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PUCSP ADR NEWS

It is with immense satisfaction and profound gratitude that we present to the academic community and the international legal audience Volume 4 and Volume 4A of the Journal of Arbitration and Conflict Resolution of the Pontifícia Universidade Católica de São Paulo (PUC/SP). This bilingual edition — published in two complementary volumes — represents not merely an editorial advancement, but, above all, the materialization of a collective endeavor by students, researchers, and faculty members who, with dedication and academic vision, succeeded in transforming an ambitious idea into a published scholarly work.

The decision to divide Volume 4 into two editions — Volume 4, entirely in English, and Volume 4A, in Portuguese — reflects the journal's commitment to the internationalization of legal knowledge, without, however, abandoning the dialogue with the Lusophone academic tradition. More than a linguistic choice, this is an epistemological stance: we believe that arbitration and conflict resolution, by their very nature transnational, require channels of communication that transcend idiomatic boundaries, while simultaneously preserving the specificities of local legal systems and cultures.

Volume 4, in English, carries a singular importance. It is the direct outcome of an academic cooperation established under the COIL project (Collaborative Online International Learning), developed between the Catholic University of Ukraine and PUC/SP. Through synchronous classes and direct interaction among students from both countries, the COIL project demonstrated that curriculum internationalization can — and indeed must — be built from the classroom, with the active participation of students as protagonists in the knowledge-generation process. The students who engaged in this experience were not mere passive recipients of content, but true articulators of a transnational academic dialogue, the most eloquent materialization of which is precisely this edition now being published.

To further enrich this volume, an invitation was extended to Brazilian PhD professors working abroad and to foreign scholars already established in their academic careers, to contribute articles in the field of arbitration and conflict resolution. The generosity with which this invitation was received, and the excellence of the texts herein assembled, attest to the prestige that the journal has been gaining in the academic landscape. The authors who made themselves present — with their erudition, international experience, and commitment to methodological rigor — elevated the standard of this publication and offered readers a collection of contributions that reflect the state of the art in contemporary debate.

We must equally highlight the role of the researchers and faculty members at PUC/SP who, with tireless work, guided, reviewed, and accompanied each stage of this project. Their efforts in curating the texts, mediating international interactions, and ensuring academic quality were indispensable in enabling this edition to reach the level of excellence it now presents.

Volume 4A, in Portuguese, complements this endeavor by maintaining alive the journal's commitment to academic production in our language and to the specific debates of Brazilian and Lusophone law. Together, the two volumes demonstrate that internationalization and the valorization of local production are not mutually exclusive phenomena, but rather complementary dimensions of a single project aimed at strengthening legal knowledge.

Finally, we express our admiration for the initiative of the students who, since the earliest moments of this journal, have demonstrated that academia is not merely a space for passive learning, but also for creation, innovation, and intellectual leadership. It is they, to a great extent, who are responsible for transforming PUC/SP into a center of reflection on arbitration and conflict resolution, both in Brazil and abroad.

We thank the Catholic University of Ukraine and all the faculty members involved in the COIL project for the partnership that made this volume possible, particularly Profa. Natalia Subbotina. We thank the authors who, with academic generosity, accepted our invitation. We thank, above all, the students and researchers who, with enthusiasm and rigor, provided the initial impetus and accompanied each stage of this project until its realization.

May this Volume 4 and Volume 4A inspire new research, foster new international partnerships, and consolidate arbitration and conflict resolution as indispensable fields of study for the formation of cosmopolitan jurists committed to excellence.

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TIME LIMITS AND DEADLINES IN BRAZILIAN ARBITRATION ACT

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Brazilian courts are often called to interpret time provisions set forth in the Brazilian Arbitration Act (Law No. 9,307/1996). This brief paper provides an overview of how the interpretation of the relevant rules was shaped by Brazilian Courts, both with respect to time limits applicable to the parties and deadlines applicable to the Arbitral Tribunal.[1]

Time limits applicable to the Parties: request to set aside an arbitral award

As for the parties, the main rule on time limits in Brazilian Arbitration Act is the 90-day period to file a request to set aside an arbitral award before a State Court.

The wording of Article 33, § 1 as amended by Law 13,129/2015 is quite straightforward: "*§ 1 a claim to annul an arbitral award, whether partial or final, shall follow the rules of ordinary procedure set forth in Law No. 5,869 of January 11, 1973 (the Civil Procedure Code), and must be filed within 90 (ninety) days from receipt of notification of the respective award, whether partial or final, or of the decision on the request for clarification." (free translation)*

Prior to the amendment, Article 33, § 1 read as follows: "*an action seeking a declaration of nullity of the arbitral award shall follow the ordinary procedure set forth in the Code of Civil Procedure and must be filed within ninety (90) days from the date of receipt of notice of the arbitral award or of any amendment of the award*."

As one can notice, the major alterations that took place in the 2015 refer to the inclusion of "partial awards" within the scope of the rule and that the time limit starts from the notification of the award <u>or</u> of the decision on a request for clarification. Both questions gave grounds to doubt, prior and even after the relevant amendment.

[1] This paper is inspired by an article prior published in DailyJus. See STEINER, Renata. Watching the Clock: Time Limits in the Brazilian Arbitration Act. In: Daily Jus by Jus Mundi, 12.8.2025 <https://dailyjus.com/world/2025/08/watching-the-clock-time-limits-in-the-brazilian-arbitration-act>, Access on June 25, 2026.

(i) does the time limit apply to partial awards?

The question of when the clock starts ticking to set partial awards aside was definitively solved by the Brazilian legislator in 2015, once Article 33, § 1 of the Brazilian Arbitration Act now expressly refers to *both for partial and final awards.*

Prior to that, however, the Superior Court of Justice of Brazil ("STJ") had already ruled on the matter on at least two cases that were initiated before the amendment of the law. In the case *Termopernambuco v. Copergás* (REsp No. 1,519,041/RJ[2]), ruled on September 1st, 2015, the Court decided that "*there is, in this respect, no valid argument to support the understanding that a challenge to the order of a partial arbitral award, through the appropriate action to set aside, could only be brought upon the issuance of the final arbitral award. (...)*." In 2022 (*H.P.E.I and others v. T do B.C.E.A.D.E.P.L*, AgInt in AREsp No. 2,143,093/MT)[3], the Court confirmed this conclusion by reference to the previous ruling.

(ii) when does the time limit start to run?

Once it is established that the time limit starts upon the issuance of an award, whether final or partial, a second question arises as for the commencement of its course in cases where a party files a request for clarification.

In *Sky Light v. Martins & Bueno* (REsp No. 2,179,459/GO[4]), ruled on April 22nd, 2025 by STJ, the Court had to decide whether the time limit for setting aside an arbitral award would run from (a) the date of the award or (b) the date on which the parties were notified of the decision on a request for clarification.

The answer provided by the STJ honored the literal wording of Article 33, §1: the clock starts ticking when the parties are notified of the award or, conversely, of the decision on a request for clarification, if any, even if such a request is denied.

In that case, parties had agreed that notifications would be made by the arbitral institution's secretariat. The award was published on July 15, 2021, followed by a clarification request. The decision rejecting this request was published on August 12, 2021, and the annulment claim was filed on November 10, 2021. Initially, the claim was considered time-

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[2] REsp no. 1.519.041/RJ, Justice Marco Aurélio Bellizze, 3rd Panel, judgment on September 1st, 2015, published on September 11, 2015.
[3] AgInt in AREsp no. 2.143.093/MT, Justice Antonio Carlos Ferreira, 4th Panel, judgement on December 12, 2022, published on December 15, 2022.
[4] REsp no. 2.179.459/GO, Justice Nancy Andrighi, 3rd Panel, judgment on April 22, 2025, published on April 25, 2025.

barred, but after a motion for clarification, it was deemed timely, as the period runs from the clarification decision. This was upheld on appeal.

Finally, STJ confirmed the decisions stating that the filing of a clarification request interrupts the 90-day period, which only starts upon notification of the decision, regardless of its outcome.[5]

(iii) how does the 90-day period apply across different challenge mechanisms?

Under Brazilian law, there are two ways to challenge an arbitral award: a request for annulment or a challenge to the enforcement of the arbitral award. In decisions rendered between 2021 and 2022, the STJ addressed the effect of the 90-day period in both cases: *is it applicable only to the autonomous claim to set aside an arbitral award, or also to challenges during the enforcement of the arbitral award by the winning party?*

In at least three cases (*Rhaiane Nunes Cardoso, Viviano Quirino de Sousa v. Genesi de Jesus Melo*, REsp No. 2,001,912/GO[6], *Barra Sol Shopping Centers vs. Gaudi Empreendimentos e Participações,* REsp No. 1,900,136/SP[7] and *EMSA v. Aquamec Equipamentos and Haztec Tecnologia E Planejamento Ambiental*, REsp No. 1,862,147/MG[8]) STJ ruled that the 90-day period is peremptory (in Portuguese: "*prazo decadencial"*). It results from this qualification that "*once the 90-day period for filing the action for annulment has expired, the party may not raise the grounds for annulment provided in Article 32 of the Arbitration Act by means of a challenge, as the formative power will have already been extinguished by the lapse of time*" (REsp No. 2,001,912/GO).

This means the grounds for invalidity of the arbitral award provided in Article 32 of the Arbitration Act may be invoked as a defense against the enforcement of the award, only and insofar this is done within the 90-day time limit.

The Court's position is endorsed by Brazilian legal scholars, such as Professor Thiago Marinho who states that the possibility to invoke nullity of an arbitral award by challenge in

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[5] Despite the correction of the decision, Professor Gisela Sampaio offers a compelling critique for those familiar with Brazilian legal scholarship, arguing if this constitutes an actual case of interruption (GUEDES, Gisela Sampaio da Cruz. *Na pauta do STJ: o pedido de esclarecimentos "interrompe" o prazo para propositura de "ação anulatória" de sentença arbitral?* In: *AGIRE | Direito Privado em Ação, n.º 161, 2025*. Available at: <https://agiredireitoprivado.substack.com/p/agire161>. Access on June 25, 2026).

[6] REsp no. 2.001.912/GO, Justice Nancy Andrighi, 3rd Panel, judgement on June 21, 2022, published on June 23, 2022.

[7] REsp no. 1.900.136/SP, Justice Nancy Andrighi, 3rd Panel, judgement on April 6, 2021, published on April 15, 2021.

[8] REsp no. 1.862.147/MG, Justice Marco Aurélio Bellizze, 3rd Panel, judgment on September 14, 2021, published on September 20, 2021.

the enforcement proceedings after the elapse of the 90-day time limit: "... *would be entirely inconsistent with the legislature's intent and would effectively allow the validity of an arbitral award to be challenged at any time during the period in which it may be enforced, which is inadmissible*"[9].

This same conclusion also applies to possible changes of action (which as a rule are not admissible), which was exactly the discussion held in the judgment of Civil Appeal No. 1097621-39.2021.8.26.0100 by the São Paulo Court of Justice in *Raphael Moreira and Brandão & Valga v. ESHO.*[10]

In that case, Claimants filed a request to set aside an arbitral award within the 90-day deadline but later submitted new grounds for annulment. The Court held that the alleged facts were not new, but rather a new allegation of previously known facts that could have been easily verified even before the beginning of the arbitral proceedings. The Court rejected the change in action but emphasized that even if it was possible, the new claim should not be accepted, as the deadline for filing the set aside request had already elapsed.

Deadlines applicable to the Arbitral Tribunal: the deadline to render an arbitral award

As for the Arbitral Tribunal, the Brazilian Arbitration Act contains two relevant provisions referring to the deadline to render an arbitral award. Compliance with those rules is particularly relevant, once an arbitral award which is rendered outside the prescribed time limit is null and void (Article 32, VII).

The first rule deals with the general deadline to issue an arbitral award, that can be agreed by the parties or set forth by Brazilian Arbitration Law. Article 23 reads as follows: "*the arbitral award shall be issued within the deadline agreed upon by the parties. In the absence of such agreement, the award shall be issued within six months from the commencement of the arbitration or the replacement of an arbitrator*."

The second rule refers to a possible addition deadline that may be granted by means of notification by interest party and applies to arbitrations based on arbitration submission agreements ("*compromissos arbitrais*"). In this sense, Article 12, III, establishes that, where the time limit for issuing and submitting the award has elapsed, the interested party may notify "*the*

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[9] NUNES, Thiago Marinho. *O prazo fatal para impugnação de sentença arbitral.* Migalhas, November 30, 2021. Available at: https://www.migalhas.com.br/coluna/arbitragem-legal/355699/o-prazo-fatal-para-impugnacao-de-sentenca-arbitral. Access on June 25, 2026.

[10] TJSP, Civil Appeal No. 1097621-39.2021.8.26.0100, 2nd Reserved Chamber of Business Law, Reporting Judge Jorge Tosta, Central Civil Court of São Paulo, 2nd Business and Arbitration Disputes Court, judgment of Nov. 22, 2022, published Dec. 7, 2022.

arbitrator or the president of the arbitral tribunal, granting a ten-day period to the issuance and submission of the arbitral award." If such notice is given and the award is still not rendered and submitted within the additional period, the arbitration agreement shall be terminated pursuant to Article 12, III.

These provisions employ the verbs "to render" ("*proferir*") and "to submit" ("*apresentar*"), thereby distinguishing the acts of issuing the award and formally submitting it. As a careful reader will also have noted the wording differs from the verb used in Article 33, § 1, with respect to the commencement of the time limit for setting aside an arbitral award, which begins to run from the "*receipt of notification of the respective award"* (*i.e.*, notification/communication).

(i) when is the deadline for rendering an award deemed to have been met?

In the *Dell'Pradi* case (REsp No. 2,210,332/SC[11]), STJ was called upon to determine whether a particular arbitral award had been rendered within the time limit established by the Brazilian Arbitration Act.

In that case, the arbitration was based on an arbitration submission agreement, and the deadline to render the arbitral award began to run upon the submission of Final Submission by the parties. After the deadline elapsed, on March 5, 2015, the arbitrator was notified as per Article 12, III, to render the decision, thereby remedying the defect. Subsequently, (i) on March 12, 2015, the award was signed by the arbitrator; (ii) on March 13, 2015, it was filed with the arbitral institution in the electronic arbitration record; and finally, (iii) on March 17, 2015, it was communicated to the parties.

In its ruling, the STJ held that the arbitral award had been rendered upon its signing and submitted upon its filing with the arbitral institution. Moreover, the Court decided that although the notification to the parties occurred after the issuing deadline, according to the Court, "*they had already had access to the content of the decision since March 13, 2015*" and that the delay in communicating the award has not caused the parties any harm. As one can

[11] REsp no. 2.210.332/SC, Justice Nancy Andrighi, 3rd Panel, judgement on April 7th, 2026, published on April 14th, 2026.

notice the conclusion of this decision is not entirely clear, as it has been noticed by Brazilian practitioners[12]-[13].

(ii) may the deadline be extended by decision of the arbitral tribunal?

Another frequent question regarding the deadline to issue an arbitral award is that referring to extension of the deadline by the Arbitral Tribunal.

In the case *Delta do Parnaíba v. Barramares* (REsp No. 2,208,537/PI[14]), ruled on May 15th, 2025 by the STJ, the Court ruled on the validity of a notification of the extension of the deadline to issue the arbitral award. In the case, the Arbitral Tribunal issued a procedural order on November 17, 2014, providing for a sixty-day period within which to render the award. In light of the chamber's year-end recess, during which procedural time limits were suspended, the deadline for the issuance of the award would otherwise have expired on January 30, 2015. Prior to the expiration of that deadline, the Arbitral Tribunal informed the parties by email that the time limit for rendering the award was extended for a further sixty days. The communication was deemed valid by STJ and the request to set aside the award was not granted.

Finally, in *TEC v. Patrimonial Volga* (Resp No. 1,636,102/SP[15]), ruled on June 23rd, 2017 by STJ, the party alleged that the clarifying award was null and void since it was issued after the elapse of the ten-day period prescribed for deciding requests for clarification, which was non-extendable. However, once the parties had been notified of the extension and had not raised any objections, the Court ruled that this flexibility should be endorsed.

Moreover, the ruling also refers *obiter dicta* to application of the provision of Article 32, VII of the Brazilian Arbitration Act, meaning that the annulment of an arbitral award or award on clarification rendered outside the deadline is conditioned upon granting an additional ten days to issue the award.

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[12] AMARAL, Guilherme Rizzo. Third Panel of the Brazilian Superior Court of Justice (STJ) and the Time Limit for the Presentation of Arbitral Awards: Brief Comments on REsp No. 2.210.332/SC, of 8 April 2026. LinkedIn, May 2, 2026. Available at: https://www.linkedin.com/pulse/terceira-turma-do-stj-e-prazo-para-apresentação-da-ao-rizzo-amaral-zvm0f. Access on: June 25, 2026.

[13] SILVA, Caio Lopes da. Filing or Notice? Brazil's Superior Court of Justice Draws the Line on When an Arbitral Award Is "Presented" Within the Meaning of the Brazilian Arbitration Act. Kluwer Arbitration Blog, June 17, 2026. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/filing-or-notice-brazils-superior-court-of-justice-draws-the-line-on-when-an-arbitral-award-is-presented-within-the-meaning-of-the-brazilian-arbitration-act/. Accessed on: June 25, 2026.

[14] REsp no. 2.208.537/PI, Justice Maria Isabel Gallotti, 4th Panel, judgement on May 13, 2025, published on May 20, 2025.

[15] REsp no. 1.636.102/SP, Justice Ricardo Villas Bôas Cueva, 3rd Panel, judgment on June 13, 2017, published on August 1st, 2017.

Final remarks

The rules on time limits and deadlines in the Brazilian Arbitration Act are relatively concise, but their practical application has generated several questions over the years. As shown by the overview above, Brazilian courts have played an important role in clarifying issues such as the effects of requests for clarification, the operation of the 90-day period for challenging arbitral awards, and the interpretation of when an arbitral award is rendered. Case law offers not only a valuable guidance for parties, counsel and arbitrators involved in arbitrations seated in Brazil, but also certainty on how to apply and interpret the relevant provisions.

SIMPLIFICATION OF THE COMMERCIAL PROCESS FOR THE INTERNATIONAL SALE OF GOODS THROUGH THE 1980 VIENNA SALES CONVENTION (CISG)

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The simplification of the cross-border commercial process has from the outset been an important goal of the 1980 United Nations Convention on the International Sale of Goods (CISG). Today, over 45 years after the Convention's adoption, its simplification effect continues to be a crucial argument whenever commercial parties consider the legal rules to be applied to their cross-border transactions, and when lawyers advise their clients in this regard. This article outlines how the CISG simplifies the negotiation and formation of international commercial contracts in practice, as well as the resolution of disputes arising from such contracts. In doing so, the article draws on case law and international experience that has developed over the past decades.

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods that was adopted in Vienna on 11 April 1980 (CISG) has been hailed as the most significant piece of substantive contract legislation in effect at the international level[2] and as the most successful success story in the field modern transnational commercial law.[3] Brazil acceded to the CISG in 2014.[4] Since then, no less than 18 States as geographically, economically and politically varied as Bahrain, the Republic of the Congo, Madgascar, Guyana, Vietnam, Azerbaijan, Fiji, Costa Rica, Cameroon, Palestine, North Korea, Liechtenstein, Laos, Guatemala, Portugal,

[1] This article is an updated and slightly rewritten version of an article first published in 50 UCC J.L. 41–56 (2021).
[2] Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods', in *International Encyclopaedia of Laws: Contracts*, para. 7 (Jacques Herbots ed., Kluwer Law International).
[3] Herbert Kronke, 'The UN Sales Convention, the Unidroit contract principles and the way beyond', 25 J.L. & Com. 451 (2005–2006).
[4] See José Angelo Estrella Faria, 'Another BRIC in the wall: Brazil joins the CISG', 20 Unif. L. Rev. 211–242 (2015); Iulia Dolganova & Marcelo Boff Lorenzen, 'The Brazilian Adhesion to the 1980 UN Vienna Convention on Contracts for the International Sale of Goods', 13 Vindobona J. 351–372 (2009).

Turkmenistan and Saudi Arabia[5] have followed in Brazil's footsteps, with the most recent one being Rwanda in October 2024.

One of the most important goals pursued by the creation of the CISG and its adoption by different States is the simplification of the commercial process in cross-border trade transactions. The CISG itself prominently refers to this goal in its Preamble, where it describes the adoption of uniform rules which govern contracts for the international sale of goods as a contribution "to the removal of legal barriers in international trade." Beyond the field of international sales, the simplification of commercial activities has early on been recognized as a central aim and purpose of the unification of commercial law in general. Writing in England in 1910, Lord Justice Kennedy expressed this thought more elegantly:[6]

> The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country. [...] I hope I am not in error in believing that in the commercial world it is the trader's sense of security from risk which is the requisite basis of all enterprise and extension of business.

Against this background, the present article's topic is the simplification of the commercial process for the international sale of goods through the CISG.[7] It will be addressed in two parts, with the first focusing on the resulting simplification of contract formation in the field of international sales (part II), and the second, somewhat briefer, on the simplification of dispute resolution in this area (part III). A third and last part offers a brief conclusion (part IV).

II. Simplification of Contract Formation in the Field of International Sales

1. Simplification through a neutral fall-back sales law regime

When starting with the simplification of a commercial bargain – or, writing from a lawyer's perspective, contract formation – it may be helpful to begin with the nature of the problem. In this regard, the challenge lies in the rather different perspectives, of lawyers on one hand and commerce on the other, on the role of the applicable contract law within the contractual process.

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[5] Note that the Kingdom of Saudi Arabia declared upon its accession in accordance with Article 92 of the CISG that it will not be bound by Part III of the Sales Convention. See in more detail on the effect of this far-reaching reservation Ulrich G. Schroeter, 'Uniformity and Standardized Flexibility under the CISG: Options for Newly Acceding Contracting States Observing Islamic Law', 22 UCLA J. Islamic & Near E. L. 191–216 (2025).
[6] Lord Justice Kennedy, 'The Unification of Law', 10 J. Soc'y Comp. Legis. 212, 214–15 (1910).
[7] Citations to international case law on the CISG made in this article refer to "CISG-online", an academic internet platform on the CISG run by the author at the University of Basel (www.cisg-online.org).

As lawyers, particularly those drafting standard conditions of sale or purchase for their clients and the boilerplate choice-of-law clause therein, our approach is typically similar no matter where on earth we practice law: we are certain that the domestic law of our home jurisdiction offers a reliable, trusted and time-tested set of rules, which we know inside-out and have extensive experience in applying. Accordingly, in our mind, there can be no reasonable doubt that this law should not only govern our client's domestic contracts, but also its international transactions,[8] and that is what we write into our client's standard terms.[9]

What this familiar narrative leaves aside is an additional "conflict of laws 101" requirement that every international lawyer knows (or should know): there is only a choice of law where *both* parties agree on it, and it is the *other party*'s consent to one's own domestic law that is the difficult part in commercial practice.[10]

Of course, there are some contracts that are extensively negotiated between the parties. In that context, parties may agree to the application of one party's domestic home law. Not surprisingly, a careful approach of this type occurs notably in large transactions that justify the involvement of the parties' lawyers in the negotiation. However, sales of movable goods are routine commercial transactions that come in very different shapes and sizes, and many of these transactions are average-sized or recurring orders that are handled with no lawyer in sight. In such cases, commercial actors often make no effort to agree on the applicable law, because none of them even thinks of it.

By way of example, three common scenarios can be mentioned in which the boilerplate choice of law clause in one party's standard terms does not save the day. The first is the rather frequent case in which only "commercially important" terms (like the goods and their technical details, the price, and the delivery terms and times) are discussed between the parties, before the deal is agreed upon on the phone or made on a handshake. As the applicable law is typically not regarded as "important" by commercial parties, it is not mentioned in such cases, and no choice of law is agreed upon. To a lawyer, it is nothing short of amazing how many deals fall into this category, including transactions of a significant value.

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[8] Gary Kenji Nakata, '*Filanto S.p.A. v Chilewich Int'l Corp.*: Sounds of Silence Bellow Forth Under the CISG's International Battle of Forms', 7 Transnat'l Law. 141, 143 (1994); Ulrich G. Schroeter, 'Has the UN Sales Convention Achieved its Key Purpose(s)?', in *Research Handbook on International and Comparative Sale of Goods Law* 59, 66 (Djakhongir Saidov ed., Edward Elgar Publishing 2019); Jacob S. Ziegel, 'Commentary on Party Autonomy and Statutory Regulation: Sale of Goods', 6 J. Cont. L.123, 124 (1993).
[9] For empirical evidence on this point, see Stefan Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', Eur. Rev. Priv. L. 13, 52 (2013).
[10] Schroeter, supra n. 8, at 66–67.

In the second, probably somewhat less common scenario, the parties do negotiate over the applicable law, but fail to reach an agreement. This is not surprising where both parties insist on their respective domestic home law, which in international transactions is obviously not the same law.[11] In cases of equal bargaining strength, it will then be difficult to reach a consensus on a domestic law.[12] Nevertheless, as few commercial actors will allow the applicable law issue to stop a profitable deal, the transaction more often than not is given the go-ahead in such cases, although no choice of law agreement has been reached.

The third scenario lies somewhere between the two that were just mentioned. It covers the frequent cases in which the applicable law was not addressed when the deal was closed, but in which boilerplate choice of law clauses appear for the first time on one or more documents sent during the performance of the contract, as on invoices or delivery sheets. This late in the day, such a clause may (at most) qualify as an offer to modify (Article 29(1) of the CISG) the conditions of a contract that has already been mostly performed,[13] and courts have generally been reluctant to accept such an interpretation.[14] Even more importantly, such a belated choice of law attempt would require the other party to agree to the proposed contract modification,[15] and this component is almost always lacking in practice.[16]

The scenarios just described are an important reminder that for business entities, the applicable law is often a rather esoteric issue that is simply not viewed as commercially important. The drafters of CISG recognized this and sought to simplify the matter through the CISG's design as a fall-back regime. This is why in cases in which the parties remain passive or cannot agree on the applicable law, the CISG determines its own applicability, with the basic

[11] John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* para. 32 (Kluwer Law International, 3rd ed., 1999); Sandra Saiegh, 'The Business Lawyer's Perspective', in *Drafting Contracts Under the CISG* 253, 257 (Harry M. Flechtner, Ronald A. Brand and Mark S. Walter eds., Oxford University Press 2008).

[12] Andrew Babiak, 'Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods', 6 Temp. Int'l & Comp. L. J. 113, 114 (1992).

[13] Ulrich G. Schroeter, 'Article 29 CISG: Modification of contract; "no oral modifications" clauses', in *Commentary on the UN Convention on the International Sale of Goods (CISG)* paras. 35–37 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed., Oxford University Press 2022).

