory and supervisory powers and functions, including the power to set aside the arbitral award. Foreign courts, on the other hand, will treat China as the arbitration seat under the territorial standard and regard themselves as lacking the relevant regulatory and supervisory powers because the arbitration is conducted, and the award is made in Chinese territory. As a result, the arbitration and the arbitral award will be left in a legal vacuum, with no courts claiming supervisory powers or jurisdiction over them.[628]

The institution standard, combined with China's reservation under the New York Convention, has created an apparent impasse also in the realm of recognition and enforcement of awards made in China by foreign arbitration institutions. In 2020, the Intermediate People's Court of Guangzhou (the Guangzhou Court) delivered its ruling on the recognition and enforcement of an arbitral award made by the ICC, possibly as a means to resolve the problems caused by the institution standard. The Guangzhou Court ruled that an arbitral award rendered by a foreign arbitration institution on Chinese territory was a domestic arbitral award subject to the Civil Procedure Law's enforcement rules[629]. This was the first time a Chinese court acknowledged the territorial standard in determining the arbitration seat, as well as the applicable law regarding the recognition and enforcement of an international arbitration award.

Art. 27 of the Draft Amendment, which reinforces the Guangzhou Court's landmark achievement, abandons the institution standard and explicitly endorses the concept of the arbitration seat, the determination of which is dependent on the territorial standard. According to art. 27 of the Draft Amendment, the court at the arbitration seat has the authority to rule on arbitration jurisdiction (art. 28), order interim measures in aid of arbitration (art. 46), set aside the arbitral award (art.77), and assist in the establishment of

[627]Ke Hu and Xi Lin (n 607).
[628]ibid.
[629] See Recognition and Enforcement of Court Judgment and Arbitral Award *Brentwood Industries and Guangdong Fanlong Mechanical Equipment Engineering Co, Ltd and others* Intermediate People's Court of Guangdong No. 62. (6 August 2020)

the arbitral tribunal (art. 92). By embracing the concept of the arbitration seat and the territorial standard, the Draft Amendment fills the gap between judicial practice and legislation and contributes significantly to the internationalization of Chinese arbitration law.

3.14 Recognition and enforcement of foreign awards

Art. 62 of the Arbitration Law expressly creates an obligation on the parties to comply with the arbitral award. However, if a party fails to perform the arbitral award, the other party may apply to the competent court for its enforcement, in accordance with the relevant provisions contained in the Civil Procedure Law. It should be also noted that there is no jurisdictional difference between recognition and enforcement; the two proceedings are combined into one in most cases.[630]

As it should be clear by now, it is always significantly important to make a distinction between domestic, foreign-related, and international arbitrations when it comes to Chinese law. The same goes with the arbitral awards which, for the enforcement purposes, can be distinguished in "Chinese domestic awards", "foreign-related awards rendered in China", "foreign awards rendered outside China", and finally the awards made in Hong Kong, Macao, and Taiwan.[631] Each type of award is treated differently on recognition and enforcement mechanisms terms, as specific procedures and grounds apply. It is worth stressing that awards rendered in China are categorized as domestic or as foreign related on the basis of the three steps "foreign-related test",[632] which values the domestic or international nature of the case itself and not the arbitration body that has issued the award, as provided by the arbitration legislation before the enactment of the State Council Notice

[630] John Shijian Mo, 'Interpretation and Application of the New York Convention in China' in George A Bernman (ed), *Recognition and Enforcement of Foreign Arbitral Awards. The Interpretation and Application of the New York Convention by National Courts* (Springer International Publishing 2017) 183.
[631] Gu (n 502) makes a similar classification.
[632] The commonly used definition of "foreign-related civil relationships" was set forth in the Supreme Court's judicial interpretation of the PRC General Principles of the Civil Law 1988 No.6 art 178 of and its judicial interpretation of the PRC Civil Procedure Law 1992 No.22, both of which provide that where: i) either party of a civil relationship is a foreigner, stateless person, or foreign legal person; or ii) the subject matter of a civil relationship is located in a foreign country; or iii) the legal fact that the civil rights or obligations are established, changed, or terminated in a foreign country, such civil relationship shall be a foreign-related civil relationship. If any of these three elements exists, the civil relationship is considered foreign-related. On the basis of the above three elements, the Judicial Interpretation issued on December 28, 2012, made effective on January 7, 2013, by the SPC regarding the application of the Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relationships, includes a fourth element—where the regular residence of either party or both parties of a civil relationship is outside the territory of the PRC, such civil relationship shall be foreign-related. Thus, not only the nationality of the parties but also their residence determines whether foreign elements are involved.

of 1996, which essentially blurred the dual-track system on this wise.[633] Let us examine the recognition and enforcement mechanisms for each of the four types of awards, beginning with domestic awards.

The application for the enforcement of either domestic or foreign-related awards must be submitted to the Intermediate People's Courts within two years of the final date on which the losing party was ordered to comply with the terms of the award.[634] The party requesting enforcement shall file the application for enforcement and deliver the original award, the arbitration agreement, and any supporting documentation.[635] When an application to set aside an award has been denied by the competent court, the enforcing court cannot refuse to enforce the award on the same grounds as the earlier court rejected the application to set aside the award.[636] This prevents conflicting rulings regarding the setting aside and non-enforcement of awards on the same case. The enforcement of domestic awards can only be refused by the enforcing court in accordance with the provisions of art. 63 of the PRC Arbitration Law (in connection with art. 237 of the PRC Civil Procedure Law), in addition to the "social and public interests of the PRC" ground. In principle, the prior reporting system applies to foreign-related and foreign awards but not to domestic ones. As a matter of fact, the Higher People's Court must be informed if the competent Intermediate People's Court declines to enforce the award, and the final say on the matter belongs to the Higher People's Court. Only since 2018, a sort of reporting system procedure has been implemented for domestic awards as well, when the parties concerned reside in different provinces. In that case, the Higher People's Court shall report its refusal to the Supreme People's Court and make a ruling based on the opinions given by the Supreme People's Court,[637] which adjustment shows a pro-arbitration tendency in the PRC legal system.

The grounds for refusing the enforcement of an award made by an arbitral tribunal in the PRC in a dispute involving a foreign element are the same as those for setting aside such an award[638] (described in the paragraph above). Such grounds are certainly narrower than those eligible for refusing the enforcement of domestic awards and are limited to procedural irregularities only. When a foreign arbitration institution or an arbitral tribunal

[633] Since the distinction between domestic and foreign-related arbitration institutions' jurisdiction has been eliminated, the fundamental nature of the dispute, rather than the identity of the arbitration institution conducting the arbitration proceedings, is the main factor in determining whether an award will be upheld in the PRC. Gu (n 502).
[634] PRC Civil Procedure Law 1991 art 239.
[635] Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Enforcement of People's Courts 1998 (revised in December 2008) art 20 and 21.
[636] Interpretation 2006 art 26.
[637] Provisions on Issues relating to the Reporting and Review of Cases Involving Judicial Review of Arbitration 2017 art 2 and 3.
[638] PRC Arbitration Law 1994 art 71, in connection with PRC Civil Procedure Law 1991, art 274.

established on an ad hoc basis outside the PRC renders an award that is not voluntarily complied with, the party seeking to enforce that award in the PRC must apply to the competent PRC People's Court for enforcement. The Intermediate People's Court in the respondent's domicile or where its property is located is the competent court for the enforcement of a foreign award.[639] The matter will be handled by the Intermediate People's Court in accordance with the terms of any international treaties concluded or acceded to by the PRC, or in accordance with the principle of reciprocity.[640]

The enforcement of foreign awards is generally concerned with the application of the New York Convention, acceded by China on 2 December 1986 and ratified the on 22 January 1987. The Convention became effective for China on 22 April 1987. As already mentioned, China adhered to the Convention with two reservations: reciprocity and commercial. As a result, the PRC is only required to recognize and enforce awards made in the territory of another New York Convention contracting state. Foreign awards rendered within the territory of the PRC by foreign arbitration institutions – for example, an arbitral award rendered by the ICC in Shanghai – are not eligible for enforcement in the PRC under the New York Convention.[641] The other reservation made by the PRC to the New York Convention is that the PRC will only apply the New York Convention to disputes arising out of legal relationships, contractual or not, that are considered commercial under national PRC law. Due to the broad interpretation of the term "commercial dispute" contained in the 1987 Circular of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, this reservation has never been invoked in practice.[642]

Aside from the said restrictions on reciprocity and commerciality, the competent Intermediate People's Court can only refuse enforcement of a foreign award for the reasons specified in Sections 1 and 2 of art. V of the New York Convention based upon evidence provided by the person against whom the enforcement is sought. Art. 260 of the Civil Procedure Law fairly reflects the grounds contained in art. V of the New York Convention, thus adopting its pro-enforcement approach. A party involved in the recognition and enforcement of Convention awards may invoke both the provisions of the New York Convention as well as the relevant laws contained in the Chinese Civil Procedure Law.[643] Although the two legislative texts are similar, they are not identical. In case of conflicts,

[639] PRC Civil Procedure Law 1991 art 283.
[640] ibid.
[641] Wang (n 500).
[642] Lichtenstein (583).
[643] Civil Procedure Law 1991 art.238 and General Principles of civil law 1986 (as revised in 2017) art 142; Wang (n 500).

Chinese law generally provides for the rules contained in the international treaties ratified by China to take precedence, except for reservations. This provision applies to all proceedings involving foreign elements in general.

As already mentioned, the grounds to refuse the enforcement stipulated in the New York Convention are purely of a procedural nature, ranging from the validity of the arbitration agreements to defects in the composition of the arbitral tribunal and the related notices of the arbitral proceedings which aim at ensuring that a fair due process standard is observed. On this last point, it is interesting to note that the understanding of "due process" is different in China compared to other jurisdictions, especially common law ones. Let's start by saying that there is no principle of due process in the Chinese Constitution, nor does the Constitution make express reference to proper notice or fair hearing.[644] A very example of such a different understanding of the due process notion is reflected on the Chinese interpretation of the New York Convention's "being unable to present his case" ground for refusing the enforcement, as it has been intended to include only "force majeure" and "serious illness" as reasons that may prevent a party from participating in the proceedings. Such an extreme rationale is certainly not the one that stands behind the "unable to present his case" ground under the New York Convention, which in fact includes at least three circumstances: "1) no proper notice of appointment of the arbitrator was given; 2) no proper notice of the arbitration proceedings was given; 3) the party was otherwise unable to present his case".[645] Art. 260 of the civil procedural law mentions the first two grounds, but the third ground is changed into "the party was unable to present his case due to causes for which he is not responsible" obviously referring to force majeure events as sickness, visa problems, etc.[646] Furthermore, practice show that Chinese courts and arbitral tribunals have prioritized substance, justice, fairness, and equity over procedure. As a result, the inability to present the case has rarely been raised as a defense in the recognition and enforcement of arbitral awards.

The prior reporting system for foreign and foreign related awards provides that the Intermediate's people Court may refuse the enforcement of an award only after the SPC's approval and confirmation of the findings. In this way, any negative ruling by lower courts is subject to a "pyramidal scrutiny" by higher level courts. Such a pre-reporting mechanism should prevent local influences over arbitration and enhance international enforcement by

[644] Even though some general principles in the Constitution may be applicable to due process e.g., PRC Constitution arts 33, 37, 125, 126; Bernman Shijian Mo (n 630).
[645] Wang (n 500).
[646] ibid.

putting refusal decisions under the SPC scrutiny.[647] Such a system has been established in an attempt to favour arbitration by stopping local courts from rejecting the enforcement of foreign awards only to safeguard the local party and to ensure that a refused recognition decision is well funded[648]. Besides, the prior reporting system is very effective tool to provide guidance and supervision for local courts regarding detailed issues or the correct understanding of the New York Convention.[649]

During the 1990s, the likelihood of enforcing a foreign award against a PRC person or entity was estimated to be around 50%, but it has significantly increased ever since.[650] A success rate of 68% was achieved between 1994 and 2015 when 67 out of 98 requests to enforce foreign arbitral awards were granted.[651]

For awards made in the Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan, there are separate arrangements or directives to regulate the relevant issues, specifically, there is the SPC arrangement with respect to the mutual enforcement of arbitral awards by the mainland the Hong Kong Special Administrative Region; the same arrangement on enforceability was concluded with Macao in the form of a Mutual Acknowledgement and Enforcement of Arbitral Awards; finally some SPC directives regulate the Acknowledgement and Enforcement of Arbitral Awards rendered in Taiwan.[652]

3.15 Public policy

The violation of public policy is a general and traditional ground for refusing enforcement of foreign awards and judgments. In fact, one of the circumstances in which parties may request the setting-aside[653] and non-enforcement of arbitral awards[654] is the violation of the

[647] Gu (n 502).
[648] Chen (514).
[649] The reasons for refusal by different levels of courts are comprehensively published and available to the public in the journal 'China Trial Guide on Foreign Related Commercial and Maritime Trial', edited by the 4th civil division of the SPC, which specifically deals with foreign related commercial cases and maritime disputes.
[650] Randall Peerenboom, 'Seeking Truth from Facts: An Empirical Study of Enforcement of Awards in the PRC' (2001) 49 American Journal of Comparative Law 249, 254.
[651] Meg Utterback, 'Enforcing Foreign Arbitral Awards in China – a review of the past twenty years' (*King & Wood Mallesons and Holly Blackwell*, 15 September 2016) <https://www.kwm.com/cn/en/insights/latest-thinking/enforcing-foreign-arbitral-awards-in-china.html> accessed 25 January 2024; Li Hu, 'Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China' (2004) 20 Arbitration International 167.
[652] Tereza Gao and Ziyi Yao, 'Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land?' (*Kluwer Arbitration Blog*, 12 October 2020) <https://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-no-mans-land-part-i/> accessed 25 January 2024.
[653] PRC Arbitration Law 1994 of art 58 para 3.
[654] Civil Procedure Law 1991 art 237 para 3.

public policy of the enforcing State. It is also the primary circumstance in which the court may review *ex officio* the decision to set aside or not enforce an arbitral award.[655]

In Mainland China "public policy" refers to the controversial concept of "social and public interest" first established in the General Principles of Civil Law which provides that "where the law of a sovereign country or of international practice is to be applied in China, this must not be contrary to China's public interest".[656] Other than the said reference, there is no statutory definition in China of what constitutes "social and public interest", thus leaving the concept to the interpretation of the enforcing Courts. Significant in this respect, was interpretation issued by the SPC in the decision of *TCL Air-Conditioner (Zhongshan) Limited v Castle Electronics Pty Ltd* which stated that: "the infringement of public interest shall be interpreted as a violation of the basic principle, infringement of the national sovereignty, jeopardizing public security, violation of public policy, and the other circumstances which will infringe the basic public interest".[657]

Social and public interest in the arbitration regime has been criticized by outsiders because sometimes the use of such a ground resulted in Chinese courts trying to review the merits of the award, as it happened with the *Henan Dongfeng Garnment* case when a Chinese court has applied that the notion of "social and public interest" to protect the state-owned enterprise against whom the enforcement of the award was sought. The Intermediate People's Court turned down the application for enforcement of an award on the ground that according to the current state policies and regulations, enforcement would seriously harm the economic influence of the state and public interest of the society and adversely affect foreign trade order of the state.[658] Nonetheless, the decision of the intermediate People's Court was subsequently overruled by the Supreme People's Court.

In this respect the application of the social and public interest ground was purely reasoned on local protectionism and such practice has been criticized by commentators both at home and abroad to be ambiguous and uncertain.[659] However, thanks to the establishment of prior reporting system, judiciaries at the central and local levels have to deal with the international awards in a very prudent and cautious manner, and thanks to the supervisory

[655] New York Convention art V (2) (b).
[656] General Principles of Civil Law 1986 art 150.
[657] *TCL Air-Conditioner (Zhongshan) Limited v Castle Electronics Pty Ltd* (Supreme People's Court No 46 26 November 2013).
[658] *Henan Garment Import and Export (Group) Company v Kaifeng Dongfeng Garment Factory* (Supreme People's Court 1992) unreported, compiled in Song Hang, 'The enforcement of foreign-related Awards in China- Issues in Practice' (1999) 2 China Private International Law and Comparative Law Journal, 370. For a summary of the case Michael Moser, 'China and the Enforcement of Arbitral Awards' Journal of the Charted (1995) 61 Institute of Arbitrators.
[659] Gu (n 502).

work of the SPC, which has worked hard to make China a pro-enforcement jurisdiction in arbitration, the public policy ground has actually not been invoked much by Chinese courts to vacate foreign arbitral awards, at least in a period of time that goes from the 2000 to 2007. Studies confirm that in China public policy has been seldomly argued as a ground for refusing enforcement of arbitral awards.

The violation of Chinese mandatory laws could in principle be reconducted to the public and social interest of China. In this regard the SPC has been clear in its Reply on the Application for Recognition and Enforcement of the London Sugar Association Arbitral that the violation of mandatory provisions of laws of China cannot be completely equivalent to violation of public policy of China (*ED & F Man (Hong Kong) Co., Ltd. v. China National Sugar & Wines Group Corp. [2003] Ruling No. 3)*. While local protectionism may be less of a concern nowadays than it used to be in the past, particularly with respect to the enforcement of foreign and foreign related awards to which the prior reporting system applies, other problems survive. There is indeed a lack of judicial competence by Chinese judges in handling arbitration.[660] In the early 1980s approximately 2/3 of Chinese judges did not have a law degree and one third were demobilized military personnel. This has changed to a large extent in the early 21st century when the new judges are required to pass the national judicial exam. However, education for judges and commercial law practices is still insufficient. They have limited knowledge of modern standards of arbitration such as the generally practiced the pro enforcement approach in reviewing international arbitration awards. Chinese judges sometimes have discretionarily applied the doctrine of public policy. On other occasions they ignored the applicable law rules in determining the effect of the arbitration agreement the general shortage of judicial expertise in arbitration has also caused that the arbitral awards to be unduly set aside or denied enforcement. There are also perceptions that rapid development of arbitration may disadvantage courts caseloads all these factors could affect the quality of special review over arbitration in China.

Such a situation should be fixed by integrating international arbitration standards and educating the judiciary at all levels to be supportive towards arbitration and have a coherent understanding of the public policy notion, considering that there are still situations in which the identification of the social public interest is not consistent.

[660] ibid.

Chapter 4. South Africa

4.1 The South African legal system

South Africa is a Republic made up of a national government, nine provinces and local spheres of government,[661] which are distinctive, interdependent, and interrelated.[662] The Constitution provides for three 'spheres of government' – national, provincial, and local – and vests legislative authority in respect of each in a particular body.[663] As a result, South Africa has three different types of legislation: local legislation made by municipal councils; provincial legislation created by the legislatures of its nine provinces and approved by the corresponding Premiers; national legislation created by the Parliament and approved by the President.[664] In South Africa, official legislation lives along with uncodified principles of law. Therefore, whereas some areas of law may be governed by Acts of Parliament or municipal by-laws, some others may be regulated by non-enacted law.

The Court system is articulated according to Section 166 of the Constitution in the following manner: the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from High Courts; the Magistrates' Courts, and any other Court established or recognised in terms of an Act of Parliament, including any Court of a status similar to either the High Courts or the Magistrates' Courts.

The legal system is the result of the country's long and varied history of colonization, which began with the Dutch East India Company's settlement in the Cape of Good Hope in 1652 and continued under the British rule from 1806 until the day of independence.[665] Colonization truly affected South African law and its society, leaving behind a series of dualities that have survived until very recently, as the overlapping white-black, ruler-ruled dichotomies, mirrored in the predominance of European legal principles over indigenous law, little of which was considered legitimate by the official law.[666] The colonial rule evolved into apartheid, a system of racial segregation, constitutionally supplanted in 1991,

[661] South African Constitution 1996 s 40 and 43.
[662] ibid s 40.
[663] ibid s 40 and 43.
[664] ibid ch 7.
[665] Infantino (124).
[666] Francois du Bois, 'Introduction: History, System, and Sources' in Cornelius G Van der Merwe and Jacques E Du Plessis (eds) *Introduction to the law of South Africa* (Kluwer Law International 2004)

when the democratic elections brought an end to South Africa's fifty odd years of apartheid rule.

Legally, as much as socially and politically, South Africa took a new direction when its first democratic Constitution came into force in 1994, providing for suffrage, outlawing racial and any other kind of discrimination, and protecting individual rights.[667] The 1994 Constitution, commonly referred to as "interim Constitution",[668] had a profound and long-lasting impact on South African law because it contained three main features that allowed South Africa to close up with the legal period marked by colonial and apartheid values namely, an egalitarian Bill of Rights with special legal status, a Constitutional Court to enforce such rights, and general rule of law values. These features continued to play a key role in the "final Constitution" of 1996, which is currently in force.[669]

The South African legal system incorporates both the civil law and common law traditions without neglecting a strong African component as well (in terms of indigenous traditional law). For this reason, it is classified as a "mixed jurisdiction", and in many respects the mixity has in fact turned into hybridity.[670] The system retains elements that are closely related to the civil law tradition brought by the Dutch, including relatively recent and overt connections with Roman law, which can be detected in the use of broad principles and concepts in legal reasoning, a significant reliance on doctrinal writings by the Courts,[671] and the existence of a specialized Constitutional Court since 1994.[672] Scholarly writings are extremely valued by Courts when making their decisions, especially by superior Courts, the Supreme Court of Appeal, and the Constitutional Court.

On the other hand, the legal system is mostly uncodified and is being shaped by legal precedents,[673] mainly established by Courts of general jurisdiction, as well as by legislation that is typically written in the style of detailed and comprehensive rules intended to reduce

[667] Du Bois (n 666). For the background and circumstances surrounding the development of the post-apartheid constitutional order Lourens du Plessis, Hugh Corder, *Understanding South Africa's Transitional Bill of Right*s (Kenwyn, Juta1994); Heinz Klug, 'Co-operative Government in South Africa's Post-Apartheid Constitutions: Embracing the German Model? (2020) 33 Verfassung und Recht in Ubersee 432 <https://ssrn.com/abstract=352324> accessed 25 January 2024.
[668] Du Boi (n 666).
[669] The Constitution of the Republic of South Africa, Act 108 of 1996.
[670] Palmer (n 117)
[671] Du Bois (n 666) 52-53. On the development of legal literature Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (OUP 1996); Martin Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour, and Prejudice* (CUP 2001) 19-30.
[672] Du Bois (n 666).
[673] South African courts adhere to the *stare decisis* doctrine, which states that precedents set by earlier courts must generally be followed unless they are thought to be manifestly incorrect and that decisions of higher courts are binding on all lower courts. Du Bois (n 666) 43-47.

judicial gap-filling.[674] However, some of the most important fields of law are governed by what are, in fact, "mini codifications"[675] as e.g., company law, which is to be found in the Companies Act 61 of 1973 and associated legislation, or the law relating to Arbitration, which is governed by the Arbitration Act 42 of 1965 and the International Arbitration Act 15 of 2017, devoted to domestic and international arbitration respectively.

Customary law has been given prominence in the South African Constitution,[676] which mentions it as one of the sources of African law, along with the Constitution itself and the Courts' decisions. In addition, the Constitution authorises the use of public international law as well as foreign law.[677] The term "customary law" refers to law with specifically indigenous cultural roots and does not cover the personal laws of religious groups, such as Muslims and Jews[678] (which, on the contrary, do not constitute authoritative sources of law in South Africa). What is peculiar of the South African experience, in this respect, is the will of the post-apartheid reforms to treat indigenous legal tradition as equal to the European tradition of the common law and civil law. As a matter of fact, as source of law, customary law may be applied to resolve disputes, according to a determined set of principles developed by the Courts.[679] These are centred on the idea that common law and customary law are, in essence, equivalent. The necessary premise is that everyone is granted the freedom to select which of the two systems will regulate their social relations. Not by chance, also in the contractual sphere, the parties are free to choose the applicable law which, according to the relevant South African scholarship, might also include non-state law[680]. Indeed, South African contract principles and rules are, to a certain extent, similar to those of Nineteenth-

[674] ibid. Moreover, Courts' decisions are listed as official sources of law by the Constitution. South African Constitution 1996 ss 8(3), 39(2) and (3), and 173.
[675] Du Bois (n 666) 40.
[676] South African Constitution 1996 s 211(3) stipulates that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Customary law is thus applicable as long as it is in accordance with the Constitution.
[677] South African Constitution 1996 s 39(1). South African Courts, especially superior Courts, have extensively relied on foreign law as a persuasive source. Du Bois (n 666) 50-52.
[678] Du Bois (n 666).
[679] On the matter T W Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 The American Journal of Comparative Law 1; Chuma Himonga and Craig Bosch, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 South African Law Journal 306. There exist specialised Courts of indigenous Traditional Leaders, also known as 'customary Courts', granted by the Black Administration Act 38 of 1927 to designate a 'chief or headman' to decide certain civil cases and certain criminal offenses in accordance with indigenous law. These rules were a key component of the racially segregated court system that served as the cornerstone of apartheid rule and can be traced back to the colonial system of indirect rule over the indigenous population. Such traditional courts have survived apartheid and continue enjoy considerable legitimacy, especially in rural areas where they often are the most significant dispute resolution institutions. Probably, this is due to their tendency to use informal procedures in which public input is welcomed and which exclude formal legal representation. Du Bois (n 666).
[680] Infantino (124); Jan L Neels and Eesa A Fredericks, 'Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law' [2006] Journal of South African Law 121.

century English common law, which place a strong emphasis on contract freedom, individual autonomy, and legal certainty, rather than using values such as good faith and Ubuntu to promote greater contractual fairness.[681]

South Africa has not ratified the CISG, nor is there any evidence for the Principles of International Commercial Contracts to have influenced the development of domestic contract law.[682]

4.2 A general overview on arbitration

The South African arbitration framework has been certainly influenced by the common law and civil law traditions, and particularly by the English Arbitration Act in its multiple versions. Alternative dispute resolution was, however, already in use in South Africa prior to the arrival and adoption of the Roman-Dutch and English law models.

Traditional South African communities, indeed, relied heavily on chiefs, headmen, and kings to mediate disputes between parties within a clan, avoiding formal legal mechanisms of dispute resolution.[683] Such a traditional practice was rather disrupted by colonialism, as the colonial powers have in fact brought with them their norms and practices, which supplanted the traditional method of resolving disputes amicably in the community, in favour of the adoption of a Western styled arbitration. During colonization, South African arbitration law developed as a substitute to litigation, allowing the parties -which were most commonly merchants and craftsmen- to quickly resolve their disputes.[684] In this sense, arbitration -and the values and goals with it- changed from being purely an internal system to the communities aimed at the reconciliation among the parties involved, to being a system that responded to efficiency goals, and which exited the traditional communal sphere.

The 1889 English Act influenced the legislation in the three South African colonies of Natal, the Cape and the Transvaal.[685] These pieces of legislation were replaced by a single statute, the Arbitration Act 42 of 1965, which regulated arbitration throughout the country, and continues to apply to purely domestic disputes in South Africa. The 1965 Arbitration Act was strongly influenced by the English Arbitration Act of 1950. Upon the English example, the 1965 Arbitration Act allows almost unrestricted access and interference to the

[681] Infantino (124).
[682] Infantino (124).
[683] Paul Pretorius (ed), *Dispute Resolution* (Juta 1993).
[684] Ditaba Petrus Rantsane, 'The Origin of Arbitration Law in South Africa' (2020) 23 Potchefstroom Electronic Law Journal1 <https://ssrn.com/abstract=3932219> accessed 25 January 2024.
[685] Peter Ramsden and Kelly Ramsden, *The Law of Arbitration: South African and International Arbitration* (Juta 2009).

national courts; it is also strictly domestic in perspective, containing no specific provisions for international commercial arbitration and, most importantly, the Court's powers of intervention contained therein applied also to the enforcement of foreign arbitral awards, although South Africa adhered to and ratified the New York Convention in 1976, without any reservation.[686] Surprisingly, in fact, the Recognition and Enforcement of Foreign Arbitral Awards Act issued in 1977 as instrument of accession, somehow departed from the provisions contained in the New York Convention to which South Africa was supposed to be bound.

Despite the vibrancy of the economic sphere in South Africa, international arbitration has been held back for several reasons, one of them is the stagnation of the Arbitration law after the promulgation of the 1965 Arbitration Act, which was never amended despite a changing environment and a growing interest in arbitration that instead would have demanded constant updating. Therefore, until very recently (2017), the principal piece of arbitration law in South Africa remained the Arbitration Act of 1965. The South African Law Reform Commission acknowledged in 1998 that South Africa was increasingly seen as the obvious centre for the resolution of commercial disputes by arbitration affecting parties not only in South Africa, but also in other African countries, and that it was therefore critical for South African arbitration proceedings to be brought in line with those of other developed countries.[687]

Not without reason, the popularity of arbitration significantly increased after the enactment of the South African International Arbitration Act in 2017 (hereinafter IAA), which transposes the text of the UNCITRAL Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the said Commission on 7 July 2006, subject to limited modifications and adaptations set forth in Schedule 1 of the 2017 IAA.[688] Section 8 of the IAA deals with the interpretation of the Model Law and empowers an arbitral tribunal or a court to relevant reports of the UNCITRAL Model Law or its secretariat in this regard.[689] The Model Law is thus applicable in the Republic of South Africa[690] thus making it a full Model Law country.[691] The adoption

[686] The list of contracting states to the New York Convention is accessible at the New Yorck Convention website <https://www.newyorkconvention.org/list+of+contracting+states> accessed 25 January 2024.
[687] Des Williams and Pierre Burger, 'Arbitration Procedures and Practice in South Africa: Overview, Thomson Reuters Practical law' (*Practical Law*, 1 May 2023) <https://uk.practicallaw.thomsonreuters.com/4-502-0878?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 25 January 2024.
[688] The most significant of such limitations relate to the power of the arbitral tribunal to order interim measures.
[689] IAA 2017 s 8.
[690] ibid ch 2 (6).
[691]It is worth mentioning that African nations can be broadly classified into two groups in the context of contemporary international arbitration: the Organization for the Harmonization of Corporate Law in Africa

of the Model Law follows the international trend of limiting and restricting court interference in arbitration. This stands in stark contrast with the relevant provisions under the 1965 Arbitration Act, along with the purely procedural, jurisdictional and public policy grounds endorsed by the Model Law to review arbitral awards, thus instilling trust in international parties about seating international arbitrations in South Africa, which is something that the Arbitration Act of 1965 did not succeed at.

The 2017 IAA applies to international arbitration seated in South Africa. The High Court within the area of jurisdiction in which the arbitration is held will typically provide arbitration assistance and supervision.[692] If there is no South African party or if the place within South Africa where the arbitration is to take place has not yet been determined, the Gauteng Division of the High Court seated in Johannesburg is the designated court.[693] In addition, the 2017 IAA facilitates the recognition and enforcement of foreign arbitral awards by repealing the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977, giving full effect to South Africa's obligations under the New York Convention.[694]

Such a long-awaited development has significantly increased the number of international arbitrations taking place in South Africa and has encouraged the creation of initiatives aimed at elevating the country's status as a key regional arbitration hub[695]. The modernisation of the arbitration legislation, practice, and procedure in South Africa is, in fact, encouraging the development of arbitration within the region, as well as in a broader international arbitration context. Domestic arbitration legislation, however, has not yet been modernised and continues to be governed by the domestic Arbitration Act of 1965, although it is widely expected that there will soon be new legislation on domestic arbitration as well.[696]

4.3 Arbitrability

As mentioned, Schedule 1 to the 2017 IAA reflects the UNCITRAL Model Law as amended in 2006, subject to certain adaptations. On this regard, art. 1(5) of the IAA, which addresses the scope of application of the UNCITRAL Model Law, provides that "This law shall not

(OHADA) group and the Model Law group. There are 30 African nations listed by the Commission as having modern international arbitration laws, and 27 of them—16 in the OHADA group and 11 in the Model Law group—fit into one of these two categories. It is generally acknowledged that the fundamental tenets of the Model Law are congruent with the Uniform Act governing arbitration in the OHADA nations. See Des William, 'International Arbitration in South Africa – A New Chapter' (*Werksmans Attorneys*, 5 June 2019) <https://www.werksmans.com/legal-updates-and-opinions/international-arbitration-in-south-africa-a-new-chapter/> accessed 25 January 2024.

[692] IAA 2017 sch 1 art 6 (a).

[693] ibid sch 1 art 6 (b).

[694] ibid sch 1 (3) (d) and sch 4.

[695] Williams and Burger (n 687).

[696] ibid.

affect any other law of the Republic [of South Africa] by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only accordingly to provisions other than those of this law." As a matter of fact, section 7 of the IAA provides that any international commercial dispute which the parties have agreed to submit to arbitration via an arbitration agreement may be determined by arbitration, unless such a dispute is not capable of determination by arbitration under any law of the Republic. The necessary consequence of such provisions is that, on arbitrability matters, the Domestic Arbitration Act continues to be applicable. Moreover, it should be pointed out that neither the 1985 version of the Model Law nor its 2006 revision contains a specific provision that deals with arbitrability, although the footnote to art. 1 (1) calls for "a wide interpretation" to the term "commercial" and offers an illustrative and open-ended list of relationships that, according to the Model Law, should be intended as commercial matters.[697] In this sense, the definition of what is commercial under a national law and the list of arbitrable matters are extremely interrelated.

Under section 2 of the Domestic Arbitration Act, a reference to arbitration is not permissible for any matrimonial cause or any matter incidental to such cause; or any matter relating to status. Such a provision certainly displays the common law influence, as generally under common law, cases relating to legal status, criminal cases, popular actions, or actions involving infamy cannot be submitted to arbitration. This does not extend to arbitration of a civil action for damages arising from a crime or an action involving infamy.

On how to interpret the "status" limitation for arbitral matters, in the *Grobbelaar v De Villiers* case[698] it was held that the question of whether a corporate entity has acted *ultra vires* its constitution is one of status matters. The court's position in the preceding case was streamlined in a relatively more recent case, *Bergen Dal Estate (Incorporating Mountaindale Estate) Homeowners Association v Van Huyssteen NO and Others* [699] resolved by another South African court dealing with a similar issue under section 2 of the 2017 IAA. It held that under the Act, status issues include the existence and nature of a juristic person, as well as the question of whether it has the capacity to acquire rights and incur obligations.[700] It is thus

[697] Footnote to Model Law 1985 art 1 (1) states that: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road'

[698] *Grobbelaar v De Villiers* 1984 (2) SA 649 (C).

[699] *Bergen Dal Estate (Incorporating Mountaindale Estate) Homeowners Association v Van Huyssteen NO and Others (5418/05,787/2006)* [2009] ZAWCHC 12 (20 February 2009)

[700] ibid.

possible to conclude that disputes over the above-mentioned issues are not arbitrable under South African law.[701] Moreover, under the aforementioned section 7 of the IAA, arbitration agreements contrary to the public policy of the Republic cannot be submitted to arbitration.[702] Therefore, unlike many European and American jurisdictions, public policy remains a critical determinant of what is arbitrable in South Africa, an encumbrance that may hinder proceedings at the earliest stage of an arbitration.[703]

4.4 The arbitration agreement

Arbitration agreements are contractual in nature[704] and as such, they must meet the general requirements for the existence of a contract, which are determined at the common-law level in accordance with the contract-law principles of South Africa. Such validity requirements include, among others, consensus (agreement between the parties on the obligations they wish to create), the parties' intention to be legally bound by the contract, and the parties' awareness of the agreement.[705]

Art. 7 of Schedule 1 to the International Arbitration Act perfectly transposes art. 7 of the UNICITRAL Model Law providing that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".[706] As emerged from the above quotation, both contractual and extra-contractual issues may be covered by the arbitration agreement, which may take the form of a separate agreement or an arbitration clause in a contract. An arbitration agreement is deemed to be in writing if its content is recorded in any form, regardless of whether the arbitration agreement or the contract that contains it has been concluded orally, by conduct, or by other means.[707] The requirement for an arbitration agreement to be in writing seeks to ensure that parties do not get forced into arbitration unless it is clear that they have agreed

[701] Joseph Mante, 'Arbitrability and public policy: an African perspective' (2017) 33 Arbitration International 275.
[702] IAA 2017 s 7.
[703] Mante (n 701).
[704] *De Lange v Presiding Bishop, Methodist Church of Southern Africa* [2015] (1) SA 106 (SCA)
[705] ibid. Possible performance under the contract and certainty i.e., definite, or determinate content of the contract so that the commitments can be enforced constitute other validity requirements under South African law of contracts. On the matter, see also Jaques du Plessis, 'South African Report' Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries* (Springer 2022).
[706] IAA 2017 sch 1 art 7. An arbitration agreement in domestic arbitration is a written agreement that refers any existing or future dispute relating to a matter specified in the agreement to arbitration. It is not necessary to name or designate an arbitrator in the arbitration agreement.
[707] IAA 2017 sch 1 art 7 (3).

to the said forum. Such a requirement can be met by an electronic communication,[708] if contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, and where the parties have exchanged statements of claim and defence in which the existence of an arbitration agreement was alleged by one party and not denied by the other.[709]

The law generally provides for the written agreement to be signed by the parties. However, under South African law, the agreement would still be valid even if it was not signed by the parties, as long as all parties adopted and acted on it.[710] The fact that only one person signs the agreement does not make the agreement any less lawful. In fact, if the parties "deliberately intended to record their agreement in writing and have demonstrated that the document so produced constitutes an agreement between them", the absence of one party's signature becomes irrelevant.[711]

Unilateral or optional clauses, where only one party has the right to choose arbitration, seem as well to be enforceable in South Africa. In fact, despite there are no reported South African judgments in which a South African court has considered the validity of a unilateral or optional arbitration clause, it is possible to suppose that, if challenged, a unilateral or optional clause is likely to be upheld by South African courts. That is because the courts would likely look at the contract and conclude that the clause should be upheld if it was entered into fairly and its terms are not illegal, immoral, or contrary to the public interest. This approach would probably apply to the most widespread B2B transactions and related contracts. However, in B2C relations, consumers may be more prone to argue that a unilateral or optional clause is unfair, unreasonable, or unjust if either the clause is excessively one-sided in favour of the supplier, the clause is so unfair to the consumer, making it unjust; or, finally, if the existence, nature, and effect of the clause were not sufficiently brought to the consumer's attention in a clear and conspicuous manner prior to the contract's execution.[712]

Apart from the mandatory requirements listed above, it is up to the parties to decide what to include in their arbitration agreement. A simple arbitration agreement under South African arbitration law would typically address the following topics: the number of

[708] Electronic Communications and Transactions Act 2002 s 1, IAA 2017 sch 1 arts 7(4)-(6).
[709] IAA 2017 sch 1, art 7 (6).
[710] *Fassler, Kamstra and Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (W).
[711] *Mervis Brothers v Interior Acoustics* 1999 (3) SA 607 (W).
[712] Sarah McKenzie and others, 'Arbitration in South Africa' Thomson Reuters' 2019 Practical Law UK Practice notes (*Webber Wentzel,* 5 November 2024) <https://www.webberwentzel.com/News/Pages/arbitration-in-sa-thomson-reuters-2019-practical-law-uk-practice-notes.aspx> accessed 25 January 2024.

arbitrators to be appointed; the venue of the arbitration; the language of the arbitration; the confidentiality of the arbitration; the costs of the arbitration and how such costs will be shared between the parties; and the right to appeal. This last point is a sensitive one and will be reprised in the paragraph that specifically deals with the setting aside of the arbitral award. Suffices to mention here that the waiver of a party's right to apply for setting aside is allowed under Schedule 1 of the 2017 Act. Any such waiver, however, would be invalidated if the court determines that the subject matter of the dispute is not suitable to resolution through arbitration or that the award is contrary to public policy.