[14] Oberlandesgericht Jena (Germany), 10 November 2010, CISG-online 2216, Internationales Handelsrecht 79, 81 (2011); Rechtbank Kortrijk (Netherlands), 8 December 2004, CISG-online 1511, Internationales Handelsrecht 114, 115 (2005); Landgericht Aachen (Germany), 22 June 2010, CISG-online 2162, Internationales Handelsrecht 82, 85 (2011); Fritz Enderlein & Dietrich Maskow, *International Sales Law* 123 (Oceana 1992).

[15] Schroeter, supra n. 13, para. 38.

[16] See *Solae, LLC v Hershey Canada, Inc.*, 9 May 2008, CISG-online 1769, 557 F.Supp.2d 452, 457 (D. Del. 2008): "Nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Art. 29;" *Macromex Srl v Globex International Inc.*, AAA Award, 23 October 2007, CISG-online 1645: "The failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract"; Supreme Court Slovak Republic, 19 June 2008, CISG-online 1875.

rule being that the Convention applies to a contract if the parties involved are residing in different CISG Contracting States (Article 1(1)(a) of the CISG). Put differently, the Convention has intentionally been designed as an "opt out" instrument, not an "opt in" instrument.[17] Wherever commercial actors are less interested in choice-of-law as their advising lawyers would like them to be, the Convention – very pragmatically – makes the necessary choice for them.

In this context, the CISG furthermore provides not only a simple, but also a commercially reasonable and fair, fall-back solution.[18] This is so because the Convention is neutral in two different respects: first, it is neutral in content, because the CISG's provisions are generally accepted as striking a fair balance between the interests of buyers and of sellers.[19] And second, the CISG is neutral as far as its accessibility to parties and lawyers from different jurisdictions is concerned, because it does not give one of the parties the legal advantage of working with their own domestic law.[20]

2. Simplification through a set of rules specifically designed for international commercial transactions

Where the CISG applies, the commercial process is simplified because the CISG's provisions were specifically designed with cross-border commercial sales transactions in mind. This is in significant contrast to many domestic contract laws that often were primarily developed for local sales. Frequently, domestic laws contain outdated provisions or approaches in case law that are ill-suited for international transactions, which are often performed over long distances.

John Honnold, who was the first common-law author to publish a comprehensive commentary on the CISG soon after the Convention was adopted,[21] noted "the outdated legal formulae that still complicate domestic sales law",[22] and reasoned: "One may delight in legal

[17] Ulrich Magnus, 'Art. 6 CISG', in *Staudinger Kommentar zum Bürgerlichen Gesetzbuch* para. 8 (Sellier de Gruyter 2018); Ulrich G. Schroeter, 'Gegenwart und Zukunft des Einheitskaufrechts', 81 Rabel J. Comp. & Int'l Priv. L. 32, 42 (2017); Schroeter, supra n. 8, at 65.
[18] Saiegh, supra n. 13, at 256.
[19] Enderlein & Maskow, supra n. 14, at 17; Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, 'Introduction to the CISG', in UN Convention on the International Sales of Goods (CISG) para. 49 (Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, eds., C.H. Beck 2011); Joseph Lookofsky, *Understanding the CISG* 2 (5th ed., Wolters Kluwer 2017); Ulrich Magnus, 'CISG', in *Staudinger Kommentar zum Bürgerlichen Gesetzbuch* para. 8 (Sellier de Gruyter 2018); Ingeborg Schwenzer & Pascal Hachem, 'The CISG – Successes and Pitfalls', 57 Am. J. Comp. L. 457, 476 (2009).
[20] Babiak, supra n. 12, at 114; Lookofsky, supra n. 19, at 2; Schroeter, supra n. 8, at 67.
[21] The first edition of his seminal commentary was John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Kluwer Law International 1982).
[22] Honnold, supra n. 21, para. 30.

antiques and in the patina of ingenious circumlocutions that have had to substitute for fundamental reform – but these aesthetic values may not be appreciated by a modern merchant and, more especially, by his trading partner from a different legal tradition."[23] The drafters of the CISG therefore took care to reject anachronisms that complicate domestic laws, and instead produced a statutory text that is relatively straightforward and uncluttered with technical detail. They were conscious of the value simply of eliminating technical rules that divert attention from the transaction and its commercial setting,[24] and did so with a particular focus on the international, cross-border situation in which CISG contracts are negotiated and executed.[25]

With respect to some of the difficulties that typically arise under international trade contracts, the combined experience and comparative law wisdom that the Convention's drafters fed into their work on the CISG resulted in solutions that are arguably superior to some of the approaches reflected in domestic laws. As an example, one may quote from the recent decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited*[26] rendered by the Supreme Court of the United Kingdom, a country that has remained in "splendid isolation" from the Sales Convention[27] by not acceding to it.[28] In this decision, the Supreme Court tackled a "truly fundamental issue in the law of contract",[29] namely whether contractual terms prescribing that an agreement may not be amended save in writing (so-called "No Oral Modification" clauses that are also quite prevalent in international sales contracts) are legally effective. Writing for the majority, Lord Sumption observed:

> The reasons advanced in the case law for disregarding [the No Oral Modification clauses] are entirely conceptual. The argument is that it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing so. The difficulty about this is that if it is conceptually impossible, then it cannot be done, short of an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity. Yet it is plain that it can. There are legal systems which have squared this particular circle. They impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses. The Vienna Convention on Contracts for the International Sale of Goods (1980) has been ratified by 89 States, not including the United Kingdom. It provides

[23] Honnold, supra n. 21, para. 30.
[24] See Honnold, supra n. 21, para. 33.
[25] Enderlein & Maskow, supra n. 14, at 16; Kröll, Mistelis & Perales Viscasillas, supra n. 19, at para. 47; Schroeter, supra n. 8, at 71; but see Jan Dalhuisen, *Dalhuisen on Transnational Comparative Commercial, Financial and Trade Law* 231 (6th ed., Hart 2016).
[26] *Rock Advertising Limited v. MWB Business Exchange Centres Limited* [2018] UKSC 24.
[27] See Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* (Centro di Studi e Ricerche di Diritto Comparato e Straniero 1993).
[28] See in more detail Benjamin Hayward, Bruno Zeller & Camilla Baasch Andersen, 'The CISG and the United Kingdom – exploring coherency and private international law', 67 Int'l & Comp. L. Q. 607 (2018).
[29] *Rock Advertising Limited*, [2018] UKSC 24 [1].

> by article 11 that a contract of sale "need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." Nonetheless, article 29(2) provides: […].
>
> *Rock Advertising Limited*, UKSC 24 [13].

After additionally citing Articles 1.2 and 2.1.18 of the UNIDROIT Principles of International Commercial Contracts – provisions that happen to be almost verbatim copies of Articles 11 and 29(2) of the CISG[30] – Lord Sumption referred to both international instruments as "widely used codes."[31] If these statements allow the conclusion that the Convention today ranks as a widely-used code that has managed to square circles that some domestic laws have yet to square, this could be read as an endorsement of the CISG.

Commercial practice under the CISG provides further evidence that the Convention's drafters achieved the goal of designing a state-of-the-art set of rules for international sales transactions, because we see an ever increasing number of cases in which parties specifically agree in their contract that the CISG shall govern their transaction.[32] While such clauses are not strictly necessary, given that the Convention determines its own applicability in its Articles 1 through 5, they indicate that such parties regarded the CISG as better suited to their cross-border contract than domestic law, and expressly made this clear.

3. Simplification through standardisation

We next turn to an advantage offered by the CISG that may be referred to as "simplification through standardization." What does that mean?

One well-known difficulty in commercial practice arises from the fact that many commercial actors maintain business relations with partners from a variety of different countries. The result can be that different laws apply to each of these relationships, thereby making it challenging for a company to develop uniform practices in concluding and performing its various sales transactions because these practices would have to comply with

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[30] Stefan Vogenauer, 'Article 2.1.18', in *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* para. 1 (Stefan Vogenauer ed., 2nd ed., Oxford University Press 2015).

[31] *Rock Advertising Limited* [2018] UKSC 24 [13].

[32] *Buyer (Taiwan) v Seller (Germany)*, ICC Final Award Case No. 18671, CISG-online 3055, XLII Yearbook Commercial Arbitration 204, 217 (2017); *Coutinho & Ferrostaal GmbH v Tracomex (Canada) Ltd*, Supreme Court of British Columbia, 13 May 2015 – S116044, S120939, S122034, CISG-online 2734, 2015 BCSC 787 para. 48; Oberlandesgericht Hamm (Germany), 9 July 2013 – 21 U 16/13, German Arbitration Journal 38, 39 (2014); *Quarella SpA v Scelta Marble Australia Pty Ltd*, Singapore High Court, 14 August 2012, CISG-online 2725, [2012] SGHC 166 para. 8; *Distributor Z (US) v Company A (Mexico), Subsidiary B (US)*, ICC Arbitral Award 13184/2011, CISG-online 2724, XXXVI Yearbook Commercial Arbitration 96, 100 (2011); Handelsgericht Zurich (Switzerland), 22 November 2010 – HG070223/U/dz, CISG-online 2160, Internationales Handelsrecht 151 (2011); Oberlandesgericht Koblenz (Germany), 22 April 2010 – 2 U 352/09, CISG-online 2163, Internationales Handelsrecht 255 (2010); ICC Arbitral Award 7585/1994, CISG-online 105, 122 Journal du droit international 105 (1995).

various different laws, depending on the location of a contracting partner. The CISG makes it easy to standardise commercial practices, because its rules apply identically between so many countries. It suffices to mention two everyday examples.

First, imagine a buyer based in Brazil who is buying goods from sellers in various countries. As far as different contract laws apply to these transactions, the Brazilian buyer's staff has to follow different requirements when ordering goods from sellers in different countries, and observe different standards regarding, say, the inspection of the goods once they have been delivered. The CISG greatly simplifies this, as the same legal rules will apply to all purchases made from sellers who reside in one of the currently 97 CISG Contracting States, so that the Brazil buyer can standardize its business practices.

Second, a slightly different standardization effect applies in cases in which a merchant trades goods through, by buying them in one jurisdiction and selling them on to another. A simple example is a Brazilian company buying goods in mainland China and selling them to the U.S. Without the CISG, both links in this chain of transactions may be governed by a different domestic contract law, because in the first transaction the Brazilian merchant is the buyer, while in the second it is the seller. Accordingly, different rules may apply as far as the standard of care, available remedies or applicable time frames are concerned, and these differences may well cause difficulties for the merchant in the middle. Where the CISG applies, these difficulties disappear, as the same rules govern both links in the chain. And in such a scenario, the court may even be able to leave open whether the Brazilian middleman acted as a buyer and seller, or only as an agent of either the upstream or the downstream party,[33] because the CISG would equally apply if the sales contract was a direct one between the mainland Chinese seller and the U.S. buyer.

4. Simplification by preserving existing contractual frameworks and practices

The points addressed up until now focused on the advantages that the CISG offers when compared with the practical challenges of agreeing on a domestic law. However, it is also well known that in commercial practice, many companies have developed well-functioning arrangements with some of their business partners that work under a domestic law, and where they customarily conclude and perform their sales transactions under this law. Sometimes such

[33] For examples of similar constellations from international CISG case law, see Ulrich G. Schroeter, 'Article 14 CISG: Offer (including incorporation of standard terms)', in *Commentary on the UN Convention on the International Sale of Goods (CISG)* paras. 65–67 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed., Oxford University Press 2022).

arrangements have been formalized through framework agreements, master sales agreements or the like, while in other cases it is merely a well-working course of dealing. Does the CISG interfere with such arrangements, so that its simplifying effect disturbs existing practices that have already made the commercial process simple?

Luckily, it does not. Article 6 of the CISG provides that parties may freely exclude the CISG's application,[34] and the only thing required is the parties' agreement, irrespective of any form.[35] The Convention therefore respects any existing commercial frameworks and allows them to continue untouched.

III. Simplification of Dispute Resolution in the Field of International Sales

Finally, a few remarks are in order on how the CISG contributes to the simplification of the commercial process in the context of dispute resolution. Dispute resolution proceedings are, of course, not the original goal for which sales transactions are entered into; but they are part and parcel of commercial reality: every once in a while, a dispute between merchants cannot be resolved through negotiation, and the lawyers step in.

Furthermore, in this context, the CISG simplifies matters, and therefore saves time and money for the parties involved. Three points may be mentioned in this regard.

1. Easy accessibility of the CISG's content in many languages

First, the content of the rules that the parties' counsel will have to plead, and that the judges or arbitrators will need to apply, are easily accessible in case of the CISG.[36] The Convention's text comes in six authentic languages (Arabic, Chinese, English, French, Russian and Spanish) and has been translated into many others (including Portuguese), and numerous commentaries, textbooks and articles in various languages explain in detail its provisions.

Again, it is important to remember that the CISG mostly comes into play where the parties have not (or not clearly) chosen a particular law. In such a scenario, the alternative to

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[34] Regarding Article 6 of the CISG, see the comprehensive discussion in *CISG Advisory Council Opinion No. 16: Exclusion of the CISG under Article 6* (Rapporteur: Lisa Spagnolo) (30 May 2014).

[35] Oberster Gerichtshof (Austria), 4 July 2007 – 2 Ob 95/06v, Internationales Handelsrecht 237, 239 (2007); Tribunale di Vigevano (Italy), 12 July 2000 – 405/2000, Internationales Handelsrecht 72, 73 (2001); Michael Joachim Bonell, 'Article 6' in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* note 3.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., Giuffrè 1987); Pascal Hachem, 'Article 6 CISG: Exclusion or derogation by the parties (party autonomy)', in *Commentary on the UN Convention on the International Sale of Goods (CISG)* paras. 3, 4 (Ingeborg Schwenzer & Ulrich G. Schroeter eds., 5th ed., Oxford University Press 2022); Magnus, supra n. 17, para. 20; Schroeter, supra n. 8, at 63.

[36] Hachem, supra n. 35, para. 12; Burghard Piltz, *Internationales Kaufrecht* para. 1-34 (2nd ed., CH Beck 2008); Kazuaki Sono, 'The Vienna Sales Convention: History and Perspective', in *International Sale of Goods: Dubrovnik Lectures* 1, 15 (Petar Sarcevic & Paul Volken eds., Oceana 1986).

the CISG is the application of private international law or conflict of laws, an area of law that once was famously described as "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."[37]

And even if one has managed to cross the dismal conflict of laws swamp[38] (possibly with the help of an eccentric law professor and his expert opinion[39]), there is a fair statistical chance that on the other side of the swamp there will be a foreign domestic sales law. Such a situation then leaves the Brazilian counsel with the less-than-attractive task of researching the content of, say, Danish sales law, either with the help of court decisions and law books that are written in Danish or by involving a Danish law firm.

It is therefore not entirely surprising that in cross-border cases, commercial judges and arbitrators are generally more comfortable with applying the CISG than with applying a domestic law that is foreign to them, because they face the same practical challenges. This may be one of the reasons why courts around the world fairly uniformly apply strict standards to attempts to exclude the Convention under Article 6 of the CISG, by requiring "clear language indicating that both contracting parties intended to opt out of the CISG"[40] or clauses that "without any doubt" aim at excluding the Convention's application.[41]

Practically speaking, the relative ease of the CISG's accessibility translates as a greater foreseeability of the applicable law, and as less effort in preparing legal briefs, court judgments and arbitral awards for the lawyers involved. For the commercial parties to a dispute, this may well mean a more certain outcome at lower legal costs,[42] thus creating a "win-win" situation.

2. International CISG case law enhances predictability

Second, the international case law that has developed under the CISG over the last 38 years enhances the predictability of its application. It is easy to see that under the Convention

[37] William L. Prosser, 'Interstate publication', 51 Mich. L. Rev. 959, 971 (1953).
[38] The uncertainties inherent in the application of private international law have often been stressed; see Dalhuisen, supra n. 25, at 231; Clayton P. Gillette & Stephen D. Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* 24–5 (2nd ed., Cambridge University Press 2016); Piltz, supra n. 36, para 1-33; Ziegel, supra note n. 8 at 124.
[39] See Ernst Rabel, 'A Draft of an International Law of Sales', 5 U. Chi. L. Rev. 543, 545 (1938).
[40] *Asante Technologies, Inc. v PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001), CISG-online 616 at para. 25.
[41] *Electronic electricity meters case*, Swiss Federal Supreme Court, 28 May 2019 – 4A_543/2018, CISG-online 4463 at para. 27 ("klar und unzweideutig").
[42] Dalhuisen, supra n. 25, at 231; Schwenzer & Hachem, supra n. 19, at 464; Johan Steyn, 'A Kind of Esperanto?', in *The Frontiers of Liability* 11, 17 (Peter H.B. Birks ed., Oxford University Press 1994).

which applies in 97 countries, many more international sales cases are decided than under one domestic sales law, in particular if it is the law of a smaller jurisdiction. The wealth of persuasive precedents available under the CISG – today, over 7,500 CISG court decisions and arbitral awards have been published – potentially makes it simpler for counsels to track down case law that supports their client's position, and simpler for judges and arbitrators to find and consult precedents than under a domestic law that may be foreign to them. Again, such simplification may save time and money.

3. No risk of both parties being "trapped" in the CISG's application

Finally, it may be helpful to address an argument occasionally raised by sceptics, namely the fear that commercial parties will be "surprised by" and find themselves "trapped" under the Convention.[43] Luckily, the Convention itself provides for a very simple solution to this perceived problem: according to Article 6 of the CISG, the parties can at any time agree to exclude the Convention's application to their contract, even after the contract has been executed or after court or arbitral proceedings have been commenced.[44] So, if *both* parties are really surprised and want to escape the Convention, Article 6 of the CISG ensures that they always can.[45]

If, however, only *one* of the parties wants to exclude the Convention, then the problem in truth is not the CISG's surprising nature, but the fact that the parties at hand cannot agree which domestic law they want to apply in its place. And in such cases, it is both fair and appropriate that the CISG's fall-back rules apply.

IV. Conclusion

As this article has shown, the CISG's uniform rules for international sales contracts may contribute significantly to the desirable simplification of the commercial process for cross-border sales transactions, both at the contract formation stage and during a possible later dispute resolution process. In doing so, the CISG not only contributes to "the development of international trade on the basis of equality and mutual benefit," which its Preamble describes as "an important element in promoting friendly relations among States," but, at the same time,

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[43] See, e.g., James E. Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales', 32 Cornell Int'l L. J. 273, 317 (1999); John F. Coyle, 'The Role of the CISG in U.S. Contract Practice: An Empirical Study', 32 U. Pa. J. Int'l L. 195, 239 (2016); Gillette & Walt, supra n. 38, at 2; Mathias Reimann, 'The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care', 71 Rabel J. Comp. Int'l Priv. L.115, 123–24 (2007).
[44] See Ulrich G. Schroeter, *Internationales UN-Kaufrecht* para. 78 (7th ed., Mohr Siebeck 2022).
[45] Schroeter, supra n. 8, at 69.

also provides a pragmatic legal infrastructure[46] that is suitable for everyday commercial practice. It therefore lends itself to adoption by further States and territories of the world that currently are outside its reach.

[46] See Ulrich G. Schroeter, 'Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities', 41 Loy. L.A. Int'l & Comp. L. Rev. 1, 24 (2018).

GLOBAL PLURALISM[1]:

A METHODOLOGICAL TOOL TO DETERMINE *WHAT* LAW IS, *WHAT* ARE ITS *SOURCES*, AND *HOW* ITS *NORMATIVITY* WORKS

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1. The Problem

When it comes to its application to controversial circumstances within the international exchange context[2], some pivotal epistemological categories - which are nonetheless taken for granted within the domestic legal level – raise some of the most excruciating conundrums with

[1] *"As a scholarly project, global legal pluralism has been extraordinarily successful, and it is not difficult to see why. Legal pluralists had long observed that, in any given social context, people are regulated by multiple different legal and quasi-legal regimes and that these regimes are sometimes associated with formal state law, but sometimes they are not.1 Global legal pluralism took that insight and applied it to the post-Cold War international and transnational arena at just the right moment. Circa 1998, international and transnational institutions were proliferating, industry standard-setting bodies and corporate codes of conduct were taking on mew prominence, and the rise of online interaction meant that social life was increasingly deterritorialized and that almost any piece of electronic data or any online interaction could implicate multiple regulatory regimes.2 This complex web of regulatory bodies included some regimes that were state-based, some that were built and maintained by non-state actors, some that fell within the purview of local authorities and jurisdictional entities, and some that involved international courts, tribunals, arbitral bodies, and regulatory organizations.3 Global legal pluralism provided scholars with a theoretical lens for conceptualizing the complex interactions among these various legal and quasi-legal entities. (...)"* Schiff, Paul. Understanding Global Pluralism, in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism (2020; online edn, Oxford Academic, 8 Oct. 2020), https://doi.org/10.1093/oxfordhb/9780197516744.001.0001, p. 1-2.

[2] *International Exchange* is hereby used as a *term of art* referring, at large, to the domains traditionally alluded to as *International Law, International Trade Law, Foreign Commerce*, among other denominations. It is a rather open term of art and implies a significative load of inter and trans-disciplinarity, which is typical and characterizes every effort to conceptually portray the concrete reality of the international exchange realm.

which international law theories are confronted, since ever. This is the case of (i) *what* law is, (ii) *what* are its *sources*, and (iii) *how* its *normativity* works, three fundamental and very preliminary issues which consistency are key for the reliability and soundness of every interpretation or adjudication process.

Far from being intuitive or kin to their domestic similar, those are very complex categories. Under the penalty of compromising the legitimation[3] of all procedural and substantial instances of decision-making and dispute resolution within the international exchange realm, they must be methodologically trustworthy, if not substantively persuasive[4]. In other words, they must be substantiated by a solid set of premises, namely a consistent (i) *theory of law,* a sound *(ii) theory of sources*, and a verifiable (iii) *normativity theory*. Lacking this reliable set of certifiable, persuasive, and self-evident epistemological premises[5], not only the inner authority of adjudicative processes, but also the persuasiveness of the argumentative series upholding their outcomes[6], would not hold on together.

2. This Article's Contention

The limited scope of this article does not allow a digressive analysis of the full content of the aforementioned theories. Nonetheless, it admits the examination of *global pluralism*, vis-à-vis the *legal monist* approach, as one of the essential methodological tools underlying the epistemological fabric of the referred set of theories.

Accordingly - and inasmuch the *monist* paradigm helps to explain, by contrast, the *global pluralist* thesis herein sustained - the demonstration of this article's contention begins with a brief exploration of the clash between both perspectives. From there, it highlights a set

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[3] See, please, item 3.4. of this article, p. **, *infra.*

[4] It is important to disclose that this article, as well as the general methodological paradigm adopted by its Author in most of its academic writings, relies on the mainstays of the so-called *Theory of Argumentation* and *Topics*, fields which roots go back to Aristotle and Cicero, but are still being studied and generally applied in human and social sciences because of its proved excellence. See, please, Aristotle. Topica (Transl. by E. S. Forster). Cambridge, Massachusetts: Harvard University Press, 1989; Aristotle. Art of Rhetoric (Transl. by J. H. Freese). Cambridge, Massachusetts: Harvard University Press, 1991; and Rapp, Christof, "Aristotle's Rhetoric", The Stanford Encyclopedia of Philosophy (Winter 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), especially ns. 7 to 8. https://plato.stanford.edu/archives/win2023/entries/aristotle-rhetoric/>. Consulted online on October 17, 2023, at 5:49pm PDT. See, also, Cicero. De Oratore (Transl. by E. W. Sutton. and H. Rackham). Loeb Classical Library. Cambridge Massachusetts: Harvard University Press, 1988; Cicero. De Partitione Oratoria (transl. by H. Rackham). Loeb Classical Library. Cambridge Massachusetts: Harvard University Press, 1992; and Cicero. Topica (Transl. by T. Reinhardt). Oxford: Oxford University Press, 2003. For all, please see Perelman, Chaim and Olbrechts-Tyteca, Lucie. Traité de l'argumentation. La nouvelle rhétorique. Bruxelles: Editions de l'Université de Bruxelles, 1983.

[5] Let's not Forget here that within the international exchange realm stakeholders lack authoritarian enforcement mechanisms and must rely on self-containment and voluntary compliance.

of *global pluralist* features which, pursuant to the article's perspective, evidence how *global pluralism* – alongside[7] *legal realism*[8] and *system thinking*[9]– grants consistency to and supports the theoretical triplet[10] applicable to the interpretation/adjudication of international exchange disputes.

3. The Clash Between Legal Monism and Legal Pluralism.

3.1. The Basic *Credo* at the Core of the *Monist Paradigm*.

Ever since international exchange disputes ceased to be resolved by crude force of the most powerful stakeholders – typically from the end of the *colonial era*, onwards - Legal Philosophy and Legal Sociology scholarship had extensively examined the *problem* described on "1", *supra.*

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[7] Categories that will not be seen here, due to the limited scope of the article.

[8] *"The term systems approach is widely used as an umbrella for concepts and ideas drawn from general system theory, cybernetics, chaos theory, and complexity theory. The term covers an approach to inquiry that is not limited to one discipline and proposes a new way of thinking about the world focusing on interconnected, interdependent, dynamical systems, rather than parts that can be isolated from the whole. A variety of systems approaches have been utilized in creativity research. A movement in the sciences and religion toward a greater recognition of the centrality of creativity in the Universe is directly related to the development of a systems approach."* A. Montuori, Systems Approach, Editor(s): Mark A. Runco, Steven R. Pritzker, Encyclopedia of Creativity (Second Edition), Academic Press, 2011, Pages 414-421, Abstract, ISBN 9780123750389, https://doi.org/10.1016/B978-0-12-375038-9.00212-0. (https://www.sciencedirect.com/science/article/pii/B9780123750389002120).

[9] *"(…) Systems theories are a set of principles and concepts that provide a framework for understanding complex systems. These systems can range from social and biological systems to ecological systems. The core principle of systems theory is the emphasis on the interconnectedness and interdependence of various parts within a system. It suggests that complex systems are more than just the sum of their parts, and that examining the relationships between those parts can lead to a better understanding of the whole (Bertalanffy, 1968). Complex systems, unlike simple, linear systems, can exhibit emergent properties that cannot be predicted from the behavior of individual components. Therefore, systems theorists often employ interdisciplinary approaches to study complex systems, drawing on fields such as mathematics, physics, psychology, and sociology. This allows them to analyze patterns of behavior and feedback-controlled regulation processes (Skyttner, 2005). Applications of systems theory can be found in diverse fields such as management, ecology, and social science. By adopting a holistic approach to understanding systems, researchers can gain insight into not just individual level behaviors, but also macro and policy levels of organizations. In essence, systems theory is an invaluable tool for understanding the complex and dynamic systems that shape our daily lives (Bertalanffy, 1968)."* Consulted online at https://www.structural-learning.com/post/systems-theories on October 18, 2023, at 1:40pm PDT.

[9] *"Systems thinking is a set of synergistic analytic skills used to improve the capability of identifying and understanding systems, predicting their behaviors, and devising modifications to them in order to produce desired effects. These skills work together as a system."* Ross D. Arnold, Jon P. Wade, A Definition of Systems Thinking: A Systems Approach, Procedia Computer Science, Volume 44, 2015, Pages 669-678, p. 7. ISSN 1877-0509, https://doi.org/10.1016/j.procs.2015.03.050.(https://www.sciencedirect.com/science/article/pii/S1877050915002860).

[10] A *theory of law,* a *theory of sources*, and a *normativity theory*

On one side of the arena – and for a long time as the only *scientific* theory - *monist*[11] theorists and practitioners, at large, tended to validate the sheer use of domestic categories – especially the *essential* domestic features of the legal phenomena - to determine, *ipso facto* - *what law*, its *sources*, and its *normativity is,* and *how* these elements operate within a real-word controversial scenario, within the international exchange realm.

According to *monism* - which in some instances have virtually dismissed *International Law* as an operative field of the legal science, but rather as a rhetorical discourse over what might happen therein[12] – all legal categories applicable to the international exchange realm, including those herein discussed, are thoroughly explained, legitimized, and justified by the effective authority of the typical nation-state activity. Therefore, the *monist paradigm* proclaims the authority of the sovereign nation-state as the one and only legitimate source of power, which *de facto* and *de iure* projection works as a kind of *extraterritorial application of domestic law*. Pursuant to this perspective, every adjudicative instance occurring within the *international*

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[11] For non-concurring views over this subject, please see the following excerpt of a consistent account about monist theories: *"(T)his book defends the theory of legal monism against dualism and pluralism. Whereas dualism holds that different bodies of law such as international and national law are entirely separate and pluralism argues that there are many potentially overlapping and heterarchical bodies of law, monism considers all law to form part of one unitary and hierarchically ordered legal order, be it international, EU, or national law. To this end, this book will use the pure theory of law of the Vienna School of Jurisprudence, which has—since its inception in the first half of the twentieth century—been largely ignored by legal theorists. On the basis of philosophical/epistemological, legal, and moral/political arguments, it will argue in favour of monism under the primacy of international law, i.e. that in cases of normative conflicts, international and EU law prevail over national law, and thereby restore the respect for international legal cooperation. In other words, it will argue that only this version of monism takes the law and the concept of legal validity seriously; that it can better describe and explain the relationship between legal orders and resolve normative conflicts than dualism and pluralism; and that it has a superior moral dimension, which can help bring about a cosmopolitan legal order under global democracy and peace."* Gragl, Paul, Legal Monism: Law, Philosophy, and Politics (Oxford, 2018; online edn, Oxford Academic, 24 May 2018), https://doi.org/10.1093/oso/9780198796268.001.0001. Consulted online at https://academic.oup.com/book/5630 on October 29, 2023, at 1:49pm PDT. See also Green, Michael S., Legal Monism: An American History (April 3, 2018). Legal Monism: An American History, in: Christoph Bezemek, Michael Potacs and Alexander Somek (eds.), Vienna Lectures on Legal Philosophy, 23-48 (Hart Publishing 2018), Available at SSRN: https://ssrn.com/abstract=3155203.

[12] *"(...) the pluralist perspective allowed theorists to extricate themselves from intractable and largely fruitless debates about what should count as law and what should not. For example, many international relations theorists, as well as scholars influenced by game theory and other formalist models of power, argued that international law was not truly law, given the absence of coercive enforcement.4 (...)"* Berman, Paul Schiff. Understanding Global Pluralism, in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 2. See also as for the claim that international law is not actually law Van der Burg's comment: *"For most"* (conceptual) *"theories it is already a challenge to deal with international law, especially in its emerging stages. When does it become law? What are the reasons to call it law – or not? Is there one international legal order, or is it a loose collection of legal orders? Most contemporary philosophers of law now recognize international law as law and have reconstructed their theoretical tradition so that they can deal with this recognition, even though it may not always fit easily in their theories. (...)"*. Wibren Van der Burg, op. cit. p. 320.

space would necessarily stem, derive, or be otherwise linked to the characteristic action of one or more individual nation-state, either by themselves or by institutional representation.

Deeply rooted on contractual theories, *monist theories* sustain that, for exerting with absolute supremacy the monopoly of adjudication and violence, the nation-state is the only legal entity able to guarantee the application of legal sanctions, without which no regulation would bear *legal* or *juridical* status[13].

It's easy to infer, from this brief account, that the specificities of the nation-state enforcement machinery, the essential bindingness of the state enacted law, among other features of its typical functioning[14], constitute compelling evidence of the autopoietic[15], nonetheless highly questionable, parti-pris sponsored by the monist theory.

Although factually evidenced by the *status quo* that prevailed during the long historic hiatus in which colonialism thrived, the persuasiveness of *monist* theories seem to have vertically decline in sync with the banishment of *foreign policies* based upon rootless subjugation of vulnerable peoples and economies, through the unbridled employment of obliterative strategies and the use of unlimited military supremacy. In the doctrinal field, the

[13] The *monist paradigm* departs from the essential notion that, without an efficient enforcement apparatus, no regulation could be qualified as *legal* or be admitted as a prescriptive element kin to the juridical domain.

[14] See Wibren Van der Burg. Conceptual Theories of Law and the Challenge of Global Pluralism. A legal Interactionist Approach in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 319 and following.

[15] Although not necessarily adopted or subscribed by this article, the so-called postmodern philosophy has come out with some epistemological concepts that, despite the criticism that might be opposed to the rather damaging overgeneralization of the trend, are interesting and might be of interest. It is the case of *"(...) (T)he term autopoiesis (self-creation) is a neologism coined in 1972 by Varela and Maturana, Chilean cellular biologists and systems theorists, to describe the capacity of living cells to reproduce and organise themselves. The term was picked up and deployed by Niklas Luhmann (1927 – 1998), a German sociologist and philosopher, to capture his conception of society as composed of closed systems of self-referential communication that constantly reproduce and evolve themselves via the repetition of their own operations. When used in reference to social phenomena, autopoiesis is usually deployed as a short-hand reference to Luhmann's theory of society. (...) Its critical potential for law is discussed via two recently published examples, and its limitations are expressed vis a vis the turn to ecological thought. Luhmann's systems theory provides a general theory of society intended to replace the epistemic inheritance usually assumed by sociology. Concepts like subject and object, material and ideal, being and non-being – concepts based on ontological substance, derived from philosophy, law, and religion, cannot, for Luhmann, adequately describe contemporary society. (...) An autopoietic system produces itself while simultaneously producing its own conditions, both internal and external. Systems thus always exist in an 'environment'. The environment is not the ontic 'real' but rather is produced from within as the result of observing and reducing the complexity of its surroundings. (...)."* Keenan, Bernard. *Niklas Luhmann: What is Autopoiesis? Key Concept. Critical Legal Thinking. 10 Jan 2022.* Consulted online at https://criticallegalthinking.com/2022/01/10/niklas-luhmann-what-is-autopoiesis/ on August 24, 2025, PDT.

preference for *monist* explanations seemed to have as well succumbed to (i) moral appreciations as for what is and isn't acceptable nation-states can and cannot do, (ii) the unbearable material, political, and human cost colonialist policies, and (iii) the natural development of once vulnerable economies, once delivered from domination and abuse.

4. The Quite Obvious Flaws of the *Monist Paradigm.*

Notwithstanding the irreversible role of history and development in the decline of narrow theories that set in the nation-state phenomena the first and ultimate cause of all things, stances that try to explain either law or the exuberant spectrum of legal phenomena as an emanation of the typical power of the nation-state – also called *sovereignty* – can hardly be sustained. After all, how the limited perspective of monist theories could possibly explain the abundant instances where, within the domestic and international domains, extra-state[16] and even nonlegal regulatory sources, including the crude force of facts, determine compliance?

Or, from other perspective, how monism can explain, especially but not only in the international domain, (i) voluntary compliance resulting from interest-based drivers rather than rights-based formal criteria[17], (ii) the prevalence of soft-law rules outcoming from treaties, conventions, and other multilateral instruments, (iii) the application of non-legal sanctions, and

[16] *"Commercial transactions have always crossed territorial borders, of course, and legal disputes therefore are often jurisdictionally contested. In response to uncertainty about the legal regime to be applied, businesses may seek to develop their own mobile legal jurisdiction or develop trade-specific norms that will operate universally, distinct from nation-state sovereignty. From the oft-mythologized medieval lex mercatoria to the modern use of industry standard-setting bodies, arbitral panels, and uniform commercial codes of conduct, we see commercial actors developing alternative jurisdictions and alternative legal rules that at least at times challenge the formal law of sovereign entities."* Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 688.

[17] Claiming that voluntary compliance in the international realm comes out of *"an exchange of legitimacy for influence"*, Parella, for instance, observes that: *"(a)round the world, corporations and other business nonstate actors voluntarily abide by rules and guidelines that are nonbinding in nature. Almost one hundred private security companies globally adhere to a nonbinding code of conduct regulating their operations.1. Bank of America, Citigroup, JP Morgan Chase, and dozens of other financial institutions around the world adopt a framework to determining, assessing, and managing environmental and social risk in projects they fund.2 Similarly. Acer, Bose, Cisco, IBM, Dell, Intel, and many other electronics companies commit to set of standards on social, environmental, and ethical issues in their supply chains.3 None of these international codes or agreements is legally binding; corporations are only bound if they choose those bonds themselves.4 So the compliance we observe presents a mistery: why comply in the absence of legal obligation? Compliance is particularly surprising when the conventional wisdom holds that corporations resist regulation and frequently evade rules that are legally binding. So why comply with rules that are not? This chapter explains how corporate compliance with nonbinding international institutions results from an exchange of legitimacy for influence. (...)"* Kishanthi Parella, *"Compliance as an Exchange of Legitimacy for Influence"* in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 770.

even (iv) the auto-compositive features of mixed-mode conflict resolution methods, namely negotiation, mediation, and arbitration[18]?

5. The Basic *Credo* at the Core of the *Global Pluralist Paradigm*.

Vis-à-vis the above-mentioned insufficiencies and other clear flaws of the monist approach, the legal pluralist perspective, although also presenting some challenges, seems to fit better and actually explain the essence, nature, and role of the regulatory phenomena as it occurs in the global exchange continent.

It opposes the traditional monist theories by admitting that regulations prevailing within the global exchange realm are by no means strictly legal or necessarily linked to the exertion of the nation-state sovereignty, but rather transdisciplinary.

It also sustains that, alongside nation-state laws and jurisdictional acts, the global exchange realm is actually governed by an open range of other sources such as treaties and conventions, model laws, commercial customs, industry and supply chain standards, guidelines, and principles, as well as a vast universe of norms outcoming from the typical activity of multilateral geopolitical and commercial blocks, international organizations, transnational companies, nongovernmental organizations, pressure groups and lobbies, among other international entities and subjects[19].

Very importantly, as well, within the collection of normative sources impacting the global exchange ambience are the factual regulations stemming from the raw force of manmade and natural global exchange shocks. Although seldom referred to in an ostensive fashion by the specialized doctrine, full-fledged and "cold" wars, embargos, tariffs, protective international trade policies, on the one hand, and pandemics, climate change events, natural catastrophes,

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[18] *"(...) those focused only on official lawmaking bodies tended to miss the potent power of non-state law-making, such as industry specific regulatory entities or standard-setting organizations.5 Meanwhile, networks of nongovernmental organizations (NGOs) promulgating rules, standards, ratings, transparency metrics, and the like wielded important influence that was often missed by those only willing to look at state-based law.6 And corporations, particularly online platforms such as Facebook, Google, Microsoft, and Apple, increasingly deployed the tools of transnational legal enforcement more effectively than territorially bounded nation-states.7".* Berman, Paul Schiff. Understanding Global Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 2.

[19] "*Thus, pluralists de-emphasized the supposedly clear distinction between a norm, a custom, a law, a standard, a moral command, a sociological consensus, a psychological imperative, and the like. Instead, a pluralist approach focused on both enacted law and what has sometimes been called "implicit "or "interactional" law, the purposive practices that groups of people enter into that impact their practical sense of binding obligation.8 In addition, pluralists recognize that both enacted and interactional legal norms tend to seep into consciousness, such that the mere existence of these commands, whether enforced or not, may sometimes alter the power dynamics or options placed on the table in policy discussions. (...)".* Berman, Paul Schiff. Understanding Global Pluralism, in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 3.

exhaustion of non-renewable resources, etc., on the other, play a major role in shaping the correlation of forces and balance of power that ultimately determine how normativity operates in that realm.

Therefore, and as for the purposes of this article, the methodological perspective stemming from the global legal pluralist approach (i) explicates the transdisciplinary that is typical of trans-territorial interactions, (ii) harmonizes with the realist methodology herein adopted[20], (iii) explains how the factual complexity of the global exchange environment makes its way towards a quite peculiar, (iv) ensues the application of systems approach and system's thinking, and (v) matches other pedagogical tools herein adopted.

In sum, the global legal pluralism describes a methodological delocalization movement that operates in at least three coaxial vertical axis that simultaneously go (i) from *"local to global"* [21], (ii) from the *nation-state conceptual territory* to the *cross-jurisdictional geopolitical, economic, and factual space*, and (iii) from *sovereignty and bindingness* to *interest-based legitimation and enforcement*.

5.1. From Sovereignty to Legitimacy.

Concerning the peculiar dynamics of the regulatory sources acting upon the homeostasis of the trans-territorial exchange system, this article is also attentive to how they interact and have their effectiveness reciprocally modulated. Regardless their primary origins and the *authority* with which they are *enacted*, the ultimate *bindingness* or *effectiveness* of a regulatory source is contingent to the unique and kaleidoscopic balance of power dictated by the force correlation prevailing in the global exchange ambience in a given historical and geopolitical instance.

In other words, and contrary to what happens in the nation-state regulatory environment - where *authority* and strict *bindingness* derives from the exertion of *sovereignty* - in the global exchange environment the attainable *bindingness* is always mediated by some sort of spontaneous of *extorted* consensus building and is determined by the *legitimacy*[22] of that

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[21] Berman, Paul Schiff. Understanding Global Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 4 and 8.

[22] Not in the legal sense or as a synonym of legality, but rather in the sense of a power or political circumstance which is majorly accepted and overall sanctioned by the correlation of forces prevailing in a given social, economic, and geopolitical context, regardless of its objective fairness. According to the Princeton Encyclopedia of Self-Determination: "Legitimacy is commonly defined in political science and sociology as the belief that a rule, institution, or leader has the right to govern. It is a judgment by an individual about the rightfulness of a

source vis-à-vis the prevailing force correlation and balance of power prevailing in that particular moment.

Therefore, what determines if regulations will programmatically suggest or emphatically require a given conduct from the collectivity of stakeholders is not the nature, caliber, or endogenic authoritativeness of the source itself, but, once again, the homeostasis of the system, meaning the existential needs and vital drive for survival existing within the global exchange arena, at that particular moment in time.

5.2. The Problem of the Sanctions and their Enforcement

As for the sanctions operating in the global exchange setting, the global legal pluralist perspective also explains their nonstate nature[23], even when it is the case of recognition and enforcement of ICA awards or ICM mediated agreements within the limits of the concerned state(s) public policy[24].

Challenging the equivocal assumption that *law* is a normative command that shapes demeanors via the enforcement of sanctions warranted by the exertion of the nation-state monopoly of force and violence (sovereignty), the global pluralist approach rests upon undeniable evidence that, most frequently than not, sanctions therein are predominantly

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hierarchy between rule or ruler and its subject and about the subordinate's obligations toward the rule or ruler. (…) Where legitimacy as a belief is a subjective and an individualistic quality, legitimation is a process that is inherently social and political. Actors and institutions constantly work to legitimize their power, and challengers work to delegitimate it. Legitimation is often done by justifying the existence of rulers or their rules in terms of important normative principles of the society. However, legitimation may also be attempted through payoffs and inducements to subordinates. (…) It is distinct from legality, in that not all legal acts are necessarily legitimate, and not all legitimate acts are necessarily legal. One would hope for a close coincidence between the two, but it is conceptually necessary to keep the two separate. (…)" Princeton Encyclopedia of Self-Determination, consulted online at https://pesd.princeton.edu/node/516#:~:text=Legitimacy%20is%20commonly%20defined%20in,toward%20the%20rule%20or%20ruler on November 5, 2023, at 10:24pm PST.

[23] *"Legal pluralism offers four critical insights about law: 1. It shows that law is all over in everyday life, not just in formal legal institution. (...) 2. These myriads instantiations of law are fragmented, inconsistent, and contradictory. They are a bricolage built up from practice, history, and the legacy of efforts to solve earlier problems. They may be chaotic and incoherent (...). 3. These systems are constantly interacting with each other, redefining each other. (...) Power is exercised when one system or order trumps the decision of others. (...). 4. There is no sharp line between law and nonlaw regulatory processes. In practice, formal state law and informal nonstate law are not distinct systems but influence each other. (...)".* Sally Engle Merry. An Anthropological Perspective on Legal Pluralism in Schiff, Paul, Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 170.

nonlegal[25]. Said sanctions – which could be called *soft sanctions*[26] for their association with *soft law* – despite not backed up by an enforcement apparatus like the one operating in the nation-state environment, are extremely effective. They typically operate through loss of legitimation[27], loss of economic sustainability, redlining and profiling, and might cause, at the limit, the banning of the transgressing party from the collectivity of legitimate stakeholders of the global exchange community[28].

Finally, and for what is worth, this article also subscribes to two other broad methodological inroads intimately linked to the global legal pluralist perspective.

(A) the supremacy of *interest-based* criteria, rather than *rights-based* criteria, as the *cardinal test* for the legitimization process that upholds the *real* effectiveness of the

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[25] "*The spike in international treaties, agreements, and declarations of the United Nations, World Trade Organization, Organization for Economic Cooperation and Development, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the ILO, and the Free Trade Agreements, among other specialized international and transnational organizations, are also rich sources of new governance structures and of law. 169 These lawmaking bodies can operate as if they were working in relative autonomy and isolation. Scores of national and international NGOs have added to the distribution and application of such laws. Maurer shows how the soft law that makes up the majority of such transnational law often depends on the support of such organizations because it is not enacted and deployed through formal implementation mechanisms. 170 (...)"* Keebet Von Benda-Beckmann and Bertram Turner. Anthropological Roots of Global Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 99-100.

[26] *Soft, as herein applied, does not refer to the supposed smoothness or suavity of such punitive constraints or to any particular feature of their operative ways. Rather, on the contrary. Soft sanctions – in the sense that they do not derive from or rely upon* hard *enforcement machinery of the nation-state – might be much more expedite and fulminant than any conceivable stated derived* hard sanction. Notwithstanding this, they are imposed by the indigenous and organic operation of the global exchange environment, itself.

[28] The same kind of "soft sanctions" operate within any domestic law business realm, as witnessed by See Lynn M. LoPucki, Elizabeth Warren, Daniel Keating, and Ronald J. Mann. Commercial Transactions: A Systems Approach. op. cit. p. 6., in the following terms: *"Probably the most striking finding of this investigation was that there seem to be two, only slightly overlapping, worlds out there: the world of businesses practices and the world of law. In the world of businesses practice, law is much less significant than reputation and leverage as forces that govern the day-to-day behavior of the actors." "(...) If a buyer or seller is not acting consistently with the expected norms in an industry, the most common response of an aggrieved party is not to sue, but rather to cease doing business with the violator. Where there is a long-term relationship at stake, both sides have an incentive to compromise and to avoid the litigation world. Even where the relationship is fairly new, the prospect of future business with the other side will often be sufficient to coax parties away from hard-line positions."* Within the same direction, we might find the observations of Woodward according to which: *"(...) Stewart Macaulay is probably the first modem example of this different orientation. In his path-breaking work, Non-Contractual Relations in Business: A Preliminary Study,2 Macaulay learned that business people did not respond to contract law rules nearly as much as one might imagine. Reputational issues, repeat business, and other informal "sanctions" proved far more dominant in how business people actually behaved than did contract damages or other "sanctions" that "the law" might supply. (...)*". William J. Woodward Jr., Empiricists and the Collapse of the Theory-Practice Dichotomy in the Large Classroom: A Review of LoPucki and Warren's Secured Credit: A Systems Approach. op. cit. p. 424.

normative sources within the global exchange environment and upon which enforcement actions, compliance, decision-making, and conflict resolution outcomes are substantiated.

As already seen, the typical rights-based categories and the monopoly of jurisdiction, enforcement, and violence of the nation-state neither explain nor can be applied within the transglobal environment[29]. As mentioned before in this section[30], an *interest-based legitimation* and *enforcement* process – which works on grounds totally divorced from the nation-state categories of *sovereignty* works in this arena. But what are the interests that, on one end, might explain compliance, decision-making, and settlements spontaneously manifested by the global exchange multi-stakeholders, and on the other, uphold enforcement in the global exchange ambience?

In genre, rather than in species, such overarching, inter-systemic, and generally accepted interests seem to stem from the very nature of the global exchange system - which is umbilically linked to trade, commerce, and finance - and can be ranked as for their complementary functions according to two intertwined layers. First, the existential interests that address the system's demands for profitability, maximum efficiency, sustainability, and survival. Second, the instrumental interests that address the system's need for a reliable, safe, and functional regulatory and enforcement apparatus that, at the end of every flow or cycle, feedbacks the system and warrants its indefinite continuity.

Accordingly, survival, subsistence, and continuity are the values at the bottom of the first layer of existential overarching interests of the global exchange system, values which symmetrically correspond to the core interests of all its multi-stakeholders. This means, within the capitalist system, that the global exchange system – as a living organism desperately struggling to survive - protects itself by prioritizing (i) the achievement of commercial profit in every single transaction, (ii) the overall boosting of commercial margins and the yielding of all associated economic processes, (iii) the maximization of efficiency and competitiveness throughout its flows and cycles, and (iv) the warranting of its sustainability and, ultimately, perpetuation[31].

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[29] *"(...) the nation-state is by no means disappearing. 132 But the unity of territory, authority, and rights that is implied in the nation-state can no longer be taken for granted, and the changes can no longer be expressed and experienced exclusively through the 'vocabularies and the institutional instruments of the national as historically constructed'. 164"* Keebet Von Benda-Beckmann and Bertram Turner. Anthropological Roots of Global Pluralism, in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 98.

[31] *"Capitalism is often thought of as an economic system in which private actors own and control property in accord with their interests, and demand and supply freely set prices in markets in a way that can serve the best interests of society. The essential feature of capitalism is the motive to make a profit. As Adam Smith, the 18th*

Within the second layer of interests, and in a rather instrumental role, the global exchange overarching interests are associated with the building and operation of a unique, indigenous, and autonomous normative and enforcement apparatus able to function in accordance with fiduciary values such as, primarily, trust and, secondarily, conformity and predictability.

Consistently, as the cornerstone of the global exchange ecosystem – and the single fiduciary element that guarantees its delicate equilibrium – trust underlies every promise of realization existing at the bottom of every economic interaction within the global exchange environment.

Therefore, by applying self-regulation and self-enforcement of quintessential interests that are, at the same time, of the system and of its whole collectivity of multi-stakeholders, the system conforms and shapes itself through a continuum of self-modulated sources, sanctions, and enforcement mechanisms[32], as seen throughout this section.

On a historical note, by the way, this interest-based golden standard for voluntary compliance, decision-making, and dispute resolution stances is not new within the trade, business, and financial arena. It has been conspicuously observed, for instance, from the XII century on, with the progressive sedimentation of the commercial capitalism and the establishment of a fairly independent and autonomous regulatory and jurisdictional structure

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century philosopher and father of modern economics, said: "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest." Both parties to a voluntary exchange transaction have their own interest in the outcome, but neither can obtain what he or she wants without addressing what the other wants. It is this rational self-interest that can lead to economic prosperity. In a capitalist economy, capital assets—such as factories, mines, and railroads—can be privately owned and controlled, labor is purchased for money wages, capital gains accrue to private owners, and prices allocate capital and labor between competing uses (see "Supply and Demand" in the June 2010 F&D). Although some form of capitalism is the basis for nearly all economies today, for much of the last century it was but one of two major approaches to economic organization. In the other, socialism, the state owns the means of production, and state-owned enterprises seek to maximize social good rather than profits." Sarwat Jahan and Ahmed Saber Mahmud. *"What Is Capitalism? Free markets may not be perfect but they are probably the best way to organize an economy."* International Monetary Fund – IMF. Finance & Development, June 2015. Consulted online at https://www.imf.org/external/pubs/ft/fandd/2015/06/pdf/basics.pdf on November 13, 2023, at 6:09pm PST.

[32] *"Any economic transaction more complex than the immediate exchange of goods of easily assessable quality depends on convincing the involved parties that in case of doubt they will be able to enforce their mutual promises for performance. In other words, commerce will seldom flourish where effective and low-cost institutions supporting contractual commitments are unavailable. Although modern lawyers tend to think predominantly of state-created commercial law, including courts and enforcement mechanisms as the institutions fulfilling these functions, the neighboring disciplines of legal history, legal sociology, and more recently new institutional economics provide ample evidence of instances where social forces as well as private entities create and maintain reliable contract enforcement institutions. (...) in fact, private contract enforcement institutions may also work as a substitute for state commercial law, specifically where the latter is "very costly, slow, unreliable, biased, corrupt, week, or simply absent."*1 Gralaf-Peter Callies and Insa Stephanie Jarass. Private Uniform Law and Global Legal Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 749

across continental and insular Europe[33]. The traditional clash between the distinct universes of rights-based and interest-based criterion, when it comes to normativity, has also been exemplarily illustrated by the American contractual doctrine[34].

All in all, this article sits over the realization that the prevalence of interest-based criteria over rights-based criteria within the trans-territorial exchange system results from the aboriginal *instinct* of the system itself to preserve its survival, sustainability, and continuation, the employment of self-regulation, self-enforcement, and self-protection tactics and, last but not least, the clash between the regulatory and enforcement needs of the system and the inefficiency of the state or quasi-state sources to meet them[35].

(B) the growing pervasiveness of human rights concerns in the typical normativity of the global exchange environment, as a direct effect of the global pluralist approach.