Lastly, in line with international practice, South African arbitration law embraces the principle of separability of the arbitration agreement from the main contract. According to art. 16(1), Schedule 1 of the International Arbitration Act, a decision by the arbitral tribunal that a contract is null and void does not automatically entail the invalidity of the arbitration clause.[713] However, the agreement will be deemed void *ab initio* if the offending provisions are so fundamental to the contract that it would be meaningless without them. No provision of that agreement, including the arbitration agreement, would be actionable unless the parties expressly agree otherwise. Such a principle has been recently reaffirmed in the case *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Others*,[714] by the Supreme Court of Appeal. Since the arbitration agreement is intended to be separated from the main one, the applicable law that governs the arbitration agreement may be different from the substantive law that applies to the main contract, which is generally determined by parties through a choice of law clause.

4.5 Jurisdiction and *kompetenz-kompetenz* doctrine

The kompetenz-kompetenz doctrine is recognized in Art. 16, Schedule 1 of the International Arbitration Act, which states that an arbitral tribunal can rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.[715] Therefore, according to such an understanding, where the parties have agreed to arbitration as a dispute resolution mechanism, this includes giving the arbitrator(s) authority to rule on a jurisdictional objection.

Even prior to the enactment of the IAA in 2017, the Supreme Court of Appeal had endorsed the principle of kompetenz-kompetenz in the *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company* case, when it held that, "in the light

[713] IAA 2017 sch 1 art 16 (1).
[714] *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Others* [2020] ZASCA 74 (29 June 2020).
[715] IAA 2017 sch 1 art 16.

of an arbitrator's power to determine his or her jurisdiction in an issue that arises from the referral to arbitration itself", once the arbitration tribunal was appointed, the tribunal itself should have taken a decision on whether the claims were arbitrable.[716]

Where a party starts court proceedings in breach of an arbitration agreement, the court before which the action is brought should stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[717] The interested party should raise its objections to the validity of the arbitration agreement not later than when submitting his or her first statement on the substance of the dispute. Nonetheless, where such an action has been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.[718] This shows a rather pro-arbitration approach and a positive reinforcement of the kompetenz-kompetenz doctrine.

Courts are generally reluctant to interfere where the parties have agreed to resolve disputes by arbitration but will deal with a challenge on jurisdiction. In *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another*,[719] the Supreme Court of Appeal (hereinafter SCA) was confronted with a High Court decision to stay proceedings brought before it on the grounds that the parties were subject to an international arbitration clause contained in the agreement giving rise to the dispute at issue. In that case, the SCA concluded that the agreement between the parties was valid and operative, that there was no basis for interference with the arbitration agreement underlying the dispute, and accordingly that no discretion exists for a court to refuse a stay application in those circumstances.[720] The serious scenario in which Courts would bypass the arbitration agreement would concern allegations of fraud; where the arbitrator is not to be trusted or is incapable of giving a decision and where there has been misconduct on the arbitrator's part.[721] To put it simply, the International Arbitration Act leaves no room for judicial

[716] See Willis JA, writing the majority judgement, cited Fiona Trust and Holding Corporation and others v Primalov and others [2007] EWCA Civ 20 to support the assumption that the parties to an agreement containing an arbitration clause intended that any dispute arising out of that agreement would be resolved through arbitration. Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL [2014] 4 All SA 617 (SCA) (W).

[717] IAA 2017 sch 1 art 8 (1). The Model Law does not explain under what circumstances an arbitration agreement is null, void, inoperable or incapable of being enforced. Therefore, given the absence of a uniform or customary definition, the law applicable to the arbitration agreement dictates when an arbitration agreement is considered defective.

[718] IAA 2017 sch 1 art 8 (2).

[719] Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (065/2021) [2022] ZASCA 68 (17 May 2022).

[720] ibid.

[721] Tumisang Mongae and others, 'International Arbitration 2021, South Africa' (*Law and Practice,* 2021) <https://bowmanslaw.com/insights/litigation-and-arbitration/chambers-and-partners-international-arbitration-2021-guide-south-african-chapter/> accessed 25 January 2024.

discretion or considerations of feasibility; a stay of proceedings is generally the only and most common solution.[722] Given the limited number of decisions on the 2017 International Arbitration Act to date, the judgment should give parties considering doing business in South Africa or naming South Africa as their arbitral seat additional confidence in the national courts, promoting the country as a business and arbitration-friendly jurisdiction.[723]

This does not come too much as a surprise, considering that the same provision on the breach of a valid arbitration agreement and substantive claim in court is contained in the UNCITRAL Model Law,[724] which object is that of facilitating arbitration proceedings, as well as in the New York Convention, when dealing with the enforcement of the arbitration agreements.[725]

4.6 Arbitrators and arbitral institutions

The selection and the number of arbitrators is entirely up to the parties to decide. In the absence of such a determination, there will be only one arbitrator.[726] This provision differs from art. 10 of the Model Law which makes three arbitrators the default provision. The International Arbitration Act and its Schedule 1 contains no legal requirements regarding the number, qualifications, and characteristics of arbitrators. It does not set any nationality requirements for an arbitrator to be South African or to be licensed to practice in South Africa to be appointed; in fact, it specifies that "No person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties".[727] The establishment of the arbitrators' characteristics is left to the parties and their agreement.[728] The arbitral institutions would typically maintain a list of arbitrators for the parties to choose from when appointing the arbitrators.[729]

In international arbitration proceedings, the parties are free to agree on the procedure for appointing the tribunal.[730] Failing such an agreement, in an arbitration with three arbitrators, each party must appoint one arbitrator, and the two appointed arbitrators will

[722] See e.g., *Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd* (12583/21P) [2023] ZAKZPHC 31 (16 March 2023).
[723] Zelda Hunter, Marius B. Gass, 'High Court of South Africa affirms South Africa as a Pro-arbitration Jurisdiction' (*White and Case*, 13 April 2023) <High Court of South Africa affirms South Africa as a pro-arbitration jurisdiction | White & Case LLP (whitecase.com)> accessed 25 January 2024.
[724] UNCITRAL Model Law 1985 art 8.
[725] New York Convention 1958 art II (3).
[726] IAA 2017 sch art. 10.
[727] ibid sch 1 art11 (1).
[728] ibid sch 1 art11 (5).
[729] The Arbitration Foundation of Southern Africa (AFSA) has a varied panel of arbitrators which includes experts from civil and common law jurisdictions including Europe, Australia, America, South America, mainland China, Hong Kong, England and Africa.
[730] IAA 2017 sch 1 art 11(2); Model Law 1985 art 11(2).

appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days from receiving a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days from their appointment, the appointment will be made (on request of a party) by the court or other authority specified in art. 6 of Schedule 1 to the International Arbitration Act 2017. In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she will be appointed, upon the party's request, by the court or other authority as specified in art. 6 of Schedule 1 to the 2017 IAA.[731] This constitutes an exception to the otherwise general rule which provides for Courts to not intervene in Arbitration, as specifically stated in art. 5 of the IAA, according to which no court may intervene in international arbitration proceedings unless specifically authorized by the International Arbitration Act itself or the Model Law.[732] The powers granted to courts by the International Arbitration Act and the Model Law are generally limited in scope and apply only in the absence of agreement or failure by parties to agree on the appointment of arbitrators.[733] Accordingly, unless the agreement provides otherwise, any party can request the court to take necessary measures, where a party fails to act as required under the agreed procedure; where the parties, or two arbitrators, are unable to reach an agreement under the agreed procedure; or where a third party, including an institution, fails to perform any function entrusted to it under the agreed procedure.[734]

Under art. 12(1) of the International Arbitration Act, a person approached to be an arbitrator must disclose any circumstances that could give rise to justifiable doubts about his or her impartiality or independence.[735] The arbitrator remains bound to such obligation throughout the proceedings and is required to immediately disclose any new occurrence that may jeopardize his or her neutrality.[736] Where justifiable doubts arise in relation to the arbitrator's independence or impartiality, or in case the selected arbitrator does not possess the necessary qualifications agreed by the parties, the arbitrator in question may be removed.[737] However, a party may only challenge an arbitrator appointed by him or her, or in whose appointment he or she has participated, and only for reasons of which he or she becomes aware after the appointment has been made.[738] The challenge procedure is

[731] IAA 2017 sch 1 art11(3); Model Law 1985 art 11(3).
[732] ibid sch 1 art 11 (5).
[733] Mongae (n 721).
[734] IAA 2017 sch 1 art 11(4).
[735] The IAA 2017 also goes a step further than the Model Law and provides that 'justifiable doubts' require substantial grounds for contending that a reasonable apprehension of bias would be entertained by a reasonable person in possession of the correct facts IAA 12017 sch 1 art 12(3).
[736] IAA 2017 sch 1 art 12 (1).
[737] ibid sch 1 art 12 (2).
[738] ibid.

described in art. 13 of the International Arbitration Act and applies where the parties have failed to agree on a procedure for challenging an arbitrator.[739] If unsuccessful, the challenging party can request the court to decide on the challenge within 30 days of having received notice of the decision rejecting the challenge.

Other than acting in accordance with the arbitration agreement and the International Arbitration Act, the arbitrator has a duty to act fairly towards the parties when deciding a dispute. In doing so, the arbitrator must take caution, proceed diligently, and act impartially and without any personal bias.[740] Parties arbitrating under the 2017 IAA must be treated with equality and must be given a "reasonable opportunity to present their case".[741] This stipulation slightly differs from art. 18 of the Model Law which provides for the parties to be given a "full" opportunity to present their case.[742] The Act does not give content to the terms "equality" or "reasonable opportunity", but they certainly relate to fundamental standards of procedural justice. Arbitrators may not delegate their power or function to another,[743] and their decisions on the merits are bound by relevant substantive law[744] or rules of law as designated by the parties.

The main commercial arbitration institution in South Africa is the Arbitration Foundation of Southern Africa (AFSA), which was founded in 1996 and provides administered dispute resolution services. AFSA had already established its International Division in 2017 and published the International Rules in June of the same year in anticipation of the promulgation of the 2017 International Arbitration Act.

Linked to AFSA, is the China-Africa Joint Arbitration Centre (CAJAC), which division established in Johannesburg is in fact a subsidiary of AFSA, a founding member of a network of arbitral institutions making up the CAJAC mechanism[745]. The Association for Arbitrators (Southern Africa) does not administer arbitrations, but provides training and arbitrator appointment services, and offers hearings facilities. AFSA and the Association for Arbitrators (Southern Africa) are amongst the most popular arbitration organisations used to resolve commercial disputes in South Africa, with AFSA being the most prominent and widely recognised institution[746]. In South Africa there is also an extensive recourse to use arbitration, mediation or other alternative dispute resolution mechanisms to resolve labour

[739] IAA 2017 sch 1 art 13.
[740] *Graaff-Reinet Municipality v Jansen* 1917 CPD 604 607.
[741] IAA 2017 sch 1 art 18.
[742] McKenzie and others (n 712).
[743] *Mervis Brothers v Interior Acoustics* 1999 3 SA 607 (W).
[744] *Dickenson and Brown v Fisher's Executors* 1915 AD 166 176.
[745] Lise Bosman (ed), *Arbitration in Africa: a practitioner guide* (2nd edn, Kluwer Law International 2021).
[746] Mongae and others (n 721).

disputes. In fact, the main active institution in this field are the Commission for Conciliation, Mediation and Arbitration of South Africa (CCMA) and Tokiso Dispute Settlement (Pty) Ltd., a private dispute resolution company and accredited private agency.

Aside from the local arbitral institutions, some South African-seated arbitrations are referred to the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), though this is less common.

Local parties generally prefer to use South African arbitration organisations as the AFSA to administer international arbitrations, where the seat of arbitration is located in South Africa, because of the competitive pricing of arbitration services compared to the ICC or LCIA costs. Finally, there is no indication in official documents that special authorizations are required to start or open an arbitral institution in South Africa.

4.7 The arbitral procedure

The parties are free to agree on the rules of procedure that will be applied by the appointed arbitral tribunal to the conduct of arbitration,[747] or they may agree to directly adopt the rules of an arbitral institution.[748] In the absence of such agreement, the 2017 International Arbitration Act contains the procedural elements relating to international arbitration proceedings held in South Africa and provides that the arbitral tribunal may conduct the arbitration proceedings in the manner it deems most appropriate, taking into consideration the weight, materiality, relevance, and admissibility of any evidence.[749]

Unless otherwise agreed by the parties, arbitral proceedings begin on the date the respondent receives a request for the dispute to be referred to arbitration.[750] Nonetheless, in *Wilmington (Pty) Ltd v Short and McDonald (Pty) Ltd*, South African courts noted that the provision of a notice for the appointment of an arbitrator may as well represent the first step that initiates arbitration proceedings. The claimant shall state the facts supporting his or her claim, the issues at dispute, and the relief or remedy sought; the respondent, in turn, shall state his or her defence with respect to these specifics within the time period agreed upon by the parties or determined by the arbitral tribunal[751]. Unless otherwise agreed by the parties, if the respondent fails to communicate his or her statement of defence in accordance with

[747] IAA 2017 sch 1 art 19 (1).
[748] The most commonly used arbitration rules in South Africa are the following: AFSA's Arbitration Rules; the AASA's Arbitration Rules; the UNCITRAL Arbitration Rules; the ICC Arbitration Rules and the LCIA Arbitration Rules. Mongae and others (n 721).
[749] IAA 2017 sch 1 art 19 (2).
[750] ibid sch 1 art 21.
[751] ibid 2017 sch 1 art 23; *Wilmington (Pty) Ltd v Short and McDonald (Pty) Ltd,* 1966 4 SA 33.

art. 23(1) without sufficient cause, the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations.[752]

Schedule 1 of the 2017 International Arbitration Act contains no provisions governing the scope of a party's disclosure of documents to the other parties and/or the arbitrator. Typically, the arbitral tribunal will address this matter as part of its authority to conduct the arbitration in a way that it deems appropriate. The evidence rules that apply to international arbitrations held in South Africa are based on South African common law and the Law of Evidence Amendment Act 45 of 1988. These are the same evidence rules that apply in domestic matters. Parties and tribunals may also look at softer forms of law (for example, the IBA Rules on the Taking of Evidence in International Arbitration) for guidance on issues not covered by South African evidence laws.[753] To ensure the predictability on the how the proceedings will be run, the parties may specify by agreement, or in the arbitration clause itself, which rules will apply to the disclosure of evidence, taking into consideration the arbitral institution's rules, which include guidelines on the extent of disclosure.

Neither the 1965 Arbitration Act, nor the 2017 International Arbitration Act expressly provide that arbitration should be conducted by means of physical hearings. It is up to the tribunal to determine whether to hold a hearing or if the case will be handled solely through the submission of documents, unless the parties wish otherwise.[754] All statements, documents, or other information provided to the tribunal by one party must be communicated to the other party.[755] In case any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. The tribunal may also appoint experts to report to it on specific issues and may require a party to give the expert any relevant information. Following an expert report, the specialist may participate in a hearing, unless parties decide otherwise.[756]

The tribunal may request assistance in taking evidence from a competent court of the State.[757] According to Art. 27 of the International Arbitration Act, an arbitral tribunal or a party to the arbitration (with the tribunal's approval) may request that a Registrar of the division of the High Court or the clerk of a Magistrate's Court in whose jurisdiction the arbitration takes place exercise their powers to issue a subpoena to compel the attendance of

[752] IAA 2017 sch 1 art 25.
[753] Mongae and others (n 721).
[754] IAA 2017 sch 1 art 24 (2); Model Law 1985 art 24. See also AFSA International Arbitration Rules art 3 (c) 'the Arbitral Tribunal shall decide on the basis of documentary evidence only, unless it decides that it is appropriate to hold one or more hearings.'
[755] IAA 2017 sch 1 art 24 (3); Model Law 1985 art 24.
[756] ibid sch 1 art 26.
[757] ibid sch 1 art 27.

a witness before a tribunal in order to give evidence or produce documents. Failure to comply with a subpoena without justification is considered an offence. The Division of the High Court has the same powers to make an order for the issuance of a commission or request for taking evidence out of its jurisdiction for the purposes of arbitral proceedings as it has for the purposes of its own court proceedings.

Art. 17 (1) of the International Arbitration Act confers powers to the arbitrators to issue interim measures. A party seeking interim relief must first prove to the arbitral tribunal that "(i) it will suffer harm that cannot be repaired by an award of damages and such harm is significantly greater than the harm that the party against whom the interim measure is sought will suffer, and (ii) the party has a reasonable chance of succeeding on the merits of the claim".[758] Interim measures shall be binding and enforceable against the other party upon application to a competent court.

The IAA also provides for court-ordered interim measures,[759] such as an order for the preservation and/or custody of evidence, irrespective of whether the court is located in South Africa. However, the courts may only do so in situations where "(i) a tribunal has not yet been established and the matter is urgent, (ii) the tribunal lacks the authority to issue the order, or (iii) it would be impractical to seek the relief from the tribunal given the urgency of the situation".[760] Since the extent of court intervention, supervision or control is often a heated topic of debate, South Africa has certainly adopted a winning strategy by amending the original Model Law text on court-issued interim measures, by stating precisely what the Courts can and cannot do. This move is especially significant considering that court-ordered interim measures in favour of international arbitration are not supported by a long history of judicial precedents, hence, legislation detailing the powers of the court can be extremely useful.[761] Moreover, clearly limiting court intervention was necessary to oppose the legislation that governed international arbitration before the introduction of the IAA, namely the 1965 Arbitration Act, according to which South African courts enjoyed an exceptionally wide jurisdiction to intervene (and interfere) in all arbitrations conducted in South Africa.

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[758] IAA 2017 sch 1 art 17 (2).

[759] ibid sch 1 art 17J. The interim measures allowed to courts under the arbitration act are the following: an order for the preservation, interim custody or sale of any goods that are the subject matter of the dispute; an order securing the amount in dispute, but not an order for security for costs; an order appointing a liquidator; any other orders to ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; an interim interdict or other interim order.

[760] ibid.

[761] Jonathan Ripley-Evans and Fiorella Noriega Del Valle, 'Court Support for Arbitration In South Africa: Knowing Where You Stand' (*Kluwer Arbitration Blog*, 30 January 2019) <https://arbitrationblog.kluwerarbitration.com/2019/01/30/court-support-for-arbitration-in-south-africa-knowing-where-you-stand/> accessed 25 January 2024.

South African Courts have now proved to be very supportive towards international arbitration, denying dilatory actions in courts by parties bound to arbitration agreements, and by showing their will to support the smooth conduct of the arbitration proceedings.

4.8 Confidentiality

The 2017 International Arbitration Act does not specifically deal with confidentiality. On this wise, it only provides that, if the arbitration is held in private, the award and all documents created for the arbitration (which would include pleadings, witness statements and alike) which are not in the public domain must be kept confidential by the parties and tribunal, except where the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.[762] Nonetheless, as a general common-law principle of contract law, parties may agree in their arbitration agreement on the level of confidentiality to apply to the arbitral proceedings and the related award[763]. If they do so, this agreement will be valid and binding on the two parties only and will not bind third parties. Therefore, if the parties to an arbitration want third parties (for example, experts or witnesses) to maintain confidentiality, they must enter a separate, written confidentiality agreement.

When a public body is a party to arbitration proceedings according to Section 11 of the International Arbitration Act, the proceedings must be open to the public unless the arbitral tribunal finds compelling reasons to direct otherwise.[764]

4.9 Choice of law

Paragraph 1 of art. 28 of the International Arbitration Act (the same as for the Model Law) deals with the determination of the legal rules that will govern the substance of the dispute. As expected, to resolve the dispute, the arbitral tribunal is primarily called to apply "the rules of law chosen by the parties".[765] Such a provision is significant in two ways. It prioritizes party autonomy, allowing the parties to choose the applicable substantive law, and broadens the range of options available to the parties in determining which law applies to the substance of the dispute, as the reference is made to "rules of law" and not merely to the "law" (which necessarily is a national State law). Parties may, for example, agree on legal rules developed

[762] IAA 2017 s11 (2).
[763] Mongae and others (n 721).
[764] IAA 2017 s11 (1).
[765] ibid sch 1 art 28 (1).

by an international forum but not yet incorporated into any national legal system, or they could also choose a body of substantive laws governing the arbitration, such as the CISG, without having to refer to the national law of any State party to that Convention. Moreover, to enhance the predictability and true implementation of the parties' choice of law, art. 28 of the IAA, specifies that "Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules", which reflects the norm and spirit endorsed by the UNCITRAL Model Law.[766]

When the parties have failed to indicate the applicable law, according to paragraph 2 of art. 28 IAA, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable, therefore the tribunal will use the indirect method to determine the applicable law. Using the arbitral seat's conflicts rules is the most common option for reasons of simplicity, predictability, and neutrality.[767] If the South African conflict of laws rules apply, a court will first determine whether there is any tacit choice of law. If there is no implicit choice, the court will determine which legal system is most closely related to the contract. This is typically the location where the contract was signed or performed.[768]

Under the International Arbitration Act, the parties may also authorize the arbitral tribunal to decide the dispute *ex aequo et bono or as amiable compositeur* (that is, according to what is fair and just in the circumstances).[769] This type of arbitration (in which the arbitral tribunal may decide the dispute on the basis of principles it believes to be just without referring to any particular body of law) is not currently known or used in all legal systems. This explains why it is important for the parties to specifically clarify in the arbitration agreement that they are empowering the arbitral tribunal to resolve the dispute in such a manner. Anyhow, when resolving the dispute that relates to a contract (including *ex aequo et bono* arbitration), the arbitral tribunal must decide in accordance with the terms of the contract and must consider the trade usages applicable to the transaction. [770]

[766] IAA 2017 sch 1 art 28 (1); Model Law 1985 art 28.
[767] Ma Winnie, 'The Law Applicable to the Substance of Arbitral Disputes: Arbitrators' Choice in Absence of Parties' Choice' (2015) 8 Contemporary Asia Arbitration Journal 185 <https://ssrn.com/abstract=2699440> accessed 25 January 2014.
[768] Jonathan Ripley-Evans and Fiorella Noriega Del Valle, 'Arbitration agreements in South Africa' (*Lexology*, 4 February 2019) <https://www.lexology.com/library/detail.aspx?g=a22bc401-afe5-4be8-8e7b-fef33d02c6b4> accessed 25 January 2024.
[769] IAA 2017 sch 1 art 28 (3).
[770] ibid sch 1 art 28 (4).

4.10 Language

Parties may agree on the language to be used in the proceedings. Failing such an agreement, the tribunal will determine the language or languages to be used in the proceedings.[771] Such an agreement or tribunal determination shall apply to any written statement by a party, any hearing and any award, decision, or other communication by the arbitral tribunal.[772] The International Arbitration Act also confers powers to the arbitral tribunal to order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[773]

4.11 The seat of arbitration

Art. 20 of the International Arbitration Act allows the parties to agree on the seat of the arbitration. Where the parties fail to include an agreement on this regard, the legal seat of arbitration shall be determined by the arbitral tribunal having cognizance of the circumstances of the case, including the convenience of the parties.[774] Nonetheless, the arbitral proceedings need not be carried out at the place designated as the legal "place of arbitration". The making of the award may be completed through deliberations held at various places, by telephone or correspondence.[775] The same consideration applies when the territorial criterion is triggered by the parties' choice regarding the place of arbitration, as this would not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by art. 20 (2) of the International Arbitration Act.

The COVID-19 pandemic has also required South African courts and arbitral tribunals to hold hearings via online teleconferencing platforms. This has significantly expanded access to international arbitrations seated in South Africa as it becomes increasingly less essential for legal representatives, litigants, and witnesses to convene at a single location. With the option of attending an arbitration via a teleconference, parties are now able to enjoy the full suite of benefits of choosing South Africa as a seat for their international arbitration without the necessity of being physically present.[776] Besides, AFSA,

[771] IAA 2017 sch 1 art 22.
[772] ibid.
[773] IAA 2017 sch 1 art 22 (2).
[774] IAA 2017 sch 1 art 20 (1).
[775] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration point 6 (b)
[776] Mongae and others (n 721).

being the most popular arbitration organization in South Africa, has recently published a protocol for remote hearings, given the increase in virtual hearings as a result of COVID-19.[777]

Many jurisdictions have intervened to increase their attractiveness as safe arbitration seats and South Africa makes no exception. It has taken important steps to secure its position in the international arbitration community by enacting the International Arbitration Act, which basically transposes the latest version of the UNCITRAL Model Law with very few amendments that primarily relate to the appropriate courts and court processes and the highlighting of specific public policy matters, such as corruption; by developing AFSA's international arbitration division; and by making various improvements to infrastructure and resources used in support of international arbitration. The International Arbitration Act leaves plenty of room for the parties to modify and adapt the rules the way they see fit, perfectly endorsing the principle of party autonomy. Mandatory laws are very few and are mainly concerned with validity requirements as to the form and content of the arbitration agreement and the arbitration award, and South African public interest. National Courts have a supportive attitude towards arbitration showing a true arbitration friendly approach when called to enforce arbitration agreements, awards, or interim measures. And again, such a limited judicial intrusion is generally regarded as an important advantage for selecting the arbitral seat, which must provide for a very limited degree of judicial control.[778] The quality of the judiciary is in fact crucial because, if during arbitral proceedings a court is approached for assistance, the matter must be dealt with "quickly, efficiently and predictably".[779] The above cannot but confirm that with such a modern arbitral legislation and overall approach to arbitration, South Africa would make a great seat for arbitration.

4.12 The award

The International Arbitration Act lists some form and content requirements for the arbitral award in its art. 31, which is directly drawn from the UNICTRAL Model Law provisions.[780] According to art. 31 (1) the award shall be made in writing and shall be signed by the

[777] To provide guidance on conducting virtual hearings administered by AFSA, the Arbitration Foundation of Southern Africa published the AFSA Remote Hearing Protocol (RHP) in October 2020. The AFSA RHP addresses the unique challenges of providing expert and factual witness testimony during virtual hearings, ensuring that appropriate technology and protocols are in place. On this wise it proved to be ahead of times compared to other prominent arbitration institutions, as the ICC, LCIA or SIAC.
[778] Simon Greenberg and others, *International Commercial Arbitration: an Asia- Pacific Perspective* (CUP 2011).
[779] ibid.
[780] Model Law 1985 art 31.

arbitrator or arbitrators. The decision should be taken by majority,[781] except on questions of procedure, which may be left to a presiding arbitrator. In the case of multiple arbitrators, the signatures of the majority of all members of the arbitral tribunal will be sufficient, provided that the reason for any omitted signature is recorded in the award.[782] It should be noted that "dissenting opinions" are neither required nor prohibited by the Model Law and the International Arbitration Act. As clarified in the Explanatory note to the Model Law, the award does not have to be signed by the arbitrators physically gathering at the same place, thus reinforcing the idea that the making of the award may be completed through deliberations held at various places, by telephone or correspondence.[783] However, the judicial seat must be well determined and indicated in the final award along with the issuance date.[784] The award must also state the reasons on which it is based unless the parties have agreed otherwise.[785] During the arbitral proceedings, the parties may decide to settle the dispute. In that case, the arbitral tribunal shall terminate the proceedings and, if so requested by the parties, record the settlement in the form of an arbitral award on agreed terms (i.e., an award that records the terms of an amicable settlement by the parties).[786] Such an award has the same status and effect as any other award on the merits of the case, and as such it must comply with the form and content provisions contained in art. 31.

If the subject matter of the arbitration is arbitrable and there are no public policy concerns, an arbitral tribunal may award any remedy available to it under the governing law of the parties' agreement. As a result, relief may include monetary compensation, specific performance, final interdicts (injunctions), declaratory orders, costs, and interest. In most cases, the successful party is awarded costs. If the arbitration is held under the rules of an arbitration institution, those rules frequently include provisions on cost quantification. If no such rules apply, the arbitral tribunal determines the cost allocation. The International Arbitration Act and its Schedule 1 make no mention of fees. In South Africa, legal fees structures typically include hourly rates or task-based billing, as well as conditional fee agreements, subject to the provisions of the Contingency Fees Act 1997.[787]

Generally, the arbitral proceedings are terminated with the arbitral award. No time-limits for the delivery of the award are stipulated in terms of the International Arbitration

[781] IAA 2017 sch 1 art 29.
[782] IAA 2017 sch 1 art 31 (1).
[783] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration point 6 (b).
[784] IAA 2017 sch 1 art 31 (3).
[785] ibid sch 1 art 31 (2).
[786] See point 6 (b) of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.
[787] Williams and Burger (n 687).

Act. Once the award has been made, a copy of the award is filed to each party.[788] At this point, unless otherwise agreed, a party may require the arbitral tribunal to correct any computation, clerical or typographical errors, or errors of a similar nature in the award within 30 days from receiving the award.[789] Any such errors may be corrected as well on the tribunal's own initiative.[790] If so agreed, a party may also request the arbitral tribunal to interpret a specific point or part of the award, in this case the interpretation shall form part of the final award.[791] Furthermore, a party may request that the tribunal make an additional award in relation to claims presented in the arbitral proceedings but not resolved or included in the award.[792]

4.13 Challenging an award

The award is generally final and binding, subject only to limited procedural review. In line with international best practice, the International Arbitration Act does not cater for an appeal. This does not prevent the parties from including an appeal mechanism in their arbitration agreement. In the absence of such an appeal mechanism -which is also the most common occurrence- the only way to resolve a flawed award is to have it set aside, as established in the UNCITRAL Model Law, and as reprised in the International Arbitration Act.[793] The list of grounds on which an award may be set aside is exhaustive, and it is contained in art. 34 of the IAA, according to which an arbitral award can only be set aside if the party making the application provides proof that: a party to the arbitration agreement lacked capacity to contract under the applicable law; the arbitration agreement is invalid under the applicable law, or, in the absence of an agreement on the governing law, under South African law; and the party making the application did not receive the required notice of the arbitrator's appointment; the award addresses issues outside the scope of the arbitration agreement (however, if capable of separation, those matters falling within the scope of the agreement will not be set aside); or the tribunal was formed in violation of the parties' agreement[794]. The Court may also set aside the award on its own motion, if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under South African law or the

[788] IAA 2017 sch 1 art 31 (4).
[789] IAA 2017 sch 1 art 33 (1) (a).
[790] ibid sch 1 art 33 (2).
[791] ibid sch 1 art 33 (1) (b).
[792] ibid sch 1 art (3).
[793] ibid sch 1 art 34; The Model Law refers to the setting aside as the exclusive recourse method, thus excluding any other recourse regulated in any procedural law of the State where the setting aside is sought.
[794] ibid sch 1 art 34 (2).

award is in conflict with the public policy of the Republic,[795] (which should be intended as substantial deviations from fundamental notions of procedural justice).[796] As explained by the International Arbitration Act itself, the award is in violation of public policy if the arbitral tribunal failed to act fairly when making the award, which resulted or will result in a significant injustice to the applicant, or if fraud or corruption was used to influence or affect the decision-making process.[797]

Finally, the International Arbitration Act fixes a three-month limit from the date on which the party making that application had received the award to proceed with a challenge to the award in question.[798] If a request for an additional award has been made under Art. 33 of Schedule 1 to the 2017 Act, the three months will begin when that request is disposed of by the arbitral tribunal, unless the party making the application can prove that he or she did not know and could not reasonably care, in which case the period will begin when such knowledge could have been acquired by exercising reasonable care.[799]

In some cases, South African courts have used section 33(1)(b) of the Arbitration Act to set aside an award on the grounds of gross irregularity. This occurred in *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,[800] where the enforcing judge found that when an arbitrator, for some reason, overlooked the nature of the enquiry in the arbitration proceedings, this translates in a party having denied a fair hearing or a fair trial of the issues and, in turn, this constitutes a gross irregularity. However, such an interpretation does not extend to the circumstances where an arbitrator engages in the correct enquiry but errs either on the facts or the law.[801]

4.14 Recognition and enforcement of foreign awards

The recognition and enforcement of foreign awards is generally concerned with the application of the New York Convention, acceded by South Africa on 3 May 1976 without any reservations, and which relevant provisions have been transposed into the national arbitration legislation and are now to be found in the International Arbitration Act. Specifically, articles 16 to 18 Chapter III of the IAA deal with the recognition and

[795] ibid sch 1 art 34 (5).
[796] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration point 7 (b).
[797] IAA 2017 sch 1 art 34 (5).
[798] ibid sch 1 art 34 (3).
[799] ibid.
[800] *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* [2018] ZASCA 23.
[801] Mongae and others (n 721) 20.

enforcement of arbitration agreements and foreign arbitral awards and are to be read together with articles 35 and 36 of Schedule 1 to the IAA 2017 and the Model Law.

According to the relevant provisions, an award shall be recognized as valid, binding and readily enforceable in South Africa "irrespective of the country in which it was made",[802] subject to the exceptions set out below.[803] Such language comes from the Model Law text, which prefers to distinguish between "international" and "non-international" awards rather than adopting the traditional distinction between "foreign" and "domestic" awards, thus treating awards rendered in international commercial arbitration uniformly, regardless of where they were made. This new line is based on substantive grounds rather than territorial borders, which are given limited importance considering that the seat of arbitration is frequently chosen for the reasons of convenience for the parties, and consequently, the dispute may have little or no connection with the State in which the arbitration is legally held. As a result, according to the Model Law, as well as the International Arbitration Act, whether "foreign" or "domestic" the recognition and enforcement of "international" awards should be governed by the same provisions.[804]

In South Africa, the procedure for enforcing an award is outlined in articles 17 and 35 of the International Arbitration Act. It is relatively simple, and it mirrors the one described in the New York Convention. Nevertheless, an arbitral award can only be enforced in South Africa after it has been converted into an order of court, at which point it can be enforced in the same way as any judgment or order of court.[805] The party seeking to enforce the award must file a notice application with the High Court of South Africa[806] and provide the necessary evidence as established in art. 17, which states that an application for an order under section 16(3) must be accompanied by the original foreign arbitral award and the original arbitration agreement, authenticated in the appropriate manner so that they can be produced in court.[807] If the award or the arbitration agreement is written in a language other than one of South Africa's official languages (Afrikaans, English, Xhosa, Zulu, Sotho, Tswana, Northern Sotho, Venda, Tsonga, Swati, and Ndebele), it must be accompanied by a sworn translation into one of South Africa's official languages and be authenticated following the appropriate procedure in which foreign documents must be authenticated for

[802] IAA 2017 sch 1 arts 17 and 35.
[803] Section 16 read together with section 18 of the IAA.
[804] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration point 8 (a).
[805] IAA 2017 sch 1 art. 16 (3).
[806] ibid sch 1 art 6. The court to which the application must be made is made is the High Court in whose jurisdiction the arbitration was held or the High Court division with jurisdiction over a South African party to the arbitration.
[807] ibid sch 1 art 17 (a).

production in court.[808] The court may accept other documentary evidence as sufficient proof of the existence of the foreign arbitral award or arbitration agreement at its discretion.[809]

South African courts may refuse to recognize or enforce a foreign arbitral award on the same grounds listed in art. V of the New York Convention, which are essentially restated in art. 36 of the UNICTRAL Model law and by articles 18 and 36 of the International Arbitration Act. A slight modification to the original text of the New York Convention has been made both in the Model Law and in the IAA in relation to the first ground listed in art. V, which now provides that recognition and enforcement may be refused if "a party to the arbitration agreement was under some incapacity" instead of "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity" because the original version was deemed to contain an incomplete and potentially misleading conflict-of-laws rule.[810]

The New York Convention leaves adhering countries free to determine whether they intend to enforce arbitral awards that have been set aside at the seat.[811] In South Africa, Courts will not enforce an award that has been set aside, because it would not meet the recognition and enforcement criteria set out in section 17 of the International Arbitration Act[812]. In case the award is subject to ongoing set-aside proceedings at the seat, the court where recognition or enforcement is sought may, at its discretion, decide to stay its decision on the enforcement of the award and, if so, the court may order the party against whom enforcement is sought to give appropriate security.[813] While there is no established case law confirming that awards subject to ongoing set-aside proceedings at the seat will be stayed, some evidence suggest that South African courts would take this stance at the very least as a "procedural measure".[814] In *Transnet Limited v Ed-U-College* concerning the execution of a payment, the Court specifically stated that "[…] the general rule is to grant a stay of execution where real and substantial justice requires such a stay or put differently, where injustice will otherwise be done", [815] thus deciding to stay the decision while the finalisation of arbitration proceedings between the parties was still pending.

There is no time limit specified in Schedule 1 for filing an application for the recognition and enforcement of an arbitral award. Additionally, the Constitutional Court has

[808] IAA 2017 art 17 (b).
[809] ibid.
[810] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration pint 8 (c).
[811] New York Convention 1958 art V; IAA 2017 arts 18 and 36.
[812] Mongae and others (n 721) 20.
[813] IAA 2017 arts18 (3) and 36.
[814] Mongae and others (n 721) 20.
[815] *Transnet Limited v Ed-U-College (Port Elizabeth) (NPC*) 2018 JDR 0471 (ECG), para 15.

ruled that arbitration awards are not subject to the Prescription Act of 1969 (which specifically deals with limitation issues) because the award does not constitute a debt as envisaged in the Prescription Act and, by consequence, the Prescription Act shall not apply to arbitration awards. Therefore, arbitration awards do not become prescribed, or time barred.[816]

The length and cost of the enforcement process will naturally vary depending on the complexities of the defences or challenges presented. Uncontested enforcement actions typically take two to three months to complete, from the time the application is filed to the time the first instance court issues its ruling. Contradictory proceedings go on longer. The division of the High Court where enforcement proceedings are filed determines how long opposed proceedings are delayed. If the court is not convinced that there are compelling reasons to treat the application as urgent, there is no expedited procedure. The duration of the enforcement process does not distinguish between domestic and foreign awards.[817]

4.15 Public policy

South Africa takes a similar approach to the public policy defence as other common-law jurisdictions, such as England and Wales.[818] To that end, the public policy defence is invoked only in the most compelling of circumstances, as in case the award has been induced or affected by fraud or corruption or if it caused substantial injustice[819]. This aids in controlling the application of the public policy safeguard, which has been described by many authors as a "unruly horse".[820] However, under the New York Convention, the enforcement court has no authority to investigate an allegation of fraud unless it is evident on the face of the award or in the arbitration agreement. In *Jones v Krok*,[821] the court refused to enforce an award involving compensatory damages as well as exorbitantly high punitive damages because it was contrary to South Africa's domestic public policy. The appellate court in *Botha Griessel v Finanscredit (Pty) Ltd* [822] emphasized that the power to declare a contract contrary to

[816] McKenzie and others (n 712).
[817] ibid.
[818] Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14 Journal of Private International Law130.
[819] IAA 2017 arts 18 and 36.
[820] John Shand, 'Unblinkering the Unruly Horse: Public Policy in the Law of Contract' (1972) 30 The Cambridge Law Journal, 144; Ekenobi ThankGod Chinonso, 'Is Public Policy Truly an Unruly Horse? [2023] Ahmadu Bello University <https://ssrn.com/abstract=4519703> accessed 25 January 2024. See also Matthew Gearing, 'The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?' (*Kluwer Arbitration Blog*, 17 March 2011) <https://arbitrationblog.kluwerarbitration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the-most-unlikely-of-places-4/> accessed 25 January 2024.
[821] *Jones v Krok*, (3) SA 880(E) 898 E, 1992.
[822] *Botha Griessel v Finanscredit (Pty) Ltd*, (2) SA 215(T) (2000).

public policy should be exercised with caution and only in cases where the impropriety of the transaction and elements of public harm are obvious. Case law has shown that when considering the public policy argument, courts usually exercise restraint. For example, the courts acknowledge that certainty about the validity of agreements is important, and that this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare agreements contrary to public policy.[823]

Public policy in South Africa, as in many other jurisdictions, is dynamic, changing from time to time and place to place. When it comes to public policy, the interest of the community or the public is paramount, but simple justice between parties should also be pursued. The fundamental values enshrined in the Constitution of the Republic of South Africa of 1996 are crucial in determining public policy,[824] which is consequently influenced by values as human dignity, equality, human rights and freedoms, non-racialism, and non-sexism which are all underpinned by the Constitution. For instance, the Constitutional Court overturned an arbitral award on the grounds of public policy in *Cool Ideas 1186 CC v Hubbard and Others.*[825] This was a rare instance of a successful challenge to an arbitral award based on public policy. In this case, the court declined to enforce an arbitral award because doing so would violate a statutory prohibition as it would have allowed a builder who was not registered under the Housing Consumers Protection Act 95 of 1998 to claim for compensation, which should be prohibited. As a result, the public policy defence was successfully invoked because the situation involved a significant impact on a specific (and potentially vulnerable) class of people in South African society.

Despite a few exceptions, South African courts have acted with extreme caution when it comes to applying the public policy exception to foreign arbitral awards. The doctrine of public policy is invoked only when a transaction is shown to be detrimental to the public interest or basic human rights. In fact, G.S. Mahantesh argues that the public policy defence against enforcement of an arbitral award should only be activated as an exception, as intended by the legislators as set out in the New York Convention.[826]

[823] ibid.
[824] *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A), paras 8D and 9G.
[825] *Cool Ideas 1186 CC v Hubbard and Others* [2014] ZACC 16.
[826] G S Mahantesh, 'Public policy as a ground for refusing recognition and enforcement of foreign arbitral awards' (2021) 4 International Journal of Law Management & Humanities 3684.

Chapter 5. India

5.1 The Indian legal system

India has one of the oldest legal systems in the entire world. It has experienced many dynasties and civilizations throughout its long history, from the ancient Indus Valley Civilization to the Vedic Age and Mauryan Empire in the north, to the Sangam and Chola dynasties in the south, the Delhi Sultanate, the Mughals, and the latest British Empire,[827] each of which somehow has impacted and left a trace in what today is the Indian legal system.

The distinguishing feature of the present-day Indian law is the existence of a single system that encompasses, at the same time, a modern, secular, and state-based system, considerably influenced by Western models (in particular by English law) and a more traditional and religious-based system, whose "fundamental stratum is that of dharma, which internal coherence is provided, in turn, by the system of karma, or duty, and not by a system of rights, as in the law [....]".[828] Above this fundamental layer, we have the reception of Western-style institutions of law and techniques of administering it. The current set-up of the legal system thus results from the superimposition of a recent authoritative law of state origin on complexes of traditional "personal" rules, applicable to various groups (each of which is characterized by its respective religion), and on local folk rules, equally traditional.[829] Among the groups in India is the Hindu community dominates, comprising at least 80 percent of the population. Also found in varying percentages are Muslims, Sikhs, Buddhists, Parsis and Christians (mostly Catholics).[830]

When India gained independence on August 15, 1947, India's leaders had the huge task of formulating a Constitution to govern a country with a population of more than 350 million people and which had so much diversity within it. Therefore, a Constituent assembly, which consisted of representatives from all sections of the society was formed to draft the constitutional text. After nearly three years, on January 26, 1950, the Constitution came into force, and India was declared a Sovereign Democratic Republic.[831] The Constitution of India is the world's longest written Constitution, with 448 articles divided into 25 parts, 12

[827] Abhishek Subarno, 'A Historical Evolution of Indian Legal System - A Broad Perspective' (2021) 3 Indian Journal of Law and Legal Research 1.
[828] Ved P Nanda and Surya Prakash Sinha (eds), *Hindu Law and Legal Theory* (New York University Press 1996).
[829] Gambaro and Sacco (n 338).
[830] Ibid.
[831] Preamble of the Indian Constitution 1950.

schedules, 5 appendices, and 98 amendments; it incorporates some fundamental values as the commitment to democracy, justice, equality, and freedom.[832]

As provided by the Constitution, India is a Union of twenty-eight States.[833] The Union and the States have the power to legislate on different matters, either exclusively or concurrently, as established by the Seventh Schedule's lists.[834] The Union also has residual authority over any issue not covered by the said Schedule. To make an example, the Union has exclusive jurisdiction over foreign and inter-state trade, while the states have exclusive jurisdiction over intra-state trade, whereas regulation of 'contracts' and 'civil procedure' is a matter of concurrent jurisdiction.[835] The Indian Constitution, which incorporates elements of both federal and unitary constitutions, is neither purely federal nor purely unitary, and is widely regarded as quasi-federal in nature.[836]

Indian law has been particularly influenced by English law. Many codes and laws made during the British era continued to be applicable and to influence Indian lawmaking even after the independence. To make an example, the Indian Contract Act of 1872 (which is still in force today, though with some modifications) embodies the distinctive traits of Nineteenth-century English contract law.[837] More in detail, the Indian Contract Act results from an attempt on behalf of the colonial government of India to codify the common law to provide a clear and systematized picture of the basic English common law rules, as adapted to the Indian society. Nonetheless, in the words of M. Infantino, "Indian contract law shares the mindset and vocabulary of English common law, but differs from it in terms of sources, interpretive approach and contents".[838] In fact, such a codification, which is not truly complete, and which still leaves room for judicial intervention, has a bit distanced Indian contract law from the English common law by putting legislation upfront.[839] Moreover, some areas of contract law are covered by specific pieces of legislation as the Sale of Goods

[832] ibid.
[833] Indian Constitution 1950 art 1 (1).
[834] Indian Constitution 1950 Seventh sch art 246 contains three lists describing jurisdiction at each level: Union List, State List and Concurrent List. The Union List vests the Indian Parliament the power to make laws. It consists of national-importance laws such as defence, foreign relations, naval, and military. State List: The state government has the authority to enact legislation under this list. It is made up of laws concerning public order, public health, sanitation, agriculture, and transportation. Concurrent List: Under this list, the state government and the Government of India can make laws together. It consists of criminal procedure, trade unions, education, industrial, and labour disputes laws. In the event of a conflict between the laws of Parliament and the laws of the state on the Concurrent List, the laws of Parliament will take precedence. Indian Constitution 1950 art 254.
[835] Infantino (124).
[836] Ashish Bhan and Mohit Rohatgi, 'Legal Systems in India: Overview' (*Practical Law*, 1 October 2021) <Legal Systems in India: Overview | Practical Law (thomsonreuters.com)> accessed 25 January 2024.
[837] Infantino (124).
[838] ibid 35.
[839] ibid.

Act of 1930 (one more, heavily borrowed from the English Sale of Goods Act, 1893) the Specific Relief Act of 1963, the Arbitration and Conciliation Act of 1996 (based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which applies to both domestic and international arbitration), or company law, which is governed by the Companies Act of 2013. Furthermore, following the British example, India has decided not to ratify the CISG, despite the majority of Indian scholars have strongly advised otherwise.[840]

While "legislation is the primary source of law" in India,[841] judicial precedents are also significant. Before delving into the implementation of the *stare decisis* doctrine, it is worth describing first Indian judiciary. The Indian judicial structure follows the typical three-tier common law system: the apex and the only federal judicial body is the Supreme Court[842], it rules on constitutional issues and serves as the final court of appeal in certain civil and criminal cases.[843] The Supreme Court also has extraordinary Constitutional powers to issue high prerogative writs in cases involving violations of the Constitution's fundamental rights.[844] In each State there is a High Court, which acts as final court of appeal in that jurisdiction even though, sometimes, High Courts have jurisdiction over multiple states and Union Territories.[845] Finally, there are lower-level, civil and district courts, which are all subordinate to State High Courts. In 2015, a lower-level commercial court -with jurisdiction on high-value commercial disputes- and a special commercial division were further established at every High Court to improve India's score in the World Bank's Doing Business Reports.[846]

Giving effect to the *stare decisis* doctrine, the law declared by the Supreme Court is binding on all courts within the Indian territory, and the Supreme Court only has the authority to deviate from it.[847] High Courts' decisions are binding on all courts subordinate to them,[848]

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[840] Nain Yashasvi and Manish Shashank, 'Why India Should Opt for CISG' (2011) 4 India Law Journal <http://www.indialawjour nal.org/archives/volume4/issue_3/article_5.html> accessed 25 January 2024.
[841] Nilima Bhadbhade, *Contract Law in India* (2nd edn, Kluwer Law International 2012).
[842] Indian Constitution 1950 arts 124–147 (on the Supreme Court), arts 214–232 (on High Courts), and arts 233–237 (on subordinate courts).
[843] The Supreme Court uses its extraordinary Constitutional power under art 136 to hear appeals in civil and criminal cases through Special Leave. For more on the topic B N Srikrishna 'The Indian Legal System' (2008) 36 International Journal of Legal Information 242 <http://scholarship.law.cornell.edu/ijli/vol36/iss2/8> accessed 25 January 2024.
[844] ibid.
[845] For example, the Guwahati High Court has jurisdiction over the states of Assam, Nagaland, Mizoram, and Arunachal Pradesh, which are all located in India's north-eastern region.
[846] Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015; Ramani Garimella and M Z Ashraful, 'The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?' (2019) 12 Erasmus Law <https://ssrn.com/abstract=3479267> accessed 26 January 2024.
[847] Indian Constitution 1950 art 141. The obiter dicta issued by the Indian Supreme Court are considered to be binding as well. See *Commissioner of Income-Tax v Vazir Sultan and Sons* AIR 1959 SC 814.
[848] The precedent value of High Court judgments is not derived from any legislation. Bhadbhade (n 841).

unless there is a contrary decision from another High Court, while District Courts' decisions are not binding on any other court. Indian courts base their decisions on legislative provisions, judicial opinions, and case-law from other common law jurisdictions, the most prominent of which are England, the United States, Canada, and Australia.[849] Although India's legal administration model is similar to the Common Law model, Indian courts must also keep Constitutional values in mind when administering justice. Journal articles and academic works are rarely mentioned in decisions, whereas references to books and treatises are more common[850]. Nonetheless, legal scholars are often involved in the drafting of legislative texts, and commonly seat at the Indian Law Commission.[851]

5.2 A general overview on arbitration

India has a long history of arbitration, which roots back to the Vedic times.[852] Hindu law already made references to arbitration in the "*Brhadaranayaka Upanishad*" one of its oldest scriptures, which provided for three different types of arbitration: 'Puga' (local courts), 'Srenis' (people belonging to the same business or profession) and 'Kulas' (members concerned with the social affairs of a particular community); these three bodies were collectively referred to as Panchayats. The Panchas, or members of the Panchayat as they were known, were village elders that would act as arbitrators and settle disputes between the parties on principles of fairness and justice;[853] their final 'awards' were credible and had some sort of binding effect.[854]

As the British expanded their rule over India, several legislations were introduced to regulate the local judicial system. From 1772 to 1827, various Regulations and Acts were thus passed to give a formalist structure to the law of arbitration.[855] In the presidency towns of Calcutta, Bombay, and Madras, the East India Company enacted the Bengal

[849] Infantino (124); K G Balakrishnan, 'The Role of Foreign Precedents in a Country's Legal System' (2010) 22 National Law School of India Review 1 <https://www.jstor.org/stable/44283711> accessed 26 January 2024.
[850] Bhadbhade (n 841) 70.
[851] Infantino (124) 37; Grant Hammond, 'The Legislative Implementation of Law Reform Proposal' in Matthew Dyson and others (eds), *Fifty years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing 2016).
[852] Rohan Madhok, 'Study on the Evolution and Development of Law of Arbitration in India' (2021) 3 International Journal of Law Management and Humanities 2027.
[853] Vikash Kumar Singh, 'Arbitration in India: Recent Developments and Key Challenges' (2023) 11 International Journal of Creative Research Thoughts 82.
[854] ibid.
[855] *State of Orissa and Ors. v Gangaram Chhapolia and orthers* 6 AIR 1982 258, for a reconstruction of the legal developments leading to the codification of arbitration laws in India.

Regulations[856] comprising various laws regarding the arbitral matter. Although they lacked uniformity and clarity in details,[857] the Regulations still made a significant difference in filling up some gaps of India's pre-existing Panchayat system.[858] With the Bengal Regulations, for instance, courts were allowed to refer cases to arbitration, with the consent of both parties. Moreover, the Regulations outlined some procedural rules for the conduct of the arbitral proceedings and allowed arbitration to be requested in any case with a monetary value of less than two hundred rupees. Such provisions remained in effect until the Code of Civil Procedure was extended to the presidency towns in 1859.

The first substantive piece of legislation to specifically deal with arbitration in India was the Indian Arbitration Act of 1899. Largely based on the English Arbitration Act of 1889, this piece of legislation was particularly important as it resolved some difficulties incurred with the previous regulations by recognizing the possibility to refer both present and future disputes to arbitration, whereas earlier regulations only provided for the arbitrability of existing disputes. The 1899 Indian Arbitration Act, however, was also characterized by some drawbacks.[859] One of the other was that its application was only limited to the presidency towns (Calcutta, Bombay, and Madras), which inevitably meant that it only covered a minor part of India. Due to the limited jurisdiction of the Act, arbitration in other places was covered under the prevailing Code of Civil Procedure.

The first unitary Act to be applied to the whole of India (including Pakistan and Baluchistan)[860] was the Indian Arbitration Act of 1940. Once more based on the English Arbitration Act of 1934, the Act aim was to consolidate and amend the law relating to arbitration; in fact, it repealed both the Arbitration Act of 1899 and the arbitration provisions in the Second Schedule of the Code of Civil Procedure of 1908.[861]

After the country gained independence in 1947, trade and industry experienced a significant boost, and the industrial and commercial community began to favour dispute resolution through arbitration. The rising popularity of arbitration in commercial transactions has not been without good reason, as adjudication of commercial disputes before courts, especially in the Indian context, had resulted in long delays and gross inefficiencies

[856] Bengal Act 1772; Ben Steinbruck, 'India' in Stephan Balthasar (ed), *International Commercial Arbitration—A Handbook* (Hart, Nomos 2015) 448.
[857] Although these Regulations did not go into great detail about arbitration, a clause in each of them stated that "in all cases of disputed accounts, it shall be recommended to the parties to submit the decision of their cause to arbitration, the award of which shall become a decree of the court." See Law Commission of India, 76th Report.
[858] Anushka Kumar, 'Evolution and Development of the Law of Arbitration in India' (2023) 5 Indian Journal of Law and Legal Research 1.
[859] Madhok (n 852).
[860] Indian Arbitration Act 1940 introduction and footnote 2.
[861] Indian Arbitration Act 1940.

in conflict resolution.[862] This increased the emphasis on arbitration proceedings but, at the same time, it exposed some shortcomings and flaws of the Arbitration Act of 1940, as the inadequacy of the arbitrators' powers and duties, or the changing rules providing for filing awards, which differed from one High Court to the other.[863] Despite its unifying significance, this 1940 Act was considerably founded on mistrust of the arbitral process and provided litigants with numerous opportunities to seek court intervention. This, combined with a sluggish judicial system, resulted in delays, rendering arbitration inefficient.[864] Still, the 1940 Act governed Indian arbitration until the Arbitration and Conciliation Act of 1996 (hereinafter Arbitration Act) was introduced out of necessity. The Statement of Objects and Reasons to the 1996 Act, indeed, made no bones about the inefficiency of the previous legislation. It stated that the same "had become outdated" and that a new Act "more responsive to contemporary requirements"[865] was necessary, as Indian economic reforms may not be fully effective if the law governing the resolution of both domestic and international commercial disputes remained out of sync.[866] Among the other goals of the new Act, are "to minimize the supervisory role of courts in the arbitral process" and "to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court".[867]

The new Arbitration Act of 1996, which is currently in force, albeit with some amendments, provides for a comprehensive set of rules and regulations for both domestic and international arbitration proceedings in India. The Act is not exhaustive and is of consolidating and amending nature.[868] It is based on the 1985 UNCITRAL Model Law (though with some adaptations), the 1976 UNCITRAL Arbitration Rules and 1980 UNCITRAL Conciliatory Rules. It is divided into two parts: part I contains the general provisions for domestic and international commercial arbitrations, and applies to any arbitration taking place in India;[869] part II deals with the enforcement of foreign awards and it is subdivided into two chapters: the first one establishes the procedure for the enforcement

[862] Aniruddh Nigam and Siddharth S Aatrey, 'An Analysis of Arbitration Clauses in Indian Contract Law' in Sairam Bhat (ed) *Contracts, Agreements, and Public Policy in India* (Bengaluru: National Law School of India University 2015).
[863] Madhok (n 852).
[864] Sumeet Kachwaha, 'The Arbitration Law if India: A Critical Analysis' (2005) 1 Asia International Arbitrational Journal 105.
[865] Statement of Objects and Reason Act 026 1996
[866] ibid.
[867] ibid points (v) and (vii).
[868] Madhok (n 852).
[869] Nonetheless, the Supreme Court used judicial innovation to extend the 'general provisions' of Part I to offshore arbitrations as well, using a creative interpretation of the Act, unless the parties expressly or implicitly excluded their applicability. See *Bhatia International v Bulk Trading* SA (2002) 4 SCC 105. The case was pretty debated and eventually overruled in BALCO 9 SCC J 26, 27 (2012).

of awards within the purposes of the New York Convention to which India had already adhered to in 1958 and then ratified in 1960,[870] albeit with a reciprocity and a commercial reservation;[871] the second chapter describes the enforcement procedure of arbitral awards that fall within the scope of the Geneva Convention.[872] Despite India's ratification of the New York Convention in 1960, for a foreign award to be enforceable as a New York Convention award in India, the Indian Arbitration Act of 1996 requires the territory where the award was rendered to be separately notified by the Central Government as a reciprocating territory through a notification in the Gazette of India.[873] Signature of the New York Convention is thus not enough for a country to qualify as a reciprocating territory. Approximately, 48 out of 172 New York Convention countries have been officially notified and listed in India's Official Gazette, as of now.[874]

Has mentioned, the Arbitration Act of 1996 underwent many changes and amendments to constantly improve the administration of the arbitral institution in India. Following the suggestions of the 246th Report of the Indian Law Commission of 2014, the Arbitration Act of 1996 was first amended in 2015 to give the High Courts and the Supreme Court exclusive jurisdiction in deciding issues related to international commercial arbitration,[875] and then again in 2019, when the Indian government significantly amended the Arbitration Act to make arbitration a more efficient and cost-effective. The amendments sought to encourage institutional arbitration, streamline the arbitration process, and reduce

[870] India ratified the New York Convention by means of Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45/1961), as published in Gazette of India, 1961.

[871] The New York Convention was adopted with a reciprocity reservation and a commercial reservation, which entails that awards would be recognized only if they were made on the territory of other contracting States and in respect of differences arising out of legal relationships, whether contractual or not, which are considered commercial under Indian law. A list of disputes that may be termed as commercial are defined under Section 2(c) of the Commercial Courts Act, 2015 e.g., disputes arising out of ordinary transaction of merchant, bankers, financiers and traders, export or import merchandise or services, construction or infrastructure projects, franchising, distribution and licensing agreements, management and consultancy agreements etc.

[872] India signed the Geneva Conventions on 16th of December 1949 and ratified them on 9th of November 1950.

[873] Indian Arbitration Act1996 s 44 pt II.

[874] The list of 'reciprocating territories' notified by the Government of India in the Gazette of India, for the purposes of Section 44 of the Indian Arbitration Act 1996 comprises the following 48 States: Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Canada, Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Mauritius, Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America. It is worth to note that two out five BRICS States, namely Brazil and South Africa, are presently not in the official list of reciprocating States, which may hinder the mutual recognition of awards.

[875] Indian Arbitration Act 1996 (Amendment) Act 2015 s 2 (1) (e) and s 6. One of the most significant innovations introduced by the Act of 2015 was the tapering of the interpretation given to 'public policy of India'. This was considered important for the purpose of granting absolute finality and attaching significance to the award given by the Arbitral Tribunal.

judicial intervention.[876] Furthermore, in an attempt to improve India's score in the Doing Business Report, another legal reform was implemented in 2019, establishing a new independent governmental body, the Arbitration Council of India, charged with the task of supervising Indian arbitral institutions.[877]

The Amendment Act of 2021 is the most recent intervention in what appears to be a never-ending attempt by the Indian government to tinker and reshape the scheme of the Indian Arbitration Act. The Amendment Act of 2021 is the arbitration law currently in force in India. It is considered as an amendment of utmost legal significance because of two main reasons. One of these is related to the introduction of the "unconditional stay on arbitral awards" (which concept shall be reprised in the next section, specifically dedicated to the enforcement of arbitral awards in India) and the other is the removal of the Eight Schedule of the Arbitration Act. The Eighth Schedule was introduced with the 2019 amendment and specified the qualifications, experience, and norms for accreditation of arbitrators; these norms were largely biased in favour of Indian lawyers, cost accountants, government officers, practically barring the appointment of foreign lawyers as arbitrators. The 2021 Amendment directly removes the said Schedule, replacing it with "the regulations".[878] Basically, the new Amendment uncharged the Arbitration Council of India[879] with the creation of the new "regulations" that are supposed to govern the criteria for the arbitrators' accreditation.[880] Such a change was considered to be an essential move to encourage inclusivity through diversity of the arbitrators' roasters, rather than rooting exclusively for Indian advocates and professionals, as it was the rule under the Eight Schedule. The latest developments just described occurred to cope with India's work to make itself a coveted arbitration hub, wherefore a pro-ADR outlook was being embraced by the judicial system as well.[881] In fact, until the 2010s, the Indian Supreme Court had allowed lower courts to deny recognition and enforcement of foreign awards by adopting a broad definition of public policy.[882] However, in the 2010s, the Court reversed its position and adopted a more

[876] Indian Arbitration Act (Amendment) Bill 2019.
[877] Indian Arbitration Act 1996 (Amendment) 2021.
[878] ibid art 43H.
[879] The Amendment Act of 2019 established an independent body called the Arbitration Council of India (ACI) for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. Its functions include: (i) framing policies for grading arbitral institutions and accrediting arbitrators, (ii) making policies for the establishment, operation and maintenance of uniform professional standards for all alternate dispute redressal matters, and (iii) maintaining a depository of arbitral awards (judgments) made in India and abroad. See Indian Arbitration Act (Amendment) Bill 2019.
[880] ibid.
[881] Rohan Mandhok, 'A Study on the Evolution and Development of the Law of Arbitration in India' (2021) 4 International Journal of Law Management and Humanities, 12.
[882] See e.g., *Bathia International v Bulk Trading SA & Anr* AIR (2002) SC 1432; *Venture Global Engineering v Satyam Computer Services Ltd & Anr* AIR (2008) SC 106 or *Phulchand Exports Ltd v OOO Patriot* (2011) 10 SCC 300, para 16 where the Court interpreted 'public policy' as 'patent illegality'.

restrictive view of both Indian courts' jurisdiction and reasons to deny recognition and enforcement of foreign arbitral awards.[883] The proliferation of arbitral institutions also reflects such a shift in favour of arbitration.

As just shown, Arbitration in India has evolved from a traditional dispute resolution practice to a modern legal framework aligned with international standards. The Indian government as well as the judiciary have put many efforts to promote arbitration displaying a pro-arbitration stance, thus contributing to the growth and development of such a dispute resolution instrument in India.

5.3 Arbitrability

In India, the issue of arbitrability of disputes is not governed by statute but by case law.[884] Indeed, on the one hand, according to the Arbitration Act all disputes arising out of a legal relationship, whether contractual or not, could be referred to arbitration.[885] On the other hand, the same Act in its Section 2(3) recognizes that "certain disputes may not be submitted to arbitration" but omits to provide a direct definition of which categories of disputes are deemed non-arbitrable. As a result, this question has been left to the Indian judiciary's interpretative mandate, which, as will be shown below, is not always uniform, and it has occasionally resulted in divergent rulings.

[883] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' George A Bernman (ed), *Recognition and Enforcement of Foreign Arbitral Awards. The Interpretation and Application of the New York Convention by National Courts* (Springer International Publishing 2017) 445–476.

[884] Considering the importance of case law for the assessment of arbitrability matters, it is worth briefly mentioning some landmark decisions from the Supreme Court that fixed some arbitrable and non-arbitrable matters. In *Kingfisher Airlines Limited v Prithvi Malhotra Instructor* 62 2013 (7) BomCR 738, the Indian Supreme Court held that labour disputes are not arbitrable as a matter of public policy. In *Natraj Studios Pvt. Ltd. v Navrang Studios* (1981) AIR 537, the Supreme Court of India held that dispute under the Rent Control Act, 1947 are to be adjudicated only by specialized tribunals, thus excluding arbitration. In *Chiranjilal Shrilal Goenka v Jasjit Singh and Ors*., (1993) 2 SSC 507 the Indian Supreme Court ruled that the courts have exclusive jurisdiction to grant probate, which overrides any agreement to submit such a dispute to arbitration. In *Fair Air Engineers (P) Ltd. v N.K. Modi* (1996) 6 SCC 385, the court interpreted Section 3 of the Indian Consumer Protection Act, 1986 and held that consumer disputes are not arbitrable. In *Haryana Telecom Ltd. v Sterlite Industries India Ltd.*, (1999) 5 SCC 688 the Supreme Court of India held that arbitrator has no jurisdiction to order winding up of a company. Regarding Competition lawsuits, the High Court of Delhi in *Union of India v Competition Commission of India* AIR 2012 DELHI 66, observed that the arbitral tribunal would neither have the mandate, the expertise, nor the wherewithal to prepare the investigation report necessary to decide the dispute in question, therefore the matter was not suitable for resolution in arbitration. All the aforementioned cases have been retrieved from Mohammed Zaheeruddin, 'The Arbitrability of the Subject Matter of Disputes in Arbitration' (2020) 23 Journal of Legal, Ethical and Regulatory Issues 1.

[885] Indian Arbitration Act 1996 s 7.

The case of *Booz Allen and Hamilton Inc v SBI Home Finance Ltd. & Others*[886] (hereinafter Booz Allen) serves as the foundation for any discussion of arbitrability in India because it first established a generic test, - known as the "Booz Allen Test"- for determining whether the subject matter of a dispute is capable of being resolved through arbitration[887]. To start with, in Booz Allen the Supreme Court stated that the question of arbitrability should be decided considering the 'nature of rights' involved in the dispute, and continues adding that a dispute is not arbitrable if it involves *rights in rem*, e.g., a right which attaches to a particular "thing" rather than a person, or creates a legal status such as citizenship, and which is therefore exercised against the world at large.[888] Whereas, if a dispute involves a *right in personam*, or rights against specific individuals, as in a contract, the dispute can be resolved through arbitration. Traditionally, all disputes relating to *rights in personam* are amenable to arbitration and all disputes relating to *rights in rem* are required to be settled by courts and public tribunals, being unsuited for private adjudication. However, this is not a rigid or inflexible rule. In fact, disputes relating to sub-ordinate *rights in personam* arising from *rights in rem* have always been considered to be arbitrable.[889] To make an example, although insolvency claims may not be arbitrated, the consequent breach of a contract by virtue of insolvency is. [890] Applying the Booz Allen test, the Supreme Court determined a non-exhaustive list of non-arbitrable categories of disputes: (1) those that give rise to or arise out of criminal offenses;(2) matrimonial disputes; (3) guardianship matters; (4) insolvency and winding up matters; (5) testamentary matters; and (6) eviction or tenancy matters.[891] In a subsequent case, *Shri Vimal Kishor Shah v Jayesh Dinesh Shah & Others* the Supreme Court added a seventh category to the list of disputes that could not be arbitrated, that is (7) disputes arising out of a trust deed under the Indian Trust Act of 1882. Drawing on its Constitution Bench decision in *Dhulabhai and Others v State of Madhya*, which established guidelines for determining express and/or implied bars on the jurisdiction of civil courts, the Supreme Court held that arbitration was impliedly barred because the Trusts Act provided a specific remedy for civil court adjudication of disputes.[892]

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[886] *Booz Allen and Hamilton Inc v SBI Home Finance Ltd. & Others* AIR 2011 SC 2507. Booz Allen arose in a suit that was held by the Supreme Court to be one for enforcement of a mortgage by a sale, a matter that would result in a judgment in rem, and consequently, one that was not arbitrable.
[887] Ajar Rab, 'Defining the Contours of The Public Policy Exception - A New Test for Arbitrability In India' (2020) 7 Indian Journal Of Arbitration Law 161.
[888] *Booz-Allen* (n 886) point 23.
[889] ibid.
[890] Arthad Kurlekar, 'A False Start – Uncertainty in the Determination of Arbitrability in India' (*Kluwer Arbitration Blog*, 16 June 2021) <https://arbitrationblog.kluwerarbitration.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/> accessed 26 January 2024.
[891] *Booz-Allen* (n 886) point 22.
[892] *Shri Vimal Kishor Shah v Jayesh Dinesh Shah & Others*, (2016) 8 SCC 788.

The Booz-Allen Test has been nonetheless criticized in subsequent judgments [893] and certainly is not comprehensive enough to represent the sole test for assessing the arbitrability of disputes.[894] As such, the Supreme Court itself in the Booz Allen decision qualifies its test by saying that it cannot be a hard and fast rule.[895]

A different approach to the issue of arbitrability was that of the Bombay High Court in the 2014 *Rakesh Kumar Malhotra* case,[896] when the High Court sought to determine arbitrability based on the relief sought by the parties, and not on the nature of the legal rights being asserted, as did the Supreme Court in Booz Allen. The case at hand revolved around specific actions taken by the company defeating the shareholders' interest. According to the Booz Allen test, the dispute would have been arbitrable. Nonetheless, the Bombay High Court observed that the relief sought by the parties was beyond the powers arbitrators can dispose of, [897] and for this reason, the dispute was incapable of settlement by arbitration.[898] Similarly, in *EROS International Media Limited V Telemax Links India Pvt. Ltd*, the Bombay High Court issued a decision in which it determined that contractual rights relating to copyright were arbitrable. Once more, such a conclusion was possible only by looking at the type of remedy sought by the parties i.e., a remedy for breach of contract; conversely, since copyright claims fall within the category of *rights in rem*, under the logic of the Booz Allen test, the dispute would have not been arbitrable.[899]

Certainly, neither the relief-based approach is perfect. On the contrary, a significant disadvantage of this approach is that a party may be able to avoid arbitration by seeking for a relief that is technically outside the purview of the arbitrator.[900] Such a concern was anticipated by the High Court itself in the *Rakesh Kumar Malhtora* case where it stated that the petition for relief must not be "mala fide, oppressive, vexatious and an attempt at 'dressing up' to evade an arbitration clause".[901] Therefore, the question of whether the arbitral tribunal is capable of granting the nature of the relief sought by the parties should be another factor to be considered by the courts when ruling upon arbitrability, and not an exclusive method.

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[893] For example, in *Rakesh Malhotra v Rajinder Kumar Malhotra*, (2015) 192 Comp Cas 516; *EROS International Media Limited V Telemax Links India Pvt. Ltd*., 2016 (6) ARBLR 121; Kurlekar (n 890).
[894] Rab (n 887) strongly criticizes the Booz-Allen test and how it has been misinterpreted and misapplied by subsequent Courts, also linking such an oversight with the public policy defence.
[895] *Booz-Allen* (n 886) point 23.
[896] *Rakesh Malhotra v Rajinder Kumar Malhotra* (2014) SCC OnLine Bom 1146.
[897] The relief sought was under Sections 397- 402 of the Companies Act 1956 which allowed the company law board (a specialised tribunal) exclusive power to regulate the affairs of a company. (n 893) point 63.
[898] *Rakesh Malhotra v Kumar Malhotra* ibid.
[899] *Eros International Media Limited v Telemax Links India Pvt Ltd* (n 893) point 26.
[900] Kurlekar (n 890).
[901] *Rakesh Malhotra v Rajinder Kumar Malhotra* point 86.

Vidya Drolia & Others v Durga Trading Corporation (hereinafter Vidya Drolia) is the most recent case involving a question of arbitrability where, considering the uncertainty on the issue, the Supreme Court proposed a four-fold test to determine arbitrability along with an interpretative guide for forums adjudicating this issue. The Supreme Court in Vidya Drolia held that disputes are not arbitrable when: 1) the cause of action pertains to *rights in rem,* which does not include subordinate rights *in personam* arising out of the *rights in rem*; 2) the cause of action affects third-party rights and is capable of creating an *erga omnes effect;* 3) the cause of action relates to inalienable public and sovereign functions of the state; and 4) the subject matter of the dispute is expressly, or by necessary implication, non-arbitrable under mandatory statutory enactments.[902] A positive answer to any of the above questions would render the dispute non arbitrable. Nonetheless, the Supreme Court clarified that, despite the tests are extremely valuable since they can be used as guidelines to determine when a particular subject matter is non-arbitrable in India, they are not "watertight compartments", leaving the determination open on a case by to case basis and thus rendering arbitration in India a little more uncertain.[903]

5.4 The arbitration agreement

The provisions relating to the arbitration agreement in the Arbitration Act borrow from the UNCITRAL Model Law on International Commercial Arbitration of 1985.[904] As a matter of fact, the Indian Arbitration Act defines an "arbitration agreement" as an agreement by the parties to submit to arbitration all, or certain, disputes which have arisen, or which may arise, between them in respect of a defined legal relationship, whether contractual or not.[905]

There are several essential features that the arbitration agreement should have to be considered valid and enforceable. To begin with, the arbitration agreement may take the form of a clause in a contract or arise in a separate agreement,[906] in any case it is vital for it to be in writing.[907] Such a prerequisite is deemed to be satisfied when the arbitration agreement is contained in a document signed by the parties; in an exchange of letters, telex,

[902] Vidya Drolia & Others v Durga Trading Corporation (2019) SCCOnLine SC 358.
[903] Shahezad Kazi and Gladwin Issac, 'Supreme Court of India Clarifies 'What is Arbitrable' under Indian Law and Provides Guidance to Forums in Addressing the Question' (*S&R Litigation and Arbitration*, 5 January 2021) <https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/1023030/supreme-court-of-india-clarifies-what-is-arbitrable-under-indian-law-and-provides-guidance-to-forums-in-addressing-the-question> accessed 26 January 2024.

[904] See Model Law 1985, s 7; Nigam and Aatrey (n 862).
[905] Indian Arbitration Act 1996 s 7(1).
[906] Indian Arbitration Act 1996 s 7(2).
[907] Indian Arbitration Act 1996 s 7(3); *Govind Rubber v Louis Dreyfus*, (2015) 13 SCC 477, points 15, 16, 21, 23.

telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement; or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.[908] A document containing an arbitration clause may also be adopted by way of reference through a written agreement of the parties.[909]

The arbitration agreement alone does not have to be signed by the parties to be valid.[910] For instance, recognizing the elements of modern e-business, in the recent *Ingram Micro India Private Limited v Mohit Raghuram Hegde* case the High Court of Bombay held that the contesting party made an express declaration of acceptance of the 'sales terms and conditions' available on the website of the contracting party by completing an online KYC form, and consequently with the 'sales terms and conditions' the party had accepted also the arbitration clause contained therein, which was thus considered a binding arbitration agreement between the parties.[911]

At the same time, an arbitration agreement will be formed if the terms of the agreement clearly indicate the parties' intention to refer disputes between them to an arbitral tribunal and their willingness to be bound by the decision of that arbitral tribunal on such disputes.[912] It is interesting to note that in the cases *Jagdish Chander v Ramesh Chander and Ors* and *Bihar State Mineral Development Corpn. v Encon Builders* the Supreme Court stated that even if the words "arbitration", "arbitral tribunal", or "arbitrator" are not used in a dispute resolution clause, it is still considered an arbitration agreement if it shows the following characteristics: the agreement is in writing; the parties have agreed to refer any disputes between them (present or future) to the decision of a private tribunal; the tribunal is empowered to adjudicate upon disputes in an impartial manner, giving the parties the opportunity to put forward their respective cases; and the parties agree that the decision of the tribunal is binding.[913] On the other hand, where the arbitration clause permits an authority to decide a dispute without a hearing; requires the authority to act in the interests of only one of the parties and provides that the decision of the authority will not be final and binding on the parties; or, further, when it provides that if either party is not satisfied with the decision

[908] Indian Arbitration Act 1996 s 7(4).
[909] ibid s 7(5).
[910] *Jugal Kishore Rameshwardas v Mrs. Goolbai Hormusji* AIR 1955 SC 812; *M/s Caravel Shipping Services Private Limited v M/s Premier Sea Foods Exim Private Limited* 2018 (14) SCALE 743.
[911] *Ingram Micro India Private Limited v Mohit Raghuram Hegde* AIR 2022 Bom 290.
[912] *State of Orissa v Damodar Das* (1996) (2) SCC 216. Sanjeev Kapoor and others, 'International Arbitration Law and Rules in India' (*CMS*, 7 August 2023) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/india> accessed 26 January.
[913] *Bihar State Mineral Development Corpn. v Encon Builders (I) (P) Ltd*., (2003) 7 SCC 418; *Jagdish Chander v Ramesh Chander and Ors* (2007) 5 SCC 719.

of the authority they may file a civil suit seeking relief, then the said agreement cannot qualify as an arbitration agreement and would thus not be enforceable.[914]

In order to give effect to the parties' intention when determining pathological arbitration clauses, Indian courts have adopted the principle of harmonious interpretation. An instance of this can be found in the recent *Pricol Limited v Johnson Controls Enterprise Ltd. & Ors,* ruling which dealt with an incomplete arbitration clause in a joint venture agreement, which provided for (a) Singapore Chamber of Commerce as the venue for the arbitration proceedings; and (b) Indian law to govern and interpret the agreement[915]. In order to prevent additional litigation from derailing the arbitral process, the Supreme Court introduced evidence of the parties' true intention to arbitrate, despite the fact that it took place under a non-existent institution,[916] as the correct wording of the place of arbitration would have been "Singapore International Arbitration Centre".

In the same way, the mere possibility of the parties agreeing to arbitrate in the future, rather than establishing an obligation to refer future disputes to arbitration, is insufficient to constitute a valid and binding arbitration agreement.[917] To put it simply, an agreement to agree is not enforceable under Indian law.

It is worth noting also that the Indian Arbitration Act does not permit a provision requiring one of the parties' claims to be adjudicated by arbitration while the other party's claim arising from the same legal relationship is adjudicated through other means. This is due to public policy, which prohibits the splitting up of claims and causes of action, as this would imply duplication and risk of inconsistent results that arose from split actions between the court and the arbitrator.[918] For what concerns multiple dispute resolution options included in the dispute resolution clause, the Supreme Court recently ruled in the case *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd v Jade Elevator Components* that where a contract gives parties the choice of approaching either an arbitral tribunal or courts, but does not specify a priority between the two, parties will be referred to arbitration.[919]

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[914] *Jindal Exports Ltd v Fuerst Day Lawson Ltd* (2011) 8 SCC 333.
[915] *Pricol Limited v Johnson Controls Enterprise Ltd & Ors,* Arbitration case (civil) (2014) No 30.
[916] Sai Ramani Garimella, 'Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: An Indian Perspective' in Sai Ramani Garimella and Stellina Jolly (eds), *Private International Law South Asian States' Practice* (Springer Singapore 2018).
[917] *Jagdish Chander v Ramesh Chander and Ors* (n 912).
[918] *Shri Chand Construction and Apartments Pvt. Ltd. v Tata Capital Housing Finance Ltd* (2020) SCC OnLine Del 472; *Tata Finance Housing Finance Limited v Shri Chand Constructions and Apartments Pvt Ltd* (2021) FAO (OS) 40/2020.
[919] *Zhejiang Bonly Elevator Guide Rail Manufacture Co Ltd v Jade Elevator Components*, Arbitration Petition (Civil) (2018) No 22.