It is important to add to this point, to counterbalance the impression that the typical normativity prevailing in the global exchange environment is only sensitive to the cruel logic of the *savage capitalism*, that this is a false impression. Despite the many instances in which, in the past and in the present, this proves to be true, the pluralism of the global exchange regulatory sources and its peculiar way of operation is growingly and consistently including into the trans-territorial normative picture human rights concerns. Also, and similar to what is happening with environmental and climate change issues, if the basic *instinctive struggle* of the global exchange system is to survive, it won't get far if its normativity does not reception the needs of its final beneficiaries, currently estimated in no less than 8 billion human beings.[36]

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[33] For a very interesting historical account of the *lex mercatoria* developments during the Middle Ages, as well as other commercial institutions, see John Linarelli, Global Legal Pluralism and Commercial Law in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 690 and following, Gralaf-Peter Callies and Insa Stephanie Jarass. Private Uniform Law and Global Legal Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 747-767, beginning at 749, and Galgano, F (1980). Storia del diritto commerciale. Bologna, Il mulino.

[34] See Lynn M. LoPucki, Elizabeth Warren, Daniel Keating, and Ronald J. Mann. Commercial Transactions: A Systems Approach. op. cit. p. 6. (check)

[35] *"After all, the evolution of commercial law seems to have taken place in recurrent cycles: an expansion of trade led to changed legal needs unmet by the established legal systems. Therefore, merchants relied on self-help and self-regulation where best practices over time turned into trade usage and custom, which were applied and developed further by commercial dispute resolution. Specialized merchant courts operated at city markets, trade fairs, or harbors, often as a privilege granted by authorities interested in levying custom duties. (...)"* Gralaf-Peter Callies and Insa Stephanie Jarass. Private Uniform Law and Global Legal Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 751.

[36] United States Census Bureau. Consulted online at https://www.census.gov/library/stories/2023/11/world-population-estimated-eight-billion.html on November 15, 2023, at 5:19pm PST.

Mainly because the prevalence of monist approaches, the inclusion of human rights concerns within the normative formulas prevailing into the global exchange setting, as well as their application within the international trade realm, has been subjected to much doctrinal debate. Nonetheless, for what is worth to this article, the reality on the field shows that the global exchange legitimation process of applicable sources and overarching interests is increasingly subscribing to and including human rights imperatives.[37]

Developed since the 1940s, the work of international organizations on this subject is also prompting the specialized doctrines to advocate for a more horizontal application of human rights protection clauses in international trade agreements, among others[38].

Also, within leading global supply chains, especially those which commodities respond directly to the most basic needs of the humankind – such as food, energy, telecommunication, and health, among others – it is possible to verify a growing preoccupation with human rights issues, translated in cooperative efforts[39]. In sum, and although the many manmade and natural shocks storming the global exchange territory lately – namely war, pandemic, and supply shortages - as a service attributed to the progressive prevalence of the

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[37] *"Human rights represent another example of legal pluralism. Since the 1940s, a system of treaties that states agree to support has been developed and supported by international organizations such as the UN Human Rights Council (HRC) and other UN bodies. It is a new global system of law. The human rights system is layered above state law and seeks to regulate it, with the assent of those nation-states that decide to ratify human rights treaties. Although human rights are dependent on states to enforce them, local social movements often make, and end run around recalcitrant states and appeal to the international sphere of human rights directly. As a system of law, it is inconsistent and unevenly enforced, yet it is also ideologically powerful. (…) (t)his is a global legal system that works through global, national, and local intersections."* Sally Engle Merry. An Anthropological Perspective on Legal Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 178-179.

[38] See also as for the fostering of human rights in the global exchange environment Ruggie, John Gerard. *"The Social Construction of the UN Guiding Principles on Business and Human Rights."* Research Handbook on Human Rights and Business. Ed. Surya Deva and David Birchall. Edward Elgar, July 2020 and IBA Practical Guide on Business and Human Rights for Business Lawyers. Adopted by a resolution of the IBA Council 28 May 2016. International Bar Association. Consulted online at https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4#:~:text=The%20UNGPs%20are%20based%20on,have%20a%20responsibility%20to%20respect on November 6, 2023, at 3:41pm PST.

[39] *"(…) Commercial, trade, and financial connections in global commodity chains and the expansion of human rights across the globe are rapidly expanding into new and complex networks of cooperation and domination in which lawmaking is a central factor. 165 (…) 'Human rights' have become a prominent transnational idiom to discuss how good governance, democracy, and the rule of law could be stimulated."* Keebet Von Benda-Beckmann and Bertram Turner. Anthropological Roots of Global Pluralism, in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 98-99

global legal realism, human rights are becoming an increasingly spoken idiom in the trans-territorial normative debates[40].

6. Conclusion

Structured as a collection of arguments for the application of *global pluralism* as an exceptionally useful methodological tool - rather than a finished account on the subject – this article is concluded with a call for debate and criticism over the premises and contentions herein disclosed. If ideas were anyhow similar to human souls, living in the intellectual heaven would be a punishment, not a reward. Exactly as it happens with human experience, it is by erroring and, hopefully, correcting, that ideas thrive and reach their best formulation. Therefore, every criticism is welcome.

[40] *"(...), legal pluralism can be seen to support the idea that law can be a productive terrain of contestation, a forum for dialogue across difference. (...) In considering the idea that legal pluralism might be a normative desirable approach to the design of legal systems and procedures, we might ask (...) whether legal or governmental systems might sometimes affirmatively seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically (...). Legal pluralism as a normative project might therefore specifically seek to identify those procedures, institutions, and practices that provide frameworks for managing diversity without dissolving it into universality. And although managing diversity is in some sense also the goal of liberal legality, it may be that legal pluralism offers a distinctive and perhaps sometimes a more effective approach. In order to construct such an approach, we might use Hannah Arendt's idea of "bearing with strangers" to think of how law could also build models of dialogue across difference rather than either wailing difference off, on the one hand, or dissolving differences altogether, on the other. From there we can develop a set of principles that might be built into legal procedures, institutions, and practices that take seriously this pluralist approach."* Berman, Paul Schiff. Understanding Global Pluralism in Berman, Paul Schiff (ed.), The Oxford Handbook of Global Legal Pluralism, op. cit. p. 18, 19, and 20.

EXCLUSIVE TERMS CLAUSES, MERGER CLAUSES, AND ENTIRE AGREEMENT CLAUSES UNDER THE CISG: DIFFERENT NAMES, SAME GAME: UNDER THE MICROSCOPE

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Abstract

As international trade expands, the United Nations Convention on Contracts for the International Sale of Goods (CISG) is becoming increasingly important. Especially with more jurisdictions signing on. This legal framework blends elements from both common law and civil law traditions, offering a unique approach to international sale of goods contracts. However, its treatment of merger clauses, provisions that emphasize the contract as the sole source of the parties' agreements, has not been thoroughly examined. These clauses essentially state that any previous discussions or agreements outside the written contract should not be considered, focusing solely on what is documented in the contract itself. The CISG's interpretative framework under Art 8(3) takes a broad view, allowing for the consideration of all relevant circumstances, including extrinsic evidence. This flexibility, however, can conflict with the common commercial expectation that merger clauses will provide certainty and completeness within written agreements. While these clauses are intended to reinforce that the contract is the definitive statement of the parties' intentions, the CISG's willingness to consider the external factors can create uncertainty about how strictly these clauses will be enforced.

Although the CISG Advisory Council has attempted to address this gap through its Opinion No. 3, it raises the question: is that enough? This Article takes a critical look at how the broad interpretive approach of Art 8(3) interacts with merger clauses. It also examines the Advisory Council's stance alongside the parol evidence rule, party autonomy, and perspectives from both common law and civil law systems.

At its core, this Article proposes a framework in which negotiated or comprehensive merger clauses are given a strong presumption of complete integration, while non-negotiated clauses can be challenged. This approach aims to align with the standard of derogation in Art 6, and furthers the deeply rooted ethos of the CISG's objectives of certainty and uniformity in international trade.

Keywords: CISG; Contractual Interpretation; Contractual Integration; Extrinsic Evidence; Merger Clauses; Entire Agreement Clauses; Exclusive Terms Clauses; Parol Evidence Rule; Four Corners Rule; Party Autonomy

Introduction

In the realm of international commerce, clarity and transparency are paramount. The primary goal of putting an agreement in writing is to ensure that all contractual parties have a mutual understanding of their commitments, leaving little room for disputes over what has been agreed upon. To reinforce this clarity, parties often include clauses that explicitly state that no external sources should influence, supplement, or contradict their agreement, a principle known as the "four corners rule" [Kim 2005].

At the heart of this discussion lies the United Nations Convention on Contracts for the International Sale of Goods (CISG), a unique legal hybrid that weaves together elements from both common law and civil law traditions [Janssen/Ahuja 2018]. Unlike many legal frameworks, which are dominated by a single system, the CISG embodies its own distinct legal character, navigating the complexities of international trade with finesse. Litigation involving the CISG continues to rise and more jurisdictions adopt it. Nine out of the ten largest exporting and importing nations are already contracting states of the Convention, with the UK being the notable exception.

In contrast to the common law system, which adheres to the parole evidence rule, excluding prior oral or written agreements, negotiations, or practices, the CISG offers a more flexible approach. While the common law system seeks to uphold the integrity of written agreements, the CISG, particularly Art 8(3), allows for the inclusion of relevant circumstances surrounding the case, such as negotiations and established practices. This provision raises questions about the extent to which parties can exclude external or extrinsic evidence under the CISG.

Under Art 6 of the CISG, which caters to party autonomy, parties have the power to deviate from any provision of the CISG, including Art 8(3). This can be achieved through merger clauses, entire agreement clauses, or exclusive terms clauses. But are these clauses truly interchangeable or do they merely sound alike? How far can parties go in excluding external evidence while still respecting the spirit of the CISG?

This paper examines Art 8 of the CISG and the parol evidence rule, exploring the nuanced boundary between contractual interpretation and supplementation. It analyses the guidance of the CISG Advisory Council alongside landmark decisions that have fundamentally shaped the modern understanding of merger clauses. Finally, the paper considers the broader implications of revisiting and potentially rethinking the default presumption in favor of extrinsic evidence, aiming to establish a balanced framework that better protects party autonomy and commercial certainty.

1. Interpretation under the CISG: Evaluating the Value of Text

Legal disputes often hinge on the interpretation of contracts, making this aspect critical in any legal battle. One might expect the CISG to provide explicit guidelines for such interpretation. Surprisingly, it does not. Instead, Art 8 of the CISG outlines how to interpret the statements and conduct of the parties involved [Schwenzer et al 2022; Bianca/Bonell/Fransworth 1987]. The drafters of the CISG had a clear vision: the intention of the parties should take precedence over the written contract itself. This means that the negotiations leading up to the contract, along with the parties' past dealings, are vital for grasping their true intentions. During the drafting process, it was agreed that courts should not be limited in their review of evidence, allowing for a comprehensive examination of the context surrounding the contract [Rosett 1984]. Accordingly, Art 8(3) of the CISG allows recourse to all relevant circumstances of the case for interpreting statements [Kröll et al 2018]. While the Convention outlines several methods for determining relevant circumstances, such as negotiations, practices between parties, usages, and subsequent conduct, the list is notably non-exhaustive [Honnold 1982; Witz et al 2000; Staudinger/Magnus 2017]. It follows that any interpretative aid may be admitted so long as it is relevant.

Assisted by all relevant contextual information, the CISG begins with a focus on the actual intent of the parties, reflecting a civil law perspective. It further introduces a requirement that the other party must have known, or should have known, about this intent, aligning it with common law principles [Murray 1988; Celleo 1999]. As illustrated by Murray's example: "A says to B, 'I offer to sell you my horse for $100.' B, knowing that A intends to sell his cow for that price, not his horse, replies, 'I accept'" [See Murray 1988 commenting on the First and Second Restatements of Contracts 1981]. Janssen and Ahuja have noted that, regardless of whether the Common Law or subjective intent approach apply, the conclusion is the same, that is, the contract would be for the sale of the cow, not the horse [Janssen/Ahuja 2018]. This scenario highlights how context and intention can redefine contractual agreements.

This dual approach underscores the CISG's commitment to a holistic interpretation of contracts, emphasizing that understanding transcends mere words on a page. By blending these methodologies, the CISG crafts a framework that respects the parties' intentions.

2. Restoring the Primacy of Text: The Parol Evidence Rule

No matter how meticulously crafted a contract may appear, it often conceals a richer understanding between the parties, an understanding that may not be fully captured in the final written document [Rosett 1984 noting "[n]o written contract is ever complete, even the most carefully drafted document rests on volumes of assumptions that cannot be explicitly addressed"]. This gap can arise for various reasons, whether from oversight by the parties themselves or their legal representatives.

At the heart of this issue lies the parol evidence rule. Despite its name, which suggests a focus on evidence, the rule actually serves to exclude it, specifically, oral or extrinsic evidence, when determining the parties' agreed terms. Originating in England and rooted in early English evidence law, which favored a "best evidence" approach, the term "parol" derives from the French word for "oral" [O'Gorman 2016]. This doctrine aims to foster commercial certainty by preventing subsequent disputes that could arise from claims that the parties intended something different than what is written, thus preserving the integrity of the written agreement. In contrast to many civil law jurisdictions, common law courts uphold the parol evidence rule, recognizing the significance that parties often place on their written documents [Janssen/Ahuja 2018]. This rule safeguards the reliability, accuracy, and consistency of contractual agreements, ensuring that what is documented reflects the parties' true intentions [Law Commission 1986; Daniel 2007; Kaufmann 2004].

The CISG does not explicitly make reference to the parol evidence rule. Rather, it allows for contracts to be proven by any means. Moreover, it empowers courts to consider all relevant circumstances – negotiations, established practices between the parties, customary usages, and subsequent conduct – to ascertain one party's intent [Kröll et al 2018]. As noted, "the CISG has recognized that many contracts are based on the concept of barter in an exchange." [Zeller 2003]. Thus, it has been suggested that "[t]he parol evidence rule is simply incompatible with international developments and arguably with the needs of the business community" [Zeller 2003].

One reason for disregarding the parol evidence rule can be its inconsistent development across jurisdictions, causing difficulties for unsophisticated commercial parties dealing across civil and common law jurisdictions. For instance, few jurisdictions have codified the rule, while others have opted to leave the rule as an uncodified principle [See United States codifying Parol Evidence Rule under UCC § 2-202; cf. Australia]. Moreover, even where the parol evidence rule has been codified its application has been non-uniform. In the United States alone, the parol evidence rule has evolved into two primary interpretations: the Corbin Rule and the Williston Rule, with some states adopting a blend of both approaches [See *infra* 3.Privatising the Parol Evidence Rule explaining the two approaches].

Ironically, the rule which began as an endeavour for certainty, has since morphed into different formulations with varying exceptions [Agren 2009 noting "While the parol evidence rule is complex and subject to many exceptions, so is the very issue of the integrity of written contracts”]. The CISG takes a unique approach by prioritizing the parties’ subjective intent and moving away from the parol evidence rule and the plain meaning rule. This shift has been recognized as a significant advancement in the globalisation of trade practices, rightly phasing out traditional common law restrictions [Zeller 2003; But see Murray 2011 noting that ‘Contract law abandoned the theory of subjective intention as unworkable’].

3. Privatizing the Parol Evidence Rule: Enhancing Its Application within the CISG

While the parol evidence rule has its limitations, it also offers notable advantages. Broadly speaking, parties often seek to restrict the admissibility of extrinsic evidence. As observed in the *Mitchill v. Lath*, “[n]otwithstanding injustice here and there, on the whole it works for the good”.[1] Thus, when parties reach an agreement, they should not be denied the benefits of this rule, as contracts reflect the intentions of the parties, and it is not the role of the courts and tribunals to assert that the parties did not mean what they explicitly stated.

To avail the benefit of the rule, parties may create their own customized version of the parol evidence rule, effectively barring the use of extrinsic evidence in the event of a dispute [Wallach 1979; Vogenauer/Kleinheisterkamp 2015]. This is often achieved through specific contractual clauses, referred to as exclusive terms clauses, entire agreement clauses, integration clauses or merger clauses. An entire agreement clause serves as a clear signal that the contract contains all communications and mutual understandings between the parties. This theoretically means that the parties cannot refer to or rely on any discussions or documents outside the contract itself. Similarly, merger clauses, true to their name, indicate that all relevant discussions have been consolidated into this single document. While “entire agreement clause”,“merger clause”, and “integration clause” are often used interchangeably, the term “exclusive terms clause” also emerges in this context, albeit less frequently. This latter term emphasizes that only the provisions within the agreement are applicable, reinforcing the idea

[1] Mitchill v. Lath, 160 N.E. 646 (1928), U.S. District Court (2008)(Court of Appeals of the State of New York).

that external sources should not influence interpretation. For the sake of this article, we will primarily refer to these terms as merger clause(s) while acknowledging that other related terms may also be used as appropriate.

Regardless of the terminology used, the objectives of these clauses remain consistent. First, they add certainty to contracts that have been negotiated over extended periods. Yet, even short-term contracts can benefit from this added clarity. Second, merger clauses explicitly preclude the use of oral statements or written communications exchanged prior to the contract's conclusion as well as any discussions that took place during its signing [Müller/Schwenzer 2013]. A merger clause, by its very nature, aims to consolidate all agreements and relevant circumstances surrounding the parties' communications into a singular, cohesive contract. This includes pre-contractual negotiations and agreements. Interestingly, the CISG does not explicitly address merger clauses [See Para 4 in A.C No. 3 for a more elaborate discussion]. These clauses first emerged in common law before eventually finding their way to civil law systems and international instruments, largely due to the Americanisation of laws [Wiegand 1991; Fontaine/De Ly 2009].

But why did merger clauses arise in common law if the parol evidence rule was already in place? Understanding this question is critical for grasping the original purpose of merger clauses and how they function. Merger clauses were never meant to exclude extrinsic evidence, rather, they served as a trigger to activate the parol evidence rule [Agren 2009]. For example, according to the Williston Parol Evidence approach, a written agreement is usually seen as the only true reflection of the parties' agreement. This view can only be changed if the agreement seems clearly incomplete [Williston 1957]. The presence of merger clauses in such jurisdictions reinforces the idea that the agreement is complete, making it less vulnerable to outside challenges [Agren 2009; Pecyna 2013].

This original understanding of merger clauses however, conflicts with jurisdictions that follow a weaker interpretation of the parol evidence rule. Take jurisdictions that adhere to the Corbin approach, where there is no assumption of complete integration [*supra* Restoring the Primacy of Text: The Parol Evidence Rule]. In these cases, integration must be supported by both the written agreement and other relevant circumstances before one can invoke the benefits of the parol evidence rule [Corbin 1943]. The challenge in adopting merger clauses in these jurisdictions lies in the fact that the written agreement can be "easily proven false by either party establishing that there were in fact additional or contradictory terms agreed upon prior to the execution of the contract" [Agren 2009]. The effectiveness of merger clauses is therefore arguably closely linked to how strictly the parol evidence rule is applied. It has been suggested that in jurisdictions with a weaker application of this rule, the impact of merger clauses can be misleading at best [Agren 2009].

4. Advisory Council's Efforts to Establish Uniformity in Merger Clauses

Having explored the complexities of merger clauses in the absence of the parol evidence rule, it is important to note that scholars have observed that such clauses are not explicitly dealt with in the CISG, but the principles of such clauses are still relevant [Advisory Council 2005; Fontaine/De Ly 2009]. This regulatory silence has contributed to varied interpretations and applications of such clauses across different jurisdictions. In any event, given that the CISG is an international convention, differing interpretations and applications are inevitable [Janssen/Ahuja 2019].

In response to this gap, the CISG Advisory Council, a group of experts dedicated to the interpretation and application of the CISG, has put forth Opinion No. 3, which tackles the issues of contractual merger clauses within the Convention. This opinion aims to clarify the impact of merger clauses, striving for greater uniformity in their application. Discussing the Advisory Council's opinion is essential not only because it serves as an effort to develop a uniform regime governing merger clauses but also due to the Council's growing significance in shaping a global jurisconsultorium [Kraton 2009; Andersen 2009].

This section unfolds in two parts: first, we will explore the Advisory Council's observations, and second, we will provide a critical analysis of the recommendations issued.

4.1 Key Observations

To begin, the CISG Advisory Council has offered a valuable insight: parties wishing to invoke the parol evidence rule within the framework of the CISG can effectively do so by incorporating merger clauses. This approach allows them to step outside the Convention's usual interpretive guidelines. The Council highlights two reasons for adding these clauses: first, to guard against extrinsic evidence that might supplement or contradict the written terms of the contract; and second, to limit reliance on such evidence for interpretative purposes [Advisory Council 2005]. With these objectives in mind, the Advisory Council has laid out three significant hypotheses.

1. Simply including a merger clause does not automatically exclude the interpretative standards set forth in Art 8 of the CISG.

2. A clear intent to derogate from Art 8 is essential; vague language will not suffice.
3. Any derogation would be assessed against both the text and the context surrounding the formation of the contract as per the standards of Art 8 CISG [Advisory Council 2005].

To arrive at these conclusions, the Advisory Council conducted a comparative analysis of how merger clauses are treated in other international legal instruments. Taking the UNIDROIT Principles of International Commercial Contracts (PICC) as a starting point, the Council noted that Art 2.1.17 of the PICC prohibits using prior statements and agreements to contradict or supplement a written agreement with a merger clause. However, it does permit such evidence for interpretative purposes [Vogenauer/Kleinheisterkamp 2015].

On the other hand, the Principles of European Contract Law (PECL) categorizes merger clauses into two distinct types: those that have been individually negotiated and those that have not [Fontaine/de Ly 2009, See also Müller/Schwenzer 2013 noting that German Law makes a similar distinction]. For merger clauses that are the result of negotiation between the parties, any prior statements not included in the contract are presumed to be excluded [Viscasillas 2001]. Conversely, for clauses that are not individually negotiated, such as those found in standard form contracts, the presumption shifts to being rebuttable [Fontaine/de Ly 2009]. Notably, the PECL aligns with the PICC by allowing prior agreements to be used for interpretative purposes.

4.2 Is It Enough?

Having explored the Council's recommendations, we now turn our attention to the nuances of their approach. The key questions arise regarding the treatment of merger clauses under the CISG. Specifically, we ask whether it is time to reconsider if the mere incorporation of these merger clauses derogates automatically from Art 8 of the Convention, or whether it ought to derogate automatically, and how we should determine the nature of such derogation.

4.2.1 Various Standards of Derogation: Exploring Differences

According to the Advisory Council’s opinion, simply including a merger clause in a contract does not inherently derogate from the interpretive standards outlined in Art 8 of the CISG. Rather, the effect of a merger clause must be assessed on a case-by-case basis, similar to how we would assess a statement under Art 8. This perspective, as noted by Flechtner, implies that any ambiguity regarding the parties’ intention for their written agreement to be integrated, to be final, should be resolved by examining their intentions, rather than assuming that the merger clause alone suffices to demonstrate the parties intent [Flechtner 1999]. Therefore, to grasp the implications of a merger clause, we need to look closely at the parties' intentions and consider all relevant circumstances, including negotiations, and customary practices.

However, this approach can potentially lead to a confusing loop. To determine whether a written agreement is integrated, adjudicators must first examine the parties' intentions, considering all relevant details [See *Caffaro Chimica* 2008, *TeeVee Toons* 2006][2]. Such a proposition may inadvertently elevate the subjective intent of parties, often an afterthought, over the text of the contract itself, thereby complicating the integration process and undermining the very purpose of the merger clause.

That said, a merger clause is intended to exclude external evidence, meaning that everything relevant should be found within the contract itself. However, there still needs to be a way to interpret the merger clause. It may make sense to consider the parties' intentions in this context. This situation is somewhat similar to determining whether the application of the CISG is excluded. If there is an international sale of goods contract and the CISG is applicable, but one party claims that the CISG has been excluded, it is still the principles of the CISG that will be referenced to determine whether the exclusion is valid. This highlights that even when discussing whether to opt out of the CISG, its foundational principles play a crucial role in guiding the interpretation.

4.2.2 Interpretation vs. Supplementation: Understanding the Distinction

Inspired by instruments like the PICC and the PECL, the Advisory Council suggests that a conventional merger clause should only exclude extrinsic evidence for purposes of supplementation or contradiction of the written contract, but not for interpreting ambiguities [Advisory Council 2005]. To bar extrinsic evidence for interpretative purposes, the Council suggests that the merger clause must be articulated more comprehensively, signaling the parties' intentions through other relevant factors [Müller/Schwenzer 2013]. This stance has been adopted in various cases, leading to the conclusion that the scope of merger clauses is limited in contractual interpretation, rendering their effects somewhat negligible.

The world of international commerce thrives on certainty and predictability. Parties invest time and effort in negotiations to navigate risks, which are then reflected in contractual

[2] Caffaro Chimica S.r.l. et al. v. Sipcam Agro USA et al., No. 1:07-CV-2471-MHS, U.S. District Court (2008), (Northern District of Georgia); TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH (2006), U.S. District Court (Southern District of New York).

obligations. The primary role of merger clauses in this context is to safeguard these expectations, and to ensure that the written contract accurately reflects the parties' understanding. The Advisory Council’s approach in this regard however, arguably introduces a layer of uncertainty to the interpretive process. By separating the concepts of supplementation and interpretation, some matters may inadvertently become complicated for commercial parties [See for instance Schwenzer/Muñoz 2022 noting “Although some legal systems, especially civil law systems, make a theoretical distinction between the concepts of integration and supplementation, there is little practical difference”]. Scholars have questioned this dichotomy, even within the context of the parol evidence rule. Perillo, for instance, argues that disallowing additional terms on the grounds of supplementation while permitting them for interpretative purposes poses challenges [Calamari/Perillo 1998]. He concludes that the parol evidence rule and the plain meaning rule are intertwined, similar to “Siamese twins” [See also Lizner 2002 approving of this view].

Nonetheless, when interpreting ambiguities through external evidence, new terms to the contract are not introduced; instead, the aim is to clarify the parties’ intent and thought process.

4.2.3 U.S. Courts’ Interpretation of Merger Clauses under the CISG

In this section we aim to illustrate the Advisory Council’s approach by examining American jurisprudence. The US courts have affirmed the broad-based approach of Art 8(3) of the CISG, giving due consideration to all relevant circumstances, even in the presence of a merger clause.

Our enquiry begins with the Court of Appeals of the Fifth Circuit, in the case of *Beijing Metals & Minerals Import/Export Corp v. American Business Center*.[3] In this case, the American Business Center sought to introduce prior oral agreements as evidence to interpret a contract. Rejecting the request, the court reasoned that the parol evidence rule would apply irrespective of the governing law. Despite the contract being governed by the CISG, the Court applied the domestic US law, and not the Convention’s canons of interpretation. Such an approach is described as a homeward trend, a tendency of domestic courts to apply familiar domestic rules rather than applying the Convention [Cross 2007].