Under the Arbitration Act and as established through case law, the arbitration clause is separable from the other clauses of a contract and constitutes an agreement by itself.[920] In fact, an arbitration clause in a contract will be treated as an independent agreement between the parties and will be enforced as such.[921] This means that a decision by an arbitral tribunal that a contract is null and void does not automatically render the arbitration clause contained therein null and void, as long as the clause constitutes a valid arbitration agreement.[922] The survival of the arbitration clause is an imperative legal fiction crucial for the efficient work of arbitration.[923]The Supreme Court additionally outlined that an arbitration clause is a contractual term and that, as a collateral term, it will survive the contract in which it was included;[924] it would still exist and could be resorted to for resolution of disputes between the parties, -including a dispute relating to validity of the agreement- after the contract has terminated. The proper law of the arbitration agreement is normally the same as the proper law of the contract. In fact, where the proper law of the contract is expressly chosen by the parties, such law must, in the absence of an unmistakable intention to the contrary (such as an express choice of the seat/venue of arbitration), govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract (as established in *NTPC v Singer Co. (1992) 3 SCC 551*).

Nonetheless, for parties to be able to invoke arbitration, the underlying contract containing the arbitration agreement or arbitration clause must be adequately stamped. According to the Supreme Court's recent decision in *N. N. Global Mercantile Private Limited v Indo Unique Flame Ltd. and Ors*. dated April 2023, an arbitration agreement contained in an unstamped or deficiently stamped contract is void, and parties are not referred to arbitration under Section 11 of the Arbitration Act until the deficiency in the underlying contract is cured.[925] In such cases, courts impound the document until the differential duty and penalty, if any, are paid. This causes some delay, which can be avoided if the document is duly stamped.

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[920] Indian Arbitration Act 1996 s 16(1); *Firm Ashok Traders and Another v Gurumukh Das Saluja and Others* [2004] AIR SC 1433.
[921] ibid; *Enercon (India) Ltd v Enercon Gmbh & Anr* (2014) SLT 470.
[922] Indian Arbitration Act 1996 s 16 (1) (b); *Reva Electric Car Co. (P) Ltd. v Green Mobil*, (2012) 2 SCC 93.
[923] Michael Mustill and Steward Boy, *Commercial Arbitration* (3rd edn, LexisNexis Butterworths 2010).
[924] *M/S P. Manohar Reddy and Bros v Maharashtra Krishna Valley Development Corporation and Ors AIR 2009 SC 1776; SMS Tea Estates (P) Ltd. v Chandmari Tea Co. (P) Ltd.,* (2011) 14 SCC 66.
[925]*N. N. Global Mercantile Private Limited v Indo Unique Flame Ltd. and Ors*. Civil Appeal No (S) 3802-3803 (2020); *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Company Pvt Ltd* (n 962) where the Supreme Court stated that it could not act on an arbitration clause contained in an insufficiently stamped document. Subsequently, in *M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram & Other Charities & Ors. v M/s Bhaskar Raju & Brothers & Ors.*, (n 924) the Court held that no arbitrator could be appointed under an arbitration clause contained in a lease deed that was insufficiently stamped under the Karnataka Stamp Act 1957, reaffirming its previous decision in SMS Tea.

From an Indian perspective, another significant element to include in an arbitration agreement, would be the seat of arbitration, as it determines which part of the Arbitration Act applies to the proceedings and the court that will have supervisory and, potentially, jurisdictional powers over the case.[926]

5.5 Jurisdiction and *kompetenz-kompetenz* doctrine

Section 16 of the Arbitration Act endorses the doctrine of *kompetenz-kompetenz*. In line with the said doctrine, the section provides the arbitral tribunal with the powers to rule upon its own jurisdiction,[927] including questions pertaining to the scope, meaning and effects of the arbitration agreement,[928] and the powers to face potential related challenges.

The positive implementation of the *kompetenz-kompetenz* doctrine was put into practice by the Supreme Court in the *Koncan Railway Corp* case when a Constitutional Bench observed that "objections relating to the existence or validity of the arbitration agreement could be raised before the tribunal itself".[929] The same judgment was reprised by a subsequent Constitutional Bench in *Food Corp of India*, where the court laid down the rule that "questions relating to the improper constitution of the arbitral tribunal or its want of jurisdiction are matters which should be canvassed before the arbitral tribunal itself, which has been specifically empowered to rule on such issues and on its own jurisdiction".[930]

Prior to such landmark judgements, the courts had adopted a more paternalistic attitude towards arbitration proceedings, allowing for a more hostile approach to prevail.[931] In fact, the Courts had interpreted the provisions contained in section 16 of the Arbitration Act as a mere possibility for the arbitral tribunal to rule on the existence and validity of an arbitration clause, as the legal text uses the word "may", which was interpreted to signify an option for the tribunal to do so only after a supervisory court had authorized it to exercise this power.[932] Fortunately, though, such an approach evolved to align with global arbitration practice,[933] which favours a decrease in the courts' role dealing with jurisdictional challenges

[926] It should be reminded here that domestic (Indian seated) arbitrations are governed by Part I of the Act, while offshore arbitrations are governed by Part II thereof, where Part I contains a comprehensive scheme for the conduct of arbitration (based on the Model Law), while Part II is essentially confined to the enforcement of foreign awards (on the basis of the New York Convention).
[927] Indian Arbitration Act 1996 s 16 (1).
[928] *Food Corp of India v Indian Council of Arbitration*, AIR 2003 SC 3011.
[929] *Koncan Railway Corp v Rani Construction*, 2022 1 Arb LR 326.
[930] *Food Corp of India v Indian Council of Arbitration* (n 927).
[931] Nigam and Aatrey (n 862).
[932] ibid. *Wellington Associates Ltd v Kirit Metha*, AIR 2000 SC 379.
[933] Redfern and Hunter comment that Indian courts have, unlike earlier, shown faith in the kompetenz-kompetenz principle. Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 340.

and, in truth, the subsequent amendments to the Arbitration Act went exactly in this direction. As a matter of fact, according to the amended section 8 (1) of the Arbitration Act (2015), a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement so applies (not later than the date of submitting his first statement on the substance of the dispute) refer the parties to arbitration, unless it finds that *prima facie* no valid arbitration agreement exists.[934] Consequently, rather than engaging in a full review of the agreement when deciding upon applications for reference to arbitration, Courts would now merely make an examination of *prima facie* validity of the arbitration agreement, which includes checking the form of the arbitration agreement – whether it is in writing, or whether it is contained in an exchange of letters, telecommunication etc…[935] and assess whether it fulfills the core contractual requirements under Indian law.[936] Where a party fails to make a request to the Court within the specified time frame, they will be deemed to have waived their right to invoke the arbitration agreement. The limitation period applicable for the filing of the statement of defence (written statement) under the relevant procedural law of the Code of Civil Procedure as well as that of the Commercial Courts Act, 2015 are also applicable to the filing of an application seeking reference of the dispute to arbitration.[937] Whereas courts have interpreted differently what a "statement of defence by a party on the substance of a dispute" is, determining it on a case-by-case basis.[938]

Only in rare cases does the court have the power to examine arbitrability of a dispute. In fact, as stated by the Supreme Court in *Vidya Drolia & Others v Durga Trading Corporation*, the Arbitration Act's amendments of 2015 and 2019, were intended by the legislature to strengthen the idea that the arbitral tribunal is the 'preferred first authority' to decide all issues pertaining to arbitrability and that courts should only take a 'second look' at the award under Section 34 of the Arbitration Act.[939] On the same occasion, the Court clarified that the permitted scope of interference under Sections 8 and 11 of the Arbitration Act is identical and is there only to decide the question of arbitrability when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the subject-

[934] Indian Arbitration Act 1996 s 8 (1). Before the amendment the norm stood as: '(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration'.
[935] On this, the previous paragraph on the arbitration agreement.
[936] Kazi and Issac (n 902).
[937] *SIPL Lifestyle Pvt. Ltd. v Vama Apparels (India) Private Limited & Anr* (2020) CS (COMM) 735/2018.
[938] *Booz Allen and Hamilton Inc v SBI Home Finance Ltd and Ors* (n 886), where the filing of detailed affidavit opposing interim relief was not considered to be a submission to the jurisdiction of the court.
[939] ibid. Indian Arbitration Act 1996 s 34, which deals with the Challenge of the arbitration award.

matter is demonstrably non arbitrable. "When in doubt, do refer [to the arbitral tribunal]" concluded the Supreme Court in *Vidya Drolia & Others v Durga Trading Corporation* case, clarifying how the courts should behave in case of uncertainty or when the validity of the arbitration agreement cannot be determined on a *prima facie* basis.[940]

What it is interesting to note is that section 45 of the Arbitration Act, which applies to foreign-seated arbitrations, contemplates the possibility for courts to issue "anti-arbitration injunctions" in cases where the arbitral proceedings seem vexatious and oppressive and hence, when they constitute an abuse of due process of law.[941] Nonetheless, as reminded by the Supreme Court in *World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd,*[942] such injunctions may only be granted if it is established that the arbitration agreement is null and void, inoperative, or incapable of being performed. The Court further adduced that the use of the words "inoperative or incapable of being performed" in Section 45 of the Act is a deliberate incorporation of the language in art. II (3) of the New York Convention and should be interpreted accordingly. Indeed, the claim of parallel and vexatious proceedings was expressly rejected as insufficient to justify an anti-arbitration injunction.[943]

Where the arbitral tribunal rejects an objection to its jurisdiction, it shall continue with the arbitral proceedings and make the award. Any challenge to the award would be available at a later stage.[944] If, on the other hand, the arbitral tribunal accepts the plea as to its lack of jurisdiction, an appeal shall lie to a court of law.[945] This provision marks a significant departure from the Model Law, which contemplates recourse to a court from a decision of the arbitral tribunal rejecting a challenge to its jurisdiction.[946] Every step of the legislation demonstrates the Indian legislature's desire to keep the courts out of the arbitral process.

[940] See Vidya Drolia & Others v Durga Trading Corporation (n 902) 75 (d).
[941] Indian Arbitration Act 1994 s 45 states that "Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed". Where the reference to the *prima facie* analysis was inserted by the Arbitration (Amendment) Act, 2019
[942] *World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd,* AIR 2014 SC 968.
[943] ibid point 29.
[944] According to Section 34 of the Arbitration Act.
[945] Indian Arbitration Act 1996 s 37 (Appeals orders).
[946] Model Law 1985 art 16 (3).

5.6 Arbitrators and arbitral institutions

Party autonomy is foremost prioritized by the Indian Arbitration Act, especially when it comes to the appointment of arbitrators. Parties are indeed free to nominate any person of their choice as an arbitrator and set out which qualifications the arbitrators should have to be appointed for the resolution of their case. There are no nationality requirements to be an arbitrator under the Arbitration Act, only the parties may agree to the contrary.[947] Parties are permitted to mutually agree on the number and procedure for appointing arbitrators, provided that this does not result in uneven number of arbitrators.[948] In the absence of an agreement between the parties, the Indian Arbitration Act lays out the default procedure to apply for the appointment of a sole arbitrator.[949] Whereas, where the arbitral tribunal is to consist of three arbitrators and the parties fail to agree on a procedure for their appointment, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.[950] In international commercial arbitrations, when either the parties, the arbitrators, or the arbitral institution fail to appoint an arbitrator, a party can approach the Supreme Court (or any person or institution designated by such Court) to appoint one.[951] Once a party files an application requesting the Court to appoint an arbitrator, the other party is presumed to have waived its right to appoint an arbitrator, and only the Court has the authority to appoint him\her.[952] When called upon to fulfill the role of appointing authority, the Supreme Court must confine itself to the examination of the existence of an arbitration agreement in matters concerning the appointment of an arbitrator.[953] This does not, however, eliminate completely the court's authority to consider issues of jurisdiction. In fact, despite the legislature's intent to restrict the scope of enquiry, the Supreme Court in *United India Insurance Co. Ltd. v Hyundai Engineering*[954] expanded the same to include the examination of whether the dispute was

[947] Indian Arbitration Act 1996 s11 (1).
[948] ibid s 10(1).
[949] bid ss10 (2) and 11 (5). It is worth stressing that The Supreme Court ruled in *Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd.* (2019) SCC Online SC 1517 that a party's right to appoint a sole arbitrator for dispute resolution cannot be exercised unilaterally, even if the agreement allows it.
[950] Indian Arbitration Act 1996 10 (3).
[951] ibid Indian Arbitration Act 1996.
[952] *Durga Welding Works v Railway Electrification* (2022) 3 SCC 98.
[953] Indian Arbitration Act 1996 s 11 (6A), which was nonetheless deleted by the 2019 Amendment Act. Seemingly, this is due to the fact that the 2019 amendment in Section 11(3A), gives the power to designate arbitral institutions, to the High Courts and the Supreme Court of India, making the appointment of arbitrators being done institutionally, in which case the courts under the old statutory regime would no longer be required to appoint arbitrators and, as a result, to determine whether an arbitration agreement exists or not. *Mayavati Trading Pvt. Ltd. v Pradyua Deb Burman* (2019) 8 SCC 714; Naresh Thacker and Mihika Jalan, 'India' (*Global Arbitration Review*, 11 June 2020) <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/india#endnote-026> accessed 26 January 2024.
[954] *United India Insurance Co. Ltd. v Hyundai Engineering* (2018) 17 SCC 607.

arbitrable. The courts have indeed the authority to decline referral to arbitration in order to weed out frivolous and vexatious claims when the terms of the contract or the case facts obviously point to the non-arbitrability of a dispute.[955] Whereas Courts cannot interfere with the appointment of an arbitrator that the parties have chosen under the terms of an agreement, unless the legal misconduct, fraud or disqualification of that arbitrator has been pleaded and proven.[956] Similarly, the parties cannot, on their own initiative, withdraw the authority of an arbitrator they have appointed unless there is a good and sufficient reason to do so.[957] In any case, according to the Indian Arbitration Act, the relevant court will make every effort to resolve an application for the appointment of an arbitrator within 60 days of service of notice on the opposing party.[958]

When approached about becoming an arbitrator, a person must disclose in writing, in accordance with Section 12 of the Arbitration Act, that he or she has no past or present financial, business, professional, or other relationship with or interest in any of the parties or in relation to the subject matter in dispute, which is likely to give rise to justifiable doubts about their independence.[959] In fact, among the most important prerequisites for a just and fair dispute resolution process are the independence and impartiality of arbitrators. The Indian Arbitration Act requires that arbitrators perform their functions honestly and impartially, and that they adhere to the principles of natural justice by giving the parties an equal opportunity to present their case and providing proper notice of hearings.[960] To ascertain the eligibility, neutrality, and impartiality of arbitrators, the Arbitration Act establishes a specific code under the Fifth and Seventh Schedules, which are largely inspired to the IBA Guidelines on Conflicts of Interest in International Arbitration.[961] The grounds and mechanism for challenge of an arbitrator on the grounds of lack of independence, impartiality, or qualification as agreed to by parties are set out respectively in Section 12 and Section 13 of the Arbitration Act. The Arbitrator's relationship with the parties or counsel (e.g., where the arbitrator is a lawyer in the same law firm which is representing one of the parties); the arbitrator's direct or indirect interest in the dispute (e.g., a close relative of the arbitrator has a big financial stake in how the dispute turns out); or if the arbitrator had priorly

[955] *Indian Oil Corporation Limited. v NCC Limited* 2022 SCC Online SC 896.
[956] *Bhupinder Singh Bindra v Union of India and Another* AIR 1995 SC2464.
[957] ibid. Kapoor and others (n 912).
[958] Indian Arbitration Act 1996 s11(13).
[959] ibid s 12 (1) (a).
[960] ibid s 18.
[961] In particular, see the Red and Orange list under the IBA Rules on Conflicts of Interest in International Arbitration as amended in 2015; Aditya Vikram Jalan and others, 'International Arbitration Laws and Regulations 2023, India' (*Global Legal Insights*, 2023) <https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/india#chaptercontent4> accessed 26 January 2024.

worked for one of the parties or has additional engagement with the case are among the grounds listed in the Fifth and Seventh Schedules, and consequently intended as instances that may raise justifiable doubts as to independence or impartiality of an arbitrator.[962] The arbitrator must, in fact, make the above disclosures as afore stated, in the format specified in the Sixth Schedule of the Indian Arbitration Act, which also requires him to disclose factors that may affect his ability to devote sufficient time to the arbitration, in particular, his ability to complete the entire arbitration within a period of twelve months.[963] These obligations apply both when the arbitrator is appointed and throughout the arbitration proceedings. Upon the Supreme Court ruling, these provisions of the Indian Arbitration Act would still apply even in cases where there is a prior agreement to the contrary.[964] As for the appointment, the parties are free to agree on the challenge procedure.[965] Failing any agreement, a party intending to challenge an arbitrator must send the arbitral tribunal a written statement stating the reasons for the challenge within 15 days of becoming aware of the arbitral tribunal's constitution or becoming aware of any circumstances referred to in Section 12(3)[966]. It must be noted here that section 12(4) provides that a party can only challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons that he has become aware of after his appointment.[967] The existence of any reason, which the party was already aware of prior to the appointment of that arbitrator, do not for a ground for challenge. Unless the challenged arbitrator withdraws or the other party to the arbitration agrees to the challenge, the arbitral tribunal will decide on the success of the challenge.[968] However, in the case *TRF Ltd. v Energo Engineering Projects Ltd*., the Supreme Court held that a party may approach the Court to plead the statutory disqualification of an arbitrator under the provisions of the Arbitration Act, and that it is not necessary to first approach the Arbitrator to obtain this relief. The Court went on to rule that when the designated arbitrator is also in charge of appointing an alternate arbitrator, they are barred from nominating such alternate arbitrator if they are found to be statutorily ineligible to adjudicate the dispute.[969]

For what concerns the arbitral institutions, the most internationally present and common ones for international arbitrations are institutions as the ICC, SIAC, LCIA, and HKIAC. Domestic institutions such as the Mumbai Centre for International Arbitration, the

[962] Indian Arbitration Act 1996 sch Fifth and Seventh.
[963] ibid s12 (1) (b).
[964] ibid s12(5); *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd.* (2017) 4 SCC 665.
[965] Indian Arbitration Act 1996 s 13 (1)
[966] ibid s 13 (2).
[967] ibid s 12(4).
[968] ibid s 13 (3).
[969] *TRF Ltd v Energo Engineering Projects Ltd* (2017) 8 SCC 377.

Delhi International Arbitration Centre, and the Indian Council of Arbitration International Arbitration and Mediation Centre, which opened in 2021, have also gained popularity for international arbitrations.[970]

The 2019 Amendment Act introduced -upon the Srikrishna Committee recommendation[971]- the Arbitration Council of India to the Indian arbitration landscape, to promote arbitration, and to serve as a catalyst for the growth of arbitral institutions in India.[972] The said agency was supposed to be an independent body comprising all stakeholders' representatives of arbitration in India and abroad, with the scope of grading arbitral institutions, arbitrators' accreditation, and establishing a specialist arbitration bar, along with a specialist arbitration bench.[973] The body's role was primarily advisory, with the goal of encouraging democratic institutional arbitration in India. However, departing from the recommendations of the Srikrishna Committee, the legislature has envisaged the formation of the agency primarily with government officials or their nominees. This choice turned out to be detrimental as the government and its entities are generally involved in a significant number of arbitrations and related court litigations, and precisely for this reason a degree of separation from the composition of Council should have been maintained. Furthermore, the nature and functions of the Council have shifted from recommendatory to regulatory. In fact, the Arbitration Council of India has now broad powers ranging from grading and reviewing arbitral institutions to making rules and regulations, conduct examination and training on various subjects relating to arbitration and award certificates thereof etc…[974] Such broad powers may nonetheless be incompatible with the very concept that lies behind such a body and the goal it seeks to achieve. Perhaps the legislature will pay attention to the criticisms and modify the arbitral text in the future to reflect the inspiration and reasons that pushed to the creation of the Arbitration Council of India in the first place.

[970] Ravi Singhania and others, 'International Arbitration 2023, India' (*Chambers and Partners*, 24 August 2024) <https://practiceguides.chambers.com/practice-guides/international-arbitration-2023/india> accessed 26 January 2024.
[971] The Department of Legal Affairs, Ministry of Law and Justice, on 13 January 2017 constituted a ten Member high level Committee under the Chairmanship of Justice B N Srikrishna, retired judge of the Supreme Court of India, from which the committee takes its name to suggest measures to improve the overall quality and performance of arbitral institutions in India and to promote the standing of the country as preferred seat of arbitration.
[972] Indian Arbitration Act 1996 (Amendment) 2019 pt I A.
[973] Srikrishna Committee Recommendation 2017 pt VI points A to D.
[974] Indian Arbitration Act 1996 (Amendment) 2019 s 43 D.

5.7 The arbitral procedure

As mentioned, the Indian Arbitration Act attempt to prioritize party autonomy whenever possible. Indeed, according to the said Act, the parties are free to mutually decide, by means of an agreement, the procedure for conducting the arbitral proceedings,[975] only subject to certain mandatory provisions contained in the Arbitration Act. In ad hoc arbitrations the parties can decide on a set of procedural rules to follow or to apply the standard rules of an arbitral institution, either modified or not. When the arbitration is administered by an arbitral institution, according to the Arbitration Act, the arbitral proceedings are assumed to be governed by the rules of that arbitral institution.[976] As a result, those rules become a part of the arbitration clause by implication.[977] If there is no agreement between the parties on the rules of procedure, Section 19 of the Arbitration Act provides discretion to the arbitral tribunal to conduct the arbitration proceedings in a "manner they deem appropriate", including empowering it with the determination of admissibility, relevance, materiality, and weight of any evidence.[978] In such circumstances, while arbitral tribunals may find support from the Code of Civil Procedure ordinarily followed by civil courts in India, they are not, in any way, forced to apply them. In fact, it is interesting to note that the Arbitration Act seeks to clarify that the arbitral tribunal is not bound nor by the Code of Civil Procedure, 1908 nor by the Indian Evidence Act, 1872.[979] This again outlines the great autonomy granted by the arbitration law to the parties and to the arbitral tribunal in deciding how to conduct the proceedings, and in determining the overall case management. Besides, the Supreme Court has noted in *Mcdill and Company Pvt. Ltd v Gouri Shankar Sarda and Others* that the Code of Civil Procedure's provisions should not be applied in arbitral proceedings when doing so would likely make the process less efficient; on the contrary, the same provisions should be considered by the tribunal when it can help the arbitral proceedings deliver justice.[980]

The parties may decide at their discretion when to start the arbitral proceedings.[981] Where the arbitration agreement is silent about the date of commencement of the arbitral proceedings, the proceedings will be deemed to have commenced on the date that the

[975] Indian Arbitration Act 1996 s 19 (2).
[976] ibid s 2 (8).
[977] Kapoor and others (n 912).
[978] Indian Arbitration Act 1996 ss 9 (3) and (4).
[979] ibid s 19(1).
[980] *Mcdill and Company Pvt. Ltd v Gouri Shankar Sarda and Others* (1991) 2 SCC 548.
[981] Indian Arbitration Act 1996 s 21.

respondent received the request invoking arbitration for the resolution of the dispute.[982] The commencement day may also be indicated in the institutional rules where the arbitration is administered by an arbitral institution. The Statement of Claim and Defence is discussed in Section 23 of the Arbitration Act. Both parties must submit their respective statements within the time frame agreed upon or determined by the arbitral tribunal. What should be included in such statements is, once more, up to the parties or to the tribunal's decision. Nonetheless, where the parties have not reached an agreement, a statement of claim is required to provide all facts that support the party's claim, the points at issue, and the relief sought.[983] The Respondent, on the other hand, should state his defence in response to the Claimant's points, unless the parties agree otherwise as to the required elements of those statements.[984] The Indian Arbitration Act does not specify that the statement of claim and the defence must be in writing, although in practice both would generally be in written form.[985]

For what concerns the taking of evidence, the parties are free to choose the method of taking and presenting evidence and/or oral arguments, as well as whether oral hearings are required, and the arbitral tribunal shall be bound to act according with such an agreement between the parties, [986] who also have the right to change the said agreement at any time during the arbitration proceedings. When the parties fail to agree on specific rules on evidentiary matters, the arbitral tribunal will decide how oral submissions and evidence are presented during the hearing and will conduct the proceedings in the manner it considers appropriate.[987] The only restraint is the parties must be treated with equality and each party shall be given a full opportunity to present its case,[988] which includes sufficient advance notice of any hearing or meeting. In relation to both India-seated and foreign-seated arbitrations, parties can, with the approval of the arbitral tribunal, seek the court's assistance in taking evidence. The court may summon witnesses or order that evidence is to be provided to the arbitral tribunal. [989] Hence (unless the parties voluntarily comply), disclosure, discovery, attendance of witnesses can be ordered through the court, in accordance with the provisions of the Code of Civil Procedure. Indian courts do not encourage wide requests for

[982] ibid. Moreover, according to ss 3 (1) (a) and (b), a request is deemed to have been received if it has been delivered to the respondent personally, or at their place of business, habitual residence or mailing address or, alternatively, the respondent's last known place of business, habitual residence or mailing address.
[983] Indian Arbitration Act 1996 s 23 (1).
[984] ibid.
[985] Kapoor and others (n 912).
[986] Indian Arbitration Act 1996 s 24 (1).
[987] ibid s 19.
[988] ibid s 18.
[989] ibid s 27.

discovery, nonetheless, they would order discovery if satisfied that the same is necessary for a fair disposal of the matter or for saving costs.[990]

Witness called to testify during arbitral proceedings in India can be duly sworn by the tribunal and be required to state the truth under oath. This is due to the extension of the Indian Oaths Act, 1969 to persons who may be authorised, by consent of the parties, to receive evidence, which encompasses arbitral proceedings. Section 8 of the Oaths Act states that every person giving evidence before any person authorised to administer an oath "shall be bound to state the truth on such subject" upon failure to do so, witnesses are liable for offences punishable under the Indian Penal Code. However, a mere irregularity in the administration of an oath or affirmation does not invalidate the deposition.[991]

The arbitral tribunal has the authority, but not the obligation, to appoint experts to report on specific issues.[992] Such authority may also be waived by the parties' mutual agreement. The Indian Arbitration Act makes no restrictions or limitations on the areas in which the arbitral tribunal may seek expert assistance. Certainly, though, the tribunal-appointed experts may only provide specific advice to the arbitral tribunal on circumscribed issues. The tribunal- appointed expert's fees and expenses would form part of the arbitral tribunal's award on costs.

For what concerns the issuance of interim measures and interim relief, the arbitrators have powers to issue interim measures and procedures, as expressly provided under Section 17 (1) of the Arbitration Act. With the 2015 amendment, the tribunal has the same power as is available to a court for granting an interim relief.[993] Therefore, an interim order passed by an arbitral tribunal is now enforceable in the same manner as if it were an order by court, which also entails that any disobedience to such order can result in contempt of court[994]. The list of interim measures includes, for example, orders for preservation, custody, sale and protection of goods, protection of trade secrets, maintenance of machinery, works and continuation of certain works.[995] It must be pointed out that the provisions contained in section 17 of the Arbitration Act apply only to Indian seated arbitrations, as they are included in Part I of the Arbitration Act, which although based on the Model Law, does not contain

[990] Kachwaha (n 864).
[991] Indian Oaths Act 1969 s 7.
[992] Indian Arbitration Act 1996 s 26(1).
[993] ibid s 7 (2).
[994] ibid.
[995] ibid s 7 (1).

any provision which is *pari materia* to art. 17H of the Model Law, enabling enforcement of interim measures issued by a foreign-seated arbitral tribunal.[996]

Courts may also issue interim measures, nonetheless, the 2015 amendment has reduced the role of courts in the grant of interim protection. In fact, courts may now entertain an application under Section 9 of the Arbitration Act for granting interim relief only after the constitution of the arbitral tribunal,[997] if it is satisfied that the arbitral tribunal would not have it within its jurisdiction, or if it determines that the remedy of an interim measures order from the arbitral tribunal, under Section 17 of the Indian Arbitration Act, would be ineffective. In addition to granting interim relief under Section 9, courts also possess appellate jurisdiction under Section 37 of the Act. The said section outlines the appealable orders – i.e., those orders subject to appeal – and it empowers the courts to hear an appeal against an order of an arbitral tribunal granting or refusing interim relief under Section 17. Already in 1996 when the Arbitration and Conciliation Act was adopted, the aim sought was to reduce the extent of judicial intervention that had been the hallmark of Indian arbitration till then. In fact, it expressly recognizes the principle of minimum judicial intervention in Section 5 that states that notwithstanding anything contained in any other law, no judicial authority shall intervene except as provided in the Act itself.

The Arbitration Act expedites the completion of arbitration proceedings by establishing timelines for the conduct of arbitration and the rendering of the award, however the due dates are strictly fixed only in relation to domestic arbitrations.[998] While there is no set timetable for international commercial arbitration, Section 29A still suggests that the award "may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23" .[999]

5.8 Confidentiality

The 2019 amendment to the Arbitration Act introduced Section 42A, which specifically deals with confidentiality and provides that "notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to

[996] See the 246th Report of the Law Commission of India, p. 27; Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer International Law 2020) 2704–2706.
[997] Prior to the 2015 amendment courts could grant interim relief either before or during the arbitral proceedings, or even after the award was rendered, but before it was enforced.
[998] Indian Arbitration Act 1996 s 29 A (1) where the provision states that 'The award in matters other than international commercial arbitration *shall* be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23'.
[999] ibid.

the arbitration agreement shall maintain confidentiality of all arbitral proceedings except the award where its disclosure is necessary for the purpose of implementation and enforcement".[1000] The said confidentiality provision is extremely broad and apply to the overall arbitral proceedings, including pleadings, documents, and any exchange of information. The only exception to the said rule is when an award is required to be disclosed for challenge or enforcement purposes. It is clear from its plain reading that the provision leaves a very narrow carve-out; in fact, being too widely worded, it could be subject to future legislative or judicial intervention. Furthermore, The Act is silent on the consequences of failing to comply with the said provisions, thus needing a court intervention to fill this loophole. A blanket cover of confidentiality may result in parties violating the provisions of the Arbitration Act as well as other regulatory requirements. Besides, interestingly, section 42A fails to prioritize the parties' agreements on confidentially, which generally is the norm.

5.9 Choice of law

When it comes to substantive laws governing the merits of the dispute, the distinction between purely domestic and international arbitrations becomes utterly relevant. It is thus imperative to clarify in what circumstances an arbitration is going to be considered as international or domestic under Indian law before delving into choice of law related discussions. According to Section 2(1)(f) of the Arbitration Act, an arbitration is considered "international" if at least one of the parties is a national or habitual resident of a non-Indian country; a body corporate incorporated in a non-Indian country; a company or association of an individual whose "central management and control" is exercised in a non-Indian country; or a foreign government.[1001] The Arbitration Act treats domestic and international arbitrations seated in India almost in the same manner, with very with exceptions, one of which is related to the governing law.[1002] As a matter of fact, the Arbitration Act in Section 28 obliges the arbitral tribunal to resolve Indian seated domestic arbitrations exclusively in accordance with Indian law,[1003] opting out the parties' decision on the substantive laws.

[1000] Indian Arbitration Act 1996 s 42 A.
[1001] Indian Arbitration Act 1996 s 2(1)(f) points (i) to (iv).
[1002] The difference between domestic and international arbitrations becomes relevant also: i) where the is a failure of the parties' envisaged mechanism for the constitution of the arbitral tribunal, the appointment shall be made: in the case of a domestic arbitration, by the High Court; and in the case of international arbitration, by the Supreme Court of India (see paragraph 4 above. See also section 11 (4) of the Arbitration Act); ii) in setting aside procedures where in domestic arbitrations, an additional ground for setting aside the award on "patent illegality" was inserted by the 2015 amendment act (see Section 34 (2A) of the Arbitration Act); iii) in terms of time limit prescribed under Section 29A for making an award in domestic arbitrations (twelve months) which does not apply to international commercial arbitrations.
[1003] Indian Arbitration Act 1996 s 28 (1) (a).

Conversely, giving prominence to party autonomy, in Indian seated international commercial arbitrations the arbitral tribunal must decide the dispute in accordance with the rules of law designated by the parties, as long as such choice is appropriate, *bona fide* and legal.[1004] This provision is significant in two respects: it grants the parties the freedom to choose the applicable substantive law; it broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute, which could either be the national law of a State, or rules of law that have been elaborated by an international forum but not incorporated in the legal system (e.g., the CISG, in spite of the fact that India has neither signed nor ratified the said Convention).[1005] Notwithstanding the fact that the said provision reprises the language and content of the UNCITRAL Model Law,[1006] Indian Arbitration Law slightly departs from it when it specifies in Section 28(1)(b) that, in the absence of parties' express or implied choice of law, the tribunal shall apply the 'rules of law' that it considers appropriate, and not 'conflict of laws' rules, as provided in the UNCITRAL text,[1007] which clarifies that in absence of the partis' choice, a direct approach is preferred for selecting the substantive law. Although the goal of this approach may be to simplify the application of private international law rules, there is still room for uncertainty because it provides the tribunal with minimal guidance in selecting the relevant law.[1008] Generally, when faced with applicable law issues in absence of choice, the arbitral tribunal will take various factors into account such as: (i) residence of the parties; (ii) place of execution of the agreement; (iii) place of performance of the agreement; (iv) place of accrual of the cause of action; and (v) place where the assets/subject matter is located and reliefs sought.[1009] Moreover, the 2015 amendment to the Arbitration Act reworded the Section 28(3) to specify that in any case, while deciding and making an award, the tribunal shall always take into account terms and usages of trade applicable to the transaction.

[1004] This a general rule of Indian contract law that applies to choice of law and choice of jurisdiction clauses. *Vita Food Products Inc. v Unus Shipping Co. Ltd.* [1939] A.C.277 (PC). Nilima Badbhade, 'Indian Report' in Salvatore Mancuso and Mauro Bussani (eds), *The Principles of BRICS contract law, A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries* (Springer 2022).
[1005] Nevertheless, when handling "international commercial cases" Indian courts have occasionally referred to the CISG Convention. For example, *Bottero S.P.A v Euro Glass* Arbitration Petition No 279 (2011) concerned a breach of contract between the parties, where the arbitration between the parties was governed by the Convention on International Sale of Goods. Arts 45, 74, and 75 of the United Nations Convention on the International Sale of Goods were also used in the *Sideralba S.P.A. v Shree Precoated Steels Ltd* Arbitration Petition No 84 (2013) case to declare an arbitral award to be enforceable in court; Sakshi Shairwal, 'Indian Position with regards to Convention on International Sale of Goods' (*Lexology*, 14 June 2022) <https://www.lexology.com/library/detail.aspx?g=ce11acd1-a410-4638-b143-8fba7885765b> accessed 26 January 2024.
[1006] Model Law 1985 art 28 (1) (3) and (4).
[1007] ibid art 28 (2) provides that 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.
[1008] Garimella (n 916).
[1009] Guide to Arbitration in India (Cyril Amarchand Mangaldas 2023).

Finally, under Section 28(2) of the Arbitration Act, the tribunal may depart from the application of any specific law or rules of law and decide the dispute '*ex aequo et bono*' only if the parties have expressly authorized the tribunal to do so.

5.10 Language

The language or languages to be used in the arbitral proceedings may also be decided upon by the parties.[1010] The arbitral tribunal will choose the language or languages to be used only in the event that no such agreement is made.[1011] The agreement of the parties or the determination by the arbitral tribunal on the language of the arbitral proceedings will, unless otherwise specified, apply to a statement of claim, written statements, hearings, the award or decision and any other communications made by the arbitral tribunal.[1012] The arbitral tribunal may also mandate that any documentary evidence be translated into the language or languages that the parties have agreed upon or that the arbitral tribunal has determined.[1013] Although under the law there is no bar on the language, domestic arbitration proceedings in India are primarily carried out in English considering that the Supreme Court and all the High Courts official functions are performed only in the English language, and consequently, carrying out of proceedings in any other language could entail additional translation costs.[1014]

5.11 The seat of arbitration

Upon the Model Law example, Section 20 of the Indian Arbitration Act contains provisions regarding the "place of arbitration".[1015] Nevertheless, as the Model Law, the Indian Arbitration Act does not give a definition of "place of arbitration" nor does it make any distinction between the 'place', the 'venue' and the 'seat of arbitration'. Consequently, the voids left out by the arbitral text are to be filled by the Courts' judicial interpretation.

Section 20 (1) of the Arbitration Act, establishes that the parties are free to agree on the 'place of the arbitration'. The terminology used in the said subsection has been interpreted to mean the 'seat of arbitration' and consequently to what it is commonly understood as the 'juridical seat'. It is worth recalling here that the procedural law of the seat

[1010] Indian Arbitration Act 1996 s 22(1).
[1011] ibid s 22(2).
[1012] Indian Arbitration Act 1996 s 22 (3).
[1013] ibid s 22(4).
[1014] Indian Constitution 1950 art 34.

[1015] Arbitration Act s 20; Model Law 1985 art 20.

applies *ipso jure* to the arbitration proceedings,[1016] thus underscoring the importance to clarify the said legal notion. This was established by the Supreme Court in *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc*., (known as the BALCO case) a landmark decision by which the Court has recognized that a difference does exist between the 'seat' and the 'venue' or 'place' of arbitration and where the seat has been defined as the "Centre of gravity" of arbitration since, to the Court interpretation, an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause.[1017] Notwithstanding the Supreme Court's acknowledgement of the 'place of arbitration' to be the juridical seat, in line with international practice, it was observed in the BALCO case that the arbitral hearings may take place at a location other than the seat of arbitration, which would be what is commonly known as the 'venue of the arbitration'. This is coherent with the provision contained in Section 20 (3), which provides for the arbitral tribunal to meet at *any place* it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods, or other property.[1018] The parties, however, must take care to expressly state that a specific location will serve as the intended venue rather than the arbitration's seat, thus preventing the venue's *curial law* to be applied to the proceedings.

In *Mankastu Impex Private Limited v Airvisual Ltd.*, a three-Judge Bench has recently reaffirmed that the distinction between 'seat of arbitration' and 'venue of arbitration' is settled and that the two terms ('seat' and 'venue') cannot be used inter-changeably. It has also established that where the parties agree on the 'place of arbitration', this should not be automatically interpreted as the parties' intention for such a 'place' to be also the 'seat' of arbitration, which should be determined from other clauses in the agreement and the conduct of the parties.[1019] Failing any agreement between the parties, according to the relevant law, the seat will be determined by the arbitral tribunal, having regard to circumstances of the case, and the convenience of the parties.[1020]

It is also true that the seat problem is not completely attained, as some subsequent judgements have pointed to different solutions. In *BGS SGS SOMA JV v NHPC Ltd*., for instance, the Court has equated the 'venue' of arbitration to the 'judicial seat'. In the said

[1016] Rajeev Aggarwal and Prateek Badhwar, 'The Curious Case Of 'Seat/Venue/Place' In Arbitration – Need for Legal Practitioners To Employ Clear Phraseology' (*Modaq*, 6 August 2021) <https://www.mondaq.com/india/arbitration--dispute-resolution/1099776/the-curious-case-of-seatvenueplace-in-arbitration--need-for-legal-practitioners-to-employ-clear-phraseology#_edn5> accessed 26 January 2024.
[1017] *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc,* (2012) 9 SCC 552.
[1018] Indian Arbitration Act 1996 s 20 (3).
[1019] *Mankastu Impex Private Limited v Airvisual Ltd*, (2020) 5 SCC 399.
[1020] Indian Arbitration Act 1996 s 20 (2).

decision, the Supreme Court ruled that in cases where a 'venue' is expressly designated, but no other location is indicated as the 'seat' and where there are no other significant contrary indicators, it is inevitable to conclude that the stated 'venue' is the 'juridical seat' of the arbitral proceedings, and further adduced that a change in the 'venue' *ipso facto* tantamount to a change in the 'juridical seat'.[1021] The same occurred in *Inox Renewables Ltd. v Jayesh Electricals Ltd.* case.[1022]

Evidently, a certain debate has resulted from the complex issue of the 'Seat/venue/Place'. To resolve the matter once and for all, a larger five-judge bench decision seems to be needed. Until then, it is the responsibility of attorneys to use precise wording in arbitration clauses to eliminate any ambiguity regarding the seat/venue/Place dilemma and prevent confusion. Besides, especially from an Indian perspective, the determination of the seat is paramount because it establishes *inter alia* which part of the Arbitration Act shall be applicable to the dispute,[1023] which Court shall, in terms of Section 42 of the Arbitration Act, have the jurisdiction over the arbitral proceedings and all subsequent applications, e.g., an application for setting aside the arbitral award, which Courts shall have supervisory powers etc… All the above makes clear why the parties should always indicate a precise seat for their arbitration in the arbitration agreement.

India is increasingly becoming itself an appealing seat of arbitration. The Courts in India are progressively adopting a non-interventionist approach, to ensure speedy, and time-bound resolution of disputes through arbitration. The amendments brought about by the 2015 and the 2019 Amendment Acts clearly reflect this pro-arbitration intent of the legislature and show its willingness to work along with arbitration and not against it. Moreover, Section 5 of the Indian Arbitration Act manifestly prohibits the interference of Indian courts except under the limited circumstances set out in Part I of the Indian Arbitration Act.[1024]

5.12 The award

According to Section 31 (1) and (2) of the Arbitration Act, the award must be in writing and be signed by the majority of the arbitrators making up the arbitral tribunal (when its members are more than one) provided that valid reasons for the omitted signature(s) e.g., the death or

[1021] *BGS SGS SOMA JV v NHPC Ltd*, (2020) 4 SCC 234.
[1022] *M/s Inox Renewables Ltd v Jayesh Electricals Ltd* Civil Appeal No 1556 (2021).
[1023] It is worth noting that, in consideration of the territorial nature of the Arbitration Act, even where two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a "domestic award". Vatsala Chauhan, 'Arbitration in India: The Process and the Problems with a Special Focus on International Commercial Arbitration' (Thesis Amity Law School 2020).
[1024] Kapoor and others (n 912) para 8.1.1.

physical inability of an arbitrator to sign, are specified.[1025] Although under the law the mandatory rule is that the award should be signed by the arbitrator, the Supreme Court has looked at non-signature as a formal curable defect.[1026]

The arbitral award must also state the reasons upon which it was made, unless the parties have agreed otherwise, or the award was on agreed terms.[1027] Such a provision aims at ensuring transparency in the decision making but it must not be intended as a strict rule. In fact, the arbitral tribunal's reasons do not have to be as specific as those given in a court ruling, but they should at least reflect the tribunal's reasoning.[1028] An award containing the parties' agreed upon terms must also be made in accordance with Section 31 of the Indian Arbitration Act[1029]. It is in fact no different from an ordinary award, having the same status and effect.[1030]

The award will be deemed to have been signed at the seat of the arbitration, even if the arbitrators signed at different places and on different dates. For this very reason, the award must also state the date and the 'place' where it was made in its meaning of 'seat'.[1031] Besides, the date of the award is extremely relevant for many reasons, one of which being the nature and payment of interest under Section 31(7) of the Arbitration Act and the correction of any errors in the award under Section 33 of the Arbitration Act. In fact, after the award has been made, a signed copy must be sent to the parties, and each of them may request the tribunal for the correction and interpretation of the award within 30 days from the receipt of the arbitral award.[1032] The tribunal may on its own initiative provide the correction of any error that came to their attention within a time limit of 30 days from the date of the award[1033]. If a party so requests, the tribunal may also issue an additional award for claims that were made during the arbitral proceedings but were left out of the final decision.[1034]

[1025] Indian Arbitration Act 1996 s 31 (1); *Moti Noshir Irani and Ors. v Sheroo Jal Vakil and Ors.* 2009 SCC OnLine Bom 604.
[1026] *State of West Bengal v Sree Sree MA Engineering* [1987] 4 SCC (4) 452, where the Court extended the time by four months and remitted the award to the arbitrator for signature.
[1027] Indian Arbitration Act 1996 s 31 (2). It is interesting to note that, under the Arbitration Act s 30 (1), the arbitral tribunal should encourage the parties to settle the dispute even if the arbitration agreement does not expressly authorise the tribunal to do so. It is not uncommon that the parties find attractive to resolve their dispute through other means of dispute resolution as mediation or conciliation as provided by the Arbitration Act itself and settle in this manner their dispute. In this case the settlement may be recorded in the form of an award on agreed terms, if so requested by the parties (see Indian Arbitration Act 1996 s 30 (2)).
[1028] *Delhi Development Authority v Alkaram* 1982 (3) DRJ 286
[1029] Indian Arbitration Act 1996 s 30 (3).
[1030] ibid s 30 (4).
[1031] ibid s 31 (4).
[1032] ibid ss 33 (1) (a) and (b).
[1033] ibid s 33 (3).
[1034] ibid s 33 (4).

Although in practice the terms "interim" and "partial" are frequently used interchangeably, the Arbitration Act only recognizes "interim" awards[1035] (other than the ordinary final awards), which can be issued in the very first phases of the arbitration proceedings to settle preliminary issues, such as the jurisdiction of the arbitral tribunal. Albeit, by definition, an interim award is released throughout the proceedings, according to the Supreme Court, such an award may have the force of a final award. Where, for instance, an award is made "*de praemissis*", the presumption is that the arbitral tribunal intended to finally dispose of all the matters in dispute making such an award final.[1036] This would also mean that the interim award must match the requested form set out in Section 31 to be valid and final.

The costs to be paid by the parties are established in the final award in accordance with the decision of the arbitral tribunal, the Court, or the parties' agreement. According to the Indian Arbitration Act, the term "costs" refers to reasonable costs related to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration, and any other expenses incurred in connection with the arbitral proceedings and the award.[1037] The arbitral tribunal has the authority to decide whether one party must pay costs to another, the amount of such costs, and when such costs must be paid. Costs are generally payable by the unsuccessful party to the successful one if they are imposed, but the tribunal may make a different order for reasons recorded in writing.[1038] Various circumstances can be taken into account by the arbitral tribunal while awarding costs like the conduct of the parties, filing frivolous claims/counterclaims, accepting or rejecting reasonable settlement offers, delaying tactics or seeking unnecessary adjournments.[1039] Nonetheless, if the parties have previously agreed that a party shall pay the whole or part of the costs of the arbitration, the tribunal will only uphold the agreement.

Arbitral proceedings are terminated by a final award or by way of an order of the arbitral tribunal.[1040] It should be kept in mind that the terms "order" and "award" are not interchangeable. An "order" denotes the end of the arbitral proceedings without a decision on the merits of the dispute, whereas an "award" implies that a decision on the merits has been rendered.[1041] Consequently, a new arbitration may be initiated in response to a termination order, but no second arbitration may be initiated after the passing of an award,

[1035] ibid s 2 (1) (c).
[1036] *UOI v Jai Narain Misra AIR* 1970 SC 753.
[1037] Indian Arbitration Act 1996 s 31 (8).
[1038] ibid s 31A (2).
[1039] ibid s 31A (3).
[1040] ibid s 32 (1).
[1041] *PCL Suncon v NHAI* 2021 SCC OnLine Del 313.

which brings to a close the rights and obligations of the parties in relation to the claims that are the subject of an award[1042]. The arbitral tribunal is required to terminate the proceedings in the following circumstances: if the claimant fails to communicate its claim statement in accordance with Section 23(1) of the Indian Arbitration Act;[1043] where the parties settle their dispute, and the arbitral tribunal records the settlement in the form of an award on agreed terms (if the parties request it and the arbitral tribunal does not object);[1044] when a party fails to pay its share (or the other party's share if the other party fails to pay its share) of the arbitrators' deposit in relation to a claim or counterclaim that is the subject of the arbitral proceedings.[1045]

5.13 Challenging an award

In the last years, Indian courts have adopted a hands-off approach to arbitral awards, treating them as final, binding and readily enforceable. Parties can, however, challenge an arbitral award on very limited grounds specified in Section 34 of the Arbitration Act (which applies to Indian-seated arbitrations only) and within a certain time period fixed by the arbitral law. The Act does not allow the parties to exclude or expand the grounds for challenging an arbitral award, binding them to the provisions of the Act. Paraphrasing Section 34 of the Arbitration Act, which is in turn based on art. 34 of the Model Law, an award may be set aside if: (1) a party was under some incapacity; (2) the arbitration agreement was not valid under the law agreed upon by the parties (or applicable law); (3) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (4) the award deals with a dispute not contemplated by or falling within the terms of the submissions to arbitration, or it contains decisions that go beyond the scope of the submissions to arbitration; or (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement; or (6) the subject matter of the dispute was not amenable to resolution by arbitration; or (7) the arbitral award is in conflict with the public interest.[1046] Somewhat deviating from the Model Law, the Indian Arbitration Act continues its Section 34 with an 'explanation', which aims at clarifying how to use the public policy defence to set aside an award, specifying that: an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in

[1042] ibid.
[1043] Indian Arbitration Act 1996 s 25 (a).
[1044] ibid s 30 (2).
[1045] ibid s 38 (2).
[1046] ibid s 34; Model Law 1985 art 34.

contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.[1047] A second explanation provided immediately after, spells out that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute[1048]. Such a clarification was needed after the *ONGC v Saw Pipes Ltd*. case, which is only mentioned here, when the apex Court gave in to the temptation to 'correct' perceived errors of judgment and, contravening an earlier landmark decision,[1049] extended the notion of public policy to include "patent illegality". To dispel any doubts, the 2015 amendment clarified, in the newly introduced Section 34 (2A), that in case of domestic awards alone, the award may also be set aside if the court finds that it is vitiated by patent illegality (i.e., a clear violation of a fundamental legal principle or a blatantly wrong application of the law) appearing on the face of the award and not merely on the ground of an erroneous application of the law or by re-appreciation of evidence.[1050] A more accurate analysis of the interpretation of the public policy defence will be conducted in the next paragraph, which is specifically dedicated to the subject.

If an award remains unchallenged during the time-period stipulated in Section 34(3) of the Arbitration Act, which is of three months, it then becomes final and binding on the parties and can be enforced under the Code of Civil Procedure of 1908 in the same way a decree of the court would be.[1051]

Coherently with the idea that only the court at the seat of arbitration has the authority to set aside a foreign award and given the territorial nature of the Arbitration Act, according to which an award is foreign if the arbitration was seated outside India, the enforcement court in India cannot set aside a foreign award. As a matter of fact, the Arbitration Act deals exclusively with the challenge of domestic awards, whereas Section 48 contains provisions for resisting the enforcement of a foreign award. Just to clarify once more the scope of the two standards, refusal to enforce an award would not by itself prevent an applicant from seeking to enforce it in some other jurisdiction, which could be possible instead where the award has been set aside at its seat.

[1047] Arjit Oswal and Balaji Sai Krishnan, 'Public Policy as a Ground to Set Aside Arbitral Award in India' (2016) 32 Arbitration International 651.
[1048] Indian Arbitration Act 1996 s 34 (2) (b), Explanation 2.
[1049] The earlier landmark decision is *Renusagar Power Plant Co. v General Electric Corporation* (1994) Supp (1) SCC 644.
[1050] Indian Arbitration Act 1996 s 34 (2A).
[1051] ibid s 35.

5.14 Recognition and enforcement of foreign awards

As mentioned above, an unchallenged domestic award shall be automatically enforced in accordance with the Code of Civil Procedure, in the same manner as if it were a decree of the court. The process by which the decree-holder may execute the decree against the judgment-debtor is to be found in Order XXI of the Code of Civil Procedure, according to which the decree-holder must apply to the court with the necessary details in order for the decree to be executed.[1052] The filing of an application to set aside an award does not render it unenforceable, unless the Court grants a stay of execution on a separate application made for that purpose. It is noteworthy that the position on the stay of execution of an arbitral award has undergone changes with amendments to the Arbitration Act, which initially provided that the mere filing of an application to set aside the arbitral award put an automatic stay on the enforcement of the award. Thereafter, the 2015 Amendment made it discretionary for the court to grant a stay on the enforcement of the arbitral award, only for the 2021 amendment to the Arbitration Act to re-establish the unconditional stay on the award if a *prima facie* case is made wherein the arbitration agreement or the making of the award is induced or affected by fraud or corruption.[1053] The said provision finds place in Part I of the Arbitration Act, and therefore, it only applies to domestic awards and not to foreign awards, which enforcement is instead governed by Section 48 (Part II) of the Arbitration Act.

The enforcement of a foreign award in India occurs only after the court has determined whether it meets the enforceability requirements described in Chap. 1, Part II of the Arbitration Act. Only after completing the stages outlined in Sections 47 and 48 of the Act does the foreign award become enforceable as a deemed decree.[1054] Section 47 of the Arbitration Act regards the evidence that the interested party must submit for the enforcement application, and it essentially adopts the standards contained in art. IV of the New York Convention.[1055] To start with, a petition seeking enforcement of a foreign award

[1052] Order XXI lays down detailed procedural guidelines for initiating and carrying out the execution process. It specifies the necessary form, steps, and timelines to be followed by the decree holder, judgment debtor, and the court. Such guidelines ensure transparency, fairness, and adherence to due process throughout the execution proceedings. Code of Civil Procedure 1908 s 11(2) Order XXI.

[1053] Indian Arbitration Act 1996 s 36, footnote 53. On the topic G Madhavi Lakshmi, 'Recent Amendments in Arbitration and Reconciliation Act' (*The Law Communicant*, 14 April 2020) <https://thelawcommunicants.com/> accessed 26 January 2024.

[1054] Indian Arbitration Act 1996 s 49 provides that 'Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court'; *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.* (2001) 6 SCC 356; Bruno Zeller and others, *Enforcement of Foreign Arbitral Awards and the Public Policy Exception Including an Analysis of South Asian State Practice* (Springer Nature Singapore 2021)

[1055] New York Convention 1958 art IV (1) provides that: 'To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof.'

must be filed before the relevant High Court that exercises territorial jurisdiction over the subject-matter of the award, i.e., the place where the assets are located.[1056] For instance, when the subject matter of the award is the payment of certain amount of money, the enforcement application can be filed in the court where the respondent's bank account is located.[1057] In case he finds no monetary resources in the account kept by the respondent within the original court's jurisdiction, the applicant may file a second application at the court having jurisdiction in the place where the respondent's other assets are situated.[1058]

Under Section 47 of the Arbitration Act, the party applying for the enforcement of a foreign award must produce, along with such enforcement application, the original award or a copy thereof - duly authenticated in the manner required by the law of the country in which it was made - and the original arbitration agreement or a duly certified copy thereof.[1059] Subsection (2) specifies that where such an award is in a foreign language, the party applying for enforcement must produce an English translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient under Indian law. The burden of proving that the award sought to be enforced is truly a "foreign award", based on a foreign arbitration agreement, is on the party seeking to enforce it,[1060] and all documents produced by him shall serve as *prima facie* evidence that the award is a genuine foreign award. The time limit to file the enforcement petition is not statutorily defined. According to the Courts jurisprudence, an enforcement petition could be submitted from three to twelve years from the date on which the right to apply accrues to the successful party.[1061]

The party against whom the enforcement is sough, may resist it under one of the grounds contained in Section 48 of the Arbitration Act, which basically transposes those

[1056] The Explanation contained in the Indian Arbitration Act 1996 s 47, specifies the meaning of 'Court' as 'the High Court having original to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit, on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decreed from courts subordinate to such High Court".
[1057] Garimella (n 916).
[1058] ibid; *Wireless Developers Inc v India Games Ltd.*, 2012 (2) ARBLR 397 (Bom).
[1059] Indian Arbitration Act 1996 s 47 (1) (a) and (b).
[1060] ibid s 47 (1) (c).
[1061] *Government of India v Vedanta Limited,* (2020) 10 SCC 1, point 65. Some courts have held that the initial phase of the procedure to enforce a foreign award cannot be regarded as "execution" since a foreign award must be recognized in India before it is regarded to be a decree of an Indian court. For this reason, the time limit for initiating enforcement procedures in India is the same as the time limit for initiating a new lawsuit. Nevertheless, other Indian courts have ruled that since enforcement and recognition are steps in the same process, the statute of limitations is the same as it is for execution procedures (12 years from the date of the award). Although the Supreme Court has not yet issued a definitive decision on the matter, it has stated that recognition and enforcement are integral components of one process and cannot be distinguished from one another. This perspective seems to back up the claim that there is a 12-year statute of limitations for enforcing a foreign arbitral award. That said, this hasn't been tried yet.

provided under art. V of the New York Convention and to those set out in section 34(2) of the Indian Arbitration Act concerning the challenge of domestic awards.

Consequently, a Court may refuse to enforce an award under the terms of Section 48 of the Indian Arbitration Act, at the request of the party against whom it is invoked, only if that party furnishes proof to the court that: the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case; the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (although Section 48 clarifies that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced);[1062] the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, absent any such agreement, was not in accordance with the law of the country where the arbitration took place; or the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Furthermore, the enforcement of a foreign-seated arbitral award may also be refused if the court finds *ex officio* that the subject matter of the dispute is not capable of settlement by arbitration under the law of India, or enforcement of the award would be contrary to the public policy of India.[1063] The language used in Section 48 regarding the application of the public policy defence is identical to the one used in Section 34, apart from the use of the patent illegality ground which, as mentioned above, is confined to domestic awards alone. Therefore, just as Section 34, Section 48 of the Indian Arbitration Act clarifies that an award is in conflict with the public policy of India only if, inter alia, "(i) the making of the award was induced or affected by fraud or corruption, or (ii) it is in contravention with the fundamental policy of Indian law, or (iii) it is in conflict with the most basic notions of morality or justice[1064]. Section 48 further clarifies that the test as to whether there is a

[1062] Indian Arbitration Act 1996 s 48 (1) (c).
[1063] ibid s 48 (2).
[1064] ibid s 48 (2), Explanation 2.

contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Unlike Section 34, under Section 48 of the Indian Arbitration Act, the Court may also not enforce an award that is not yet binding on the parties.[1065] Indian courts have held that an award becomes binding between the parties if it has not been challenged by the award debtor in the country where the award was given and hence has become executable. Therefore, if the award has been fully or partly set aside at the seat of arbitration, the award will not be binding on the parties to the extent of the same having been set aside and consequently may not be unenforceable in India. Further, in light of Section 48(3) of the Arbitration Act, Indian courts are likely to await the outcome of the proceedings initiated at the seat of arbitration and proceed with the enforcement only thereafter.

It is also worth recalling that India is one of the original signatories of the New York Convention (Convention), having ratified it on 13 July 1960. However, there are some reservations to its applicability,[1066] as per Section 44 of the Indian Arbitration Act. India enforces an award as per the Convention only if it is made in the territory of a reciprocating state, and such territory must be identified by the Government of India in the Official Gazette as being a reciprocating State, bound by the New York Convention. Further, India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered 'commercial' under Indian law.[1067]

5.15 Public policy

Although it has already been mentioned how the Arbitration Act declines public policy, for the sake of this paragraph it would be useful to briefly retrace how the public policy defence has been constructed, interpreted and applied by Indian courts over the years to resist the enforcement of both domestic and foreign awards, outlining a distinction between the two types of arbitral awards, which besides, both the Arbitration Act and the Indian courts acknowledge.

To start with, the 1996 Arbitration Act does not define the term 'public policy', making it challenging to come up with a rigid formula that describes and assess its parameters. Unlike English law, where there are distinctive and limited heads of defence

[1065] ibid s 48 (1) (e).
[1066] See n 871.
[1067] ibid.

of public policy,[1068] Indian courts have interpreted public policy in a varied of manners. At times, Courts have privileged the finality of the arbitral awards, refraining to make any consideration regarding the merits of the dispute, which were intended to be settled, consequently limiting themselves to play a minim role. Some other times, especially when it came to domestic awards, Courts have found ways to intrude and stipulate over the substance of the dispute, occasionally even modifying awards when adjudicating setting-aside applications.[1069]

The *ratio* of the *Renusagar* case was the first to contour public policy in India for international commercial arbitration. Hearing an application for challenging the execution of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961 the Supreme Court established that for an award to be unenforceable in India, it must cause a violation of public policy under Indian laws and not just under any law (including the law of the jurisdiction in which the agreement, or the award, was made) and limited the scope of public policy to: (a) fundamental policy of Indian law; or (b) the interests of India; or (c) justice or morality.[1070] In the case at issue, the public policy exception was narrowly constructed by the Court identifying three main heads. Nonetheless, the decision left them vague and open to future subjective interpretation, which sometimes led to a broadening up of their meanings, especially regarding the interpretation of the "interests of India".[1071] Even though *Renusagar* was decided before 1996, many subsequent rulings adhered to the three grounds that were used in this case, and besides, the case also had implications for how foreign awards might be enforced under the now-repealed Foreign Award (Recognition and Enforcement) Act, 1961.

Another landmark decision was *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.* which, despite the fact that it involved a domestic arbitration, was so important that it also influenced subsequent decisions about the enforcement of foreign awards. Violating a well-established principle in arbitration, according to which the substance and merits of the dispute can never be subjected to judicial review, the *ONGC v Saw Pipes Ltd.* judgement[1072] held that the impugned award was legally flawed and, as a matter of law, an award could

[1068] Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 787. *ONGC v Saw Pipes Ltd*., 2003 (5) SCC 705 when the Apex Court rejected the contention and modified the award to allow ONGC to deduct liquidated damages.
[1069] Puneeth Ganapathy, 'Court Discretion in Indian Setting-aside Proceedings: Modification v Doing "Complete Justice" (*Kluwer Arbitration Blog*, 15 September 15) <https://arbitrationblog.kluwerarbitration.com/2021/09/15/court-discretion-in-indian-setting-aside-proceedings-modification-v-doing-complete-justice/> accessed 26 January 2024.
[1070] Renusagar (n 5) 647.
[1071] Zeller and others (n 1054).
[1072] See *ONGC v Saw Pipes Ltd*. (n 1068).

also be challenged on the ground of patent illegality, which occurs in the Supreme Court's words, "if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract".[1073] The said decision received harsh criticism[1074], as it expanded the concept of public policy adding a potentially dangerous ground, which could have allowed Courts to substantially review the merits of the dispute. It was thus paramount for subsequent decisions to better clarify how and when to apply the patent illegality ground.[1075] Additionally, because of an earlier decision, i.e., *Bhatia International v Bulk Trading SA & Another*, which held that the provisions of Part I (including Section 34 on the "Application for setting aside arbitral award") were applicable to foreign-seated arbitrations as well, the *ONGC v Saw Pipes Ltd.* decision had repercussions also on foreign arbitral awards, creating significant uncertainty and delay in foreign-seated arbitrations involving Indian parties or Indian laws.[1076] By such reasoning in *Phulchand Exports v O Patriot*, the Court agreed with the appellant's argument that international arbitrations and the enforcement of foreign arbitral awards should be governed by the *ONGC v Saw Pipes Ltd.* precedent, which permitted challenges to the enforcement of a foreign arbitral award based on patent illegality.[1077]

It was only with the *Bharat Aluminium Company v Kaiser Aluminium Technical Services*, Inc. (hereinafter 'BALCO') decision in 2012 that the *Bathia International v Bulk Trading SA & Another* judgement was finally overruled, excluding in such a away, the application of Part I of the Arbitration Act to foreign awards and clarifying, on the contrary, that the enforcement of foreign awards will be exclusively subject to the provisions and standards specified in Part II alone. Another significant decision following the BALCO example is *Shri Lal Mahal v Progetto Grano Spa*, which overruled the Court's decision in *Phulchand* and restored the content of public policy as stated in the *Renusagar* case, thus indicating a shift of Indian courts towards a more conservative approach to the interpretation of the public policy defence and their refrain from interfering on the merits of the awards, at least when the proceedings involved the enforcement of foreign awards. In fact, with the

[1073] ibid.
[1074]Fali Nariman, 'Ten steps to salvage arbitration in India: The first LGIA-India arbitration lecture' (2011) 27 Arbitration International 115.
[1075] The Supreme Court ruled in *McDermott International Inc. v Burn Standard Co. Ltd.*, (2006, 11 SCC 181) that if the award offends the 'court's conscience' patent illegality is proven. It also made clear that if the arbitrator disregarded any clause in the contract or failed to act in accordance with its terms, the arbitral award would be clearly unlawful. See also *Associate Builders v DDA*, (2015) 3 SCC 49 and *Indian Oil Corporation Ltd. v Shree Ganesh Petroleum Rajgurunagar*, (2022) 4 SCC 463.
[1076] *Bhatia International v Bulk Trading* SA (2002) 4 SCC 105; Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2016) 3 Journal of National Law University Delhi105.
[1077] *Phulchand Exports v O Patriot* (n 882).

Shri Lal Mahal v Progetto Grano Spa case the Court returned to the concept of "different thresholds" for domestic and international arbitrations and, more importantly, established a clear precedent against reviewing a foreign award on the basis of patent illegality according with the principle of "least Court interference".[1078] In this manner, the Court made clear that the public policy ground should have been narrowly construed when dealing with foreign awards, while retaining a wider interpretation of the same when it came to domestic awards. Besides, on the same occasion, the Court marked a distinction between the challenge of an award on the public policy ground in terms of setting aside procedure in the meaning of Section 34 - officially relegated to domestic awards - and the challenge in the sense of resisting the enforcement of a foreign award under Section 48, exclusively applicable to the enforcement of foreign awards.

In the light of the maze-like situation created the conflicting jurisprudence on the subject, the Supreme Court once again attempted to provide a consolidated explanation to public policy exception in the 2019 *Ssangyong Engg & Construction Co Ltd v National Highways Authority of India*[1079] decision, featuring in Sections 34 and 48 as summarized below:

i) "patent illegality" – illegality that goes to the root of the matter, but excluding the erroneous application of law by an arbitral tribunal or re-appreciation of evidence by an appellate court. This ground may be invoked if: (a) no reasons are given for an award; (b) the view taken by an arbitrator is an impossible view while construing a contract; (c) an arbitrator decides questions beyond a contract or his terms of reference; and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or is based on documents taken as evidence without notice to the parties;

ii) "fundamental policy of Indian law" – contravention of a law protecting national interest, or disregarding orders of superior courts in India or principles of natural justice, such as *audi alteram partem*; and

iii) "most basic notions of morality or justice" – an award would be against justice and morality if it shocks the conscience of the court; morality, however, would be determined on the basis of "prevailing mores of the day".

Despite the clarification provided in *Ssangyong*, it appears that Indian law on public policy must cover a wide range of issues in order to meet its vision of an arbitration-friendly

[1078] Garimella (n 916); Zeller and others (n 1054).
[1079] *Ssangyong Engg & Construction Co Ltd v National Highways Authority of India*, (2019) 15 SCC.

jurisdiction. Public policy generally is a flexible concept in constant need for interpretation, but while interpreting the same, it is crucial to strike a balance with other principles, especially the ones of minimal judicial intervention and party autonomy. Thus, it is the judiciary's grave duty to uphold the spirit of arbitration, especially in relation to significant unsolved issues related to the articulation of the public policy exception in terms of better clarification or change of the "fundamental policy of Indian law" as one of the standards to assess public policy and its applicability to foreign awards.[1080]

[1080] Oswal and Krishnan (n 1047).

Chapter 6. Comparative Overview

The analysis conducted in the previous Chapters highlights significant and foreseeable differences among the BRICS countries in terms of legal traditions, systems, sources of law, and international influences. Nonetheless, there are also some visible commonalities, especially in the regulation, practice, and attitudes towards arbitration, albeit with some deviations, which will be further examined below using the same analytical framework employed to analyse the five countries' arbitral laws.

Of the five legal systems, the Brazilian one is certainly the closest to the civil law model, along with the Russian legal system which, additionally, shows a strong socialist imprint. China follows, being both civil law-based and influenced by the socialist experience but differs from Russia because of the strong bounce that philosophical thoughts such as Confucianism or legalism have on the legal system (which in turn heavily impacts the field of dispute resolution). Besides, further to Mao Zedong's departure from the formalistic Soviet conception of socialist legality, China forged its own vision of socialism, shaping it to reflect Chinese characteristics, and thus reinforcing the difference that exists between the Chinese and Russian experiences. South Africa is a great example of a civil law and common law combination, where African traditional laws are slowly being officially recognized and incorporated into the legal system. Finally, India is the most common law oriented legal system, which is nonetheless very complex and varied to account for the high degree of diversity that characterize the country on different levels, i.e., social, traditional, and religious ones.

While legislation is certainly present in all the five countries studied, its function ranges from announcing general principles held to form the primary source of civil law, to providing detailed regulations stating deviations and exceptions to common law.[1081] South African and Indian law, being closer to the common law model, plainly adhere to the doctrine of *stare decisis*, whereas civil law countries formally do not.[1082] However, despite the absence of any rule of binding judicial precedents, even in civil law countries as Brazil and Russia, higher courts' decisions may be regarded as binding by lower courts or take on the role of guide. Brazilian apex courts, for instance, have developed the practice of *súmulas*, which have been acknowledged to have binding effects on lower bodies of the judiciary,

[1081] Infantino (n 124).

[1082] It must be pointed out here that both India and South Africa have adopted a constitution. This means that all decisions taken by Courts cannot only adhere to the legal precent doctrine but must also account for the values enshrined in their constitutions. Moreover, differently from the English judicial structure, both legal systems have constitutional Courts.

whereas Russia and China's supreme courts inherited from their Soviet and socialist forefathers the authority to issue guidelines and instructions akin to legislation and of general applicability.[1083] As for the courts' structure, it is relevant to mention how countries as India and Russia have specialized commercial courts dealing specifically with commercial and trade issues, with Russia having a long history of a dual track of civil and commercial courts (*arbitrazhnye sudy*), and India having established specialized commercial courts in 2015 at the lower and appellate level to better off its position in the in the World Bank's Doing Business Reports. China as well has recently set out two international commercial courts as its own bodies.

All countries appear to grant a reasonable level of party autonomy, allowing parties to severe their contract and potentially subject their arbitration agreement to a different law than the one governing the main contract, as well as the freedom to choose the applicable law to the contract. The only reservations arise in Brazil, where it is unclear whether parties are always free to choose the law applicable to their contracts. Furthermore, while South Africa and India did not ratify the CISG, Brazil, Russia, and China are signatories to the Convention.[1084] However, despite the national laws of these three states have all been influenced by the CISG to varying degrees, it appears that the ratification of the CISG had a more substantial impact on Chinese national law.[1085] In terms of the impact of other international hard and soft sources, China, India, and South Africa drafted special statutes on electronic contracts based on the 1996 UNCITRAL Model Law of Electronic Communication, while Russia ratified and implemented the 2005 UNCITRAL Convention on the Use of Electronic Communications in International Contracts in a special law.

[1083] Infantino (n 124).

[1084] China ratified the CISG in 1986, Russia in 1990, Brazil in 2013.

[1085] On the CISG impact on Chinese law Long Weidi, 'The Reach of the CISG in China: Declarations and Applicability to Hong Kong and Macao' in Ingeborg Schwenzer and Lisa Spagnolo (eds) *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2011). Weidi discusses about it in terms of "phenomenal impact" of the CISG in China in two main respects: in the evolution of the Chinese domestic contract law and on the application of the CISG in Chinese court decisions. On the topic see also Shiyuan Han, 'The CISG and Its Impact on China', in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (European Law Publishers 2008).
The scarce significance of the CISG on Brazilian law can be derived from Celli and Veronese who state that 'Since the CISG only applies to international contracts for the sale of goods, the Brazilian Civil Code remains the governing law for all other types of international contracts in Brazil. As a civil law jurisdiction, the material rules of the Brazilian legal system (e.g. those provided by the Brazilian Civil Code) are inspired by other traditional civil codes, e.g. the German Bürgerliches Gesetzbuch and the Italian Codice Civile' see Celli and Espolaor Verones (n 128) 70. See also José Angelo Estrella Faria, 'Another BRIC in the Wall: Brazil Joins the CISG' (2015) 20 Uniform Law Review 211. As for Russia, according to Zoll 'The new Russian Civil Code was drafted with the ideas underlying CISG quite strongly in mind. This influence, however, is much less evident in the case of contract formation'. See Fryderyk Zoll, 'The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries' (2007) 71 Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht 81.

Legal scholarship plays an important role in all the jurisdictions studied, though not being recognized as an official source of law and having a varied degree of prestige and authority. In Brazil, South Africa, and India, judges and professors are called to interpret and evaluate existing laws and oftentimes legal scholars are involved in the drafting of new laws.

6.1 Arbitration in BRICS

All the BRICS countries but Brazil, each for different reasons, had familiarity with arbitration, at least as a means of domestic dispute resolution system. However, the evolution of the institution and its use to resolve international and transnational commercial disputes has varied across the BRICS countries. Often, these divergent paths have influenced aspects of the national arbitral legislation, suggesting a need for improvements to align arbitration practices with international standards. Russia, for instance, has had a long history of arbitration, but such history is extremely intertwined with its Socialist past and the intrusive behaviour of the Soviet government on arbitration, which is a difficult attitude to eradicate. Not surprisingly, the main arbitration institutions (Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, established respectively in 1930 and 1932) still operating in Russia, albeit under different denominations, were established during the Socialist period and used strategically by the government itself to avoid litigating in foreign courts. Besides, what emerges from the above analysis is that in Russia arbitration, as other ADR means, have been generally used to pursue ulterior objectives, in an open attempt to circumvent the law. This explains the strict reform adopted by the Ministry of Justice in 2015, which now establishes that arbitral institutions can operate in Russia only upon a special permission granted by the Council for the Improvement of Arbitration.

China has followed, to a certain extent, the Russian example and indeed the first institutions uncharged with the administration of international arbitration where government related (the FTAC now CIETAC and the CMAC). Although, departing from the Russian experience, China had grown in the use of ADR methods to align with the Confucian teaching to avoid direct opposition and to look for more amicable solutions. China thus gradually improved the instruments related to international arbitration albeit with a view to healthy developing the socialist market economy.[1086] On the contrary, international arbitration has been rather opposed, especially in the beginning of its development, in Brazil and South Africa. In the Brazilian case, the issues with arbitration were related to the misinterpretation of the constitutional right to access to justice, along with a lack of a true

[1086] PRC Arbitration Law 1994 art 1.

culture in the use of alternative dispute resolution methods, and a variety of other factors, also of a political nature, which hampered the development of a functioning and efficient arbitration system until the adoption of the Arbitration Act in 1996. The aforementioned issues had also retarded the Brazilian adherence and ratification of the New York Convention. In fact, Brazil was the last of the BRICS countries to ratify the said Convention on June 7, 2002, even though the Convention text had served as reference during the making of the new arbitral law. South Africa had known arbitration as a domestic means to resolve disputes in the local communities. Nonetheless, the development of international arbitration faced a backlash, owing to heavy criticism from local authorities such as the Judge President of the Cape, Mr. John Hlophe, who argued that "arbitration is inappropriate because it undermines the legal system and the transformation of the judiciary, neither of which can be compromised".[1087] Only recently the true potential of arbitration for attracting business has been acknowledged in South Africa, as the appeal of becoming a reference point for arbitration for the whole African country. India, on the opposite, has always seen arbitration as a good opportunity to attract investments and enhance trade relations, other than recognizing its role in lifting the overburdened situation affecting its courts. Apart from having a long culture in the use of arbitration, international arbitration has been constantly at heart of the legislation, which continuously works on its adaption to suit the changing needs and expectations of international parties. Although, it must be acknowledged that amendments to the arbitration law have not always resulted in an improvement of the institution in India. Some examples on this wise are represented by the heavy criticism addressed to the recent reform passed in 2021,[1088] and the questionable interpretation and application of the public policy ground by Indian courts, which continues to create uncertainty. Despite widespread criticism of state intervention in arbitration, it is important to remember that different jurisdictions face their own challenges with the tools at their disposal. We cannot expect all legal systems to react in the same way the common issues.

Notwithstanding the above, during that 1990s, practically all BRICS countries opened their markets to international trade, and hence, proper international arbitration regulations in their domestic laws became a common strategic matter. In this, the UNCITRAL Model Law has played a key role. While India and Russia practically adopted the Model Law in its entirety (with some minor deviations) Brazilian law was deeply

[1087] Dennis M Davis and others, 'The Administration of Justice' [2005] Annual Survey of South African Law 816.

[1088] Ashish Dholakia and others, 'India's Arbitration and Conciliation (Amendment) Act, 2021: A Wolf in Sheep's Clothing?' (*Kluwer Arbitration Blog*, 23 May 2021) <https://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/> accessed 26 January 2024.

influenced by it, whereas Chinese law adopted many concepts and ideas clearly related to the Model Law, but preferred nonetheless a more controlled regime, at least for domestic and "foreign related" arbitrations.[1089] South Africa, on the other hand, adopted the Model Law (as revised in 2006) only in 2017. In a way or the other then, all BRICS countries have been influenced by the Model Law. This is particularly important as it confirms that a small harmonization among BRICS in the field of arbitration has already occurred. In fact, the Model Law had a crucial role in harmonizing arbitration on a global scale, working in conjunction with the New York Convention -another precious instrument of legal harmonization in the normative framework of international arbitration - which all BRICS countries have signed and ratified, albeit in some cases with reservations (in terms of reciprocity and commercial reservations),[1090] which so far have had little impact in the application of the Convention in practice. The only true obstacles have arisen in relation to the Indian reciprocity reservation, as the Indian internal mechanism for the recognition and enforcement of Convention awards, requires a sort of double recognition through the Indian Gazette acknowledging that the state where the award was rendered is in fact a reciprocating state. Such mechanism seems extremely cumbersome and not at all ideal. This is confirmed by the fact that only a few countries have been officially recognized in India as reciprocating states, and the big absentees from such a reciprocating list of States are Brazil and South Africa, which makes recognition and enforcement of awards rendered in such territories much more complex and uncertain in India, which is precisely what the New York Convention seeks to avoid and what a BRICS cooperation in arbitration must attempt to solve out.

Arbitration has consistently developed in all BRICS countries in the last decades. Among all, Brazil has rapidly become a global player in international arbitration, due to the safe environment created by local Courts and authorities, both for domestic and international arbitration. China's participation on international arbitration developed fast to meet the pace of its growing economy. In other countries, as India, the success of arbitration has been fluctuating, especially because of the high degree of courts' intervention during the enforcement of international awards, and their questionable application of the New York Convention (it is worth recalling here the appraisal caused by the Indian Supreme Court's decision on *Bhatia International vs. Bulk Trading S.A.* discussed before).[1091] Besides, among the BRICS countries, India, Russia, and China continue to maintain a clear distinction

[1089] PRC Arbitration Law 1994 ch VII.
[1090] It is worth recalling that China, Russia, and India adhered to the Convention with commercial and reciprocity reservations.
[1091] *Bhatia International vs. Bulk Trading S.A.* (n 869).

between domestic and international arbitration, thus having different set of rules to apply depending on the categorization of the dispute. Sometimes such a distinction is softened by the communal inspiration to the Model Law used for the improvement of both domestic and international arbitration laws, as happened in the Russian case. Nonetheless, the determination of the dispute as "domestic" may entail the application of stricter mandatory rules and limit party autonomy on crucial issues (e.g., parties' freedom to choose the applicable law). Furthermore, classifying a dispute as "domestic" has an impact on establishing the nationality of the award, often preventing the domestic award at issue from benefiting from the privileged regime established by the New York Convention, as its norms generally apply to foreign awards only. The BRICS countries criteria used to determine whether the dispute and the award are national or foreign shall be discussed in the dedicated paragraphs below.