[3] Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., No. 92-2171 (1993), U.S. Court of Appeals (5th Circuit).

Contrastingly, the Eleventh Circuit's decision in *MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova d'Agostino S.p.A*,[4] held that the parol evidence rule does not apply to the CISG [See also *Shuttle Packaging System*s 2001; *Mitchell Aircraft Spares* 1998].[5] The court emphasized that Art 8(3) of the CISG mandates due consideration of all relevant circumstances, including extrinsic evidence, to discern the party's intent. As a workaround to the non-applicability of the parol evidence rule, the Court suggested incorporating merger clauses.

Yet, does the mere incorporation of a merger clause necessarily derogate from the CISG's rejection of the parol evidence rule? This answer is no, as Art 8 would nevertheless govern the assessment of such a derogation. This implies that merger clauses may be ineffective, and more so in template contracts, because the parties may not have intended them to serve that function [Dodge 2024].

In the case of *Cedar Petrochemicals v. Dongbu Hannong Chemical Ltd.*,[6] the contract contained an entire agreement clause stating that it represented "the entire agreement of the parties." The Court held that this clause could not displace the mandate of Art 8, to consider extrinsic evidence, noting that extrinsic evidence should not be excluded unless the parties actually intended so, and that such an intention must itself be established through Art 8. The Court noted that merger clauses cannot override the Convention's canons of interpretation as stipulated under Art 8 of CISG, and it can only bar prior oral agreements that contradict the written agreement.

Cedar Petrochemicals showcases that the issue with merger clauses goes beyond whether they were negotiated. It really revolves around whether they were drafted comprehensively, and specifically enough to indicate an intent to derogate. If the clause is comprehensive, it may demonstrate the parties' intent to derogate from Art 8 and to exclude extrinsic evidence. A clause that expressly identifies the choice to interpret the text, along with categories of excluded evidence, would be stronger in ensuring that merger clauses achieve their intended effect.

[4] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A., No. 97-4250 (1998), U.S. Court of Appeals (11th Circuit).

[5] Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S.A. et al., No. 1:01-CV-691 (2001), U.S. District Court (Western District of Michigan); Mitchell Aircraft Spares v. European Aircraft Service, No. 97 C 5668, 23 F. Supp. 2d 915 (1998), U.S. District Court (N.D. Illinois).

[6] Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd., 2011 U.S. Dist. LEXIS 110716, U.S. District Court (Southern District of New York).

5. Towards a Balanced Approach: Reconciling Party Autonomy with Potentially Unconscionable Merger Clauses

The Advisory Council's position appears to seek a middle ground between party autonomy, that is, the freedom of parties to structure their contractual relationships as they choose, and concerns surrounding unconscionable merger clauses. Yet, this approach raises an important question: should the burden truly rest on the party seeking to exclude extrinsic evidence, as the Council suggests? After all, the very purpose of a merger clause is to consolidate the parties' agreement within the four corners of the contract and to preclude reliance on prior negotiations or external understandings.

In this section we will explore how to balance party autonomy with the need to protect both buyers and sellers. We will begin by identifying the circumstances in which merger clauses can become unconscionable. Then, we will discuss the idea that the burden should rest on the party seeking to include external evidence to show that the merger clause does not reflect the parties's intentions and was not negotiated. Finally, we will propose aligning the standards of derogation of merger clauses with the uniform standard under Art 6 of the CISG.

5.1 Identifying Unconscionability: Standards for Contractual Clauses

While the Advisory Council does not directly address unconscionable merger clauses, their emphasis of evaluating these clauses against the parties' intentions resonates with the broader need to shield parties from unfair trade practices. This echoes the perspective of the PECL, which we discussed earlier distinguishing between negotiated merger clauses that are deemed exclusionary, and non-negotiated clauses that come with a rebuttable presumption that favour excluding prior statements [*supra* 4.1 Key Observations; Jansen/Zimmermann 2018].

But what exactly constitutes unconscionability, and when do merger clauses cross that line? The doctrine of unconscionability originated in the United States as a safeguard against contractual unfairness, a concept that finds parallels in various civil law countries [See Yong 2011]. In *Williams v. Walker-Thoams Furniture Co.*,[7] the District of Columbia Circuit defined unconscionability as "the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party". Often, such clauses appear in boilerplate contracts, or contracts of adhesion where one party faces a stark choice: accept the terms or forgo the contract entirely [See generally Radin 2012 explaining 'take it or

[7] Williams *v.* Walker-Thomas Furniture Co., 350 F.2d 445 (1965), U.S. Court of Appeals (District of Columbia Circuit).

leave it' contracts]. This often occurs due to an imbalance in bargaining power. Merger clauses, too, frequently find their way into standard form contracts, limiting negotiation opportunities. These clauses may turn unconscionable when reasonable notice is not provided or when the drafter disregards prior verbal expectations that contradict the written terms of the contract [Macintosh 1988].

National legal systems have also grappled with the implications of standard form merger clauses. In Germany for instance, the presence of a standard merger clause raises a rebuttable presumption that the written document is complete, although this presumption can be challenged with any form of evidence [Magnus/Moss 2011]. The idea of establishing non-rebuttable presumptions in merger clauses has been met with skepticism [Magnus/Moss 2011 noting "it is more doubtful whether clauses of that kind [setting up a non rebuttable presumptions] are valid, because they restrict the possibility to prove to the contrary" (context added); Wolf 1999].

Similarly, under English law, the incorporation of standard form merger clauses creates a strong, yet rebuttable presumption of integration, with no distinction made between negotiated and non-negotiated merger clauses unless specific circumstances warrant otherwise [See Mileform Ltd v Interserve Security Ltd; See also Netherlands making a distinction between negotiated and non-negotiated clauses].[8] In the United States, the treatment of merger clauses and the doctrine of unconscionability varies widely, yet non-bargained or unexpectedly surprising merger clauses remain susceptible to unconscionability challenges [Warkentine 2008].

5.2 Addressing the Dilemma: Revisiting the Presumption Against Extrinsic Evidence

Imagine two parties entering into a standard contract for the sale of lemons. They casually discuss flexible delivery terms before signing, but the contract includes an entire agreement clause stating it constitutes the complete agreement, excluding prior written or oral agreements. When the seller is late with the delivery, the buyer argues that the seller is liable for this delay, pointing out that the contract makes no mention of any flexible delivery terms.

Following the Advisory Council Opinion in this case, the buyer must provide evidence to demonstrate the intention and validity of the merger clause, particularly as the buyer seeks

[8] Mileform Ltd v Interserve Security Ltd, [2013] EWHC 3386 (QB), (Queen's Bench Division) quoting Ravennavi SpA v. New Century Shipbuilding Co Ltd., [2007] EWCA Civ 58, Court of Appeal (Civil Division).

to exclude any external evidence. Accordingly the buyer must prove that the parties intended under Article 8 of the CISG for the merger clause to apply. Perhaps one reason for this conclusion could be that contracts under the CISG need not be in writing and accordingly, the burden could reasonably rest on the party wishing to exclude evidence, although could merger clauses apply in the case of oral contracts? If parties are allowed to rely on informal discussions or understandings, it makes sense for the party seeking to exclude that evidence to demonstrate why it should not be considered.

But this raises an important point: why should the buyer in this case bear this burden? Given that standard contracts are common and the merger clause is in writing, it would be more appropriate for the seller to demonstrate that the clause does not accurately reflect the parties' intentions. The court or tribunal should first assess whether the merger clause was negotiated or simply part of a standard contract. If the contract includes a clear merger clause, the seller should be responsible for showing why this clause should be disregarded, especially since there were informal discussions suggesting a different understanding. Such an approach aligns with the principles in PECL and with the treatment of merger clauses in jurisdictions like Germany, USA and England [*supra* Identifying Unconscionability: Standards for Contractual Clauses].

Additionally, shouldn’t parties also bear some responsibility for thoroughly reviewing the contracts they sign? While informal discussions may reflect the parties’ intentions, the existence of a merger clause indicates an agreement to limit reliance on prior negotiations. This creates a tension between encouraging parties to communicate their intentions and holding them accountable for understanding the terms they agree to. If parties are expected to engage in meaningful discussions, they should also take the time to scrutinize the final written agreement.

Thus, while the Council’s perspective suggests the burden would rest on the buyer in this case, it also highlights the necessity for both parties to actively ensure their written contracts accurately reflect their intentions. Balancing these responsibilities could lead to more equitable outcomes in contract disputes.

5.3. Aligning Standards of Derogation: Harmonizing Merger Clauses with Art 6 of the CISG

Article 6 of the CISG grants parties the freedom to exclude the application of the Convention entirely or derogate or vary the effects of any its provision, subject to Art 12. This principle of party autonomy also extends to Arts 8 and 11, which address the determination of a contract’s subject matter, its interpretation, and the form of the contract. Derogation under Art

6 CISG can manifest through individually negotiated terms or standard terms, so long as they accurately reflect the parties' intentions, assessed pursuant to the provisions of the CISG [Schwenzer et al 2023; Kaufmann 2004].

A crucial question arises regarding whether the standard of derogation for merger clauses, as proposed by the Advisory Council, aligns seamlessly with the broader principles established under Art 6. According to the Advisory Council, merely inserting a merger clause in a CISG-governed contract does not automatically derogate from Art 8; instead, the parties must furnish additional evidence to demonstrate their intention. This raises an interesting contrast with Art 6, where intent to derogate may be reflected solely from the contractual provisions, independent of any surrounding negotiations [See generally *Corn Case* 2012 where force majeure clause was replaced with a lower contractual standard; Manner et al 2019].[9]

Implementing the recommendations discussed earlier would alter this standard. By establishing that a merger clause, when articulated in the contract, is presumptively exclusive of extrinsic evidence, we effectively waive the requirement for contextual evidence to establish intent. Consequently, the burden of proof would shift to the party contesting the integration, requiring them to present evidence that contradicts the explicit terms of the contract. Therefore, aligning the standard of derogation of merger clauses with Art 6 of the Convention presents a compelling rationale for reversing the presumption in favour of excluding evidence [Suresh 2021].

6. What Extrinsic Evidence do Merger Clauses Include and Exclude in Contractual Interpretation

Having explored an alternative approach to the presumptions surrounding merger clauses, an important question arises. Do merger clauses exclude trade usages or the reliance on extrinsic evidence for interpretation?

The prevailing view today suggests that merger clauses are not typically intended to modify the rules governing contractual interpretation. Consequently, reliance on extrinsic evidence remains permissible for interpretative purposes [Advisory Council 2005; See also DCFR II; CESL 72 cf. Mitchell 2006]. This understanding is further reinforced by distinguishing between contextual information that supplements or contradicts a written

[9] Corn Case, Case No. 218/2011, International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, 23 January 2012.

contract and that which clarifies ambiguities [But see *supra* 4.2.2 Interpretation vs. Supplementation for an analysis of distinction between supplementation and interpretation].

Moreover, the Advisory Council has indicated that reliance on trade usages and practices remains valid, even in the presence of a typically worded merger clause. To exclude such evidence effectively, a more comprehensive clause would be necessary, one that explicitly states the exclusivity of the contract, rendering prior discussions irrelevant [See for example "The New Agreement contains the entire agreement between the Parties with respect to the subject matter hereof; and all prior agreements, promises, representations, understandings, negotiations, and communications, whether oral or in writing, between the Parties with respect to the subject matter hereof (other than the Prior Agreements) are merged into and superseded by the New Agreement."; See also Contract Clauses in Trans-Lex Principle IV.5.7].

What, then, should determine the scope of a merger clause? The answer ultimately lies in the expectations the parties intended to uphold. Merger clauses are commonly understood to exclude reliance on prior negotiations for the purposes of supplementing or interpreting the written contract. However, extending their effect beyond this default position should not be presumed automatically. Rather, a broader exclusionary effect must emerge either from the language of the clause itself or from a clear mutual understanding between the parties. This becomes particularly relevant in international commerce, where parties may share a common legal background that shapes their expectations regarding contractual interpretation. For instance, where both parties come from jurisdictions that traditionally accord merger clauses a broader effect, there is a compelling argument that such a shared understanding should be respected, even when the CISG governs the contract. This approach is also reflected in judicial reasoning recognising that a shared domestic legal culture may inform the parties' mutual intent [See Magnus/Moss 2011 commenting on BGH NJW-RR 1992 noting "the court set aside the dogma that foreign-law style contracts should be always interpreted according to the foreign law <u>and should rely on the understanding familiar to both parties</u>" (emphasis added)].

This distinction also explains why labels such as "merger clause", "integration clause", or "entire agreement clause" cannot, by themselves, determine legal effect. These terms are often used interchangeably in commercial drafting [Farnsworth 2004; Müller/Schwenzer 2013], and under the CISG, the title of a clause is ultimately secondary to the intention it conveys. For instance, just because a contract labels the buyer as the "Prime Minister" does not mean that they actually hold that position in reality. Similarly, whether a clause is called a merger clause or an integration clause, its effect remains consistent. Article 8 directs courts to look beyond form and examine what the parties actually intended the clause to achieve. A clause labelled as an "entire agreement clause" does not automatically derogate from the Convention's interpretative framework simply because of its heading. Equally, a carefully negotiated clause may justify a stronger exclusionary effect even if it carries no specific label at all. What really matters is whether the clause is interpreted in line with Art 8 and demonstrates an intent to derogate from the Convention's default framework. A boilerplate clause that one party never engaged with might be unlikely to meet this standard.

Ultimately, the interpretation of a merger clause hinges on several factors: the title of the clause, the specific wording used, and if necessary, the guidance provided by Art 8 regarding the parties' intentions. Just because a clause asserts that the contract is an entire agreement and that no extrinsic evidence should be considered, it may be essential to analyze the wording carefully. The application of these rules will determine whether the clause is intended to take effect and its potential impact on the interpretation of the clause.

Conclusion

Merger clauses are essential in commercial contracts, clearly signaling that any prior negotiations and representations are set aside in favour of the agreed terms in the contract. These clauses should be treated with significance they deserve, reflecting the mutual intent of the parties for a definitive agreement. It is a choice to interpret the contract with what parties wrote rather than what they may have said. When disputes arise, it's only fair that the party looking to challenge the merger clauses takes on the responsibility of justifying the introduction of extrinsic evidence.

The Advisory Council's Opinion No. 3 adds valuable insights into the function of these clauses, reinforcing expectation of clarity and finality that parties seek when they enter into contracts. At the same time, the Opinion also leaves open important questions regarding the precise role merger clauses should play within the CISG's interpretative framework, particularly where parties intend such clauses to carry stronger exclusionary effect. Of course, this is merely an initial observation; it's unfortunate that access to the Advisory Council's meeting notes and the thought process behind the Opinion is not available, as it would provide invaluable insights into the reasoning of CISG experts.

Nevertheless, these unresolved questions make the present discussion all the more important. With this discussion we aim to address the need for greater recognition of merger clauses within the CISG framework, especially when they've been thoughtfully negotiated or included. Establishing a non-rebuttable presumption for individually negotiated or arguably even comprehensive merger clauses in standard contracts aligns well with honouring the intentions of the parties and reflects practices seen in other transnational instruments such as the PECL, as well as in Common law and Civil law jurisdictions

At the same time, it is important to remember that this is not about rigid textual interpretation. When the written terms do not fully capture what the parties intended, the CISG's broader interpretative approach remains crucial.

In the end, our goal is to give more weight to merger clauses while still protecting against unconscionable terms. By closing the gap between what merger clauses promise and how they are applied under the CISG, we can create a more fair and effective system for interpreting contracts that truly respects the intentions of all parties involved.

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CAN AI-ASSISTED AWARDS SURVIVE THE NEW YORK CONVENTION? A DOCTRINAL ASSESSMENT OF ENFORCEMENT RISK IN THE AGE OF THE ALGORITHMIC ARBITRATOR

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Abstract:

This article examines whether the New York Convention's existing framework for refusing recognition and enforcement of arbitral awards is equipped to address the rise of AI-assisted arbitration. Drawing on recent institutional initiatives — including the AAA-ICDR's AI Arbitrator, private AI mediation platforms, and the UNCITRAL Colloquium on Artificial Intelligence in Dispute Resolution — as well as emerging case law such as *LaPaglia v. Valve Corp.* and *ARIHQ v. Santé Québec*, the article tests six distinct challenges raised by generative AI against the Convention's text. It asks, in turn, whether an award presupposes a human decision-maker; whether AI drafting reviewed only nominally by a human arbitrator amounts to an impermissible delegation of authority; whether AI-generated reasoning can satisfy reasoned-award requirements; whether embedded algorithmic bias escapes the Convention's disclosure-and-challenge apparatus; whether party consent can neutralize these risks; and whether the Convention remains an adequate living instrument or requires targeted amendment. The article concludes that the Convention's existing grounds for refusal, tested against each of these challenges, adequately address them without requiring amendment. A treaty designed to test the soundness of human judgment, the article argues, has no difficulty identifying where that judgment is missing.

Keywords:

Artificial intelligence; international arbitration; New York Convention; arbitral awards; algorithmic bias; due process; delegation of authority; reasoned awards; party consent; AI governance.

Table of Contents: I. Introduction; II. Machine-Made Judgment: Does the Definition of an "Award" Presuppose a Human Decision-Maker?; III. Outsourcing Judgment: Is AI Use an Impermissible Delegation of Authority?; IV. The Reasoned-Award Requirement: Can Artificial Intelligence Satisfy It?; V. Embedded Bias and the Limits of Disclosure and Challenge; VI. Consent as a Neutralizer of Enforcement Risk; VII. Living Instrument or Call for Amendment?; VIII. Conclusion.

I. Introduction

When the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was opened for signature in New York in 1958, its drafters rightfully assumed that an arbitral award was necessarily the product of a human mind.[1] Sixty-eight years on, that assumption has ceased to be true. Generative artificial intelligence has moved from the periphery of arbitral practice, where it once assisted with translations and document review, to the center of the adjudicative process itself.[2] Awards are now being drafted, and in some institutional models, substantially shaped by AI systems operating alongside, or in place of, the human neutral.[3]

The American Arbitration Association, through its International Centre for Dispute Resolution, has launched an AI Arbitrator, described as the first AI-assisted adjudicative tool introduced by a major arbitral institution.[4] Early testing reported by the AAA-ICDR indicated resolution times roughly twenty to twenty-five percent faster and cost savings of approximately thirty-five percent or more compared to conventional proceedings.[5] The institution has signaled plans to extend the tool to disputes of greater value and complexity.[6] The AAA has also paired this with ClauseBuilder AI, a conversational drafting tool that helps parties tailor arbitration and mediation clauses to their preferences.[7]

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[1] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Nova York, 10 June 1958. 330 U.N.T.S. 3.
[2] AMERICAN ARBITRATION ASSOCIATION. *AI arbitration explained: what it is and how it works*. ADR.org, 17 July 2026. Available at: https://www.adr.org/news-and-insights/ai-arbitration-explained/. Accessed on: 29 July 2026.
[3] Id.
[4] Id.
[5] AMERICAN ARBITRATION ASSOCIATION. *AI arbitrator*. ADR.org. Available at: https://www.adr.org/ai-arbitrator/. Accessed on: 29 July 2026.
[6] Id.
[7] AMERICAN ARBITRATION ASSOCIATION. *American Arbitration Association® launches AI Agreement to Mediate Builder to simplify and customize agreements to mediate*. ADR.org, 19 May 2026. Available at: https://www.adr.org/press-releases/aaa-launches-ai-agreement-to-mediate-builder-to-simplify-and-customize-agreements-to-mediate/. Accessed on: 27 July 2026.

Dyspute.ai has launched Adri v2, an asynchronous AI mediation platform that uses notifications to alert parties when action is required, rather than requiring them to participate simultaneously in real time.[8] It has entered into partnerships with other companies to make Adri v2 the default mediation provider embedded in standard-form legal agreements.[9] The stated rationale, in the words of the companies involved, is to replace slow and expensive legacy court or arbitration models with "a smarter, more efficient resolution pathway."[10] Parties can now choose between various Online Dispute Resolution ("ODR") companies, including Bot Mediation, Immediation, and New Era ADR.[11]

Consequently, ADR institutions are scrambling to safeguard the integrity of the arbitration and mediation proceedings against the impact of generative artificial intelligence. The International Chamber of Commerce established a task force on AI in international dispute resolution in 2025, and the Singapore International Arbitration Centre revised the technology and enforcement provisions of its seventh edition rules that same year.[12]

Multilateral bodies have taken notice: the United Nations Commission on International Trade Law ("UNCITRAL") convened the Colloquium on the Use of Artificial Intelligence (AI) in Dispute Resolution and Remote Hearings in Arbitration and Mediation in February 2026, and mandated the Working Group to consider the recognition and enforcement of electronic arbitral awards and electronic notices of arbitration.[13] Similarly, the National Center for Technology and Dispute Resolution, together with the International Council for Online Dispute Resolution, published Guidance for Third Parties Using Artificial Intelligence in Dispute Resolution in April 2026, extending the 2022 Online Dispute Resolution Standards.[14]

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[8] AMBROGI, Bob. *Dyspute.ai launches Adri v2, a 24/7 asynchronous AI mediation platform*. LawNext, 13 January 2026. Available at: https://www.lawnext.com/2026/01/dyspute-ai-launches-adri-v2-a-24-7-asynchronous-ai-mediation-platform.html. Accessed on: 29 July 2026.
[9] Id.
[10] Id.
[11] Id.
[12] INTERNATIONAL CHAMBER OF COMMERCE. *ICC dispute resolution services in 2025: a year in review*. ICCWBO.org, 16 December 2025. Available at: https://iccwbo.org/news-publications/news/icc-dispute-resolution-services-in-2025-a-year-in-review/. Accessed on: 29 July 2026.
SINGAPORE INTERNATIONAL ARBITRATION CENTRE. *Arbitration rules of the Singapore International Arbitration Centre*. 7. ed. Singapore: SIAC, 2025. Available at: https://siac.org.sg/siac-rules-2025. Accessed on: 29 July 2026.
[13] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. Working Group II. *Colloquium on the use of artificial intelligence in dispute resolution and remote hearings in arbitration and mediation*. [S.l.]: UNCITRAL, 16–17 February 2026.
[14] NATIONAL CENTER FOR TECHNOLOGY AND DISPUTE RESOLUTION; INTERNATIONAL COUNCIL FOR ONLINE DISPUTE RESOLUTION. *Guidance for third parties using artificial intelligence in dispute resolution*. [S.l.: s.n.], 8 April 2026.

The clearest signal that this is no longer an academic exercise came from a US and a Canadian court. In *LaPaglia v. Valve Corp.*, a consumer who had lost an AAA proceeding against Valve Corporation petitioned the district court to vacate the award, arguing that the sole arbitrator had exceeded his powers by effectively delegating his adjudicative role to artificial intelligence.[15] LaPaglia's petition rested on circumstantial evidence rather than direct proof: the arbitrator had reportedly mentioned, during breaks in a ten-day hearing, that he used ChatGPT to draft an unrelated personal article and that he hoped to finish the case quickly ahead of a planned trip.[16] The award was then issued just fifteen days after the final post-hearing brief, over the December holidays and allegedly included facts not found in the record along with prose stylistically consistent with AI generation.[17] Unfortunately, the district court never addressed whether the arbitrator has actually exceeded his powers.[18] Invoking the Supreme Court's holding in *Badgerow v. Walters* that the Federal Arbitration Act does not itself supply an independent basis for federal subject-matter jurisdiction, the court dismissed the petition.[19]

In *ARIHQ v. Santé Québec*, decided by the Québec Superior Court in April 2026, an arbitrator’s award in a multi-million-dollar healthcare services dispute was set aside after the losing party demonstrated that the legal authorities cited in the award’s core reasoning did not exist.[20] The authorities had been fabricated by a generative AI tool the arbitrator had used to draft the award, and the arbitrator had not independently verified them.[21] The court was careful to note that it was not condemning the use of AI in arbitral drafting as such; an award assisted by AI in a minor or secondary capacity would likely survive.[22] What it could not tolerate was an arbitrator who allowed hallucinated authority to form the substantive core of the decision without independent verification.[23] Although the case arose under domestic Quebec procedural law and did not engage the New York Convention directly, its reasoning is equally applicable

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[15] UNITED STATES. United States District Court for the Southern District of California. *LaPaglia v. Valve Corp.*, n. 3:25-cv-00833-RBM-DDL, Petition to Vacate Arbitration Award, p. 1. San Diego, 8 April 2025.
[16] Id. at 3.
[17] Id. at 3.
[18] UNITED STATES. United States District Court for the Southern District of California. *LaPaglia v. Valve Corp.*, n. 3:25-cv-00833-RBM-DDL, Order Granting Motion to Dismiss the First Amended Petition to Vacate Arbitration Award. San Diego, 9 December 2025.
[19] Id.
[20] CANADÁ (Québec). Cour supérieure. *ARIHQ c. Santé Québec*. 2026 QCCS 1360. Québec, 22 April 2026.
[21] Id. at 88-121.
[22] Id.
[23] Id.

with regard to the Convention's own grounds for refusal,[24] and it is only a matter of time before a case squarely presenting the question reaches a New York Convention enforcement forum.

This article takes up that question directly. Section I examines whether the concept of an award presupposes a human decision-maker. Section II addresses whether an award drafted by AI and merely signed by a human arbitrator survives scrutiny under the New York Convention. Section III analyzes whether a reasoned-award requirement can be satisfied by AI-generated reasoning. Section IV assesses whether embedded algorithmic bias escapes the conventional disclosure-and-challenge apparatus. Section V explores whether party consent can neutralize these risks. Finally, Section VI considers whether the Convention remains an adequate living instrument or requires targeted amendment.