Despite the fact that almost all BRICS have been influenced by the Model Law and the New York Convention, under the guise of legal harmonization through hard and soft international legal instruments, the interpretation given to uniform rules such as the concept of 'public order' and the 'seat' of arbitration, the grounds for preventing recognition and enforcement of international arbitral awards, or the criteria for setting aside arbitral awards vary significantly across the countries, along with concepts that are inevitably influenced by the legal system as that of arbitrability. The following analysis compares arbitration and specifically the application and interpretation of the main rules governing it, in and among the BRICS, systematizing their experiences and highlighting similarities and distances.

6.2 Arbitrability

At its simplest, the term 'arbitrability' has been generally used to indicate whether a dispute may be settled by arbitration. Nonetheless, a closer look reveals that the term arbitrability encapsulates two meanings, with most jurisdictions implying it as a '*ratione materiae'* notion, commonly referred to as 'objective' arbitrability, whereas other systems understand arbitrability as a *'ratione personae'* notion, also known as 'subjective' arbitrability.[1092] Subjective arbitrability concerns issues related to the existence of the parties' agreement to arbitrate certain or all issues related to their controversy. Phrases implied in the arbitration agreement as "all disputes arising out of the contract" or "in connection with the contract"

[1092] Seyoum Yohannes Tesfay, *International Commercial Arbitration, Legal and Institutional Infrastructure in Ethiopia* (Springer 2021). On the concepts of objective and subjective arbitrability Domenico di Pietro, 'General Remarks on Arbitrability under The New York Convention' in Loukas A Mistelis and Stavros L Brekoulakis (eds) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

are generally intended as fulfilling the parties' intention to arbitrate the dispute.[1093] Nonetheless, these expressions may cause interpretative issues, in the sense that one may ask whether precontractual or post-contractual claims arising from the parties' relationship could also be decided in arbitration or not. Chinese jurisdiction fairly addresses the matter. Indeed, the Supreme People's Court Interpretation on Several Issues Concerning the Application of the Arbitration Law published in 2008 clarifies the intended scope of an arbitration agreement by stating that "when parties to a contract agree that contractual disputes shall be submitted to arbitration, then the contractual disputes shall be construed as including disputes arising from the establishment, validity, change, assignment, performance, default, interpretation and termination of the contract".[1094] In any case, a well-drafted arbitration clause should be capable of accurately reflecting the parties' intent in any jurisdiction. Subjective arbitrability also refers to potential restrictions on a party's ability to enter into arbitration agreements, because in fact certain entities, such as States or State entities, may not be allowed to enter into arbitration agreements or may require a special authorization to do so due to policy considerations (for example, according to artciles 1 and 2 of the BAA, the arbitration agreement must be signed by the government official who has the authority to enter into settlements on behalf of the government).

As for the objective arbitrability, all jurisdictions provide for certain disputes to be resolved exclusively by domestic courts or special tribunals established by law, generally because such disputes involve sensitive public policy issues, a public interest, or the interests of third parties, which are uniquely subject of governmental authority.

Art. 1 of the 1996 Brazilian Arbitration Act, which deals with the arbitrability, has a clear two-fold structure. Its first part addresses the capacity of the parties to conclude a contract ('persons capable of contracting'), that is, it refers to the so-called subjective arbitrability, whereas in its second part it refers to patrimonial rights as matters that the system considers capable of resolution by means of arbitration i.e., it refers to objective arbitrability. The Indian approach, instead, privileges the understanding of the arbitrability notion as *ratione materiae*, indeed it simply establishes that *"*all disputes arising out of a legal relationship, whether contractual or not, could be referred to arbitration", not taking much care in weighting the parties' capacity or intention to enter the arbitration agreement, which is nonetheless indispensable, but regarded as a constitutive element for the enforcement of a valid arbitration agreement rather than a dimension of arbitrability.

[1093] Greenberg and others (n 778).
[1094] Interpretation of the Supreme People's Court concerning Some Issues on Application PRC Arbitration Law 1994 of the People's Republic of China 2008 art 2.

Beyond the nuances of meaning that the term arbitrability can have, what is truly worth of noting is that the determination of the matters that are arbitrable remains a very domestic matter, assessed by national legislators. In accordance with the traditional approach, each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policies.[1095] Not surprisingly, arbitrability is a subject with regard to which the harmonisation of arbitration rules has remained the lowest.[1096] Neither the New York Convention nor the Model Law attempt to provide a clear delimitation of arbitrable matters. The New York Convention does in fact make a reference to the concept of arbitrability in articles II and V, providing in the latter that the court of the jurisdiction in which the recognition and enforcement of an award is sought may refuse to recognise and enforce the award where it determines that the subject matter of the dispute is not arbitrable 'under the law of that country',[1097] deferring the definition of such arbitrability to the enforcing state. The Model Law dedicates some provisions to address the issue of arbitrability without specifying which matters are arbitrable.[1098] On the contrary, art. 1, paragraph 5, is keen to specify that the Model Law shall not affect any other law of the state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to other provisions.[1099]

There are also supporters of the transnational approach to arbitrability, who maintain that arbitrability may be determined by reference to transnational legal principles that is 'general principles of law that have been recognized by a number of legal systems'[1100] that we arrive at by condensing the rules on arbitrability from various jurisdictions and legal traditions.[1101] Although defining a transnational, or even a uniform rule on the type of disputes capable of being settled by arbitration might be a difficult task, considering that arbitrability proved to be *per se* a tedious issue, at times uncertain and non-exhaustive in the systems object of the present study singularly taken, one may agree that a transnational approach is the most suitable to meet the objectives pursued by BRICS in the field of arbitration and mutual cooperation in dispute resolution. Along these lines, find a common

[1095] Redfern (n 1068).
[1096] Karim Youssef, 'The death of Inarbitrability' in Loukas A Mistelis and Stavros L Brekoulakis (eds) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009); See also Tesfay (n 1092).
[1097] New York Convention 1958 art V (2).
[1098] Model Law 1985 art 1 on the scope of application and the explanatory note.
[1099] ibid art 1 (5).
[1100] Matthias Lehmann, 'A Plea for a Transnational Approach to Arbitrability in Arbitral Practice' (2004) 42 Columbia Journal of Transnational Law 753, 775.
[1101] Youssef (n 1096).

ground for the five jurisdictions on the arbitrability of some categories of disputes would be as arduous as necessary. More consensus on arbitrability among the BRICS national laws is in fact paramount to increase legal certainty. That is because of two main reasons: in international arbitration by definition, more than one law can determine whether arbitration can actually take place or not. These laws are likely to include the law governing the arbitration agreement, the law of the seat of arbitration, and the law of the place of the award enforcement[1102] which are all most likely to be BRICS national laws. Now, in general terms, instead of picking one of those laws, the arbitrator should explore the content of more than just one law but certainly, if there existed a high degree of harmonization among those laws that may call for application on arbitrability matters, the chances of rendering an enforceable award would be better off, improving the overall institution of arbitration. Moreover, in consideration of the system of dispute resolution centres that the BRICS are attempting to create, one cannot imagine to be capable of submitting a dispute to arbitration say in China, and then seeing the final award that settled the very same dispute being refused recognition and enforcement in another BRICS state[1103] because the subject matter is not considered arbitrable there. A mechanism of harmonization and reciprocal trust would be thus indispensable for making such a shared arbitration mechanism truly work within and among the BRICS.

The comparative analysis of the BRICS legal systems, from across their arbitration laws, reveals that there are underlying principles by reference to which arbitrability may be determined. To start with, disputes or claims relating to commercial or contractual matters are commonly regarded as arbitrable in all the five jurisdictions, and all systems have proved to adopt a strong the presumption of arbitrability, that is the approach taken in jurisdictions of significance to arbitration, giving effect to the agreement of the parties to arbitrate in the absence of a clear legal prohibition against it. Furthermore, there is already some agreement among the arbitration laws of the BRICS on a few categories of disputes typically regarded as non-arbitrable such as family law and family rights (thus including matrimonial disputes relating to marriage, divorce, judicial separation, restitution of conjugal rights, child custody, or guardianship); testamentary and hereditary issues; personal status and criminal offences, antitrust and competition legislation (given their influence on the market structure and their relation to public interest, more evident in the Chinese system) taxation, insolvency, and bankruptcy issues. The arbitrability of consumers and labour contracts related disputes

[1102] Alan Redfern and others (n 1068).
[1103] The non-arbitrability of the subject matter is one of the grounds provided in the New York Convention to refuse recognition and enforcement of the award see New York Convention art V (2).

continue to create uncertainty in many of the studied countries, especially in Brazil, whereas China (art. 3 of the Chinese Arbitration Law) and Russia (art. 22.1(2) of the Civil Procedure Code) have clearly ruled out labour contracts from the arbitrable subject matters, while in *Kingfisher Airlines Limited v Prithvi Malhotra Instructor* (2013), the Indian Supreme Court held that labour disputes are not arbitrable as a matter of public policy and in *Fair Air Engineers (P) Ltd. v N.K. Modi* (Cases, 1996), the court interpreted Section 3 of the Indian Consumer Protection Act, 1986 and held that consumer disputes are not arbitrable.

Certainly, each system then has its own peculiarities that explain why the category of non-arbitrable matters includes, for example, disputes arising out of a trust deeds in India, the privatisation of state and municipal property and environmental damage in Russia, or collective rights in Brazil whereas, virtually all States rule certain categories of disputes to be non-arbitrable as a matter of public policy, even if the parties have concluded a valid arbitration agreement.[1104]

It is also true that the investigated arbitral laws imply different tests to ascertain the arbitrability of a certain matter, with Brazil privileging the patrimonial nature of the rights at issue according to which non-pecuniary rights (that is those rights not directly linked to an economic evaluation) are considered non-disposable and, consequently, non-arbitrable. Or India, which implies a complex four-fold arbitrability test according to which disputes are not arbitrable when: 1) the cause of action pertains to rights in rem, which does not include subordinate rights *in personam* arising out of the *rights in rem*; 2) the cause of action affects third-party rights and is capable of creating an *erga omnes* effect; 3) the cause of action relates to inalienable public and sovereign functions of the state; and 4) the subject matter of the dispute is expressly, or by necessary implication, non-arbitrable under mandatory statutory enactments. Such heterogeneity may call for a deeper effort in the harmonization of the arbitrability test among BRICS. Another aspect that should not be underestimated is that to determine whether a claim or dispute is arbitrable, one generally refers to statutes and judicial interpretations of their provisions but while in civil law countries as China, Russia or Brazil the arbitrable matters are primarily identified by statute, in South Africa and foremost in India, arbitrability is judicially derived, consequently, each state shall have to intervene differently to give effect to the shared arbitrability rules.

[1104] Born (n 996).

6.3 The arbitration agreement

BRICS arbitration laws certainly share the same understanding of what constitutes an arbitration agreement. That is because many of them as India, South Africa and Russia have practically transposed the Model Law text on this regard, which defines the arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".[1105] The Brazilian and Chinese laws do not contain a proper definition of an arbitration agreement as the one just mentioned, but the manner in which it is characterized in the arbitral texts suggests that the underlying idea of the arbitration agreement as an agreement to submit to arbitration some or all disputes that have arisen or may arise out of the legal relationship between the parties corresponds.[1106]

As for the form that the arbitration agreement may take, the answer of the five arbitral texts is once again unanimous: it may take the form of an arbitration clause in the contract or constitute a separate agreement submitted by the parties once the dispute has arisen, with Brazilian arbitral law requiring for submission agreements (terms of reference included) some specific additional requirements set out in the arbitral text.[1107] Moreover, they all require for the arbitration agreement (regardless of the form) to be in writing, which prerequisite is in turn derived from art. II of the New York Convention, according to which "Each Contracting State shall recognize an agreement in writing […]". Generally, such a requirement is deemed to be satisfied when it is possible to prove that any kind of record of the agreement exists therefore, in line with the Model law provisions, an exchange of letters, telexes, or other means of telecommunication is considered suitable to provide such a record of the parties' agreement for further use. Russia, South Africa, and India's arbitral laws also convene that the existence of an agreement to arbitrate may nevertheless be conclusively proven, even in the absence of a written agreement, if the parties submit their statements of claim and response to a dispute without further contesting the arbitral tribunal's jurisdiction, as suggested by the Model Law.

Not all the investigated arbitral laws require the arbitration agreement to be signed, and when this is the case, there is flexibility. Brazilian law, for instance, does not make any reference to the necessity of signing the arbitration agreement when this is included in the main contract, in fact tacit acceptance of the arbitration clause is admitted as long as consent

[1105] Model Law 1985 art 7 (1); ICA Law 1993 art 7(1); Indian Arbitration Act 1996 s 7(2); South African IAA sch 1 art 7.
[1106] PRC Arbitration Law 1994 art 16; BAA 1996 arts 3 and 4.
[1107] BAA 1996 art 10.

by both parties to submit the dispute to arbitration is evidenced by other circumstances (the latter is a constant that can be found also in the other systems). Nonetheless, Brazilian law requires post-dispute agreements to be signed by the parties and two witnesses before a notary public. South African law is the one making express requirement for the written arbitration agreement to be signed, however, again, this is not a strict requirement as the agreement would still be valid if all parties adopted and acted on it. It is worth stressing that in some jurisdictions one sided or unilateral arbitration clauses are considered void (Russia) unfair and invalid (China) where in other jurisdictions, as in South Africa, they are likely to be enforced, because as already discussed above, in B2B transactions courts would mostly check whether the contract was entered into fairly and its terms are not illegal, immoral, or contrary to the public interest, and if it is not the case a one sided arbitration clause should be upheld. This is certainly a point that would need confrontation for the adoption of a common stance among BRICS. Moreover, it should be pointed out that, according to Indian law, when one of the following circumstances occur, the arbitration agreement shall not be enforced, namely where the arbitration clause permits an authority to decide a dispute without a hearing; the agreement requires the authority to act in the interests of only one of the parties and provides that the decision of the authority will not be final and binding on the parties; or, further, when it provides that if either party is not satisfied with the decision of the authority they may file a civil suit seeking relief.

The two most recurrent validity requirements established by the five jurisdictions include the arbitrability of the dispute (thus reinforcing the importance of the topic tackled over the previous paragraph) and the parties' consent to refer their dispute to an arbitral tribunal. Chinese arbitration law provides for an additional ground to the previous two, which is to indicate the name of the arbitral commission in the text of the arbitration agreement.[1108] An agreement that lacks one of the three grounds is regarded as null and void under Chinese law. Usually, a well drafted arbitration agreement would include a reference to the arbitral institution charged with the administration of the case, in spite of the statutory demand to do so, but it is also common for the parties to commit errors in the process e.g., selecting only the arbitral rules of the institution but not the institution *per se*, misspelling the arbitral institution or even name a non-existent one. This explains why all systems, in one way or the other, are confronted with pathological arbitration agreements and commonly adopt a flexible approach in trying to save the agreement and to give effect to the parties' intention to arbitrate the dispute, as does the Chinese law through its Interpretations or even

[1108] PRC Arbitration Law 1994 art 3.

Indian law with its pro enforcement stance, by using the principle of harmonious interpretation.

The edgy consequences related to the additional ground provided for in the Chinese arbitral text concern the impossibility for the parties to opt for ad hoc arbitration, which on the contrary, is perfectly recognized and endorsed by the remaining jurisdictions.

The BRICS arbitral laws return to converge when dealing with the notion of separability of the arbitration agreement from the main contract (it goes without saying that this has relevance should the arbitration agreement take the form of a clause included in a broader contract between the parties), which is clearly endorsed in all the analysed arbitral texts. Accordingly, they all share the view of the arbitration agreement as distinct from the other terms of the contract, and as such, it would not be affected by the amendment, rescission, termination, or invalidity of the main contract in which it is contained, which in turn is critical for determining the arbitral tribunal's jurisdiction. To understand the arbitration agreement as autonomous and independent from the main contract also signifies that the parties may decide to subject the arbitration clause to a different law than the one (or ones) governing the main contract. This is particularly important because, generally, the validity of the arbitration agreement is assessed by the arbitrators or by the courts on the basis of the said chosen law.

Finally, stamp duties are of vital importance in India. In fact, an arbitration agreement contained in an unstamped or deficiently stamped contract is void and cannot be invoked by the parties until such deficiency in the underlying contract is cured.

6.4 Jurisdiction and *kompetenz-kompetenz* doctrine

Except for China, all four jurisdictions have accepted and implemented the doctrine of *kompetenz-kompetenz* in its positive, negative, or both dimensions, corroborating the same at the legislative and judicial levels; courts, in fact, play a crucial role in giving effect to the negative outcomes that the said doctrine brings with it. The arbitral laws of Brazil, Russia, India and South Africa statutorily embrace the doctrine of *kompetenz-kompetenz* providing the arbitrators with the powers to rule, *ex officio* or at the request of a party, on their own jurisdiction (positive *kompetenz-kompetenz*), including questions pertaining to the existence, validity, and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause, which in turn explains the importance for a jurisdiction to understand the arbitration agreement as separated and autonomous from the main contract, discussed just above.

The national courts of the four jurisdictions that have incorporated the *kompetenz-kompetenz* doctrine have demonstrated a growing pro-arbitration attitude reserving chronological priority to the arbitrators to rule on their own jurisdiction in case a court is simultaneously called to decide on jurisdictional matters (negative *kompetenz-kompetenz*). In fact, instead of delving into a full review of the arbitration agreement to find whether it is null, void or incapable of being performed, as provided in both the New York Convention (Art. II (3) and the UNCITRAL Model law (Art. 8 (1),[1109] these national courts generally limit themselves to a *prima facie* analysis, with Russian courts giving a special attention to formalities an the Indian ones to ascertain that the arbitration agreement meets the core contractual requirements provided by Indian law. The Indian case law, in particular, went further in the developing the negative effects of *kompetenz-kompetenz*, establishing that in case of uncertainty, or when the validity of the arbitration agreement cannot be determined on a *prima facie* basis, the question should not be decided in court but referred to the arbitral tribunal[1110], once again trusting and giving preference to the decision of the arbitrators. South Africa proved a similar pro-arbitration stance, providing that when a jurisdictional issue is pending in courts, arbitrators can continue the proceedings and eventually issue an award[1111], upon the Model Law suggestion.[1112] The natural consequence to what just described is the creation of a safe and friendly environment for arbitrations seated therein, promoting the use of such a dispute resolution mechanism.

The case is different for China, which has lagged on improving the way it deals with jurisdictional issues and to bring it in line with the international arbitration practice. China, in fact, is the only jurisdiction of the five that does not recognize the principle of *kompetenz-kompetenz* neither in its positive nor negative implications. The fact that when confronted with an objection to its jurisdiction, the arbitral tribunal is not entitled by the law to rule on the matter but must refer it to the arbitral commission where the tribunal is operating means that there is no use whatsoever of the *kompetenz-kompetenz* doctrine, nor trust placed in the arbitrators' decision, confirming how arbitral commissions have a dominant role in the Chinese arbitral system. Not only jurisdictional issues are by default bear upon by the arbitration commission, but if simultaneously one party requests the arbitration institution to decide on a validity matter and the other party applies to the PRC People's Court for a ruling, the decision of the PRC People's Court shall prevail. Put in other words, the negative

[1109] "When a national court is seized from one of the parties who agreed to arbitrate, it has to refer the parties to arbitration, unless it finds that the arbitration agreement is "null, void or incapable of being performed", see New York Convention 1958 (art II (3)) and the Model law 1985 (art 8 (1)).
[1110] See Vidya Drolia & Others v Durga Trading Corporation (n 902)
[1111] IAA 2017 sch 1 art 8 (2).
[1112] Model Law 1985 art 8 (2).

implications of *kompetenz-kompetenz* are denied, as priority is attributed to the Court decision and not to the arbitration commission. The urge to fix such a mechanism that only shows distrust in the arbitral institution and the decision of arbitrators has been felt recently, in so much as the draft amendment proposed to introduce the *kompetence-kompetence* principle into the Chinese system in all its implications and dimensions.

6.5 Arbitrators and arbitral institutions

All jurisdictions but China prioritize party autonomy when it comes to the selection of the arbitrators. In fact, with the exception of China, the other investigated arbitral laws do not impose specific requirements on potential arbitrators in order for them to be appointed by the parties. In fact, it is up to the parties to determine what criteria they should use to decide who to appoint as arbitrator for the resolution of their case.

All jurisdictions but the Chinese one, convene that anyone who enjoys legal capacity and is entrusted by the parties can act as an arbitrator and, to reinforce the last point, none of the arbitral laws impose nationality requirements, or to get any specific licence to be appointed as arbitrator in international arbitrations seated therein. It is only Chinese arbitration law that, in its art. 13, establishes that arbitrators must meet one of the enlisted (broad) qualifications to be eligible e.g., to have been engaged in arbitration work for at least eight years; to have been engaged in legal research or legal teaching and in a senior position; to have legal knowledge and be engaged in professional work relating to economics and trade in senior positions or equivalent professional levels, which practically correspond to the background of those who commonly act as arbitrators. It is in fact expected from an arbitrator to be an experienced lawyer, a judge, a professor in a senior position or an expert in the economic and trade fields. Nonetheless, Chinese law makes it mandatory.

Furthermore, parties may select their arbitrator from a roster provided by arbitral institutions, which will undoubtedly use fixed criteria to determine who is accredited to act as arbitrators at their institution. This was in fact the rule in Brazil, until the 2015 reform of the BAA allowed the parties to select an arbitrator outside the list provided by the arbitral institution.

Parties are also free to agree on the number of the arbitrators that will make up the arbitral tribunal as well as the appointing mechanism. The arbitral laws on this matter limit themselves at mandatorily providing for the number of the arbitrators to always be uneven, and as a default rule in case the parties fail to reach an agreement, for a sole arbitrator (South Africa) or a three-arbitrator panel (Russia, India, China, Brazil). In all the systems, the

standard procedure for naming a three-arbitrator tribunal is for each party to nominate one arbitrator and mutually agree on a third. Alternatively, the parties may agree that the third arbitrator will be appointed by the two arbitrators appointed by each party. If the parties are unable to reach an agreement, it is usually the arbitral institution who intervenes and acts as appointing authority to overcome the impasse. Some arbitral laws as the Brazilian or the South African ones allow the court to also assume the role of appointing the arbitrators and addressing the number of the panel. Some others, as the Chinese law, do not contain any clauses that permit the Court to get involved in the choice of the arbitrators. It is worth also stressing that, according to Russian law, an arbitration agreement may deprive state courts of both the power to appoint arbitrators and to consider applications to challenge them because of the dilatory risk that a cause in court may generate.

All the arbitral legislations provide strict rules to ensure that the arbitrators are neutral, independent, and impartial. Russian law, in particular, provides the highest impartiality and independence standards for both arbitral institutions (in terms of avoiding conflict of interests within the institution's staff) and the arbitrators (art. 12 (1) of the ICA Law). To this end, arbitral laws and established case law hold that arbitrators have a duty to immediately disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. On this basis, a party may challenge an arbitrator, insofar as it is capable of adducing valid reasons and within the required time limit (generally before the first hearing as provided by Chinese law, or within 15 days of becoming aware of the circumstances causing doubts regarding the arbitrators' impartiality as provided by Indian law). It is worth reminding here that, under art. 38 of the Chinese arbitration law, an arbitrator may even bear criminal liability if his conduct amounts to serious breach of his duties as arbitrator.

To ascertain the eligibility, neutrality, and impartiality of arbitrators, the Indian Arbitration Act establishes a specific code under the Fifth and Seventh Schedules, which are largely inspired to the IBA Guidelines on Conflicts of Interest in International Arbitration. It is in fact very common for parties and arbitrators to refer to the IBA Guidelines on conflict of interest to ensure the highest standard of neutrality and autonomy. Major arbitral institutions also require arbitrators to comply with their arbitration rules and codes of conduct, which once more are commonly inspired by the said Guidelines.

To conclude, there is no indication in official documents that special authorizations are required to start or register an arbitral institution in South Africa, India, and Brazil. The only two legislations that may cause troubles for the establishment of a BRICS branch of the dispute resolution centres are Russia and to a lesser extent China. In the latter case, art. 10

of the PRC Arbitration Law stipulates that the establishment and operation of arbitration institutions are subject to the prior approval of the relevant administrative department of justice of the relevant province, autonomous region, or municipality directly under the central government. Because of this, foreign arbitration institutions have been traditionally prohibited from operating in the PRC. Nonetheless, this situation has recently begun to change. The approach is certainly more relaxed, and in fact currently, representative offices have been set up by the HKIAC, the ICC, the SIAC, and the KCAB.

The real cumbersome situation came to existence as a result of the 2015 Russian Arbitration Reform, when a new system of licensing for "permanent arbitration institution" appeared. The new requirement may pose some threats to the establishment of a BRICS branch for dispute resolution in Russia, as the BRICS centres are of recent creation and therefore have not had the chance to establish a reputation yet, leave it alone a "well-known" international standing that would allow them to comply with the Russian requirement. This would surely call for an exception. It is yet to be seen whether the Russian government will grant exceptional treatment. Another possibility is for Russia to intend the new BRICS centre as a domestic one, considering that Russia is itself is a party to the BRICS group. In this sense the new Arbitral Institution should not go through the same licensing process required for foreign Institutions and should have the chance to start more smoothly its operations. So far, four foreign arbitral institutions have obtained a permission to operate in Russia namely, the HKIAC, the VIAC, the ICC, and the SIAC, which are all internationally renewed arbitral centres.

6.6 The arbitral procedure

All the five systems examined value the parties' ability to choose how to carry out the arbitral procedure, establishing only a few mandatory provisions mostly aimed at ensuring due process of law and procedural guarantees.

In principle, parties may choose to determine the rules of procedure on their own, as they see fit, or to use a pre-established set of rules such as the UNCITRAL Arbitral Rules or the rules made available by the arbitral institutions. However, some specifics should be emphasized in this regard. Given that Chinese law prohibits the use of ad hoc arbitration and that the parties must specify which arbitral commission will be in charge of administering their case, the arbitral institutions' rules are assumed to apply to the conduct of arbitral proceedings in China, and parties are allowed to agree on variations to the standard institutional rules where the rules permit such a variation and as long as the agreement does

not conflict with the mandatory procedural rules established by law. Similar circumstances exist in India in that according to the Arbitration Act, when the arbitration is administered by an arbitral institution, the proceedings are already presumed to be governed by the rules of the said arbitral institution chosen by the parties, without requiring them to agree on the procedural rules any further. Nonetheless, differently from the Chinese experience, under India law, parties may resort to ad hoc arbitration. When this is the case, parties are required to specify the arbitral rules.

The arbitrators are commonly required to conduct the procedure according to the parties' agreement. However, if the parties fail to reach such an agreement, it is up to the arbitrators to determine the applicable procedural rules. When this is the case, presumably inspired by art. 19 (2) of the UNCITRAL Model Law, according to the Russian, South African and Indian laws, the arbitral tribunal may, subject to the mandatory provisions contained in the respective arbitral laws, "conduct the proceedings in a manner it considers appropriate". Often, in Brazil-seated arbitrations, arbitrators choose to apply the law of the seat (*lex loci arbitri*); the same happens in India-seated arbitrations, with the judicially derived clarification that the arbitral tribunal is not bound nor by the 1908 Code of Civil Procedure, nor by the 1872 Indian Evidence Act, but such sources can be used when they can help making the process more efficient and deliver justice.

The national legislations tend to establish different moments for which the proceedings can be said to have begun and in relation to such a commencement date, fix a time limit for the issuance of the award, which may nonetheless be changed by the parties at the beginning or throughout the proceedings. According to art. 19 of the BAA, the arbitral proceedings are deemed to be initiated when all the arbitrators (or the sole arbitrator) have accepted the appointment and this date is considered the starting day for counting the term for issuance of the arbitral award, which according to art. 23 of the BAA, should be of six months, unless the parties have fixed a different date in the arbitration agreement or during the course of the arbitration. According to Russian law, the proceedings are deemed to commence on the date on which the respondent receives the claimant's request for arbitration. Such a rule may be altered according to the parties' will or because the rules of an institution provide otherwise, whereas the law does not fix a specific time limit for the tribunal to render a final decision. The very same provision on the commencement of the proceedings is to be found in South African law, albeit South African courts noted that the provision of a notice for the appointment of an arbitrator may as well represent the first step that initiates arbitration proceedings; as Russian law, the South African one does not fix a specific time limit for the award issuance. Indian law as well uses the date the respondent

received the request invoking arbitration for the resolution of the dispute as general rule to be applied when the parties fail to designate it, besides, the arbitral rules may concurrently indicate such a commencement date. As Russian and South African laws, Indian law does not count down for the rendering of the award, however, Section 29A of the Indian Arbitration Act suggests that the award "may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23".

The taking of evidence is an area where civil and common law greatly differ, and such a distance is well visible when looking at the way arbitrators and the investigated laws end up preferring to use instruments that are more in line with one tradition or the other. As a matter of fact, being understood that parties are uniformly recognized to be free to choose whether an arbitration may be conducted either by means of oral hearings or on document-only basis, and that the arbitrators can take depositions, hear witnesses, carry out expert examinations (both of party-appointed experts and tribunal-appointed experts) and determine the production of any other evidence deemed appropriate, in arbitrations seated in the most civil law oriented countries as Brazil, Russia and China there will not typically be a common law-style discovery procedure. In fact, to make an example, in China's arbitration practice, witness statement is generally less persuasive than documentary evidence, which on the contrary, is regarded as the primary form of evidence. Whereas the very use of discovery seems to clash with basic principles characterizing the Brazilian legal system, which are contained in the Brazilian Civil Procedure, as the fact that parties are not compelled to produce unfavourable evidence unless it is strictly necessary and determined by the decision maker, or that the parties have privacy concerning private documents. This is confirmed by the fact that in Brazilian arbitrations the parties and the arbitrators commonly rely on the documents they already possess, and the use of written documents is preponderant over oral testimonies. Being closer to the common law, the Indian system, on the contrary, fairly knows the concept of discovery, which is in turn frequently used in Indian-seated arbitrations. An element that makes us understand how embedded such an instrument is in the legal system is related to the fact that courts may order disclosure, discovery, attendance of witnesses in accordance with the provisions of the Indian Code of Civil Procedure. It is also worth mentioning on this regard that witnesses called to testify in arbitral proceedings in India can be duly sworn by the tribunal and be required to state the truth under oath, as the 1969 Indian Oaths Act also extends to arbitration. The evidence rules that apply to international arbitrations held in South Africa, the other most common law influenced country, are based on South African common law and the Law of Evidence Amendment Act

of 1988. Softer laws on the taking of evidence are allowed in South Africa as in all the other jurisdictions, with special emphasis on the IBA Guidelines on the Taking of Evidence and the Prague Rules for Brazil and Russia. In consideration of the widespread use of these Rules, they could be easily referred to by Rules of the BRICS dispute resolution Centres, providing a more neutral and less aligned methods of taking on evidence that finely work for both civil law and common law practitioners and users.

It is also common for arbitrators to seek the courts' support on the taking of evidence, but the formalization of such a relationship between the arbitral tribunal and the court, which court should be asked for assistance, and what categories of evidence may be required by the arbitral tribunal must be found in the national arbitral laws, and oftentimes such laws proved to diverge. According to Brazilian law, for instance, the requests from the arbitral tribunal to a local state court must be made via an arbitral letter (*carta arbitral*), which is a document that formalizes the dialogue of cooperation between the tribunal and national courts. State Courts may also assist arbitrators in Russia under art. 74.1 of the Russian Commercial Procedure Code and the Civil Procedure Code, which aims to give the institution of arbitration quick and efficient ways to gather evidence, as long as such evidence concerns either written records, physical proof, or additional records and materials (e.g., photos, videos). The law excludes judicial assistance for witness testimony, depositions, and on-site inspections, which most probably results from the Russian civil law tradition and its emphasis on written submissions and an inquisitorial procedure.

In China, on the other hand, the arbitral commissions may seek the courts' support in terms of interim protective measures, i.e., orders preserving property or evidence when it is vulnerable to be destroyed or missing, rather than asking for their help to properly collect it. The parties concerned may then apply to the commission to put the evidence on custody and in turn the arbitration commission shall submit the evidence of the party concerned to the People's court at the place where the evidence is obtained. This also means that arbitrators in China are not empowered to issue interim measures or grant interim relief. The PRC People's Court enjoys sole jurisdiction to issue such measures in accordance with the relevant provisions of the Civil Procedure Law.

The other four jurisdictions provide the arbitrators to grant interim measures, according with the conditions fixed in the arbitral laws. Nonetheless, in most cases, such interim measures must be enforced against the other party upon application to a competent court, as in South Africa, whereas after the 2015 reform in India, an interim order passed by an arbitral tribunal is enforceable in the same manner as if it were an order by court, which also entails that any disobedience to such order can result in contempt of court. The list of

interim measures includes, for example, orders for preservation, custody, sale and protection of goods, protection of trade secrets, maintenance of machinery, works and continuation of certain works.

Finally, many of the investigated arbitral laws (Russia, China, and India) incentivize the attempt to conciliate or mediate the dispute either before or throughout the proceedings if it is apparent to the arbitrators and to the parties that mediation or conciliation is viable. As a matter of fact, blended systems of dispute resolution that introduce mediation and conciliation options into arbitration are consistently more widespread. The Federal Law on Arbitration has recently brough with it such an interesting novelty in the Russian arbitration landscape, providing for the mediation option to a dispute submitted to arbitration. So does also Chinese arbitral law, according to which the parties may try to settle their differences through conciliation or mediation at any time during the arbitral proceedings. However, a crucial difference between the Russian and the Chinese provisions must be pointed out. Whereas Russia keeps the mediation and arbitration processes distinguished and carried out by different entities, China has the mediation imbedded in the arbitration process and allows the same arbitrators who were appointed for the arbitration to conduct the mediation, thus creating few concerns regarding impartiality of the case consideration when the same adjudicator "switches hats" to become a mediator or an arbitrator throughout the proceedings. For both Russian and Chinese laws, if a settlement is reached, the arbitration may be declared successful, and the parties can request the arbitral tribunal to formulate its decision on the basis of the settlement agreement or to record the said agreement in an award on agreed terms. If the conciliation fails, the arbitration may be resumed, and the award should be issued in due course. The Indian Arbitration Act also deals with conciliation in its Part III and encourages the parties to settle their disputes amicably through conciliation before resorting to arbitration.

The above-mentioned tendency indicates that conciliation and particularly mediation are constantly and growingly valued by some BRICS countries and for this reason the new set of arbitral rules for the BRICS centres of dispute resolution should not neglect it and should, on the contrary, incorporate such a mediation or conciliation option in its arbitral rules.

6.7 Confidentiality

The Brazilian and South African arbitral laws do not contain an express confidentiality provision. Nonetheless, Brazilian law imposes a duty on the arbitrators to be "discrete" and

not to disclose to the public any information about the proceedings. For what concerns Russian law, the ICA does not contain a specific confidentiality norm however, art. 28 of the Federal Law on Arbitration, which applies to domestic arbitration and to international commercial arbitrations seated in Russia, provides for arbitration to be confidential, unless otherwise agreed by the parties, and establishes a duty not to disclose information, not only on the arbitrators but also on the administrative staff working for the permanent institutions operating in Russia. As mentioned, South African arbitral law does not provide for a norm on confidentiality but endorses the general principle according to which the parties may agree in their arbitration agreement on the level of confidentiality to apply to the arbitral proceedings and the related award. Nonetheless, this means that the agreement will be valid and binding on the two parties only and will not bind third parties. Therefore, if the parties to an arbitration want third parties (for example, experts or witnesses) to maintain confidentiality, they must enter a separate, written confidentiality agreement.

Under Chinese law, unless the parties specifically agree otherwise, the arbitration is confidential, and such confidentiality obligation generally applies noy only to the parties, but also to the arbitrators, witnesses, translators, experts, and all other parties involved in the arbitration. Interestingly, an arbitration law that cares about valuing party autonomy as the Indian law, precisely with regard to confidentiality, fails to prioritize the parties' agreement in that it creates by default a duty on the arbitrators, the arbitral institutions and on the parties to the arbitration agreement to maintain confidentiality of all arbitral proceedings, thus including pleadings, documents, and any exchange of information (2019 amendment to the Arbitration Act introduced Section 42A).

All jurisdictions agree that whenever a public body is a party to arbitration proceedings, such proceedings must be open to the public, unless the arbitral tribunal finds compelling reasons to direct otherwise, e.g., in case of state secrets.

6.8 Choice of law

Honouring one of the most important features of party autonomy, the five arbitral laws recognize that the parties may choose the law applicable to the substance of the dispute and bind the arbitrators to the implementation of the same. Nonetheless, not all systems grant the same degree of freedom to the parties in choosing the substantive law. Following the Model Law example, Brazil, Russia, South Africa, and India provide that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". As discussed many times in the course of the analysis, to talk about "rules of laws" instead of simply a "law" means that parties are granted

the chance to apply to their dispute either state or non-state laws, as the general principles of law, commercial usages and customs, international business rules and *lex mercatoria*. In Brazil, Russia and South Africa, the parties may also authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur*. However, given the broad discretion that such methods of judgement confer to the arbitrators, they are not used frequently in any of the five systems.

To enhance the predictability and true implementation of the parties' choice of law, Russian and South African laws specify that "any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules", which reflects the norm and spirit endorsed by the UNCITRAL Model Law.

Under Chinese law, the parties are free to agree on the governing law if the contract involves a foreign interest. Nonetheless, for some types of Sino-foreign contracts, e.g., equity joint ventures, Chinese law provides for the mandatory application of the PRC law, despite the foreign interest involved. Besides, even when the choice of law is admitted, this choice is limited to a national law and not to "rules of law" as in the UNCITRAL Model Law, which means that under Chinese law the use of non-state laws, as the general principles of law, commercial usages and customs, international business rules and *lex mercatoria* is not allowed. Furthermore, the parties cannot not instruct the arbitral tribunal to resolve the dispute *ex aequo et bono* or as *amiable compositeur*, because according to the relevant provisions, the arbitration award cannot be based on the principle of fairness and reasonableness alone; it needs to relate to the relevant laws or regulations.

When it comes to choosing the applicable law in absence of the parties' choice, arbitral laws can vary. In fact, in case the arbitration agreement is silent on the law applicable to the substance of the dispute, all jurisdictions agree that the arbitrators should choose the applicable law, but they differ in the methodology and types of laws they can choose. According to Russian and South African laws, when the parties have failed to indicate the applicable law, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable",[1113] which means that the arbitrators are not generally granted the faculty to choose "directly" the applicable law, which instead is a viable alternative according to Brazilian law - and in fact the preferred one -, but such a choice must result from a conflict of law analysis. This creates uncertainty for the parties because their substantive rights and obligations may differ significantly depending on the applicable law.

[1113] Both Russian and South African have transposed the Model Law provision in this regard. Consequently, they use the same language implied in art. 28 of the Model Law.

Usually in South African arbitrations is more common to make reference to the conflict of laws rules of the arbitral seat for reasons of simplicity, predictability, and neutrality.

Under Indian law, in the absence of parties' express or implied choice of law, the tribunal shall apply the "rules of law" that it considers appropriate, and not the "conflict of laws" rules (as provided in the UNCITRAL text and by the arbitral laws mentioned above), which clarifies that in absence of the partis' choice, a direct approach is preferred in selecting the substantive law. Although the goal of this approach may be to simplify the application of private international law rules, there is still room for uncertainty because it provides the tribunal with minimal guidance in selecting the relevant law.

The PRC Arbitration Law is silent regarding the choice of the applicable substantive law in arbitration when the parties fail to designate one, leaving it up to the arbitral commissions to do so. It appears that in most cases, the arbitration rules of arbitral institutions in China have mainly adopted the approach of *voie directe*.

6.9 Language

Practically all jurisdictions statutorily allow the parties to agree on what language to use for the conduct of the proceedings, which *per se* constitutes one of the most important advantages of using arbitration as a means of dispute resolution. Only Brazilian law provide for the mandatory use of the Portuguese language when the proceedings involve state entities.

The only arbitral law that does not contain any provisions governing the language to be used in arbitration proceedings is Chinese law. The determination of such a language is thus presumed to be included in the parties' prerogatives in accordance with the principle of party autonomy. Nonetheless, the Arbitral Rules of Chinese arbitration commissions generally include provisions on the language of the proceedings, and according to many of them, in the absence of an express agreement by the parties, the language of arbitration shall be presumed to be mandarin, whereas some other rules as CIETAC Arbitral Rules, would take into account the specificities of the case to determine the applicable language.

In the absence of an agreement between the parties, the arbitral laws of the remaining jurisdictions provide for the arbitral tribunal to determine the applicable "language or languages", upon the UNCITRAL Model Law example. The criteria to identify such a language are generally set out in the Arbitral Rules of the institutions operating therein, the most common of which is for the tribunal to have due regard of the circumstances, including the language of the contract. All arbitral laws apart from the Chinese one provide that the

arbitral tribunal may also mandate that any documentary evidence be translated into the language or languages that the parties have agreed upon or that the arbitral tribunal has determined.

It is important to note that under Brazilian law, unless the parties agree otherwise and all parties are fluent in the language used, all documents introduced during the proceedings must be translated into the language of arbitration. Furthermore, under Brazilian law, all documents originally written in a foreign language that are to be used as evidence must be translated into Portuguese by a sworn public translator. Such a provision may be burdensome for the parties, who may avoid all related issues by waiving the aforementioned requirement in the arbitration agreement and relying solely on unofficial translations. However, the waiver must be made in advance, prior to the commencement of the proceedings, therefore the disputing parties should be duly aware of this.

6.10 The seat of arbitration

All the analysed jurisdictions are familiar with the notion of the seat of arbitration as a purely legal concept, which links the arbitration to a national legal system and to its procedural law. In theory, the place of the actual proceedings and the seat of arbitration may be different. Hence, it is commonly understood that there is a difference between the "seat" and the "place" or the "venue" of the arbitration.

Brazil, Russia, and South Africa have encapsulated such notion into their arbitral laws, dealing specifically with the choice of the arbitral "seat" and put such a choice back to the parties, albeit in cases involving Brazilian state identities, Brazilian law mandatorily provides for the seat to be Brazil. Failing such agreement between the parties, the seat of the arbitration shall be determined by the arbitral tribunal, considering the circumstances of the case and the convenience of the parties. The same rule is contained in Indian arbitral law, which nonetheless prefers to use the same language as the Model Law, thus referring to the "place of arbitration" rather than to the "seat of arbitration", as the other three jurisdictions do. In fact, the Indian Arbitration Act failed to provide proper definitions of the terms "seat", the "venue", and the proper "place of arbitration", which had to be filled by the Courts' judicial interpretation. Of particular mention on this regard are *BALCO* and *Mankastu* decisions.

The said arbitral laws (Russian, Brazilian, South African and Indian) and related case law, specify that arbitral proceedings need not to be carried out at the place designated as the

legal “place of arbitration”, thus distinguishing the seat of arbitration from the place where the arbitral tribunal can meet for consultation among its members, for hearing witnesses, experts, the parties, or for inspection of documents, goods, or other property, which can in fact be carried out at any place. The “place of arbitration” may not be specified in the arbitration agreement, nor does it have to be mentioned in the final award; whereas the indication of the legal “seat” should always be present in a well-drafted and well-informed arbitration agreement and must be contained in the final award. That is because the seat of arbitration has a series of important repercussions on the award. According to Brazilian law, the seat of arbitration determines the nationality of the award and consequently whether it will be enforced by means of the New York Convention or as a domestic award. Under India law the designation of the seat the is paramount because it establishes, amongst other things, which part of the Arbitration Act shall be applicable to the dispute, which Court shall, in terms of Section 42 of the Arbitration Act, have the jurisdiction over the arbitral proceedings and all subsequent applications, e.g., an application for setting aside the arbitral award, which Courts shall have supervisory powers etc.: in a few words, anything related to the subsidiary role of the *lex arbitri*.

As a response to the COVID-19 pandemic arbitral tribunals could easily shift to virtual and hold hearings via online teleconferencing platforms. Such new means for the communication are presumed to stay, and this suggests the BRICS to update the arbitral laws first to accommodate with such changes and second to embrace them in the drafting of the Rules for the BRICS dispute resolution centers.

Russia, Brazil, South Africa and India may all, in different ways and at different levels, represent a good arbitration seat. Their courts proved to act mostly in support of arbitration, as in the issuance of interim measures and interim relief, in the application of the *kompetenz-kompetenz* doctrine that favours and entrusts the arbitrators with jurisdictional choices and their observance of an overall non-interference policy, sometimes statutorily fixed, as for Indian law. Besides, their arbitral rules are flexible, adaptable, and leave much space to party autonomy in the determination of arbitration, in line with the Model Law standards. Furthermore, they have adhered to the New York Convention, and ofttimes are even party to other important local networks that facilitate the enforcement and the recognition of foreign awards. Certainly, there is no place of the five that can be defined as perfect, India for instance has experienced some troubles in the recognition of the awards, but the premises are of the most encouraging.

While China has adhered as well to the New York Convention, a separate discussion on how it qualifies as an arbitral seat is necessary. Chinese law stands out as the only one

that does not recognize the concept of the seat of arbitration and makes no mention in its arbitral text of what other arbitral laws, such as the Indian one, refer to as the 'place' or the 'venue' of arbitration. This lack of acknowledgment complicates the interpretation and application in China of all those international rules that employ or relate to the legal notion of the seat of arbitration, including the New York Convention. This appears utterly clear just looking at the criteria used to enforce arbitral awards, or to define an award as a "foreign" one, to begin with. Arbitral commissions seem too much involved in the court systems and influenced by the central government. Besides, Chinese law is also the one law that does not recognize nor enforce in any way the paramount principle of *kompetenz-kompetenz*, and this alone would be sufficient to prove a sense of mistrust towards arbitration and the arbitrators' jurisdictional choices. In addition, the court support to the arbitral commissions is essentially limited to evidence preservation and property preservation and not rarely even challenging to implement. It is also true that the new Draft amendment seems to look at improving the arbitral law, coping with all the important fall out that have been just discussed. The Arbitral Rules of the most prominent arbitral commissions in China seem to be rooting to the same direction. Therefore, if one is called to give an evaluation on the present-day situation, China would not come out as a great seat for arbitration, but the last word is yet to spoken considering the potential future changes that the draft amendment would bring with it.

6.11 The award

All jurisdictions convene that arbitral proceedings are terminated by the arbitral award. Indian law provides for the arbitral proceedings to be concluded either by an award or by means of an "order" of the arbitral tribunal, which is different from an award in that, to put in simply, an order has no *res judicata* effects.

The validity requirements established by the five jurisdictions seem to converge, as they all demand for the award to be in writing and signed by the arbitrator (s). If the arbitral tribunal has more than one arbitrator, it is required the signatures of the majority of the arbitrators, provided that any missing signatures are explained. Brazilian law allows for dissenting arbitrators to issue a dissenting opinion. The same is true for Chinese law, which in addition, specifies that dissenting arbitrators are allowed but are not required to sign the award. In line with modern arbitral legislations, all BRICS arbitral laws require for the award to state the reasons upon which it was based to avoid any arbitrary decisions. But where Russia and Brazil make it mandatory for the award to be reasoned (even when the award was rendered in equity, under Brazilian law) China, South Africa and India leave such a

requirement amendable by the parties, who may freely convene in their arbitration agreement that the award shall not to be reasoned. Nonetheless, it must be brought to the attention that unreasoned awards shall not be enforceable in Russia, given the compulsory nature of the said provision.

The arbitral award must also contain the date when it was issued and the place where it was rendered (in its meaning of seat), which are generally crucial *inter alia* to start counting the time for requesting corrections, for the identification of the nationality of the award as well as the national courts where the award can be annulled or set aside. Curiously, but not surprisingly, Chinese arbitral law requires for the award to state the date but not the place where it was made, strong in its foreignness to the very concept of the seat.

Not all types of awards are recognized in all five countries. Russian law only welcomes final awards. Therefore, recognition and enforcement of acts of international arbitral tribunals referred to as either "orders" "partial awards" or "interim awards" that cannot be qualified as final arbitral awards will not be enforced in Russia. On the contrary "awards on agreed terms" are regarded as awards for all purposes, with the same status and effects as any other final award on the merits of the case. Consequently, awards on agreed terms are fully enforceable in Russia, in the same manner they would be in all the other four jurisdictions, provided that they meet the validity requirements fixed by the law. This certainly is in line with the Russian tendency to incentive the use of conciliatory means of dispute resolution throughout arbitration. India as well discerns among the types of awards and would recognize final, interim and awards on agreed terms but not partial awards. The same is true for Brazil.

The five arbitral laws collectively provide for the award to state the amount of the arbitration fees, the costs, and their allocation among the parties. Generally, arbitration fees are established in accordance with the Arbitral Rules of the institution administering the case, whereas the costs allocation may be contained in the arbitral rules or priorly be agreed upon by the parties. When the parties fail to do so, the observed common approach is for the arbitral tribunal to provide the winning party to recover its costs from the losing party.

The Federal Law on Arbitration in Russia enlists some additional requirements for the awards issued by "permanent arbitral institutions", such as the composition of the arbitral tribunal and the procedure of its constitution; names and locations (residencies) of the parties to arbitration; the basis for the tribunal's jurisdiction; the claims, objections and motions of the parties; and factual background of the case, the evidence upon which the decision has been made, and the legal norms that guided the arbitration in the making of the final decision. Chinese law also requires for the award to specify the arbitration claim and the facts of the

dispute. On the same line, Brazilian law explicitly stipulate for the award to include the names of the parties, the factual and procedural background of the dispute; the grounds for the decision; the decision itself in addition to the ones just mentioned above.

Moreover, all arbitral laws allow a specific time limit (usually thirty days from receiving the award) within which the parties may submit a request to the arbitral tribunal to correct clerical, typographical, and minor errors or clarify any dimness, doubt, or contradiction of the award. According with South African, Russian, and Indian law a party may also request the arbitral tribunal to interpret a specific point or part of the award within the fixed time frame, if so agreed by the parties. In this case the interpretation shall form part of the final award. Furthermore, according to Chinese, South African and Indian law the parties may even request a supplementary award for claims that were made during the arbitral proceedings but were left out of the final decision.

6.12 Challenging an award

The basic assumption from which all BRICS systems start on the matter of the award challenge is to consider the award as final and binding on the parties. Therefore, the BRICS arbitral laws do not normally cater for an appeal. Nonetheless, as provided in South African law, the parties may priorly agree on including an appeal mechanism in their arbitration agreement. In absence of the parties' agreement on the appeal, the only available alternative to the interested party is to try to raise his objections to the award filing an application to the competent court for setting aside or annul the award or ultimately try to resist the enforcement where the winning party oughts to make the award recognized and enforced. It is worth recalling here that only the courts at the seat of arbitration may set aside or annul the award, whereas the enforcing court may be any court of any state where it is convenient for the winning party to have the award recognized and enforced against the losing party (which generally is the place where the losing party has its assets). At this juncture, the earlier point about the absence of a clear concept of the seat of arbitration in Chinese law becomes highly relevant. This deficiency can in fact lead to significant consequences, as the arbitration and the related objections to the award, may either cause a clash of jurisdictions or be left to a legal vacuum. These are certainly one of the most serious problems that the Chinese 'institution' approach brings with it. In fact, the Draft amendment is supposed to include not only a definition of the seat notion but to bring the Chinese system in line with international practice by incorporating the 'territorial' approach to the identification of such a seat.

The grounds listed in the arbitral laws of Brazil, Russia, South Africa, and India to challenge an award basically transpose the ones contained in the New York Convention and the UNCITRAL Model Law, which are limited to basic jurisdictional, procedural, and formal grounds to ensure that the proceedings took place fairly, in respect of the due process standards and both parties' wishes. Consequently, when faced with a challenge to the award, the court at the seat of arbitration will have to assess whether the composition of the arbitral tribunal and the arbitral procedure comply with the parties' agreement; that the party against whom the award is being enforced was given proper notice of the arbitrator's appointment, or of the time and place of the arbitration hearing or was otherwise, and for a valid reason, unable to present their case; the parties where under some incapacity; the arbitration agreement was not valid and that the award deals with a dispute not contemplated by the arbitration agreement, or it contains decisions on matters outside the scope of the arbitration agreement. The grounds listed in Chinese arbitral law are similar to the ones just mentioned but they also provide for the annulment of the award when the evidence upon which the award is based have been forged or the arbitrators have accepted bribes.

The above-mentioned provisions are collectively regarded as mandatory. Consequently, the parties cannot agree to exclude any basis of challenge against an arbitral award, expand the scope of appeal or agree on new methods for judicial revision of the award, expect for Russian law, which allows the parties to exclude the possibility to set aside the award by making an express provision in the "direct agreement" between them. South African arbitration Act also allows a waiver of a party's right to apply for setting aside. Nonetheless, any such waiver could be invalidated if the court determines that the subject matter of the dispute is not suitable to resolution through arbitration or that the award is contrary to public policy. Such two grounds are prerogatives of the competent court who, according to the New York Convention, may exercise them *ex officio.*

If the court rules to set aside the award, according to Russian law, the party is entitled to appeal against such a decision within a month to the court of cassation (second appeal) - the *Arbitrazh* court of the relevant court district up to the Supreme Court of the Russian Federation.

It is always crucial to stress whether the award under scrutiny is a foreign or a domestic one, because especially in China or India, courts have often taken the liberty to go beyond the mere procedural review of the award and questioned the very merits of the disputes when dealing with a challenge of domestic awards.

All legislations provide for a specific period within which a challenge to the award can be made, and such a period is of 90 days. When the date expires, the award cannot be

subject to any challenge, and consequently, the only possible alternative the interested party is to oppose the recognition of the award in the place where the enforcement is sought.

6.13 Recognition and enforcement of foreign awards

It has been already discussed on several occasions that all the countries making up the BRICS group have ratified the New York Convention, albeit some of them with some reservations, specifically a reciprocity reservation has been upheld by Russia, China, and India, and in addition China and India also adhered to the New York Convention with a commercial reservation. What has been identified as a true problem on this regard is the "double recognition" undertaken by Indian law that makes it harder for awards rendered in Brazil and South Africa to be recognized in India, since they have not been officially recognized yet as reciprocating states by the Indian Gazette. Actions must be taken in this regard to add Brazil and South Africa to the Indian reciprocating list of states to enhance mutual recognition and enforcement of the awards.

To say that all states have adhered to the New York Convention certainly does not automatically solve all the problems that may arise in connection to the recognition and the enforcement of foreign arbitral awards in the five countries. To begin with, there is no universal definition adopted by the international community, let alone the five countries involved in the current study, on the definition of "domestic awards" versus "foreign awards" and what are the preferred criteria for making such a determination, which is nevertheless required to determine whether the category of award is suitable for the application of the New York Convention. Where the Brazilian Arbitration Act differentiates between national awards and foreign awards on the basis of a geographic criterion (according to which all the awards rendered on Brazilian territory, even when issued by foreign institutions, are considered national under the purposes of the BAA), South African law privileges a more substantive approach distinguishing between "international" and "non-international" awards rather than adopting the traditional distinction between "foreign" and "domestic" awards, thus treating awards rendered in international commercial arbitration uniformly, regardless of where they were made. Under Chinese law, the location of the arbitration institution delivering the arbitral awards becomes again a key determinant, but the picture is even more complex since Chinese law knows at least four different types of awards namely "Chinese domestic awards", "foreign-related awards rendered in China", "foreign awards rendered outside China", and finally the awards made in Hong Kong,

Macao, and Taiwan, and where according with the "institution-based standard" the New York Convention is deemed applicable only for the category of awards rendered outside China, whereas awards rendered by foreign arbitration institutions within the territory of the PRC – for example, an arbitral award rendered by ICC in Shanghai– are not eligible for enforcement in the PRC pursuant to the New York Convention.[1114] It would be thus auspicious for the five countries to agree on a common and shared definition of "foreign awards" to ensure a coherent application of the New York Convention.

Some differences can be noted also in the procedures of recognition and enforcement in the five different jurisdictions, which albeit harmless, must be pointed out. As a matter of fact, where in Brazil, Russia, South Africa and India recognition and enforcement of the award are two separate procedures, which in most cases, require the competent court to recognize the award first, and to convert the same it into a decree of court, before it can be enforced as such. Moreover, the enforcing court may also be different from the one that took care of the recognition, according to the criteria fixed in the Arbitral laws or in the national civil procedures (e.g., such a Court under Indian law is the relevant High Court that exercises territorial jurisdiction over the subject-matter of the award). China makes no jurisdictional difference between recognition and enforcement and oftentimes the two proceedings are combined into one.

In practical terms, the procedure established in the New York Convention, providing for the party seeking for recognition and enforcement of a foreign award to be supported by the authenticated original award and the arbitration agreement or by certified copies thereof, and in case either of these documents is made in a foreign language, to provide their certified translations is commonly observed, even though it has come to the attention that frequently courts have asked to submit also the applicable arbitration rules duly translated and a copy of the main contract containing the arbitration clause (this was the case of the Brazilian STJ) in spite of fact that requiring additional documentation goes against the very rationale behind the New York Convention.

[1114] It must nonetheless be pointed out that, in some cases, Chinese courts treated arbitral awards made within Chinese territory by foreign arbitration institutions as non-domestic, recognized and enforced as foreign arbitral awards under the New York Convention. For example, in *DUFERCO S.A. v Ningbo Arts & Crafts Import & Export Co., Ltd.*, the Ningbo Intermediate People's Court ruled that the arbitral award made in Beijing by the International Chamber of Commerce International Court of Arbitration should have been treated as a non-domestic arbitral award under the New York Convention, and thus recognized and enforced under the accordingly). Unfortunately, confusion still governs the courts behaviour on the distinction and consequent treatment of the awards in China. Under the current Chinese legal framework, no leading authority has clarified this problem yet. See Jiong (John) Liu and Minli Tang, 'Different Types of Arbitral Awards under Chinese Law' (Part II) (*Lexology*, 11 July 2017) <https://www.lexology.com/library/detail.aspx?g=edc166ca-f09a-4c16-87be-749cacac2131> accessed 26 January 2024.

The grounds for resisting the enforcement are also contained in the New York Convention and have been duly transposed in the national laws of all five jurisdiction, with minor neglectable adaptations e.g., Brazilian Arbitration law has slightly modified letters d) and e) whereas, the South African Arbitration Act, inspired to the Model Law other than the New York Convention, in relation to the first ground listed in art. V, provides that recognition and enforcement may be refused if "a party to the arbitration agreement was under some incapacity" instead of "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity" which is the original version.

At this point, confronted with the very same set of rules, what makes the difference is the interpretation that courts give to such rules in the five jurisdictions and what chords do resisting parties prefer to touch based on the system involved. It has been observed that due to the lack of an authentic "due process" standard, as intended in common law countries, Chinese courts have interpreted the Convention's "being unable to present his case" ground in an extremely narrow way, including to the same only "force majeure" and "serious illness" as reasons that may prevent a party from participating in the proceedings. Such an extreme rationale is certainly not the one that stands behind the "unable to present his case" ground under the New York Convention. Furthermore, practice show that Chinese courts and arbitral tribunals have prioritized substance, justice, fairness, and equity over procedure. As a result, the inability to present the case has rarely been raised as a defense in the recognition and enforcement of arbitral awards. Furthermore, a peculiarity of the Chinese mechanism concerning the recognition and enforcement procedures is represented by the Prior Reporting System, which is something we cannot find in any of the other four jurisdictions, and according to which a lower court must ask the opinion of the higher court in case it is considering about denying the recognition or the enforcement of a foreign award. And, in turn, the higher court would have to refer the case to the Supreme Court to make a final decision on the matter. This mechanism is supposed to enhance the overall procedure of the awards enforcement but it is also true that it could be extremely time consuming.

All jurisdictions differ on the time limit within which the interested party may seek the enforcement and recognition of the award, with Brazilian law applying to arbitration the general rule on the time limit for exercising a specific right (statutory limitation period for initiating proceedings), once a *res judicata* decision is rendered, which entails that the winning party has the same amount of time to initiate enforcement proceedings, whereas recognition applications are not time-barred. According to Russian law, once a final arbitral award is rendered, a party has a three-year period to apply to a competent Russian court for

exequatur whereas under South African law there is no specified time limit for filing an application for the recognition and enforcement of an arbitral award.

6.14 Public policy

It was inevitable to note that the five countries have interpreted and applied public policy differently. This is because, in general, the content of public policy is determined by the core political, legal, moral, and economic values espoused by the relevant society, culture, and legal system in a particular moment in time. The connotation given to "public policy" by the five countries is that of the national public policy, notwithstanding the fact that the notion promoted under the New York Convention was that of international public policy, precisely to ensure a more coherent application of the Convention, is in line with the attempt of the Convention's drafters to create a pro-enforcement atmosphere for international commercial arbitration.

It is worth noting that legal systems oftentimes do not contain a fixed definition of public policy. This is true for all the jurisdictions involved in the study, leaving the connotation of such a notion to the interpretative mandate of courts, with the support of legal commentators and scholars. This, nonetheless, makes the very content of public policy uncertain and easy to adapt. It must be brought to the attention that all countries have showed a tendency to narrow down the concept of public policy when using it within the meaning of the New York Convention, especially in the last years.

So, in Brazil, public policy has been declined as the "State's most basic notions of morality and justice",[1115] with the clarification that it is not any kind of breach of local law that implies violation of public policy. In fact, the foreign decision must be found to infringe the fundamental values of Brazilian legal culture to be refused on a public policy ground. A further clarification on the public policy notion comes from a decision of the STJ, which has drawn up a list of eleven areas of law that are considered sensitive to Brazilian public policy, and this includes, as expected, constitutional law and constitutional rights, but also procedural law and formal validity of the acts (especially regarding consent).

The fundamental values enshrined in the Constitution are crucial in determining public policy also in South Africa, which means that such a notion is influenced by values as human dignity, equality, human rights and freedoms, non-racialism, and non-sexism which are all underpinned by the 1996 Constitution of the Republic. The common law

[1115] Barreira Lins (n 318).

influence on the South African legal system must not be neglected, especially on the construction of public policy. As a matter of fact, in line with other common-law jurisdictions, the public policy defence is invoked only in the most compelling of circumstances, as in case the award has been induced or affected by fraud or corruption or if it caused substantial injustice.

Surprisingly, India, the most common law-oriented legal system of the five, has interpreted the public policy defence differently with respect to its common law pairs. The construction of public policy has been a troubled one, maybe the most problematic of the five, and which despite the attempt of the Supreme Court to clarify and reduce its scope its application is still too broad as it covers a wide range of issues, from "patent illegality" (which may be invoked in a number of occasions, as when no reasons are given for an award; an arbitrator decides questions beyond a contract or his terms of reference; and if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or is based on documents taken as evidence without notice to the parties), "fundamental policy of Indian law", intended as a contravention of a law protecting a national interest, or disregarding orders of superior courts in India or principles of natural justice to "most basic notions of morality or justice", a far-reaching notion that is invokable when award "shocks the conscience of the court", which in turn is extremely suitable to the court interpretation.

Russia and China are the two jurisdictions which have strategically used the public policy defence to protect State owned enterprises, to the detriment of foreign creditors. Nonetheless, the courts of both jurisdictions have recently shifted to a less protectionist policy to meet the spirit of the New York Convention. In Russia, the Supreme Commercial Court's Presidium has issued precious instructions that give content to the public policy defence and set out some boundaries, in the aim of guiding courts on the interpretation and application of public policy. So, according to Letter No. 156 of the said Presidium, the enforcement of an award may be refused if it violates fundamental legal principles, which are of particular social and public importance and lay at the heart of the economic, political and legal order of the State, and when the award entails actions directly prohibited by Russian imperative norms (art. 1192 of the Russian Civil Code); or in cases such actions violate the sovereignty or security of the state, affect the interests of major social groups, and breach the constitutional rights and freedoms of private parties. Albeit being still a broad conceptualization the tendency is that of narrowing down the public policy defence, which should not be "catch-all ground" to broadly include anything that would violate the fundamental principles of Russian law.

Under Chinese law, public policy is mostly linked to the "social and public interest of China"[1116], which again is a broad and flexible concept, open to courts' interpretation judiciously used by courts in the past to favour local and state enterprises. Thanks to the supervisory work of the SPC, which has worked hard to make China a pro-enforcement jurisdiction in arbitration, the public policy ground has not been invoked much by Chinese courts to vacate foreign arbitral awards. It appears that judges should be nonetheless more educated on the modern standards of arbitration and consequently, on the interpretation of arbitration notions which are more in line with international practice.

Public policy has always been a flexible concept in constant need for interpretation, but while interpreting the same, it is crucial to strike a balance with other principles, especially the ones of minimal judicial intervention and party autonomy. Thus, it is the judiciary's grave duty to uphold the spirit of arbitration, especially in relation to significant unsolved issues related to the articulation of the public policy exception. The public policy ground should be interpreted narrowly to avoid the risk that a genuine defence turns into an insuperable wall, making all kind of Conventions on the enforcement of foreign arbitral agreements and foreign awards useless. The best strategy for the development of international arbitration should be that of balancing national sovereignty with the spirit of the New York Convention.

[1116] General Principles of Civil Law 1986 art 150.

PART III
Towards the BRICS Common Centres for Dispute Resolution

Chapter 1. The reasons behind the project of establishing the new BRICS centres

Considering the very diverse situation described so far, where the differences among BRICS in legal systems, legal traditions, languages, cultures are clear, it is fully intuitable that various kinds of misunderstandings -possibly related to translation errors- and legal misconceptions, will not be long in coming. Therefore, as mentioned in the introduction to this dissertation, investors and business partners operating under the BRICS umbrella will need to turn to a genuinely neutral, flexible, and reliable dispute resolution mechanism that can guarantee efficient dispute resolution in line with the needs of the parties, including in terms of time and (most importantly) cost. The business relationship between the disputing parties will only benefit from the use of a method of dispute resolution that is not strictly oppositional and antagonistic, and which, just like arbitration or mediation, avoids a direct confrontation between the parties, thus facilitating the renewal and continuation of the business partnership that, in this manner, can endure over time. This takes on special relevance within the broader consideration surrounding the long-term cooperation of the BRICS, which aims at building up a peaceful, prosperous, and united community.[1117]

It has already been reiterated that the parties, especially in international trade and foreign investment, generally tend not to resort to state courts and domestic legislation but do prefer to submit the resolution of any such disputes to arbitral institutions. The same is true for the countries that make up the BRICS group. The finding was confirmed by a recent study on contract law in the BRICS countries, which showed that "with reference to the resolution of contractual disputes, arbitration is the most widely used tool",[1118] reflecting in this sense the practice of traders and business associates belonging to the BRICS countries to prefer alternative justice to that of traditional state courts. What deserves a separate enquire concerns the reasons that prompted academics, experts, and practitioners, who belong to and operate within the BRICS countries, to consider the establishment of a whole new body dedicated specifically to BRICS disputes and BRICS disputant parties. Indeed, the international scene is already abundantly dominated by arbitration institutions that offer dispute resolution services in both commercial and investment matters. Among the most

[1117] II BRIC Summit, Brasilia Declaration (Brasilia, 2010) point 5 'To construct a harmonious world with ever-lasting peace and common prosperity",.
[1118] Mancuso and Bussani (n 2) 360.

influential and widely used arbitral institutions are the ICC, which has branches in different parts of the world, including the BRICS countries[1119]; the LCIA, the SCC, the AAA, the HKCIA, the SIAC and finally, the International Centre for the Settlement of Investment Disputes (ICSID) one of the leading centres for investment dispute resolution. No less important is the dispute settlement mechanism within the WTO. However, as mentioned in a previous chapter, the actors entitled to take part in proceedings before the Dispute Settlement Body are exclusively the member states of the organization.[1120] This means that businesses and traders from one member country will not be able to directly file a complaint against another member country but can only persuade their own government to do so. Following this mechanism, businesses would have to make requests to their own governments to intervene diplomatically in foreign countries, thus paving the way for interstate conflicts that, especially in the BRICS context, where the political relations among some of its members are already quite fragile, should be duly avoided. Whereas the overall functioning of the WTO gives a relevant, if not preeminent, role to the political strength and diplomatic capabilities of each state, the ICSID system, for example, allows a direct confrontation between a state and a private investor, totally depoliticizing the dispute[1121]. In principle, then, the ICSID offers a more neutral forum and encourages a direct contact between the parties. Yet, as will be discussed, the ICSID and its administration have generated discontent in the BRICS countries and, more generally, such discontent has been complained about by developing countries, which have in fact questioned the genuine neutrality of the forum, as well as that of the most "Western" arbitration forums mentioned above.

As argued by the Legal Forum itself, the idea of setting up a new dispute resolution centre specialized in intra-BRICS disputes stemmed primarily from the need to establish a "fair and efficient dispute resolution mechanism with BRICS characteristics within (the) BRICS countries" to resolve the increasing cross-border disputes.[1122] The project was subsequently supported by a series of additional and fundamental criticisms directed at the existing framework of commercial and investment dispute resolution that emerged during

[1119] The list of countries where ICC has offices and conducts its activities can be found at the official website <https://iccwbo.org/national-committees/> accessed 26 January 2024.
[1120] Understanding on Rules and Procedures Governing Dispute Settlement Understanding (DSU) art. 3. 3. See also the ruling of the Appellate Body in United States - Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimps), WT/DS58/AB/R, Report of the Appellate Body, October 12, 1998, para. 101.
[1121] On the depoliticization of the ICSID Convention see Shihata Ibrahim, 'Toward a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 ICSID Review - Foreign Investment Law Journal 1.

[1122] II BRICS Legal Forum, Shanghai Declaration (Shanghai 2015) point 8.

the New Delhi conference on 'International Arbitration in BRICS: Challenges, Opportunities and Road Ahead' (hereinafter the 'Conference') hosted in 2016 by the Government of India, in collaboration with the Indian Council of Arbitration and Federation of Indian Chambers of Commerce & Industry. For most, as mentioned, the Conference signalled a great discontent from BRICS with the way international arbitration was administrated, and in this regard, the following interesting and unexpected aspects have emerged.

Although one of the most acclaimed features of international arbitration is its neutrality, criticism has been raised by the BRICS experts (and particularly by the Indian government) concerning alleged regime bias [1123] and partiality of the existing arbitral tribunals towards developing economies. Indeed, the Indian experiences in *Dabhol Power Project*[1124] and *White Industries,*[1125] two arbitration cases (2005; 2010) showed how, being dominated by the Western World, the investment arbitration system often failed to take into consideration specific public interests pursued by developing countries, thus exposing the double standards of the world economic order.[1126] Such bias, especially in investment arbitration, has proved to be an issue of grave concern. According to Pinky Anand, Additional Solicitor General of India, "there still is a widespread prejudice on the part of many Westerners who perceive that third world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. A Western arbitrator may pay greater credence to a Western witness rather than to an Asian one, even where the local witness may be a recognized expert in his or her field".[1127] Anand further asserted that "Western arbitrators, in their arrogance, hold no respect for the laws of non-western countries and often tend to simply ignore entirely the law chosen by the parties or, worse, opine it to be meaningless".[1128] These are undoubtedly strong accusations that should be duly proven, but the allegation alone speaks volumes about the view that non-Western parties have of arbitration, particularly in the case of investment arbitration, where the private investor is frequently confronted with the state and, without a doubt, the interests of

[1123] Pinky Anand, 'International Arbitration in BRICS', in Book of Abstracts 2018 V BRICS Legal Forum Cape Town, South Africa 23 – 24 August 2018.
[1124] American Arbitration Association, International Centre for Dispute Resolution, AAA Case No. 50 T195 00509 02.
[1125] *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award (30 November 2011). As this is a complex case, for a more in-depth analysis please refer to Patricia Nacimiento and Sven Lange, 'White Industries Australia Limited v The Republic of India' (2012) 27 ICSID Review - Foreign Investment Law Journal, 274.
[1126] Anand (n 1123).
[1147] Anand (n 1123) 48-49.
[1128] ibid. Disrespecting the choice of law expressed by the parties is a huge procedural violation, which may represent a solid ground to request the setting aside or even the annulment of the arbitral award.

which the parties are bearers -private on the one hand and public on the other- are opposing and irreconcilable.

A further downside of international arbitration in the eyes of BRICS and other developing countries concerns the inequitable representation of arbitrators on panels, which results in a lack of empathy and, especially in investment arbitration, in a lack of due consideration of the socio-economic conditions prevailing in developing countries. In fact, the international arbitration community has historically been, and largely remains, relatively organic and difficult to penetrate. As a matter of fact, even Western academics, experts, and practitioners in the field of arbitration have admitted and lamented the lack of diversity and the uneven representation of arbitrators in the arbitral lists.[1129]

Diversity is a particularly sensitive aspect of arbitration that has finally received due attention in recent years. First and foremost, diversity enhances the quality of the proceedings by providing alternative perspectives and assorted experiences that contribute to improve the decision-making process. Besides, as argued in the previous chapter, the BRICS arbitral laws acknowledge that the parties do have the right to appoint arbitrators who are sympathetic to their point of view and to decide for themselves what characteristics the "ideal arbitrator" should have to be chosen and matched to the resolution of their case. Given that the parties to an international arbitration are, by definition, *diverse* in terms of nationality, culture, origins, language, values, and so on, there must be a larger and more diverse pool of arbitrators from which the parties can choose according to their own preferences. Presumably, the choice will lean towards those arbitrators who most closely resemble them. Consequently, the lack of adequate diversification of the list of arbitrators may jeopardize the parties' free choice as they may be impaired from finding an arbitrator that truly reflects the characteristics, empathy, and affinity they seek. Even worse, if only one of the parties found itself in such a situation, there would not only be an ethical issue of unfairness, but also a violation of that neutrality that arbitration is supposed to ensure. As a result, the lack of diversity in arbitration threatens due process, both in terms of equal access

[1129] See Joshua Karton, 'Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration' in Giorgio Colombo and others (eds) *Sustainable Diversity in International Arbitration* (Edward Elgar 2022). Such a recent work considers diversity in all its forms - demographic, legal, cultural, and philosophical - and investigates how best to develop an international arbitration order that is not only tolerant of diversity, but that supports and promotes diversity in concert with harmonised practices. It is also worth noting the now-famous "African Promise" proposed by lawyers, arbitrators, professors, and other professionals in response to the under-representation of Africans in international arbitral tribunals, with the goal of promoting diversity and inclusiveness in international arbitration, improving the profile and representation of African arbitrators, and increasing the number of appointments of African arbitrators, especially when the disputes have a link with Africa. For more on the topic refer to Fahira Brodlija, 'Innovative Solutions for an Age-old Issue: How Transparency and Data Analytic Tools can Improve Diversity in International Arbitration' (2021) 5 Journal of Strategic Contracting and Negotiation 24.

to sympathetic arbitrators and to how arbitrators understand and judge the parties' conduct.[1130] All the above can only erode the overall legitimacy of international arbitration, contributing significantly to create the need for the establishment of a BRICS centre capable of ensuring greater impartiality and fairer rules, a centre that is closer to the needs of those countries that, impaired and underrepresented in the international arena, would create, manage, and utilize it. Another worrisome aspect, especially in investment arbitration, concerns its costs. Party costs (including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk of the overall costs of the proceedings (83% on average).[1131] Investment arbitrations generally involve treaties (bilateral or multilateral) entered between a private investor and a state; in fact, they are "hybrid" agreements somewhere between the public and private spheres. But while investors usually are rich conglomerates perfectly capable to cope with major expenses such as those required by investment arbitration, a state is not always in the position to bear such huge expenses. In truth, the high cost of international arbitration puts a strain on public money, especially in emerging and developing countries where per capita income is low and where public funds could certainly be better placed. An investment arbitration centre that is aware of such conditions, may be more incline to adopt emerging countries-friendly fees, making investment arbitration more accessible and less expensive.

The reasons presented here mostly explain why the legal communities of BRICS have started pondering the idea of establishing a new BRICS-dedicated centre of dispute resolution. To sum up, the arbitration landscape presented itself to the BRICS as biased, cost consuming and highly underrepresented by emerging and developing countries. A clear need to reform has emerged, especially in the existing investor-State arbitration mechanism under the ICSID and under bilateral investment treaties to account for the unique circumstances and challenges of emerging economies.

Finally, the proposal to create its own arbitral centre is yet another example of the BRICS nations' dissatisfaction with the current international institutional landscape. Moreover, geopolitically speaking, resolving trade and investment disputes that arise within the BRICS - and then potentially between BRICS and low-income countries - in an efficient

[1130] It is exactly this impression that has given rise to the calls for the elimination of party-appointed arbitrators. See Catherine A Rogers, 'Eliminate or Celebrate?: Party-Appointed Arbitrators and Cognitive Bias' (2022) 64 Harvard International Law Journal 51.

[1131] ICC Report on 'Decisions on Costs in International Arbitration'– ICC Arbitration and ADR Commission, ICC Dispute Resolution Bulletin 2015.

way, will also have important outcomes, as it would boost and bolster the position of BRICS as leaders in the age of a new world economic order.[1132]

[1132] According to Feris and Ripley-Evans, 'The BRICS nations regard themselves as the de facto vanguard of emerging economies, duty-bound to ensure that an international arbitration mechanism is developed, which has regard to factors relevant to emerging economies in the resolution of disputes.' See Feris Jackwell and Jonathan Ripley-Evans, 'Challenges, Opportunities, and Road Ahead for International Arbitration in BRICS' (*Lexology*, 1 September 2016) <www.lexology.com/library/detail.aspx?g=a5432c38-44ca4283-ac7d-3f92d46f2766> accessed 26 January 2024.

Chapter 2. The BRICS common centres for dispute resolution: the state of the art

The BRICS Legal Forum took the lead in proposing a joint dispute resolution mechanism first, and in establishing the BRICS Centres of dispute resolution then. After all, one of the main goals pursued by the Legal Forum is to contribute to the development of a legal and policy framework conducive to the growth of business and trade in the BRICS countries, thereby ensuring greater opportunities for investment, trade, and employment.[1133] Better means of dispute resolution contribute to improving the business climate and, as a result, to achieving the BRICS' and, by extension, the Legal Forum goals of economic, financial, and trade cooperation.

It was at the second Legal Forum, held in October 2015 in Shanghai, that it was decided to establish the Shanghai Centre for BRICS Dispute Resolution, due to the development of economic relations between the five countries, which, as detailed in the Shanghai Declaration issued at the end of the meeting, made it necessary to set up a fair, efficient and BRICS-reflective mechanism to resolve the growing cross-border disputes.[1134] The establishment of such an institution had to mirror the close relations between the BRICS countries while providing a further instrument for increasing economic cooperation.[1135]

The first BRICS Centre was born within the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre) and created with the support of the China Law Society and other members of the BRICS legal community. It appears that the BRICS Centre in Shanghai currently has jurisdiction over commercial disputes between BRICS litigants but not on investment matters,[1136] notwithstanding the aforementioned criticisms addressed to international arbitration in general and investment arbitration in particular, which became clear only at the New Delhi Conference, hence one year after the establishment of the Centre in Shanghai.