II. Machine-Made Judgment: Does the Definition of an "Award" Presuppose a Human Decision-Maker?

The New York Convention does not explicitly require that an award be rendered by a human being.[25] Article I defines its scope by reference to arbitral awards made in the territory of a State other than the State where recognition and enforcement are sought, and Article V's grounds for refusal speak of the composition of the arbitral authority, the arbitral procedure, and the validity of the arbitration agreement, without ever specifying that the decision-maker must be a natural person.[26] In 1958, the possibility of a non-human decision-maker would have seemed so remote that the drafters had no occasion to exclude it.[27]

One author noted that a number of national arbitration laws already permit legal persons, not only natural persons, to serve as arbitrators, which undercuts any claim that international arbitration rests on a transnational principle confining the tribunal to human beings.[28] That textual freedom, however, calls for immediate qualification.[29]

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[24] ARTIFICIAL INTELLIGENCE HALLUCINATIONS IN ARBITRATION: analyzing the landmark award annulment in ARIHQ c. Santé Québec. *Lexology*, 4 May 2026. Available at: https://www.lexology.com/library/detail.aspx?g=f040d3f0-2382-456b-9c20-ee1e1afb4204. Accessed on: 29 July 2026.
[25] U.N. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention"). Nova York, 10 June 1958. 330 U.N.T.S. 38.
[26] Id.
[27] GIELEN, Nico (mod.); AST, Federico; NAPPERT, Sophie; ORTOLANI, Pietro. *Debate: are AI-assisted awards enforceable under the New York Convention?* Kluwer Arbitration Blog, 13 July 2026. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/debate-are-ai-assisted-awards-enforceable-under-the-new-york-convention/. Accessed on: 29 July 2026.
[28] Id.
[29] Id.

Most concretely, a substantial number of arbitration statutes are drafted in terms that assume, or expressly require, a human arbitrator.[30] Article 1450 of the French Code of Civil Procedure, which applies to domestic arbitrations only, provides that "only a natural person having full capacity to exercise his or her rights may act as an arbitrator," and if the parties' agreement designates a legal person instead, "such person shall only have the power to administer the arbitration."[31] Similarly, Article 13 of the Spanish Arbitration Act (Ley 60/2003): limits the arbitrator role to "natural persons who are in full exercise of their civil rights."[32] Article 14 governs institutional arbitration, allowing parties to entrust the administration of their arbitration and the appointment of arbitrators to designated organization.[33] Article 1023 DCCP of the Dutch Code of Civil Procedure allows for "any natural person of legal capacity may be appointed as arbitrator."[34] It carves out no exception for a legal person, an institution, or any other non-human decision-maker, subject only to whatever further criteria the parties themselves choose to impose (such as nationality restrictions, professional qualifications, or language ability).[35]

Where the law of the seat requires a natural person, a decision rendered by a machine, or so substantially generated by one that the human arbitrator's role was nominal, could be set aside at the seat or treated as invalid by an enforcement court on the grounds that the composition of the arbitral authority that did not accord with the law of the country where the arbitration took place, as required by Article V(1)(d).[36]

A more foundational objection contends that the New York Convention should be read not as a technical instrument, indifferent to the identity of the decision-maker.[37] It positions "the tangible recognition of international arbitration as an instrument for the guardianship and application of the rule of law," "ruled thoughtfully, rather than rigidly and mechanically."[38]

[30] Id.
[31] FRANCE. *Code de procédure civile* [Code of Civil Procedure]. Paris: Légifrance, art. 1450. Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000023450931. Accessed on: 29 July 2026.
[32] SPAIN. *Ley 60/2003, de 23 de diciembre, de Arbitraje* [Spanish Arbitration Act]. Madrid: Boletín Oficial del Estado, 26 December 2003. art. 13. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-23646. Accessed on: 29 July 2026.
[33] SPAIN. *Ley 60/2003, de 23 de diciembre, de Arbitraje* [Spanish Arbitration Act]. Madrid: Boletín Oficial del Estado, 26 December 2003. art. 14. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2003-23646. Accessed on: 29 July 2026.
[34] NETHERLANDS. *Wetboek van Burgerlijke Rechtsvordering* [Dutch Code of Civil Procedure]. Haia: Overheid.nl, art. 1023. Available at: https://wetten.overheid.nl/BWBR0001827/2025-07-01?g=2025-07-18&z=2026-02-05. Accessed on: 29 July 2026.
[35] Id.
[36] New York Convention, art. V(1)(d); Kluwer Debate, supra note 27.
[37] Kluwer Debate, supra note 27.
[38] Id.

According to this view, a decision must comprise an irreducibly human element: "perhaps enhanced by AI, but human nonetheless."[39] On that account, the efficiency gains that AI promises are real and laudable, but asserts that the rule of law suffers if the deliberative element of adjudication is displaced by a mechanistic process.[40]

The importance of the human element of decision-making is flagrant, for example, in "défense de rupture" cases, in which one of the parties challenge the fairness of syllogistic application of law to fact. Jacques Vergès, the late French-Vietnamese lawyer, developed the rupture defense—a strategy that abandons the conventional aim of persuading a court of a client's innocence and instead denies the court's very legitimacy to judge the case at all.[41] Vergès first deployed this approach in 1957 while defending Djamila Bouhired, an Algerian National Liberation Front militant accused of planting bombs in Algiers during the Algerian War of Independence; rather than contesting the facts, he argued that a French colonial tribunal had no moral or legal authority to try a freedom fighter resisting occupation, effectively putting French colonialism itself on trial.[42] The technique inverts the usual roles of a criminal proceeding: the defendant becomes an accuser, the courtroom becomes a political stage, and the prosecution's underlying legitimacy, not the defendant's guilt, becomes the central question.[43] In the context of the New York Convention, a rupture-style argument could be invoked under Article V(2)(b), which lets an enforcement court refuse recognition of an award on the grounds that enforcing this award would offend fundamental public policy of the enforcing state—a legitimacy objection to the outcome.

The term "public policy" is deliberately undefined so that a human forum can weigh evolving societal values, historical context, and political commitments against the specific award before it, case by case.[44] An AI arbitrator cannot evaluate whether its decision violates public policy in any meaningful sense. First, the judgment is evaluative and political rather than

[39] Id.
[40] Id.
[41] VERGÈS, Jacques M. *De la stratégie judiciaire*. Paris: Les Éditions de Minuit, 1968; COPELLO, David. Jacques Vergès, rupture strategy and the Argentinean new left: circulations and adaptations of a judiciary theory. *Global Society*, v. 33, n. 3, p. 348-364, 2019. DOI: 10.1080/13600826.2019.1598943; KARNAVAS, Michael G. *Damning international criminal defense with faint praise*. Michaelgkarnavas.net, 4 October 2016. Available at: https://michaelgkarnavas.net/blog/2016/10/04/damning-international-criminal-defense-with-faint-praise/. Accessed on: 29 July 2026.
[42] Id.
[43] Id.
[44] INTERNATIONAL BAR ASSOCIATION. Subcommittee on Recognition and Enforcement of Arbitral Awards. *Report on the public policy exception in the New York Convention*. London: IBA, October 2015. Available at: https://www.disputeresolutiongermany.com/wp-content/uploads/2015/12/Report-on-the-Public-Policy-Exception-in-the-New-York-Convention-2015.pdf. Accessed on: 29 July 2026.

propositional. It isn't a fact to be retrieved or a rule to be applied, but a judgment on which party's grievance is grave enough, and which authority's conduct disqualifying enough, to justify refusing to enforce the outcome. Second, a legitimacy determination is only meaningful if made by an entity that can be held politically and institutionally answerable for it, and an AI system has no standing to bear that responsibility — it cannot be a party to the social contract whose authority is being questioned or vindicated.[45]

Although the textual argument correctly establishes that the Convention imposes no per se bar on AI involvement in the production of an award, the rule-of-law argument correctly identifies that the degree of that involvement matters, and arbitral judgment involves reasoning that AI is incapable of performing. The more workable framework is allowing assistive uses of AI, such as legal research, drafting support, translation, or summarization, but requiring a human arbitrator to review and adopt its own reasoning, as opposed to sanctioning substitutive uses in which the AI system determines the outcome and the human role is reduced to formal ratification. Institutional efforts such as the AAA's AI Arbitrator, must focus on providing a tool assisting a human-supervised process rather than an autonomous decision-maker. Whether any given award falls on the permissible or impermissible side of the spectrum is, however, a question of fact and evidentiary proof that arises most sharply not at the level of definitional first principles but in the context of what a human arbitrator actually did when reviewing the AI's output.

III. Outsourcing Judgment: Is AI Use an Impermissible Delegation of Authority?

Suppose an AI system drafts the arbitral award in full, and either there is no human review or a human arbitrator reviews and signs it without independently evaluating the merits. Should enforcement be refused on the grounds that composition of the arbitral authority or the arbitral procedure failed to match the parties' agreement according to Article V(1)(d) of the New York Convention?

Two distinct scenarios can be usefully separated. In the first, "the tribunal leans so heavily on AI drafts that doubts arise whether its adjudicative function was improperly delegated to a machine."[46] In this case, the vice is not in the use of AI as such but in a species of deception.[47] The parties selected a particular arbitrator, often after vetting their qualifications,

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[45] VERGÈS, supra note 40; MATTHIAS, Andreas. The responsibility gap: ascribing responsibility for the actions of learning automata. *Ethics and Information Technology*, v. 6, n. 3, p. 175-183, 2004. DOI: 10.1007/s10676-004-3422-1.
[46] Kluwer Debate, supra note 27.
[47] Id.

reputation, and disclosed conflicts, precisely because they valued that individual's judgment.[48] By signing an award, an arbitrator represents to the parties that they personally exercised that judgment and reached the conclusion themselves.[49]

In fact, there have been numerous challenges to arbitral awards premised on impermissible delegation of decision-making authority to a tribunal secretary.[50] In each case, the court declined to vacate or annul the award, generally finding that a secretary's substantial involvement in research, note-taking, or even drafting did not, without more, establish that the tribunal had abdicated its role.[51] Courts were nonetheless careful to draw a line rather than bless unlimited delegation: they uniformly held that full delegation—where the secretary rather than the arbitrator performs the actual adjudicative function of deciding the case—would not be permissible, and that an arbitrator's duty to personally review, deliberate on, and adopt the reasoning as their own remains non-delegable no matter how much drafting assistance is used.[52]

Similarly, where an appointed human arbitrator merely rubber-stamps an AI-generated output, "the parties get something other than what they bargained for: a signature, not the human judgment" they contracted for when they agreed to that arbitrator's mandate.[53] On this analysis it makes no analytical difference whether the undisclosed drafter was an AI system or an unsupervised junior associate. Either conduct can be properly framed as a procedural irregularity engaging Article V(1)(d) of the Convention, which permits refusal where the composition of the arbitral authority or the arbitral procedure was not in accordance with the

[48] BORN, Gary B. International commercial arbitration. 3. ed. Alphen aan den Rijn: Kluwer Law International, 2021. §12.01[A]; BLACKABY, Nigel et al. Redfern and Hunter on international arbitration. 6. ed. Oxford: Oxford University Press, 2015. paras. 4.13, 4.34.
[49] BORN, Gary B. International commercial arbitration. 3. ed. Alphen aan den Rijn: Kluwer Law International, 2021. §13.04[A][8]; *P v Q* [2017] EWHC 194 (Comm), para 65.
[50] ENGLAND AND WALES. High Court of Justice, Commercial Court. La Société pour la Recherche la Production le Transport la Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC. [2014] EWHC 875 (Comm). Judgment of 2 April 2014; NETHERLANDS. Gerechtshof Den Haag [The Hague Court of Appeal]. Russian Federation v. Veteran Petroleum Ltd, Yukos Universal Ltd & Hulley Enterprises Ltd. Case No. 200.197.079/01. Judgment of 18 February 2020; ENGLAND AND WALES. High Court of Justice, Commercial Court. P v. Q & Ors. [2017] EWHC 194 (Comm). Judgment of 9 February 2017; SWITZERLAND. Federal Supreme Court. Case 4A_709/2014. Judgment of 21 May 2015; BELGIUM. Cour de cassation. Emek İnşaat Şti and WTE Wassertechnik GmbH v. European Union. Case C.21.0548.F/1. Judgment of 24 April 2023.
[51] ENGLAND AND WALES. High Court of Justice, Commercial Court. La Société pour la Recherche la Production le Transport la Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC. [2014] EWHC 875 (Comm). Judgment of 2 April 2014; ENGLAND AND WALES. High Court of Justice, Commercial Court. P v. Q & Ors. [2017] EWHC 194 (Comm). Judgment of 9 February 2017, paras. 262-264; BELGIUM. Cour de cassation. Emek İnşaat Şti and WTE Wassertechnik GmbH v. European Union. Case C.21.0548.F/1. Judgment of 24 April 2023.
[52] SWITZERLAND. Federal Supreme Court. Case 4A_709/2014. Judgment of 21 May 2015; BELGIUM. Cour de cassation. Emek İnşaat Şti and WTE Wassertechnik GmbH v. European Union. Case C.21.0548.F/1. Judgment of 24 April 2023, applying INTERNATIONAL CHAMBER OF COMMERCE. Note to parties and arbitral tribunals on the conduct of the arbitration. Paris: ICC, 2019. paras. 184, 187.
[53] Kluwer Debate, supra note 27.

agreement of the parties.[54] The threshold for refusing enforcement on this basis is understood to be a high one, but it is not categorically excluded: "a wholesale de facto delegation could breach requirements on the arbitral mandate, the proper constitution of the tribunal, or public policy."[55]

In a second scenario, the parties themselves have agreed, in advance, that the tribunal's role is limited to transforming an AI-generated output into "an award without altering its substance."[56] That arrangement resembles a consent award, but with the critical difference that the substantive content was not negotiated or agreed by the parties themselves; it was generated by a system neither party controlled in the moment of decision.[57]

ARIHQ v. Santé Québec supplies the clearest illustration to date of how a court actually rightfully applies this distinction, even outside the New York Convention framework.[58] The Québec Superior Court did not hold that any use of generative AI in drafting an award is fatal.[59] It held that where the core legal reasoning of the award rested on authorities that did not exist, because the arbitrator had used a generative AI tool without independently verifying its output, the arbitrator had abdicated the duty of independent review and had, in substance, delegated a portion of the adjudicative function to the machine.[60] That failure was serious enough to constitute a violation of the applicable arbitral procedure under Quebec's Code of Civil Procedure.[61] The court was careful to distinguish this from a scenario in which the arbitrator had verified the cited authorities, or in which the hallucinated citations were no more than a minor and non-material irregularity. In either of those situations, the award would likely have stood.[62] The analytical structure the court applied — materiality of the AI's role to the actual outcome, and the genuineness of the human arbitrator's verification — translates directly onto Article V(1)(d) of the New York Convention, which is concerned precisely with whether the arbitral procedure and the composition of the arbitral authority conformed to what the parties agreed and to the law of the seat.[63]

[54] ENGLAND AND WALES. High Court of Justice, Commercial Court. P v. Q & Ors. [2017] EWHC 194 (Comm). Judgment of 9 February 2017, paras. 65-71.
[55] Kluwer Debate, supra note 27.
[56] Kluwer Debate, supra note 27.
[57] Id.
[58] CANADÁ (Québec). Cour supérieure. ARIHQ c. Santé Québec. 2026 QCCS 1360. Québec, 22 April 2026.
[59] Id.
[60] Id. at 88-121.
[61] CANADÁ (Québec). Code de procédure civile [Code of Civil Procedure]. Québec: Éditeur officiel du Québec, 2016. art. 646(3).
[62] Id.
[63] New York Convention, art. V(1)(d).

For institutions and platforms building AI-assisted models, the practical lesson is that the enforceability of the eventual award will often turn on evidence rather than on the mere fact of AI involvement. Arbitrators and tribunals would be well advised to generate and preserve a documented record of what the human decision-maker actually did: what was reviewed, what was changed, what independent legal or factual verification occurred, and on what basis the human arbitrator adopted the reasoning as the arbitrator's own. In the absence of such a record, a losing party seeking to resist enforcement will be well placed to argue, as the claimants successfully did in ARIHQ v. Santé Québec, that the signature on the award did not reflect an exercise of independent judgment.[64]

IV. The Reasoned-Award Requirement: Can Artificial Intelligence Satisfy It?

The New York Convention itself contains no express requirement that an award be reasoned.[65] Article V sets out an exhaustive list of grounds for refusing recognition or enforcement, and it is deliberately silent on the internal content requirements of an award, including whether the arbitrator or the tribunal explained itself.[66]

However, many institutional rules and national arbitration laws require a reasoned decision, and the New York Convention itself, through Article V(1)(d), permits refusal where the arbitral procedure did not conform to the parties' agreement or, absent such agreement, to the law of the place of arbitration.[67] The question posed by AI-generated decision-making is whether reasons produced by a machine can ever satisfy this requirement.

Some authors argue that origin is not truly the relevant variable. In fact, "the real problem of AI-generated reasoning is not that it is machine-authored," but that it may be flawed.[68] AI often hallucinates factual evidence and legal precedent, espousing conclusions that are not in fact supported by the record or by the law.[69] These authors argue that risk, however, is not unique to AI.[70] A human associate, a junior arbitrator, or indeed a senior partner working under time pressure can equally produce unsupported or incorrect reasoning.[71] The doctrinal

[64] CANADÁ (Québec). Cour supérieure. ARIHQ c. Santé Québec. 2026 QCCS 1360. Québec, 22 April 2026.
[65] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Nova York, 10 June 1958. 330 U.N.T.S. 3.
[66] Id. at V.
[67] Id. at V(1)(d).
[68] Kluwer Debate, supra note 27.
[69] Id.
[70] Id.
[71] Id.

response to that risk has never depended on identifying which individual mind produced the error, but on whether the reasoning, once produced, is sound and substantiated.[72]

These authors argue that a categorical rule barring AI-authored reasoning would in any event be difficult to administer in practice, given that AI drafting assistance is now built into word processors, legal research platforms, and citation-checking tools used by human arbitrators and their support staff as a matter of course.[73] Any line drawn between permissible AI assistance with style or research and impermissible AI generation of substantive reasoning would be exceptionally difficult to police from outside the tribunal's own deliberation room.[74] The more administrable standard, on this account, asks about the integrity of the reasoning actually adopted by the tribunal, not the identity of whoever or whatever first produced the words on the page.[75] We should not ask, in the abstract, whether AI is capable of reason, but whether the reasoning actually offered in the award was sound, regardless of the origin.[76] Framed this way, the integrity of arbitral awards can be more effectively preserved not by prohibiting AI assistance with drafting reasons, which would be both conceptually contestable and practically unworkable, but by refusing to recognize and enforce an award embedded with fabricated or incorrect legal or factual premises which impact the core of the decision.[77] This refusal becomes available not only under Article V(1)(d) but potentially, in the most serious cases, under the public policy ground in Article V(2)(b), discussed further in Section V.[78]

However, this question is inseparable from the question of what an award is in the first place, addressed in Section I. First, a tribunal doesn't merely record what witnesses said: it forms a belief about what actually happened, considering the credibility of the witness, the internal inconsistencies in the testimony, and corroboration from external sources, according to the standards of proof that govern that belief — preponderance of the evidence, clear and convincing evidence, beyond reasonable doubt.[79] These are explicitly epistemic thresholds.[80]

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[72] Id.
[73] Id.
[74] Id.
[75] Id.
[76] Id.
[77] Id.
[78] Id.
[79] CLERMONT, Kevin M.; SHERWIN, Emily. A comparative view of standards of proof. The American Journal of Comparative Law, v. 50, n. 2, p. 243-275, 2002; LAUDAN, Larry. Truth, error, and criminal law: an essay in legal epistemology. Cambridge: Cambridge University Press, 2006.
[80] Id.

They specify how justified a belief must be, given the available evidence, before the law will treat it as established fact.[81] AI is simply incapable of this type of knowledge-formation.[82]

Further, arbitral judgment frequently involves determining what the law *is*.[83] Positivism treats this as largely a source-based, factual question.[84] The law is whatever a society's rule of recognition identifies as valid, and knowing the law is a matter of correctly identifying those sources.[85] Ronald Dworkin's rival account treats legal knowledge as inescapably interpretive: knowing what the law requires in a hard case means constructing the interpretation that best fits and morally justifies the existing body of law, which is closer to forming a justified evaluative judgment than to looking up a fact.[86] Both camps disagree about the *nature* of legal knowledge, but both agree that applying law to a case requires the reasoner to have arrived at a justified position on what the law is, not merely to mechanically retrieve text from valid sources and apply it to a set of facts.

Therefore, current models of generative AI are simply incapable of this type of knowledge formation.[87] A large language model does not weigh a witness's credibility, sense the internal inconsistency that experience teaches a human fact-finder to distrust, or hold a justified position on what the law *is* as opposed to what text merely resembles it.[88] No matter how sophisticated the model may be, it merely generates statistically probable continuations of a prompt, without any of the belief-forming, evidence-weighing, and interpretive judgment that both the epistemic and the jurisprudential accounts of legal reasoning demand.[89] It follows that AI can meaningfully assist an arbitrator — drafting, researching, flagging inconsistencies, organizing the record — but it cannot become the arbitrator. An award is "reasoned" only when a human decision-maker has actually formed the justified belief and justified legal position the

[81] Id.
[82] HICKS, Michael Townsen; HUMPHRIES, James; SLATER, Joe. ChatGPT is bullshit. Ethics and Information Technology, v. 26, n. 2, art. 38, 2024. DOI: 10.1007/s10676-024-09775-5.
[83] HART, H. L. A. The concept of law. 3. ed. Oxford: Oxford University Press, 2012.
[84] Id., ch. VI.
[85] Id., ch. VI, sec. 2.
[86] DWORKIN, Ronald. Law's empire. Cambridge, MA: Harvard University Press, 1986.
[87] HICKS; HUMPHRIES; SLATER, supra note 82.
[88] BENDER, Emily M.; KOLLER, Alexander. Climbing towards NLU: on meaning, form, and understanding in the age of data. In: PROCEEDINGS OF THE 58TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS. Stroudsburg: Association for Computational Linguistics, 2020. p. 5185-5198.
[89] BENDER, Emily M.; GEBRU, Timnit; MCMILLAN-MAJOR, Angelina; SHMITCHELL, Shmargaret. On the dangers of stochastic parrots: can language models be too big? In: PROCEEDINGS OF THE 2021 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY (FAccT '21). New York: Association for Computing Machinery, 2021. p. 610-623. DOI: 10.1145/3442188.3445922.

award purports to express; where that human element is missing or merely nominal, what results is not a reasoned award but the appearance of one, however polished its prose.

V. Embedded Bias and the Limits of Disclosure and Challenge

The New York Convention does not list arbitrator bias, as such, among the grounds on which enforcement of an award may be refused.[90] However, it may be smuggled in through Articles V(1)(b) and V(2)(b).[91] A party seeking to resist enforcement on the ground of arbitrator bias faces a genuinely difficult path under the New York Convention as it currently stands. Because impartiality is not itself a listed ground under Article V(1), the claim will typically have to be reframed either as a due-process objection under Article V(1)(b), on the theory that undisclosed structural bias prevented the party from meaningfully presenting its case,[92] or responding to the basis of decision, or as a public policy objection under Article V(2)(b) in the most extreme cases where the bias produced a result so fundamentally unfair as to shock the conscience of the enforcement forum.[93] Both routes carry a high evidentiary burden, and courts have historically been reluctant to let claims of arbitrator partiality function as a disguised vehicle for merits review.[94] There is no reason to expect that reluctance to disappear simply because the alleged source of partiality is algorithmic rather than personal.[95]

The soft-law guidance recently issued by NCTDR and ICODR,[96] and the parallel work underway at UNCITRAL,[97] represent the more realistic near-term path toward giving this concern institutional teeth, by building disclosure and architectural-diversity norms directly into arbitral rules and procedural orders rather than waiting for enforcement courts to stretch Article V to fit.

The deeper difficulty with AI systems is that disclosure obligations and challenge procedures for human arbitrators exist to surface relational conflicts: prior relationships with

[90]New York Convention, supra note 1.
[91]New York Convention, art. V(1)(b) and art. V(2)(b).
[92] UNITED STATES. United States Court of Appeals, Second Circuit. Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA). 508 F.2d 969. Nova York, 23 December 1974.
[93] Id.
[94] UNITED STATES. United States Court of Appeals, Fifth Circuit (en banc). Positive Software Solutions, Inc. v. New Century Mortgage Corp. 476 F.3d 278. Nova Orleans, 2007.
[95] Kluwer Debate, supra note 27.
[96] NCTDR/ICODR. Guidance for Third Parties Using Artificial Intelligence in Dispute Resolution: Applying the Online Dispute Resolution Standards, available at: https://drive.google.com/file/d/1Rc9a5fpYaRu7qu4k7zy1Tm3gN5AhwQrv/view. Accessed on: 29 July 20206.
[97] UNCITRAL. Colloquium on the Use of Artificial Intelligence (AI) in Dispute Resolution and Remote Hearings in Arbitration and Mediation. Available at: https://uncitral.un.org/en/events/uncitral-colloquium-use-artificial-intelligence-ai-dispute-resolution-and-remote-hearings. Accessed on: 29 July 2026.

counsel, the parties, or the subject matter, financial interests, and the like.[98] That apparatus presupposes a decision-maker "with a biography" that can be investigated.[99] An algorithmic system's bias is not relational in this sense; it is structural, arising from the composition of training data, the design choices embedded in a model's architecture, and statistical patterns that may correlate with protected characteristics, industry sectors, or even the linguistic style of submissions, without any of this being traceable to a discrete, disclosable relationship.[100] Asking an AI system to complete a conflicts disclosure questionnaire modeled on the IBA Guidelines on Conflicts of Interest, in other words, simply asks the wrong kind of question of the wrong kind of system.[101]

Furthermore, intellectual property law, and trade secret protection in particular, gives AI developers a legitimate basis for withholding the very information a disclosure regime would need: the composition of training data and the instruction on how to weigh choices embedded in a model.[102] Because these elements often represent the core commercial value of a proprietary A.I. tool, developers routinely treat them as trade secrets.[103] This creates a structural tension with any disclosure-based approach to algorithmic bias: an arbitrator or party seeking to interrogate why a model reached a particular output, or whether its training data reflects a demographic or ideological skew, will typically run headlong into a legitimate proprietary-information objection from the vendor, with no equivalent to the arbitrator disclosure obligations that apply to human decision-makers.[104] The result is that AI bias, unlike human bias, is not merely difficult to detect—it is often legally shielded from the kind of scrutiny that

[98] Kluwer Debate, supra note 27; INTERNATIONAL BAR ASSOCIATION. IBA Guidelines on Conflicts of Interest in International Arbitration. London: IBA, 2014.
[99] Id.
[100] KATYAL, Sonia K. Private accountability in the age of artificial intelligence. UCLA Law Review, v. 66, p. 54, 2019.
[101] Kluwer Debate, supra note 27.
[102] WORLD TRADE ORGANIZATION. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Marraquexe, 15 April 1994, art. 39(2); UNITED STATES. Defend Trade Secrets Act of 2016. 18 U.S.C. § 1836 et seq., § 1839(3); EUROPEAN UNION. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Official Journal of the European Union, L 157, 15 June 2016, art. 2; UNITED KINGDOM. The Trade Secrets (Enforcement, etc.) Regulations 2018, SI 2018/597 (implementing Directive (EU) 2016/943, retained post-Brexit); UNITED STATES. Wisconsin Supreme Court. State v. Loomis. 881 N.W.2d 749. Madison, 2016; WEXLER, Rebecca. Life, liberty, and trade secrets: intellectual property in the criminal justice system. Stanford Law Review, v. 70, p. 1343, 2018; KATYAL, Sonia K. Private accountability in the age of artificial intelligence. UCLA Law Review, v. 66, p. 54, 2019; PASQUALE, Frank. The black box society: the secret algorithms that control money and information. Cambridge, MA: Harvard University Press, 2015.
[103] Id.
[104] Id.

would detect it, leaving transparency-based solutions dependent on what the developer voluntarily chooses to reveal rather than what a challenging party can compel.[105]

Ast argues that two complimentary principles could help offset biases in A.I. decision-making. The first is "transparency of deployment:" arbitrators and tribunals should disclosure of which AI tools were used, for what purpose, with what prompts or inputs, and what human verification followed, so that scrutiny shifts from asking about a model's abstract provenance to asking about its actual function in the specific decision under challenge.[106] The second is "architectural diversity:" running multiple independent models on the same inputs and requiring convergence, or at least reasoned reconciliation of divergent outputs, before any AI-generated analysis is incorporated into the tribunal's reasoning.[107] This mirrors the logic that has long supported the use of three-member tribunals as a structural safeguard against the idiosyncratic bias of a sole arbitrator: an ensemble of independently trained models, cross-checked against one another, offers an analogous structural check on the bias of any single system.[108]

Both proposals, however, treat symptoms of the disclosure problem discussed earlier without curing its cause. Transparency of deployment discloses that a tool was used, for what purpose, and with what prompts — but it discloses nothing about what actually sits inside the tool, and that is precisely the information trade secret and intellectual property protections shield from compelled disclosure.[109] Knowing that a model was consulted is not the same as knowing whether its training data, weighting, or fine-tuning embedded a demographic, ideological, or jurisdictional skew. A party can audit the fact of use without ever being able to audit the thing that would actually reveal bias. The proposal essentially substitutes disclosure of function for disclosure of composition, and only the latter would let a challenging party test the claim of bias rather than merely confirm that a black box was, in fact, a black box.

Architectural diversity fares no better, because it rests on an assumption borrowed from human tribunals that doesn't transfer cleanly to machines: that independent decision-makers reasoning separately will make uncorrelated errors, so that convergence across several of them is meaningful corroboration.[110] Three human arbitrators drawn from different professional traditions, jurisdictions, and lived experience genuinely are independent in the

[105] Id.
[106] Kluwer Debate, supra note 27.
[107] Id.
[108] Id.
[109] Id.
[110] BOMMASANI, Rishi et al. Picking on the same person: does algorithmic monoculture lead to outcome homogenization? In: ADVANCES IN NEURAL INFORMATION PROCESSING SYSTEMS (NeurIPS), 2022.

relevant sense — their agreement carries epistemic weight because it reflects separately-formed judgment.[111] Large language models are not independent in that way.[112] Most AI models are trained on overlapping scrapes of the same data, refined with similar alignment and reinforcement techniques, and shaped by a small number of firms operating under similar commercial and cultural pressures.[113] Running several of them side by side is closer to asking the same witness the same question in three different accents than to convening three genuinely different minds.[114] Convergence among such models may just as easily reveal a shared blind spot baked into training data everyone drew from as it reveals a bias-free answer — and a tribunal has no reliable way to tell the two apart from the outside.[115] Worse, when the models diverge, someone or something must reconcile the disagreement, which simply relocates the delegation problem one level up: the reconciler's own reasoning process, human or algorithmic, becomes the new unaudited black box, no more transparent or independently verifiable than the outputs it is meant to adjudicate between.

VI. Consent as a Neutralizer of Enforcement Risk

If both parties expressly agree, before or during the dispute, that their case will be substantially shaped or decided by an AI system, and expressly waive any challenge grounded in that fact, does that consent eliminate the enforcement risks canvassed above?

The most useful starting point is to separate Article V's two paragraphs, because they behave very differently in the face of party agreement. Article V(1) sets out grounds that operate, in substance, in the interest of the parties themselves — incapacity, invalid agreement, due process, excess of mandate, improper composition, and procedural non-conformity — and a sophisticated party can generally waive reliance on these grounds by clear advance agreement, subject to whatever mandatory rules of the seat or the enforcement forum may otherwise apply.[116]

Article V(2), by contrast, empowers the enforcement court to refuse recognition on grounds of non-arbitrability or public policy that the forum invokes in its own institutional

[111] INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings. ICCA Reports No. 8. [S.l.]: ICCA, 2020. p. 14.
[112] BOMMASANI, Rishi et al. On the opportunities and risks of foundation models. Stanford: Stanford Center for Research on Foundation Models, 2021.
[113] Id.
[114] Id.
[115] Id.
[116] Kluwer Debate, supra note 27.

interest and that are not the parties' to waive.[117] Consent can therefore do a great deal of work under Article V(1), but it cannot touch Article V(2), which exists precisely to protect values that transcend the parties' private bargain.[118]

Within that framework, the first step is to analyze whether parties gave "genuine, informed, bilateral consent . . . before the dispute."[119] Where parties cannot realistically be said to have understood what they were accepting, because the disclosure was buried in boilerplate, because the technology's limitations were not explained, or because one party lacked any meaningful opportunity to negotiate the term, there is no genuine consent.[120]

This distinction between ex ante boilerplate and genuinely informed advance agreement is not merely theoretical; it maps closely onto the two commercial models now emerging in practice.[121] A framework in which a large arbitral institution offers an AI-assisted process as one option among several, disclosed in detail and selected by sophisticated counsel who negotiated the arbitration clause, sits closer to the paradigm of genuine consent.[122] A framework in which an AI mediation and arbitration pathway is embedded as the default dispute resolution mechanism in a standard-form legal agreement offered to startups and their founders, of the kind now being deployed through platforms partnering to make an AI mediator the default first step before arbitration,[123] raises a harder question: founders signing template agreements at the formation stage of a company are unlikely to focus closely on, or fully appreciate the significance of, a dispute resolution clause buried among dozens of other boilerplate provisions, even though the clause may be perfectly clear on its face.[124]

A further complication arises from mandatory regulatory regimes that sit alongside, and are not displaced by, party consent. Under the European Union's Artificial Intelligence Act, the use of an AI system to substantially shape or determine the outcome of a legal dispute is classified as "high-risk," triggering obligations concerning risk management, data governance, transparency, and, most importantly, human oversight, independently of what the parties have

[117] Id.
[118] Id.
[119] Id.
[120] Id.
[121] LAWNEXT (Ambrogi, Robert J.). Dyspute.ai launches Adri v2, a 24/7 asynchronous AI mediation platform. LawSites, 13 January 2026.
[122] Kluwer Debate, supra note 27.
[123]LAWNEXT (Ambrogi, Robert J.). Dyspute.ai launches Adri v2, a 24/7 asynchronous AI mediation platform. LawSites, 13 January 2026.
[124] RADIN, Margaret Jane. Boilerplate: the fine print, vanishing rights, and the rule of law. Princeton: Princeton University Press, 2013.

agreed.[125] Where the use of AI in a given arbitration violates such mandatory rules, no degree of party consent can cure the violation, and it remains an open and largely untested question whether an enforcement court would treat that regulatory violation as triggering the public policy exception under Article V(2)(b).[126]

The European Commission for the Efficiency of Justice (CEPEJ) adopted the *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems* back in 2018 — this covers all 46 Council of Europe member states, including non-EU members like the UK, Switzerland, Norway, and Turkey, which the AI Act doesn't reach.[127] It requires that AI tools remain instruments the justice professional (judge, or by extension arbitrator) controls and can depart from, ruling out a "prescriptive approach" in which the human is simply bound by the machine's output.[128] CEPEJ's 2023 operationalization guidance states plainly: "When AI systems are intended to be used by a judicial authority or on their behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts, they should not affect the independence of judges in their decision-making process. The final decision making should remain a human-driven activity and decision**.**"[129]

The Indian Supreme Court's draft *Regulations for Use of Artificial Intelligence (AI) in Courts, 2026* go further than the EU AI Act's framework.[130] Regulation 20 explicitly states that using AI to reach judicial outcomes is "strictly forbidden," and mandates a "Human-in-the-Loop" approach ensuring final decision-making authority rests solely with a duly appointed judicial officer.[131] This prohibition encompasses judgments, sentencing, or determinations of witness credibility.[132] Additionally, the regulations apply not just to courts but to tribunals and statutory commissions performing adjudicatory functions.[133] Chief Justice Surya Kant has

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[125]EUROPEAN UNION. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). Official Journal of the European Union, L 1689, 12 July 2024, art. 6(2), Annex III, point 8(a); recital 61.
[126] New York Convention, art. V(2)(b).
[127] EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Strasbourg: Council of Europe, 4 December 2018.
[128] Id.
[129] Id.
[130] INDIA. Supreme Court of India. Draft Regulations for Use of Artificial Intelligence (AI) in Courts, 2026. Nova Délhi, 2026.
[131] Id., reg. 20.
[132] INDIA. Supreme Court of India. Draft Regulations for Use of Artificial Intelligence (AI) in Courts, 2026. Nova Délhi, 2026.
[133] Id.

publicly reiterated that AI "would never be allowed to overpower judicial decision-making."[134] This is a clean, express ban rather than a risk-tiered regulatory regime like the EU's.

In the United States, there's no federal prohibition. At the state level, California is the clear leader: the Judicial Council's Rule 10.430 and Standard 10.80 require courts either to prohibit generative AI outright or adopt a use policy.[135] Notably, judges are not authorized to use AI to analyze evidence or draft legal opinions under the accompanying guidance, and any generative AI use must undergo meaningful human review.[136]

Consent, in short, is powerful but bounded: it operates within, and never above, the mandatory legal framework of the relevant jurisdictions.

VII. Living Instrument or Call for Amendment?

The final and, in some respects, most consequential question is institutional rather than doctrinal: does the New York Convention remain adequate to meet these challenges through interpretation, or do they call for targeted textual amendment? The answer, for now, is no.

Notably, the Convention has already absorbed one technological revolution, the shift from paper-based to electronic commerce and communication, without any amendment to its text, because its core concepts were deliberately drafted with "enough elasticity" to be applied to circumstances the drafters could not foresee.[137]

The more realistic and immediately achievable path is a non-binding recommendation on how to interpret the existing text, of exactly the kind that UNCITRAL's February 2026 colloquium was convened to explore and that the Commission may adopt at a forthcoming session.[138]

VIII. Conclusion

The New York Convention's existing grounds for refusing enforcement, tested against six distinct challenges raised by AI-assisted arbitration, prove to be up to the task without a single word of amendment.

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[134] newsonair.gov.in. Supreme Court assures judges exercising "utmost caution" on use of AI in judicial process. 6 December 2025.
[135] CALIFORNIA. Judicial Council of California. California Rules of Court, rule 10.430; California Standards of Judicial Administration, standard 10.80. Adopted 18 July 2026, effective 1 September 2026.
[136] CALIFORNIA. Judicial Council of California. California Rules of Court, rule 10.430; California Standards of Judicial Administration, standard 10.80. Adopted 18 July 2026, effective 1 September 2026.
[137]Kluwer Debate, supra note 27.
[138]UNCITRAL Colloquium, supra note 13.

On the threshold question of what an award is, the Convention imposes no textual bar on AI involvement in producing one. But that permissiveness does not resolve the deeper point: arbitral judgment involves an exercise of reasoning that current AI systems are incapable of performing on their own, which is why the workable line is assistive AI reviewed and adopted by a human arbitrator, not substitutive AI whose output the human merely ratifies. That incapacity is at its most acute where the award's very legitimacy is under attack through the public policy exception of Article V(2)(b), since a legitimacy determination is inescapably evaluative and political, and demands an entity that can be held politically and institutionally answerable for it in a way no AI system can be.

With regard to impermissible delegations of authority, the tribunal-secretary cases and *ARIHQ* together establish a materiality-and-verification standard rather than a bright line: an award becomes vulnerable under Article V(1)(d) not because AI assisted in its production, but because the human arbitrator's review of that assistance was nominal rather than genuine. Institutions building AI-assisted models should treat this as an evidentiary problem to be solved through documented, verifiable human review, not a permission to be assumed from the mere fact of oversight.

Further, the legal reasoning encompassed in an arbitral award is cannot be replicated by current generative AI. These AI models cannot form justified belief about disputed facts and the applicable law, however eloquent the produced award may be. AI can meaningfully assist an arbitrator but it cannot become one.

Additionally, the remedies proposed to address the problem of AI bias are inadequate to fix the problem this technology creates. Transparency of deployment discloses that a tool was used, not what sits inside it, and trade secret protection ensures the latter remains largely unreachable. Architectural diversity rests on an assumption about model independence that does not hold in practice, since most systems are trained on overlapping data with similar methods; and any process built to reconcile their divergent outputs simply relocates the delegation problem to a new, equally unaudited decision-maker rather than resolving it. Absent institutional reform along the lines proposed by NCTDR, ICODR, and UNCITRAL, a party resisting enforcement on bias grounds remains confined to the high thresholds of Articles V(1)(b) and V(2)(b).

Finally, the Convention's own bifurcated structure on whether consent can neutralize enforcement risk does much of the necessary work: Article V(1) grounds are waivable by parties who gave genuine, informed consent, while Article V(2) grounds are not. An expanding set of mandatory regimes converge in requiring that final decision-making must remain a human-driven activity, a baseline no degree of party agreement can waive away.

Considering the above, one can safely conclude that the New York Convention is ready for AI, but AI is not ready for the New York Convention: a treaty designed to test the soundness of human judgment has no trouble spotting where that judgment is missing.

THE CONCEPT OF LEGAL ORDER IN INTERNATIONAL ARBITRATION: A COMPARATIVE ANALYSIS OF GAILLARD AND PAULSSON'S THEORIES OF ARBITRATION'S LEGAL FOUNDATIONS

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1 Introduction

Jan Paulsson (*The Idea of Arbitration)*[1] and Emmanuel Gaillard (*Legal Theory of International Arbitration)*[2] each examine the legal foundations of international arbitration, albeit from distinct perspectives. Despite their differences, both rely on the notion of a *legal order*. For Gaillard, the juridicity of international arbitration derives from an 'arbitral legal order', whose contours emerge when arbitrators rely on majoritarian State practice to resolve borderline situations. In this view, arbitration becomes an essentially international phenomenon through the legitimacy conferred upon it by multiple States.

Paulsson, by contrast, advances an institutionalist account in which a 'legal order' is conceived as a form of social reality rather than the exclusive domain of sovereign authority — a conception that supports the idea of a 'dialogue' among legal orders and attributes to arbitration a distinctive depth, rendering it a pluralistic and multidimensional phenomenon. In this perspective, such dialogue does not arise merely from the fact that each State may independently assess the effectiveness of a single arbitral proceeding (the classic pluralist picture); rather, it emerges when States reflect on the extent to which they permit the general idea of arbitration as it manifests itself within the specific configurations of various

[1] PAULSSON, Jan. **The Idea of Arbitration.** Oxford: Oxford University Press, 2013.
[2] GAILLARD, Emmanuel. **Legal Theory of International Arbitration.** Leiden: Brill, 2010.

infra-official *legal orders*, as well as the legal dynamics of arbitration as an institution *in its own right*.

This essay examines the complementarities and divergences between the concepts of 'legal order' developed by Gaillard and Paulsson and applied to the specific domain of arbitration. It addresses the following research question: to what extent do their respective conceptions offer complementary, rather than merely divergent, accounts of the juridicity of international arbitration, including the relationship between State-based authority and extra-official normative spheres? The central claim advanced here is that, despite Paulsson's criticisms, the two theories can be understood as complementary, operating at different analytical levels. Taken together, their perspectives illuminate both the State-based and extra-official foundations of arbitration's juridicity.

2 Emmanuel Gaillard and the *Arbitral Legal Order*

Emmanuel Gaillard remains widely recognized as one of the most influential figures in international arbitration, serving as both arbitrator and counsel in some of the field's most significant cases — including *Yukos v. Russian Federation*, the highest-value arbitration ever conducted, and *SPP v. Egypt*, a landmark decision that affirmed the possibility of consenting to ICSID jurisdiction through domestic legislation[3] (in which Jan Paulsson, interestingly, appeared as counsel for the Claimant on the opposing side). As a scholar, he earned his doctorate from *Université Paris II – Panthéon-Assas* and taught at *Université Paris XII – Paris Est-Créteil* and Sciences Po Paris, in addition to serving as a visiting professor at Yale and Harvard.[4]

In *Legal Theory of International Arbitration*, Gaillard developed a sophisticated account of the legal foundations of international arbitration, most notably through the introduction of the concept of an 'arbitral legal order'. This notion represents, in fact, an evolution and partial synthesis of the dominant jurisprudence of the French courts over the preceding four decades, itself deeply influenced by scholars who advocated the genuine internationalization of dispute resolution and of certain categories of contracts — most prominently the school associated with Berthold Goldman, with its emphasis on the *lex*

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[3] **Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt – Decision on Jurisdiction**. ICSID, 14 Apr. 1988. Disponível em: <https://jusmundi.com/fr/document/decision/en-southern-pacific-properties-middle-east-limited-v-arab-republic-of-egypt-decision-on-jurisdiction-thursday-14th-april-1988>. Acesso em: 25 fev. 2026.

[4] Global Arbitration Review, **Obituary – Emmanuel Gaillard 1952–2021** (2021). Disponível em: <https://globalarbitrationreview.com/article/obituary-emmanuel-gaillard-1952-2021>. Acesso em: 27 February 2026.

mercatoria and *contrats d'État*. It is worth noting that Gaillard co-authored, together with Goldman himself and Philippe Fouchard, one of the seminal works in the field of International Commercial Arbitration (*Fouchard, Gaillard, Goldman on International Commercial Arbitration)*[5].

In the *Legal Theory*, the notion of an 'arbitral legal order' is examined both as an autonomous reality endorsed by state activity — thus grounded in legal-positivist premises recognized as such — and as a methodological approach adopted by international arbitrators, aimed at safeguarding the parties 'deliberate choice of an international method of dispute adjudication, one that nonetheless remains anchored in the authorization granted by the various sovereign States that permit it, considered collectively and not individually.

According to Gaillard, the work seeks to examine the legal foundations of international arbitration from the standpoint of each of the various conceptual images or representations of the discipline, while also offering practical answers to the questions concerning the source of the arbitrators' powers to decide on matters of effectiveness - an inquiry that may be synthesized in the broader analysis of the *juridicity* of the international arbitral process. With respect to said representations, the point of departure is the problem of the source of validity of the agreement from which arbitrators derive their adjudicatory mandate. In this sense, the book turns to the representations capable of accounting for the *entire* phenomenon of international arbitration — namely, (i) the approach that views arbitration as a component of a single State legal order; (ii) the approach grounded in a plurality of State legal orders; and (iii) the approach that emphasizes the autonomous character of international arbitration, embodied precisely in the 'arbitral legal order'.

Because the focus of this essay lies in Gaillard's notion of an (arbitral) 'legal order', particular attention will be devoted to the third representation of international arbitration. Nonetheless, for the sake of conceptual clarity and to situate that representation within Gaillard's broader jus-philosophical framework, brief considerations on the first and second representations will be offered so as to outline their main features and the conceptual space they occupy within his overall theory.

With respect to the first image — namely, the one anchored in a single State legal order — the international arbitrator is assimilated to the ordinary judge of the seat. Under

[5] GAILLARD, Emmanuel; FOUCHARD, Philippe; GOLDMAN, Berthold. **Fouchard, Gaillard & Goldman on International Commercial Arbitration.** Ed. Emmanuel Gaillard; John Savage. The Hague: Kluwer Law International, 1999.

this conception, the authority of the award derives exclusively from the legal order of the State in which the decision is rendered. This school comprises two strands: (i) the objectivist strand, which views the arbitrator as similar to an organ of domestic justice and, following F. A. Mann[6], equates the law governing the arbitration with the *lex loci arbitri*; and (ii) the subjectivist strand, which treats the choice of the seat — whether made by the parties, the decision-maker, or the administering institution — as a deliberate submission of the proceedings to that State's exclusive supervisory authority.

Philosophically, this representation rests on a strong form of State positivism, according to which legal rights and obligations must ultimately trace back to a foundational norm supplied by a sovereign legal order; within this framework, the *lex loci arbitri* functions as such *Grundnorm* for the arbitral process. It also draws on the classical private international law approach of identifying the jurisdiction with the closest regulatory connection, an approach whose modern manifestations reason on the basis of the pursuit of harmonized solutions on the international plane. The principal critique of this model lies in the tension between the parties ' intention to remove their dispute from national courts and the re-nationalization that results from subjecting the award to the decisive scrutiny of the courts of the seat, thereby exposing the process to parochial judicial doctrines and risking the frustration of the international expectations that typically motivate parties to choose international arbitration.

The second representation — the multilocal conception — grounds juridicity in the plurality of legal orders willing to recognize and enforce an award. Under this view, the seat remains relevant but loses its privileged status, becoming merely one legal order among several that may validate the arbitral process. The award is thus apprehended as essentially international in character, and the arbitrator's 'forum' expands to encompass all jurisdictions in which recognition or enforcement might be sought. Gaillard emphasizes that this conception approaches arbitration from its final outcome: the award as it circulates among States (as well as the process of recognition and enforcement).

This representation combines legal positivism with a Westphalian understanding of sovereignty, reflected in the New York Convention's acknowledgment that each State may independently assess the validity and therefore the effectiveness of an award. The model's decentralizing impulse shifts attention away from the law of the seat and toward the conditions for recognition in secondary jurisdictions. Its principal difficulty lies in the impossibility of

[6] GAILLARD, Emmanuel. **Legal Theory of International Arbitration.** Leiden: Brill, 2010, p.15.

cumulatively taking into consideration all the relevant legal orders without collapsing into *lex executionisme*, which would reduce juridicity to the lowest common denominator and also contradict the very premise of sovereign equality on which the model relies.

Finally, the arbitral legal order — the third jus-philosophical representation of international arbitration — is grounded in the notion of transnationality. Under this conception, the juridicity of the arbitral process does not stem from any individual national legal system, nor from the mere absence of one, but from the broad consensus among States that international arbitration constitutes a legitimate and ordinary mechanism for resolving cross-border disputes. This constitutes the foundational, normative dimension of the arbitral legal order.

This image takes into account the perspective of the arbitrators. While the multilocal conception captures how different States may independently assess the validity of an award, it does not provide arbitrators with a workable framework for addressing problems that may arise during the conduct of the arbitration itself, especially the difficult cases. Faced with conflicting and sometimes unexpected domestic views on issues affecting the effectiveness of an arbitration, arbitrators cannot 'simply take account of this plurality of positions. They must make their own determination'[7] - either by (i) choosing among the competing positions through a conflict-of-laws method or (ii) by relying on substantive norms endorsed by the majority of the international community, thereby allowing those norms to prevail over isolated or minority positions and, in effect, acting as an instance of international justice. Gaillard considers this latter method preferable, as it avoids reducing or equating an internationally relevant situation to a purely domestic matter. In this sense, this method of applying transnational rules is grounded in the 'normative trends of the international community',[8] and entails a comparative-law assessment. This constitutes the methodological dimension of the arbitral legal order.

Two points must be made regarding the notion of an 'arbitral legal order'. First, as a theoretical construct, it seeks to explain the source of arbitrators 'authority to adjudicate independently of any single legal system taken individually — moving beyond the classical *lex mercatoria* scholars, whose analyses tended to focus on specific manifestations of internationality rather than on the foundations of the adjudicatory authority. Second, the theory does not necessarily posit an autonomous legal process intrinsic to arbitration itself. Instead, it locates juridicity in the transnational significance of State practice taken collectively, and in the

[7] GAILLARD, Emmanuel. **Legal Theory of International Arbitration.** Leiden: Brill, 2010, p. 36.
[8] GAILLARD, Emmanuel. **Legal Theory of International Arbitration.** Leiden: Brill, 2010, p. 51.

prevailing positions adopted by States, particularly on questions of effectiveness. This orientation allows for the identification of sources and a degree of autonomy sufficient to justify speaking of a legal order, while remaining fundamentally positivist insofar as it is ultimately anchored in the normative activity of States.

Similarly, the method of applying transnational rules enables the identification of mandatory and non-mandatory norms, of both general and more specific principles, as well as the recognition of public-policy rules — sometimes described as 'truly international public policy' —, as evidenced in arbitral decision-making practice. In this sense, the approach also allows for a systematization of the underlying theoretical legal structure, thereby further supporting its characterization as a genuine legal order.

Conclusively, Gaillard's conception of a legal order ultimately rests on autonomy, identifiable sources, and systematization, coupled with the capacity to interact coherently with other legal systems. Interestingly, when assessing the representations of international arbitration, he also invokes the ideas of internal consistency and effectiveness. In that same sense, in a 2016 debate with Lord Mance,[9] Gaillard emphasized that international arbitration, when conceived as an autonomous legal order, takes into account the reality of arbitral practice, particularly in addressing difficult situations while preserving the parties 'will.

3 Jan Paulsson's Conception of the *Legal Order* and Multidimensional Pluralism

Jan Paulsson is another seminal figure in the field of international arbitration. Having participated in more than 700 proceedings, he holds degrees from Harvard and Yale, as well as a *Diplôme d'Études Supérieures* from the University of Paris[10]. *The Idea of Arbitration*, however, is not a study of international arbitration in the strict sense. Rather, it examines the arbitral phenomenon in its most general form, treating arbitration as an 'archetype' and identifying organizational features that remain recognizable despite the increasing complexity and diversification of its contemporary manifestations. The purpose of the book is not to advance a self-standing legal theory of arbitration, but to analyze arbitration as a successful *social institution* and to draw legally relevant insights from the way it operates within society.

Within this analytical framework, the basic idea of arbitration is presented as the 'binding resolution of disputes accepted with serenity by those who bear its consequences

[9] **L'Ordre juridique arbitral | Lord Mance and Gaillard clash in Paris**. international arbitration debates, 2016. Disponível em: <https://www.youtube.com/watch?v=4hlDQiJtObw>. Acesso em: 27 fev. 2026. Minutagem: 1:44:30.