When the Shanghai experiment was still at the very early stages, the third BRICS Legal Forum, held in New Delhi, in September 2016 led to the establishment of the "New Delhi International Centre of Dispute Resolution of BRICS countries and other developing economies" and already prospected the establishment of new arbitral centres in all of the

[1133] I BRICS Legal Forum, Brasilia Declaration (Brasilia, 2014).
[1134] II BRICS Legal Forum, Shanghai Declaration (Shanghai, 2015) point 8.
[1135] Feris Jackwell, 'An international Arbitration System for BRICS – Is It an Imperative for Further Economic Cooperation' (*Lexology*, 18 August 2016) <www.lexology.com/library/detail.aspx?g=6541959b-3054-4821-a55a672e00c4776c> accessed 26 January 2024.
[1136] Fernando Dias Simões, 'A Dispute Resolution Centre for the BRICS?' in Rostam J Neuwirth, and others (eds), *The BRICS-Lawyers' Guide to Global Cooperation* (CUP 2017).

five countries to be "structured in a manner so as to secure opportunities and promote excellence within the BRICS".[1137] Unfortunately, very little is known about the New Delhi centre. Unlike the Shanghai centre, which has a dedicated BRICS Dispute Resolution website[1138], where it is possible to read about the model clause, the institutional rules, how to apply, fees and list of arbitrators, the Indian centre does not provide any BRICS related information, nor it has a dedicated website.

Overall, the Legal Forum approach to the establishment of the BRICS Centres does not seem to follow neither a definite design nor a clear strategy. It is not immediately discernible whether the initial plan was to create a full-fledged BRICS dispute resolution system in which branches of the first Centre would be progressively established in the other BRICS countries in the likeness of the first one, i.e., the one in Shanghai, or whether the Centres were meant to be autonomous, unconnected, and independent from one another. Trivially, the doubt stems, in the first place, from the fact that the names of the two Centres do not match. The Shanghai Centre makes it clear, right from its name, that the accepted disputes will concern only the BRICS, whereas the New Delhi Centre opens to other developing economies as well. Moreover, in the aftermath of the establishment of the New Delhi Centre, some commentators specifically pointed out the need "not to duplicate the efforts" because "the Shanghai Centre already deals with BRICS disputes in trade matters",[1139] foreseeing in this sense the possibility of dedicating the new Centre in New Delhi to the resolution of investment disputes, which had previously been excluded *rationae materiae* from the jurisdiction of the Shanghai Centre.

Moreover, the establishment of a Governing Council, charged with the political direction of the Centres, and that of an Arbitration Board occurred only in 2017 with the Moscow Declaration, which for the first time, set the aim of creating common institutional rules to coordinate and merge the operations of the BRICS Dispute Resolution Centres already established in Shanghai and New Delhi, as well as the proposed Centres for Brazil, Russia, and South Africa to create a wider framework of neutrality for disputes arising within BRICS, and to set in motion a time bound plan of action for its implementation.[1140] Whereas

[1137] III BRICS Legal Forum, New Delhi Declaration, (New Delhi, 2016).

[1138] The Shanghai Centre of Dispute Resolution website is accessible at <http://www.shiac.org/BRICS/index_E.aspx> accessed 26 January 2024.

[1139] Feris and Ripley-Evans (n 1132); Dias Simões (n 1136). See also Katarzyna Kaszubska, 'A BRICS-only Arbitration Forum Will Not Be the Panacea Imagined' (*The Wire*, 9 September 2016) <http://thewire.in/64641/a-bricsonly-arbitration-forum-will-not-be-the-panacea-they-are-hoping-for> accessed 26 January 2024.

[1140] IV BRICS Legal Forum, Moscow Declaration (Moscow, 2017) point 2; V BRICS Legal Forum, Cape Town Declaration (Cape Town, 2018) points 5 and 6 where it is clear that the new Centres in Brazil, Russia and South Africa will have to adhere to the same Rules and Procedures established by the relevant Committee

the 2018 Cape Town Declaration defined the approach behind the creation of the network of Centres operating within the five countries under common arbitration rules and procedures to be packaged by a group of experts identified by the Legal Forum itself.

It is unfortunate that such fundamental clarifications came out only two years after the establishment of the first Centre in Shanghai, confirming the initial suspicion that the project was not well defined at an early stage. It remains unclear, however, whether the Centres should all have the same expertise or will each have to specialize in a different area. These aspects are critical for the establishment of a Dispute Resolution Centre and would have deserved more attention long before the first BRICS centre was inaugurated. Furthermore, some relevant profiles are yet to be defined. For example, it is unclear, and has never been specified, what is meant by "BRICS disputes". What makes a dispute "BRICS"? The nationality of the parties? The subject matter of the dispute? The place of performance of the contract? The nature of the relationship between the parties? That is, whether it fits within the Group's wide range of areas of cooperation. How can the parties choose the BRICS Dispute Resolution Centres if they are unable to qualify their dispute as such?

The purpose of the BRICS Centres to offer arbitration services could also have been clarified in advance. This clarity would have enabled the centres to be better presented to the potential users who are already confronted with a wide range of institutions to choose from. Apparent small details as the name of the institution give important information to the users. Why was it decided to name the Centre in Shanghai generically as "BRICS Dispute Resolution Centre" and not already as "BRICS Arbitration Centre", a denomination which would have spelled out the scope and type of services offered by the centre at the very outset, giving hints to the parties about what they could have expected from using it. The answer to the last question comes from one of the Legal Forum's most recent Statements, that of Rio de Janeiro of 2019, which raises the possibility for the BRICS Centres to also offer mediation services and even to establish a "BRICS+ Dispute Resolution Institute" for emerging markets and developing economies. For another, the Declaration emphasizes the importance of completing the now-clear plan to establish a network of BRICS Centres in each of the five member countries.[1141]

Several years have passed from the inception of the project, but unfortunately, a lot is yet to be done to make the centres authentically "BRICS", without mentioning the consequences potentially arising from its enlargement. Just to make an example, taking a

of Experts identified by the Legal Forum (point 5) and that the Legal Forum will have to approve the modalities for the establishment of a network of dispute resolution institutions in the BRICS countries (point 6).

[1141] See VI BRICS Legal Forum, Rio de Janeiro Declaration (Rio de Janeiro, 2019) points 5, 6, 7, 8, 9, 10, 12.

look at the list of arbitrators provided by the Shanghai centre (the only one that is accessible), it is possible to note how this is still characterized by a large number of Chinese arbitrators; arbitrators from the other BRICS nations are a small number, and there is still a significant part of Western arbitrators. Not that they should not be completely excluded, but they should at least represent a minority. Otherwise, the risk that the above-mentioned neutrality issues will reoccur is around the corner.[1142] Moreover, the Centre still proposes to the parties the same arbitration rules of the Shanghai International Economic and Trade Arbitration Commission within which it operates (which are similar to the ones used by other Chinese arbitral institutions) strictly in the Chinese language. At the very least, this being the BRICS Dispute Resolution Centre, the arbitration rules should have been offered in the main official languages of the member countries. Even more so, in fact, it would have been desirable for the arbitration rules to have been drafted at the very time of the Centre's creation, in consultation among the professionals, academics and experts from all the countries of the Group, so as to be shaped and elaborated synergically by their representatives, taking into account the needs and interests of the BRICS discussed above. The development of the arbitration rules is a key moment because the parties decide to select a certain arbitral institution over others also on the basis of the arbitral rules proposed and their degree of flexibility.[1143] We have reached a point that is as delicate as it is crucial: the new BRICS centres will have to compete in the broader international arbitration market and will therefore have to be chosen by the parties. What is the added value created by BRICS centres for the parties to the dispute? Why should they be chosen over other, perhaps even more established centres with a solid reputation behind them?

If the BRICS centres do not make progress in providing the kind of justice their users demand, increasingly these users will look elsewhere to resolve their disputes, and all efforts will be vain. This leads to the final considerations about the future steps that BRICS should take, both at the Legal Forum level and at the level of cooperation among Heads of State, to ensure that the BRICS centres operate efficiently, avoiding any waste of time and energy.

[1142] The new Panel of Arbitrators is constituted by 965 arbitrators. In the Panel, 604 arbitrators which take 62.59% are from Mainland China, while 361 which take the rest 37.41% are from Hong Kong SAR, Macau SAR, Taiwan region and foreign countries. All the arbitrators come from 74 countries and regions around the world, including 36 countries along the Belt and Road. The number of nationalities of the arbitrators has increased by 13 compared to the former Panel, including 10 new countries along the Belt and Road. The new Panel of Mediators is constituted by 42 mediators, including 40 China mainland mediators and 2 foreign mediators. About 11 arbitrators listed were South African, 5 Brazilian, 4 Russian nationals and only 3 Indian. The full list of arbitrators is accessible at the official website <http://www.shiac.org/upload_files/file/2021/20210816152714_0030.pdf> accessed 26 January 2024.

[1143] On the topic of Institutional Rules and the main features that make them more attractive refer to Sherina Petit, 'Choosing the Right Arbitral Rules' (*Norton Rose Fulbright*, May 2022) <https://www.nortonrosefulbright.com/en/knowledge/publications/b09ea434/choosing-the-right-arbitral-rules> accessed 26 January 2024.

Chapter 3. Thinking the next steps

As the ambitious project of establishing the five BRICS Dispute Resolution Centres - one established in each of the five BRICS jurisdictions - is underway, it becomes imperative to plan the next steps for its implementation, finally looking at the practical side of the project rather than the theoretical one. The Declarations of the Legal Forum are, indeed, filled with good intentions. However, the time has come to translate ideas into concrete action and implement a winning strategy that can lead the Centres to the success they can aspire to.

The basic assumption upon which grounding future decisions is to understand the BRICS Centres as a single, cohesive international dispute resolution agency, so that the standard and quality of services offered by them are of the same level, regardless of their location. This serves a twofold purpose: first, it ensures that all BRICS citizens have equal access to the same arbitration standards, thereby avoiding any kind of discrimination; second, it allows the rate of competition among the BRICS Centres within the broader international arbitration market to decrease, although it is inevitable for the Centres to rival each other to win the most users. Besides, arbitration, like everything that gravitates around it, is a real business. Therefore, it will also be necessary to develop proper strategies to make the Centres attractive and promote them to reach potential clients. In addition, the Centres must adopt all the necessary precautions to avoid the same critical issues and shortcomings already encountered within the arbitral institutional landscape, striving to come to grips with the clear needs of the BRICS disputing parties, some of which have already been discussed. To achieve these goals, harmonization, unity, and coordination will be the three key words that will have to guide the implementation of the project. As mentioned in the introduction to this dissertation, for the Centres and the overall arbitration system to work as shared means of dispute resolution among BRICS, they must be backed up by a common institutional and legal framework. To achieve this goal, harmonization will be required at two main levels: the first concerns the arbitral rules, the second the BRICS arbitral laws. In fact, some aspects of arbitration may be perfectly addressed through the drafting of shared arbitral rules applicable in the same manner by all the BRICS Centres; some others, will require an adaptation of the national arbitral legislations. On this last point, BRICS will need to understand what strategy to use, i.e., whether delegate each country to individually work on the adaptation and modernization of their national law on arbitration once the common goals have been established at the highest levels of the BRICS cooperation; or whether to act collectively, agreeing to adopt shared standards on arbitration to enforce when the BRICS

disputes are involved and when such disputes are seated in their jurisdiction. Nonetheless, if the first of the two strategies may be implemented by means soft laws e.g., in the form of a Declaration, to which the BRICS are perfectly accustomed to, the second would require a higher level of commitment and mutual legal obligation, which can only be achieved through the more official venues of international cooperation, as by using international treaties or agreements, which nonetheless BRICS has proved to be more reluctant to use.

There are many steps to be taken to realize the said aspirations, some of these will be outlined below.

3.1 Harmonize institutional building rules of the BRICS dispute resolution centres

In order to unify the standards of BRICS dispute settlement centres, so that parties can obtain the same level of service regardless of the physical location of the centre, it will first be necessary to harmonize the institution building regulations of the five countries.[1144] However, as emerged from the comparative analysis proposed in the previous chapter, the BRICS regulations on the establishment and approval of international trade dispute settlement bodies are significantly different, with Russia having a strict licensing regulation, which entails that the arbitral body that is seeking to operate in Russia must be first authorized to do so. It is worth recalling here that such an authorization is granted upon the recommendation of the Council for the Improvement of Arbitration on the criterion of the "widely recognized international reputation" of the applicant institution. So far, only four foreign arbitration institutions have been granted permission to operate in Russia, whereas all the awards issued in arbitration proceedings operated by unlicensed institutions are considered to have been issued in violation of the arbitration procedure established by the Russian Federal Law on Arbitration,[1145] which qualifies as a ground for the annulment of the arbitral award.[1146] On the contrary, in Brazil, foreign arbitral institutions are fully authorized to administer arbitrations and no special license is required under local law; nor there is any official registration or accreditation system for arbitral institutions, whether domestic or international. The variety of approaches in this regard will undoubtedly require BRICS experts to deepen their study and exchange of knowledge on their respective

[1144] Yundong Chen, 'Suggestions on the Establishing Dispute Resolution Mechanism in BRICS Countries' in Book of Abstracts 2018 V BRICS Legal Forum Cape Town, South Africa 23 – 24 August 2018.
[1145] ICA Law 1993 art 52 par 15.
[1146] Russian Code of Civil Procedure 2002 art 233.

institution building standards, eventually leading to the harmonization of such standards, at least for what concerns the making of the BRICS centres.

Alternatively, to avoid all the intricacies related to the physical establishment of the centres, it may be more advantageous to rely on the already existing Shanghai centre of dispute resolution and concentrate all the efforts into making it the main geographical reference point for all the BRICS-related disputes. Holding that the parties may opt to conduct the proceedings at the Shanghai facilities in-person, this would entail that any other matter that would have been handled physically by the BRICS branches will be transferred online, including the hearings, documents submissions, counselling and so on. Furthermore, going virtual reduces travel costs and logistical challenges for the parties, their legal representatives, and witnesses thus translating into a great advantage. This is certainly a bold suggestion that goes on a different direction than the one proposed so far by the Legal Forum, but it would certainly respond to the more practical needs of both the centres and the parties. On the other side, for this option to be put into practice, the Shanghai centre must be supported by adequate logistics to welcome parties coming from the other BRICS countries; arbitral rules that fairly address all the aspects related to holding most of the centre's activities and operations remotely; and a sensitively modernized *lex arbitri*, capable to be to accommodate with the new format of the arbitral institution.

Should the choice fall on the physical realization of centres, in an era of globalization, digitalization, and widespread use of artificial intelligence, the establishment of a dispute resolution institution cannot, in any case, disregard the adoption of advanced knowledge, technology, and equipment to meet the needs of the times. Besides, the parties involved in international trade disputes are the first to seek out and promote such services, as videoconferencing, hearing room technologies, or the use of e-documents.[1147] As a result, the establishment of the new BRICS Centres will need to consider both current and future needs in order to present themselves as appealing and innovative to their users.

Another important aspect to assess when dealing with institution building concerns the level of the institution's involvement in the case administration. As a matter of fact, arbitral institutions all adopt different and varied manners for managing and administering

[1147] According to the 2021 International Arbitration Survey conducted by the Queen Mary University of London 'The increase in the use of virtual hearing rooms appears to be the result of how the practice of arbitration has adapted in response to the Covid-19 pandemic. If a hearing could no longer be held in person, 79% of respondents would choose to 'proceed at the scheduled time as a virtual hearing'. Only 16% would 'postpone the hearing until it could be held in person', while 4% would proceed with a documents-only award'. See 'Adapting Arbitration to a Changing World by the School of International Arbitration' (2021) Queen Mary University <2021 International Arbitration Survey: Adapting Arbitration to a Changing World - School of International Arbitration (qmul.ac.uk)> accessed 26 January 2024.

arbitrations. On this wise, it should be decided for the BRICS arbitral centres either to follow the HKIAC "light touch" approach or to look up at the ICC one, which privileges a more active involvement in arbitration proceedings. One of the highly regarded matters that falls within the institution's involvement levels concerns the scrutiny of the award. The ICC or SCIAC provide for the mandatory scrutiny and approval of draft awards of the tribunal before they are issued. This allows the award to be free of those flaws in form or content that could cause problems at the enforcement stage. Other institutions, such as the HKIAC, the LCIA, and SCC do not review nor approve the awards, leaving the burden up to the tribunal to issue an error-free decision. The disagreement stems from differing perspectives on the importance of the inspection process. To put it simply, while some perceive it as beneficial, others see it as a waste of time and money. BRICS should determine which positioning they want to privilege on this divide.

3.2 Draft and unify the arbitration rules of the BRICS dispute resolution centres

The BRICS centres will certainly need a unified and cohesive set of arbitration rules so that, regardless of the specific centre selected from the five, all BRICS arbitration proceedings will be subject to the same regulatory and legal regime. The creative phase of the rules is a crucial moment in which the identity of the BRICS centres is created. Identity in which the parties will have to recognize themselves for the BRICS Centres to win the confrontation with other arbitral institutions. This explains why the arbitral rules should be packaged by a group of experts from the five countries, taking in due consideration the potential parties' needs and the mandatory, overriding rules contained in the national legislations of the five jurisdictions. Moreover, to make the new arbitration rules fully in line with the BRICS users' needs and expectations, it would be desirable to conduct preliminary research to assess the parties' preferences, involving in the survey business, entrepreneurs, and professional associations.

The factors to be taken into consideration when creating the arbitration rules of an institution are several: from constitution of the tribunal, to the degree of confidentiality to be applied to arbitration proceedings, materials, documents, and awards; the maximum timeframe for dispute resolution; the importance attached to cost savings; and again to the possibility of arranging for prior inspection of the arbitral award by the institution before its official issuance (which usually consists of checking that the award is free of formal and typographical errors). Each arbitration institution has its own distinct characteristics and

predilections.[1148] For example, although confidentiality is commonly regarded as one of the most important advantages of arbitration compared to court proceedings (which are public by definition) not all the arbitral rules of the institutions, even the most important ones, include a strict obligation of confidentiality. As a result, understanding the potential parties' habits and preferences on the matter is critical. Besides, an express provision on confidentiality contained in the arbitral rules would cope with the potential lack of a default rule in the national legislation of the five countries when identified as the legal seat (as it is the case for Brazil and South Africa), which may contribute to instil confidence in the parties in choosing one of the BRICS centres.

The rules of the Centres will certainly need to be flexible and guarantee party autonomy, leaving ample room for the parties to manipulate them to meet the circumstances of the case. Arbitration rules will also need to consider the different cultures and legal backgrounds of the BRICS parties to the dispute, to ensure that the proceedings are efficiently administered and in line with their expectations, especially with regard to the characteristics of the trial and pre-trial phases. In order to meet the parties' ever changing needs and preferences, the arbitral rules of BRICS centres should also keep up with the recent developments in arbitration not only on the field of technology, as already mentioned, which means that reference should be made in the arbitral rules to the parties' potential use of instruments as videoconferencing, online counselling, virtual exchange of documents and virtual hearings, but also to the most recent innovations in the field of arbitration as the use of emergency arbitration, which involves procedures designed to expedite the arbitral proceedings in exceptional circumstances,[1149] or early determination of disputes and summary disposal, which are intended to save time and costs associated with a full arbitration process, especially when certain claims or issues are deemed to be clear-cut or legally unsustainable. Moreover, it would be desirable for the arbitral rules to fix a time-limit to issue the award to respond to procedural speediness and efficiency, holding that the parties may rearrange the said limit before or throughout the proceedings.

[1148] Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer Law International 2013) 57.

[1149] According to a Survey of International Arbitration Users conducted in 2015, 92 per cent of respondents were in favour of the adoption of a simplified 'fast track' arbitration procedure for claims under a certain value. See 'Improvements and Innovations in International Arbitration' (2015) Queen Mary University of London. The 2018 survey conducted by the same University, also reflected this data with increased preference for expedited procedures for claims, regarded as one the key improvements that would lead to greater use of international arbitration across all industries and sectors. See 'The Evolution of International Arbitration' (2018) Queen Mary University of London. Both surveys are accessible at the official website. Moreover, many Institutional Rules already provide for the use of such mechanisms e.g., SIAC Rules of Arbitration 2016 s 5, which arranges for the use of emergency procedures where the value of claims does not exceed $6 million; whereas the LCIA Rules 2020 arts 9A and 9C recognize other ways to expedite proceedings when circumstances permit.

The BRICS arbitral rules will also have to establish a common approach to the constitution of the arbitral tribunal, the appointment of the arbitrators, the procedure for their potential challenge and replacement, and whether the institution may act as appointing authority, coherently with the provisions of the BRICS national legislations discussed above. A separate discussion on the arbitrators and the list of arbitrators shall be conducted in the dedicated paragraph, as the creation of the list of arbitrators is not generally included in the arbitral rules of an institution. On the other side, in terms of the arbitrators' powers, the arbitral rules must establish whether the arbitrators are entitled to issue interim measures and interim relief, what types of relief can be sought and under what circumstances.

In the formulation of the arbitral rules, a critical consideration pertains the determination of the applicable "law" or the applicable "rules of law" to the substance of the dispute. The point at issue is a sensitive one because, as emerged from the above analysis, not all the BRICS national legislations allow for the merits of the dispute to be resolved by using non state laws, as exemplified by the Chinese approach. Consequently, if the arbitral rules endorse the utilization of soft laws for dispute resolution, there exists a discernible risk that the resulting award may encounter challenges when its enforcement is sough within the Chinese jurisdiction. Now, to resolve the issue at hand, considering that the parties are generally more inclined to choose state laws over "rules of laws" as they are more predictable and dependable, whereas the second ones are inherently uncertain and discretionary, it might be strategically advantageous to allow the parties to select any "applicable law" for the resolution of the dispute, provided that such law is a state law. This would meet both the parties' tendency and the Chinese limitation.

Persisting with the inquiry into the matter of the applicable law, it is imperative for the arbitral rules to delineate a course of action in case the parties have not expressly indicated a preference. This determination necessitates due consideration of the diverse approaches endorsed by the five national laws to preclude, again, potential impediments to the enforcement in subsequent stages. In alignment with the discernments derived from the comparative analysis, it is plausible for arbitration rules to stipulate that, in the absence of a specified choice by the parties, the responsibility of ascertaining the applicable law shall vest in the arbitral tribunal, and that such a determination may be effectuated through the *voie direct* method, given its prevalence and acceptance as the predominant approach among the five jurisdictions.

In line with the trend highlighted in the previous chapter, the BRICS arbitral rules should also encourage the parties to consider the settlement of all or part of their dispute either by negotiation or through any form of amicable dispute resolution methods such as

mediation. Nonetheless, it should be adequately evaluated whether to integrate the mediation option into arbitration, thus allowing the same tribunal to mediate the dispute upon the Chinese example, or to implement the Russian approach consisting in keeping separate mediation and arbitration. In this latter case, the arbitral centres may handle the mediation according with *ad hoc* mediation rules, which again should be collectively drafted and equally applied by the BRICS Centres. It would also be advisable for the Centres to hold a diversify list of mediators who may be called to adjudicate the dispute in case the parties decide to resort to mediation before or during the course of the arbitration.

Due regard must also be devoted to the costs and fees' structure, which again are ones of the most distinguishing features of an arbitral institution. Other than deciding which methodology to use for calculating arbitrator' fees and administrative fees,[1150] all the BRICS centres should certainly adopt the same approach to costs allocation in order to level the competition among them within the wider international arbitration market.

Moreover, the divergences previously highlighted in the handling of languages should be overcome in view of the creation of common rules and it would be desirable for such rules to provide that, unless otherwise agreed by the parties, the tribunal will choose the applicable language considering the circumstances of the case, as the nationality of the parties, the language of the contract and that of the applicable law. The final suggestion given here is that once drafted, the arbitral rules should be uploaded on the online website of the centres so that they are accessible to the parties for consultation and translated into the main languages of the BRICS countries, since they are primarily addressed to the BRICS national disputing parties. This, again, could make a difference in the parties' choice, considering the wide pool of arbitral institutions internationally available.

3.3 Diversify the arbitral lists

If the institutional arbitration rules provide a basis for the arbitral procedure, it is the arbitrators' attitude that determines how the arbitration will be conducted. To start with, the Centres should fix some shared criteria to determine who is accredited to operate at their institutions. The arbitral lists of the BRICS Centres will then have to be constructed in such a way as to ensure respect for neutrality which, just as reported by the BRICS themselves,

[1150] There are many and diverse methodologies to fix the arbitration costs. Many institutions, like the ICC, SCC, and SIAC, assess administrative and arbitrator fees based on the amount in dispute (ad valorem). Others, such as the LCIA, charge administrative and arbitration fees depending on time spent and hourly rates. Institutions that charge on an ad valorem basis generally offer cost calculators on their websites to help parties estimate their arbitration expenses beforehand. Institutions that charge based on time and hourly rates rely on their own data to provide insights.

has often been lacking within the more "Westernized" arbitration institutions. To this end, arbitrators belonging to the five BRICS nations should be represented in the same percentage, regardless of the geographic location of the Centre. Diversity can also be secured by ensuring that arbitrators have diverse training, professional backgrounds, legal cultures, and personalities, while also taking gender and age into account.[1151] It will also be vital to ensure that new arbitrators are fit for the position they will play, demonstrating that they not only have the necessary expertise, but can also instil trust in the parties. The goal is to guarantee that each party feels fairly and equally involved in an arbitration process that is free of bias and prejudice. In fact, coherently with the national arbitral legislations, which care to provide strict rules that ensure that the arbitrators are neutral, independent, and impartial, the BRICS Centres should adopt a Code of Conduct and a Code of Ethic to be rigorously followed by their accredited arbitrators.

Finally, the arbitral lists should be the shared by all Centres, so as to reduce once again the grounds for competition among them and made available for the parties on the official website of the arbitral Centres.

3.4 Harmonize some aspects of the BRICS national arbitral laws

The comparative overview proposed above shows that, on many regards, the BRICS arbitral laws are already similar as many of them were inspired to the UNCITRAL Model Law. Nonetheless, there are some crucial aspects upon which the BRICS national arbitral laws must try to converge, as they play a pivotal role in guaranteeing the smooth conduct of arbitration, the enforceability of the arbitration agreement and that of the arbitral award, which in turn secure the success of arbitration. Some of the said key areas are the following: arbitrability; the basic requirements for a valid arbitration agreement; kompetenz-kompetenz provisions; the powers conferred to the arbitrators; the types of awards recognized in the national law; the recognition and enforcement standards and the use of the public policy defence. The starting point when discussing harmonization among the BRICS national laws on arbitration is to understand that such a process requires time and compromise and may undergo through several stages before it is fully completed. Consequently, any small improvement in that direction is extremely important. Let us start pondering how harmonization may work on the field of arbitrability and all the other domains to follow.

[1151] Joshua Karton (n 1129); Joshua Karton, *The culture of Commercial Arbitration and the Evolution of Contract Law* (OUP 2013).

The law on arbitrability has been traditionally shaped within the national borders of states. It is fluid and will, no doubt, continue to evolve with time. Nonetheless, the BRICS should start adopting a transnational approach to arbitrability, acknowledging the global nature of many commercial transactions and disputes albeit requiring, at the same time, careful consideration of the various legal systems involved, international conventions, and the potential challenges associated with enforcing arbitral awards across the borders. In consideration of the fact that some categories of disputes are well-established to be barred from resolution through arbitration, and that, on the contrary, there still are some differences on the way arbitrability is conceived and assessed within the BRICS jurisdictions, the issuance of some guidelines that clarify the scope of arbitrability among BRICS, would be a precious instrument for BRICS disputing parties, practitioners, lawyers and courts and a first step towards an harmonized arbitrability notion.

It is also important for the BRICS to have a common view on what constitutes an arbitration agreement and what are its validity requirements because this makes an agreement to arbitrate the dispute readily enforceable in the five countries at issue, avoiding any resistance from specific provisions of the national laws, contributing to improve arbitration and the overall procedure. As emerged from the above study, a good basis to fix a shared definition of an enforceable arbitration agreement already exists among the BRICS legislations, nonetheless some efforts must be made to accommodate some additional national peculiarities, which have been extensively presented above. The adoption of a model clause by the BRICS centres of dispute resolution that takes due care of the five countries' mandatory validity requirements, would enhance the enforceability of the arbitration agreements in the five BRICS jurisdictions, reserving no surprises, in terms of additional unexpected conditions, to their less educated users who may not be accustomed to the national arbitral law.

All the BRICS jurisdictions but China have proved to perfectly endorse the kompetenz-kompetenz principle in its positive and negative implications. This means that, in this specific case, China is the one country that has to intervene in its national law to bring it in line with the other four jurisdictions and with international practice. This is paramount to create a favourable environment for arbitration and to ensure that the proceedings can be easily started and carried on. A failure to adjust the Chinese national law on this wise would penalize the Shanghai arbitral centre, as the parties' choice would likely lean toward an institution supported by a more favourable *lex arbitri* that entrusts the arbitrators with jurisdictional powers. Powers that, on the other side, are plainly recognized by the other BRICS national laws. The passing of the Draft Amendment may come in hand to resolve the

situation, as it would introduce into the Chinese legislation major important innovations as that of kompetenz-kompetenz or that of the seat of arbitration, a legal concept that still seems to be absent in the Chinese law.

The same crucial role in creating a favourable environment for arbitration is played by the courts and their attitude towards arbitration. The judicial bodies of all the five countries as well should work in support of arbitration in general, and of BRICS arbitration in particular, showing trust in the arbitrators' determinations, facilitating the operations of the tribunal, rather than opposing them or frustrate them with long awaits. When discussing the powers of the arbitrators, the five national laws should also align with respect to their ability to issue interim measures and interim relief, as the previous analysis has shown that such powers are not equally recognized. This is an important element as it could, once more, create asymmetry among the BRICS centres of dispute resolution, not matching with the broader attempt to make the centres all work in the same manner.

Another important aspect that comes into play at the enforcement stage concerns the types of awards that are recognized by the enforcing jurisdiction. Once again, this topic requires for the BRICS to adopt a common stance. In fact, presently, not all types of awards are recognized in all five countries. Russian law only welcomes final awards, entailing that acts of international arbitral tribunals referred to as either "orders" "partial awards" or "interim awards" that cannot be qualified as final arbitral awards will not be enforced in Russia. India as well discerns among the types of awards and would recognize only final and interim awards (but not partial awards) and awards on agreed terms. The same is true for Brazil. It is paramount for the BRICS Centres to issue awards that are going to be easily enforceable in the other BRICS jurisdictions. To this end, either the arbitral Centres establish that they will only issue final awards or awards on agreed terms to meet the Russian limitations, to the detriment of the partial or interim awards that may be precious for the parties during the proceedings, or Russian and Indian laws may be called for adaptation in order to meet the major trend of the other jurisdictions to recognize all the types of award just mentioned.

Due consideration should be also given by the arbitral centres, and in particular by the arbitral tribunals that are constituted within them from time to time, to the requirements to assess the validity of the awards provided by the five jurisdictions, which fortunately seem to converge, as they all demand for the award to be in writing and signed by the arbitrator(s).

In international commercial transactions, the recognition and enforcement of foreign arbitral awards are crucial for promoting trade and investments among states. The significance lies in the assurance that a foreign arbitral award rendered in one state against a

party to the transaction will be recognized and enforced by the courts of the state where enforcement is sought. This is particularly relevant for a group like BRICS, which aims to encourage further exchanges and investments among its member states. Just as it was vital for the European Union when creating the single market to provide a system of mutual trust among the judicial bodies of its member states and to create a mechanism of automatic recognition and enforcement of foreign decisions to allow them to freely circulate within the Union, along with people, goods and services, the same *ratio* should be applied by BRICS on the field of arbitration, as the European example teaches the importance of mutually giving effects to foreign decisions when trying to making up an economic and trade cooperation. To some extent, the recognition and enforcement of mutual awards among BRICS should have a solid foundation, as all the BRICS countries have signed the New York Convention. However, internal cohesion issues persist, hindering the full circulation of arbitral decisions among all five BRICS countries.

First of all, to safeguard the uniform application of the New York Convention, the BRICS should adopt the same criteria for determining what constitutes a "foreign" or a "domestic" award, as at the moment they all use different approaches, leading to an uneven application of the said Convention. Even more so, they should commonly establish whether the awards rendered by the BRICS arbitral Centres in their territory are going to be seen as domestic or as foreign, thus clarifying to what regime they shall be subject to in their jurisdiction.

Moreover, in light of what mentioned in the previous analysis, the Indian government should take actions to promptly recognize both South Africa and Brazil as reciprocating States, because the lack of such official recognition has proved to create uncertainty in the enforcement of the awards in India, to increase transaction costs for South African and Brazilian businesses compared to Indian ones, and to damage bilateral relations between the two countries, ultimately undermining the cooperative efforts of the group.

Significant differences among BRICS persist also in the interpretation and application of the grounds for refusal of recognition and enforcement of foreign awards listed in art. V of the New York Convention, especially in the construction and use of the public policy defence. Furthermore, some countries in the group take a long time in enforcement proceedings, leading to worrisome judicial delays. An example is China, where the process of recognition and enforcement of an award can take up to four years.[1152]

[1152] Kaszubska (n 1139).

The public policy defence should be narrowly constructed to meet with the spirit of the New York Convention, and even more so, it should be interpreted as "international public policy". In this sense, international public policy would encompass only the most fundamental legal principles of the enforcing jurisdiction. In this sense, resort to public policy would not be intended as a broad review of the merits of the case but rather as a safeguard against enforcement of awards that are contrary to the most basic and essential principles of the legal system of the enforcing country. Even though, one must admit that the trend in BRICS seems to positively point to lessen the use of such ground to avoid recognition and enforcement of foreign awards.

The issues just described directly impact the realization and immediate protection of the rights and interests of the parties and indirectly harm the effectiveness of arbitral awards and the overall development of arbitration in BRICS. Therefore, BRICS should better coordinate and clarify their positions regarding the recognition and enforcement of arbitral awards, ensuring that the entire process takes place smoothly, promptly, and efficiently. These characteristics are not only essential but gain even more relevance when the awards in question are issued by BRICS dispute resolution centres, thus instilling confidence and loyalty in the parties to choose and use such centres as dispute resolution agencies. This last point is crucial: the lack of agreement would cause problems in the recognition and enforcement of awards, preventing the winning party from benefiting from the effects of the award in any of the BRICS jurisdictions and thus failing the goal of resolving disputes effectively, quickly, and conveniently. In this scenario, arbitration itself would lose its credibility and comparative advantage.

3.5 Evaluate the enlargement of the centres' jurisdiction to investment arbitration

The BRICS member states should assess whether the new arbitral centres should include a mechanism for resolving investment disputes, rather than being exclusively dedicated to resolving commercial disputes. This issue becomes relevant because, as mentioned, following the 2016 New Delhi Conference, a strong need to reform the International Centre for Settlement of Investment Disputes (ICSID) has emerged. However, at this point, it is worth considering the possibility that the ICSID may not effectively serve the interests of the BRICS as of other emerging economies, leading to the idea of extending the jurisdiction of the BRICS centres to investment disputes, as the BRICS Centres may be more capable of considering those specific factors and unique socio-economic conditions that characterize

developing countries. Moreover, currently, out of the five BRICS member states, only China is a member of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which established the ICSID under the auspices of the World Bank. Hence, the conclusion of an agreement among the BRICS countries on the subject could also fill the gap left by the ICSID Convention and significantly enhance the efficiency of the new investment centre created by the group.

3.6 Promote the BRICS Centres

The establishment of an arbitral institution requires not only long-term strategic planning but also patience and continuous monitoring. Once the initial phase, which involves the creation of the centres with a structure (board of directors, administrative staff, list of arbitrators, and physical infrastructure) and a legal framework (institutional rules) is completed, it is necessary to "bring it to the market" and inform potential "clients" that a new institution that could meet their dispute resolution needs has been created.[1153] This involves actively marketing and promoting the centres to communicate and persuade interested parties of all their advantages. Any BRICS institution, whether created from scratch or established within existing institutions (as in the case of the Shanghai Centre), should adequately publicize its work. Otherwise, parties might simply be unaware of the arbitration opportunities offered and not select the Centres for this reason.

So far, there has been a lack of communicative capacity among the BRICS Centres. The only one dedicating a webpage to the BRICS is the Shanghai Centre whereas, information about the New Delhi Centre continues to be scarce. In general, very little is known about the project to create the BRICS dispute resolution system. The literature is extremely lacking, and official recognitions are insufficient. Much progress needs to be made in the field of communication and promotion of the Centres; otherwise, they will fail to build a caseload that allows them to claim a good international reputation. It is not surprising, that since its creation, the Shanghai Centre has not received a single case.

[1153] Dias Simões (n 1136) 302.

Conclusions

The BRICS legal communities, with particular reference to the Legal Forum, have expressed their intention to continue the cooperation to improve arbitration and other forms of peaceful cross-border dispute resolution, such as mediation. Nonetheless, an equal commitment should also come from the highest levels of government, which, so far, have shown little recognition towards the project and, in general, towards the subject matter inherent to dispute resolution, despite the key role it plays in improving the business environment and consequently in increasing trade and financial flows among the countries of the group.

The BRICS heads of state could play a decisive role on this regard. Albeit less accustomed with the use of Conventions and Treaties as means of international cooperation within BRICS, precisely on the matter of international arbitration, the conclusion of a Convention on the automatic recognition and enforcement of awards issued by the BRICS arbitration Centres, would be a huge boost to the attractiveness and efficient operation of the Centres, thus representing that added value they can lay claim to their potential users. Besides, if the previously mentioned steps were properly implemented, the Centres would be synergically constituted on shared institutional norms and arbitration rules; the neutrality of the arbitrators ensured by a fair and diverse representation of decision-makers, suitable to meet the diversity needs that a heterogeneous group such as the BRICS requires; and crucial aspects in the national laws properly harmonized. Consequently, there would be no apparent reason why an award issued by a BRICS arbitration Centre could not also be automatically recognized by the jurisdictions of five countries.

The establishment of a functioning and authentic BRICS dispute resolution system would have critical internal and external implications for the group, which should be given due consideration. Regarding the internal dimension, the effective establishment of the BRICS Centres would represent a further step in institutional building and integration among the five countries, as was the establishment of the New Development Bank, but this time in the field of alternative justice, while also strengthening the internal cohesion of the group. As for the external dimension, a recognized BRICS dispute resolution system is a great demonstration of soft power, which conveys broader messages about their political stability. The BRICS arbitration infrastructure would thus strengthen the group's position as a leader in the global South and make it an imitable model.

It is, therefore, very disappointing to note that BRICS Dispute Settlement Centre initiatives have been excluded from official recognition during the Summits and have almost completely disappeared from the program of events under the South African Chairmanship for 2023. Summit statements should give more credit to the project, and heads of states and their ministries should actively participate in it. The BRICS Dispute Resolution Centres could indeed prove to be a great success, especially since there is nothing like this in the current international dispute resolution scenario. The project is absolutely pioneering, but for it to succeed, the BRICS will have to work synergically on all levels.

Almost ten years after the establishment of the first BRICS Centre in Shanghai, we should have been looking at almost fully functioning Centres with a clear, well-established vision, mission, and rules. Today, however, it seems that the project is at a standstill. There are certainly many reasons for this, starting with the COVID-19 pandemic, which has certainly forced more urgent issues to be addressed, to the ongoing war in Ukraine, which has once again imposed new concerns. Yet it is precisely at these critical and difficult times when cohesion among the BRICS is being tested, that mutual support, commitment to improving cooperation and strengthening ties should take priority. In such a context, the implementation of a shared and reliable dispute resolution system can play a decisive role in safeguarding the unity of the group, leading it towards an increasingly solid and prosperous future.

Further research is needed to complement the present work and to understand how the arbitration system should accommodate the enlargement of the BRICS to the new five states. Nonetheless, given their recent accession, engaging in discourse pertaining to dispute resolution and the harmonization processes might be premature.

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