[10] University of Miami, **Jan Paulsson – Professor Emeritus Profile** (2026). Disponível em: <https://people.miami.edu/profile/j.paulsson@miami.edu>. Acesso em: 27 fev. 2026.

because of their special trust in chosen decision-makers'[11]. For Paulsson, this formulation ultimately raises a question of political philosophy: arbitration is conceived as a space in which freedom and law are reconciled. It presupposes that parties are free to organize their private affairs as they see fit, yet state law remains present in two distinct ways: (i) as the standard by which the non-arbitrariness of a decision is appraised - therefore, as a *standard for decision*; and (ii) as the standard through which courts authorize the possibility of arbitrating and enforce arbitral awards.

The distinctive contribution of *The Idea of Arbitration*, however, lies in its portrayal of arbitration as a functional phenomenon not necessarily dependent on a state-based legal reality. The aforementioned standard of appraisal need not be supplied by the state, and non-state *legal orders* may rely on arbitration as a self-contained mechanism for enforcing rights and obligations. This is possible because (i) arbitration largely replicates the adversarial forms of judicial process, and (ii) its effectiveness can be maintained independently of state courts. This perspective reflects Paulsson's adherence to the Santi-Romano tradition, according to which a *legal order* is not inherently state-dependent.

Against this background, the notion of a legal order becomes significant for Paulsson in two complementary respects. First, he highlights that each legal order operates within a domain of normative relevance, within which it may articulate its own understanding of a given underlying situation, independently of the conclusions reached by other orders. This internal perspective reflects the capacity of distinct normative systems to formulate autonomous positions regarding the same set of facts — a feature associated with *pluralism*. Second, he emphasizes the dialogue among legal orders, the dynamics through which they interact, and the emergence of what he terms *verticality*, namely situations in which two or more legal orders come to occupy the same normative space.

A proper understanding of Paulsson's concept of a legal order requires situating these two dimensions within his broader account of the legal foundations of arbitration — that is, the mechanisms that 'produce firm expectations that arbitral agreements and awards will be given effect if given rules apply'.[12] To articulate this account, he draws on the three representations of international arbitration identified by Gaillard in the *Legal Theory*, using them to frame the inquiry into how arbitral authority is ultimately justified — a matter that the French scholar links to the investigation of the *juridicity* of arbitration.

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[11] PAULSSON, Jan. **The Idea of Arbitration.** Oxford: Oxford University Press, 2013, p. 1.
[12] PAULSSON, Jan. **The Idea of Arbitration.** Oxford: Oxford University Press, 2013, p. 29.

Although Paulsson considers Gaillard's 'multilocal' model the most faithful depiction of international arbitration among the three, he argues that it must be supplemented by a vertically oriented layer of juridicity anchored in the organic structures of social life. This yields a theory of *multidimensional pluralism* - or *pluralism in depth.*[13] Drawing on Santi Romano's conception of law as the effective organization of social groups through institutions, Paulsson maintains that non-state arrangements may 'lay serious claims to qualify as'[14] *legal orders,* for they may govern important aspects of the lives of broad sectors of society in an impersonal manner, operate through their own normative processes (including the creation and enforcement of rules), and exhibit an expectation of continuity over time. Under this view, the effectiveness of international arbitration is shaped not only by state-based legal systems but also by these socially embedded normative orders, which may themselves intersect with structural aspects of effectiveness. The central question in arbitration as an empirical practice — beyond its idealized archetype — thus becomes how the different legal orders engage in *dialogue*.

Paulsson challenges the concept of an 'arbitral legal order' on the grounds that it is circular and redundant, offering no analytical advantage over the purely pluralistic representation. He further argues that the mere ability of different legal systems to reach independent conclusions on facts of private international law does not render such facts autonomous from the legal order in which they were constituted. States, he notes, can only address private international law issues from and for within their own normative frameworks — therefore, that a given State chooses to recognize a transnational legal order does not make that order a necessary reality for all others. In *The Idea of Arbitration*, the notion of *legal order* is that of an organizational and social construct, potentially more effective in governance terms than many formal state systems.

> If law only can materialize and take shape within the institution, […] the institution is always a legal regime. […][15]
>
> From the concept of a legal order that I offered in the previous chapter we can deduce the corollary that there are as many legal orders as institutions. […] they might be connected in such a way that, while their orders keep distinct in some respects, in other respects they constitute elements of a broader order,

[13] PAULSSON, Jan. **The Idea of Arbitration.** Oxford: Oxford University Press, 2013, p. 29, 46.
[14] PAULSSON, Jan. **The Idea of Arbitration.** Oxford: Oxford University Press, 2013, p. 49.
[15] ROMANO, Santi. **The Legal Order.** Abingdon: Taylor & Francis, 2017, p. 22. Disponível em: VitalSource Bookshelf.

> or rather, of a broader institution of which they are integral parts. However, this is not always the case […][16]

4 Conclusions

The two theories and their notions of *legal order* are complementary for they operate at distinct yet intersecting analytical levels - Gaillard largely grounds the arbitrator's inherent powers and the internationalization of arbitration in State-based normative authority, whereas Paulsson broadens the inquiry by attributing juridicity to the internal processes of non-official institutions. Gaillard, however, acknowledges that non-state regulations, including, for instance, institutional ones, contribute to identifying prevailing transnational rules[17]; while Paulsson presents his account as an additional layer within classical pluralism, whose own ultimate conclusions do not diverge from those of the 'arbitral legal order' regarding the effectiveness of international arbitration.

Taken together, their accounts portray international arbitration as a transnational *social institution*, for it is a social fact of international life - enabled and legitimized by States, but simultaneously constituted by its own juridical processes; suggesting the emergence of international arbitration as a transnational institutional *legal order* composed of both state and non-state elements.

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[16] ROMANO, Santi. **The Legal Order.** Abingdon: Taylor & Francis, 2017, p. 50. Disponível em: VitalSource Bookshelf.

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LAW NO. 14,879/2024 AND THE RESTRICTION ON FREEDOM OF FORUM SELECTION IN CONTRACTS:

AN ANALYSIS OF THE NEW ARTICLE 63 OF THE BRAZILIAN CODE OF CIVIL PROCEDURE

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ABSTRACT

This paper provides an in-depth analysis of the amendments introduced by Law No. 14,879 of June 4, 2024 to Article 63 of the Brazilian Code of Civil Procedure, which restricted the freedom of forum selection in contracts. It examines how this reform affects party autonomy, legal certainty, and contractual predictability, particularly in complex business transactions. From a comparative perspective, it investigates the treatment of forum selection clauses in relevant legal systems – the United States, the United Kingdom, Germany, France, and Portugal – as well as the European regime under Regulation (EU) No. 1215/2012 (Brussels I Recast). The study further reflects on the relationship among currency liquidity, jurisdictional choice, and the effects on financial and business contracts, with emphasis on Banking & Finance, M&A, and Private Equity operations. Finally, it analyses the impact of the new wording of Article 63 on the principle of *pacta sunt servanda* and on dispute resolution clauses in arm's-length commercial contracts, assessing the constitutional compatibility of the restriction with the principles of free enterprise and legal certainty.

Keywords: Forum selection. Brazilian Code of Civil Procedure. Party autonomy. Commercial contracts. Legal certainty. Comparative law. Currency liquidity. *Pacta sunt servanda*. Dispute resolution. Arbitration. Private equity. M&A. Banking & finance.

1 INTRODUCTION

Party autonomy is one of the fundamental pillars of Brazilian private law, manifesting itself with particular vigour in business contract law. Among the multiple expressions of this autonomy, the freedom of forum selection – the power granted to the parties to choose, by mutual agreement, the court competent to settle disputes arising from their business relationships – has always occupied a prominent position in contractual practice, especially in transactions of high economic complexity, such as structured financings, mergers and acquisitions, and *Private Equity* investments (Theodoro Júnior, 2024).

The forum selection clause, historically governed by Article 63 of the Brazilian Code of Civil Procedure (CPC), represented one of the most relevant expressions of the principle of private autonomy in the procedural field. By allowing the parties, by mutual agreement, to modify relative jurisdiction, the legislature recognised the capacity of economic agents to self-regulate not only the substantive content of their transactions, but also the mechanisms for resolving their conflicts – serving concrete objectives of efficiency, predictability, and legal certainty (Dinamarco, 2020).

The enactment of Law No. 14,879 of June 4, 2024, however, substantially restricted the scope of freedom of forum selection. The new wording of Article 63 began to impose territorial limitations on the parties' choice of court, requiring that the elected forum bear a connection to the domicile or residence of one of the parties or to the place of the obligation (Brasil, 2024). Although its declared purpose is to curb abuses in adhesion contracts and protect the weaker party against unilateral impositions of an inconvenient forum, the amendment produced impacts that go far beyond consumer protection, radiating over the universe of arm's-length business contracts.

The research problem guiding this work may be summarised as follows: to what extent does the restriction on freedom of forum selection introduced by Law No. 14,879/2024 compromise party autonomy, legal certainty, and Brazil's attractiveness as a jurisdiction for complex business transactions, particularly in the context of *Banking & Finance*, *Mergers & Acquisitions* (M&A), and *Private Equity* contracts?

The general objective is to critically analyse the effects of the amendment on the legal regime of forum selection in Brazil, from the perspectives of domestic law, comparative law, and practical implications for financial and business transactions. The specific objectives are: (i) the dogmatic analysis of the new Article 63 and its legislative rationale; (ii) the comparative investigation of forum selection in relevant foreign systems; (iii) the examination of the relationship among currency liquidity, jurisdiction, and international contracts; and (iv) the assessment of the reform's impact on the binding force of contracts and on dispute resolution mechanisms.

The methodology consists of a bibliographic review of national and international scholarship, comparative legislative analysis, and the examination of relevant case law, complemented by reflections grounded in the practical experience of business and financial law.

2 THE AMENDMENT TO ARTICLE 63 OF THE CPC UNDER BRAZILIAN LAW

2.1 Previous and new wording of Article 63 of the CPC

Before Law No. 14,879/2024, the caput of Article 63 of the CPC provided that the parties could modify jurisdiction in terms of value and territory, electing the forum in which an action arising from rights and obligations would be filed (Brasil, 2015a, art. 63) – a feature preserved after the new statute. The paragraphs required the forum selection to appear in a written instrument referring expressly to a given legal transaction (§ 1), bound the parties' heirs and successors (§ 2), allowed the judge to deem an abusive clause ineffective ex officio before service, with referral to the defendant's domicile (§ 3), and, once served, required the defendant to raise abusiveness as a preliminary matter under penalty of preclusion (§ 4) (Brasil, 2015a).

The then-prevailing wording enshrined broad freedom for the contracting parties in matters of relative jurisdiction, with no requirement of a territorial link between the elected forum and the parties' domiciles or the place of performance. The only express limitation lay in the abusiveness review, which case law applied predominantly in situations of manifest imbalance, especially in adhesion contracts with consumers (Nery Junior; Andrade Nery, 2021).

With Law No. 14,879/2024, § 1 of Article 63, read together with the caput, now requires that the elected forum correspond to the domicile or residence of one of the parties or to the place of the obligation (Brasil, 2024).

The legislative innovation thus added a territorial condition absent from the previous text. Forum selection ceased to be free – permitting the choice of any judicial district – and became bound to one of two criteria: the domicile or residence of one of the parties, or the place of the obligation. Any selection failing to observe one of these benchmarks will henceforth be ineffective (Marinoni; Arenhart; Mitidiero, 2024).

Law No. 14,879/2024 also preserved the existing paragraphs and added § 5, which qualifies as an abusive procedural practice the filing of an action in a random court – one chosen without any connection to the parties' domicile or residence or to the legal transaction at issue (Brasil, 2015, art. 63, § 5; Brasil, 2024, art. 1). On that basis, the law expressly justifies the ex officio declination of jurisdiction without distinguishing between civil and consumer claims (Theodoro Júnior, 2024).

2.2 Legislative rationale and statement of reasons

Law No. 14,879/2024 originated in Bill No. 1803/2023, sponsored by the Chamber of Deputies. Forwarded to the Federal Senate under Article 65 of the 1988 Federal Constitution (CF/88) in conjunction with Article 134 of the Common Standing Orders, the bill established that forum selection takes effect only when it appears in a written instrument, expressly refers to a given legal transaction, and bears a connection to the parties' domicile or to the place of the obligation, qualifying as abusive – and subject to ex officio declination – the filing of an action in a random court (Prudente, 2023; Brasil, 2010).

Examination of the legislative debates reveals, however, that the approved rule did not distinguish, with the necessary precision, between adhesion contracts and arm's-length contracts. Although the legislative motivation was clearly directed at protecting vulnerable parties – consumers and adherents in general – the wording of the caput, as approved, applies indistinctly to any and all contracts, including those entered into between sophisticated parties endowed with equivalent bargaining power (Tartuce, 2025).

This circumstance configures the central problem: in seeking to curb a specific conduct – the abusive imposition of a distant forum in adhesion contracts – the rule ended up restricting contractual freedom where protection is not warranted. The phenomenon reveals tension with the principle of proportionality, which, as Barroso (2023) teaches, requires a rational and proportionate relationship among the reasons for the rule, the means it employs, and the ends it pursues. By applying indistinctly to arm's-length contracts between sophisticated parties, the restriction breaks that adequacy link between means and end, directing a protective instrument at subjects who do not need it and disproportionately limiting party autonomy in contracts whose terms – including the forum selection clause – both parties are able to negotiate freely.

In short, the statute met a legitimate demand to protect the weaker party, but did so through insufficiently calibrated technique that does not withstand the proportionality test (developed in section 5.5 below). The legal order already had effective abusiveness-control mechanisms – §§ 3 and 4 of Article 63 in the original wording and the protective rules of the Consumer Defence Code – so that the territorial rule exceeds what is strictly necessary and sacrifices private autonomy where no adequate constitutional justification exists (Barroso, 2023; Alexy, 2017).

2.3 Doctrinal analysis: party autonomy, free contractual negotiation, and legal certainty

Party autonomy, as the guiding principle of contract law, is constitutionally anchored in the principles of free enterprise (Article 1, IV, and Article 170, caput, of the CF/88) and contractual freedom, a corollary of the general freedom of action protected by Article 5, II, of the CF/88 (Silva, 2025). In the procedural field, this autonomy manifests itself in the possibility of the parties entering into procedural agreements under Article 190 of the CPC, and in the power of forum selection, historically admitted as a legitimate exercise of the contractors' will (Didier Júnior, 2019).

Brazilian procedural scholarship, since the 1973 CPC, has consolidated the understanding that forum selection is a genuine bilateral procedural transaction, through which the parties exercise self-regulating power in the jurisdictional sphere (Dinamarco, 2020). Didier Júnior (2019) teaches that this freedom manifests the principle of respect for self-regulation of the will in civil procedure, deriving from the general clause of freedom and from human dignity.

The restriction imposed by Law No. 14,879/2024 raises the question whether the territorial limitation is a proportionate state intervention or an excessive restriction on the legitimate exercise of private autonomy. Theodoro Júnior (2024) observes that, in arm's-length contracts, the forum selection clause serves relevant purposes: it allows the parties to concentrate disputes in a forum with specialised expertise, to avoid the dispersion of claims, and to reduce transaction costs.

Legal certainty is likewise affected. Long-term business contracts entered into under the previous wording of Article 63 may have their forum selection clauses challenged, creating uncertainty for economic agents. The inter-temporal question – the applicability of the new restriction to contracts signed before the statute took effect – remains open and tends to generate jurisprudential controversy (Câmara, 2014).

Within business contracts, the restriction has particularly significant effects on *Banking & Finance*, M&A, and *Private Equity* transactions, in which electing a forum in districts endowed with courts specialised in business law – such as the District of São Paulo – is a consolidated practice justified by the court's technical expertise (Wald, 2024).

Concentrating complex business disputes in specialised divisions fosters coherent case law and promotes efficiency in the administration of justice.

2.4 Limits on forum selection in adhesion contracts and arm's-length business contracts

The distinction between adhesion and arm's-length contracts is fundamental to understanding the reform's impacts. In adhesion contracts, one party unilaterally pre-establishes the clauses, leaving the other merely to accept or reject the transaction as a whole (Gomes, 2019). In arm's-length contracts, both parties exercise effective freedom of negotiation, discussing and modifying the proposed clauses until reaching consensus (Tepedino; Konder; Bandeira, 2022).

Even before Law No. 14,879/2024, Brazilian case law afforded differentiated treatment to forum selection according to the nature of the contract. In adhesion contracts with consumers, the rule of Article 101, I, of the Consumer Defence Code (CDC) applied, assuring the consumer the right to litigate at his own domicile (Brasil, 1990). In arm's-length business contracts, by contrast, courts recognised broad effectiveness of the clause, rejecting abusiveness claims where it was shown that both parties had freely negotiated the terms (Brasil, 2017).[1]

By imposing the territorial-link requirement in the caput, without distinguishing between adhesion and arm's-length contracts, the new wording created a zone of interpretive uncertainty. Although § 5 refers adhesion contracts to Article 46, the caput's restriction remains applicable to arm's-length contracts, limiting forum selection even between sophisticated and balanced parties (Tartuce, 2025).

In *Banking & Finance* transactions, electing the São Paulo forum is widespread regardless of the parties' domicile or the place of performance, justified by specialised business divisions, the density of commercial case law, and the magistrates' expertise. Law No. 14,879/2024 jeopardises this practice where none of the parties is domiciled in São Paulo and the place of the obligation lies elsewhere – frequent in multiparty transactions and contracts of national or international scope (Verçosa, 2025).

2.5 Position of Brazilian courts before and after the amendment

Before Law No. 14,879/2024, Brazilian case law had consolidated an understanding broadly favourable to the validity of forum selection clauses in arm's-length business contracts and, even in consumer relations, recognised limits on abusiveness claims. The Superior Court

[1]BRASIL. Superior Tribunal de Justiça. REsp 1.641.052/RS. Relator: Ministro Ricardo Villas Bôas Cueva. Terceira Turma. Julgado em: 2 maio 2017. Publicado em: 11 maio 2017. Diário da Justiça Eletrônico.

of Justice (STJ) repeatedly affirmed that a clause freely agreed between capable parties binds them and may be set aside only in exceptional cases of manifest abusiveness. In Special Appeal (REsp) No. 1,675,012/SP (Justice Nancy Andrighi, 8 August 2017), the Third Panel held that altering territorial jurisdiction by an adhesion contract does not, by itself, allow an inference of nullity – which requires concurrent abusiveness or illegality – nor does consumer status alone generate a presumption of vulnerability sufficient to repel the clause (Brasil, 2017b).

In REsp No. 1,641,052/RS, the same Panel held that, in arm's-length business contracts, the clause must be upheld as a legitimate expression of party autonomy, the judge being barred from setting it aside ex officio (Brasil, 2017)[2]. These holdings align with Precedent 335 of the Federal Supreme Court (STF), under which a forum selection clause is valid for proceedings arising from the contract (Brasil, 1963). The São Paulo State Court of Justice, in turn, systematically recognised the jurisdiction of its specialised business divisions over disputes arising from contracts electing that forum, even where the parties were domiciled in other federal units (São Paulo, 2022)[3].

After Law No. 14,879/2024 took effect, the first judicial pronouncements reveal interpretive divergence. Part of the case law has applied the restriction literally, recognising the ineffectiveness of clauses that do not observe the criteria of the new § 1 (São Paulo, 2024)[4]. Another line, however, has adopted a restrictive reading of the innovation, confining its application to adhesion contracts and preserving the effectiveness of forum selection in arm's-length business contracts, on the ground that the *ratio legis* does not authorise extending the restriction to relations between balanced parties. This divergence underscores the need for the higher courts to harmonise the interpretation of the provision, preferably through a repetitive special appeal.

3 THE AMENDMENT UNDER COMPARATIVE LAW

Forum selection in *common law* systems: the United States and the United Kingdom

In *common law* systems, the contractual forum selection clause is widely recognised and upheld as a legitimate expression of party autonomy. In the United States, the leading precedent The Bremen v. Zapata Off-Shore Co. (1972), decided by the Supreme Court,

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[2]BRASIL. Superior Tribunal de Justiça. REsp 1.641.052/RS. Relator: Ministro Ricardo Villas Bôas Cueva. Terceira Turma. Julgado em: 2 maio 2017.
[3]SÃO PAULO. Tribunal de Justiça. Agravo de Instrumento nº 2047563-81.2022.8.26.0000. Relator: Des. Grava Brazil. 2ª Câmara Reservada de Direito Empresarial. Julgado em: 15 ago. 2022.
[4]SÃO PAULO. Tribunal de Justiça. Agravo de Instrumento nº 2198374-52.2024.8.26.0000. Relator: Des. César Ciampolini. 1ª Câmara Reservada de Direito Empresarial. Julgado em: 20 nov. 2024.

established that forum selection clauses are prima facie valid and should be enforced unless the party challenging them shows that enforcement would be unreasonable or unjust under the circumstances (Estados Unidos, 1972).

After The Bremen, U.S. case law consolidated the presumption of validity of forum selection clauses in commercial contracts. In Carnival Cruise Lines, Inc. v. Shute (1991), the Supreme Court extended that presumption even to form contracts, upholding a clause in a passenger ticket (Estados Unidos, 1991). Contemporary U.S. scholarship treats forum selection in sophisticated business contracts as presumptively reasonable, the challenger bearing the burden of demonstrating exceptional circumstances justifying its setting aside (Born, 2021a).

English law takes an analogous and equally permissive position. Exclusive jurisdiction clauses are recognised as binding, exceptionally set aside only in circumstances of *strong cause*, under the precedent Donohue v. Armco Inc and others (2001), decided by the House of Lords (Reino Unido, 2001). English law imposes no territorial restriction; the parties may elect the jurisdiction of any State, including jurisdictions with which the contract has no factual connection. International commercial practice frequently elects the English jurisdiction precisely for its reputation for impartiality, commercial-law expertise, and predictability (Fentiman, 2015).

The trend in *common law* systems is thus one of broad freedom of forum selection, with judicial controls confined to exceptional cases of fraud, coercion, or manifest unreasonableness – reflecting the primacy accorded to party autonomy and the perception that forum selection furthers commercial efficiency by reducing litigation costs and eliminating uncertainty as to the competent jurisdiction (Clermont; Eisenberg, 1998).

Forum selection in *civil law* systems: Germany, France, and Portugal

In European *civil law* systems, the contractual forum selection clause is likewise admitted with broad freedom, albeit with normative particularities.

In Germany, § 38 of the Zivilprozessordnung (ZPO) governs jurisdiction agreements (Gerichtsstandsvereinbarungen), permitting forum selection between merchants (Kaufleute) with no territorial restriction, requiring only a determined or determinable legal relationship; for non-merchants, at least one party must lack a domicile in Germany or the agreement must follow the dispute (Alemanha, 2005). The distinction is emblematic: between merchants – presumptively sophisticated parties – the freedom of forum selection must be full (Schack, 2021).

In French law, Article 48 of the Code de procédure civile admits clauses attributives de compétence between merchants, provided they are expressly specified (França, 1976). The Cour de Cassation holds such clauses fully valid between parties acting in their professional or commercial activity, with no territorial nexus required (França, 1997), consumer protection being assured by the Code de la consommation, which prohibits abusive clauses in consumer contracts (França, 2016).

In Portugal, Article 95 of the Code of Civil Procedure (Law No. 41/2013) admits agreements derogating from and conferring jurisdiction, requiring only that they appear in writing and indicate the competent forum, without territorial restriction (Portugal, 2013). The Portuguese Supreme Court of Justice recognises their validity even where the elected forum has no territorial connection to the dispute, provided the requirements of Article 25 of Regulation (EU) No. 1215/2012 are met, any asymmetry in bargaining power or inconvenience of location being irrelevant (Portugal, 2023, 2025).

Comparative examination thus reveals that European *civil law* systems adopt a stance analogous to that of *common law* systems in contracts between merchants: broad freedom of forum selection, with no territorial restriction and protective mechanisms confined to asymmetric relationships (consumers, employees). By imposing an indiscriminate territorial restriction, the Brazilian reform departs from this consolidated trend.

3.3 The Brussels I Recast Regulation and the international trend

Within the European Union (EU), Regulation (EU) No. 1215/2012 – the Brussels I Recast Regulation – is the central instrument governing judicial jurisdiction in civil and commercial matters. Article 25 governs prorogation agreements, providing that, if the parties have agreed that a court or the courts of a Member State are to have jurisdiction over disputes arising from a given legal relationship, that court or those courts shall have exclusive jurisdiction (UE, 2012).

Article 25 imposes no requirement of territorial connection between the elected forum and the parties or the underlying relationship. Party autonomy is fully respected, requiring only minimum formal requirements (writing or, in certain cases, conformity with international commercial practice) (Magnus; Mankowski, 2023). The Court of Justice of the European Union has repeatedly affirmed the primacy of party autonomy, limiting exceptions to violations of exclusive jurisdiction (Article 24) or protection of vulnerable parties (consumers, employees, insured persons) (UE, 2015).

The international trend, crystallised both in the 2005 Hague Convention on Choice of Court Agreements and in the Brussels I Recast Regulation, is unequivocal: freedom of forum selection in commercial contracts is a fundamental value of international trade, essential for legal predictability and for reducing transaction costs (Hague Conference on Private International Law, 2005). The Hague Convention provides that choice-of-court agreements must be recognised and enforced by the contracting States, save for exhaustively listed exceptions.

3.4 Comparative analysis: convergence or departure?

Comparative analysis reveals a consolidated international trend favouring broad freedom of forum selection in commercial contracts, with protective mechanisms reserved exclusively for vulnerable parties. This trend appears both in *common law* systems, where the presumption of validity is nearly absolute, and in European *civil law* systems, where freedom is full between merchants.

Law No. 14,879/2024 thus represents Brazil's departure from this international trend. By imposing a territorial restriction without distinguishing, in the caput, between arm's-length and adhesion contracts, the Brazilian legislature adopted a more restrictive position than any of the compared systems, in which limitations are reserved for situations of imbalance (Araujo, 2019). Sophisticated parties' choice of jurisdiction in cross-border contracts turns on the predictability of the judicial system, the courts' commercial expertise, and the recognised effectiveness of forum selection clauses; restrictions with no parallel elsewhere may render Brazil less attractive, encouraging the migration of dispute resolution clauses to foreign jurisdictions or to arbitration (Tiburcio, 2009).

3.5 Effects on international contracts electing the Brazilian jurisdiction

In international contracts, Law No. 14,879/2024 raises additional questions. Although Article 25 of the CPC governs the jurisdiction of the Brazilian authority over international cases and Article 63 addresses internal jurisdiction, the interaction between the two provisions generates uncertainty where foreign parties elect a forum in Brazil (Araujo, 2019).

International financing contracts, for example, frequently elect the São Paulo or Rio de Janeiro forum for disputes before the Brazilian jurisdiction, motivated by the magistrates' sophistication, the judicial infrastructure, and decades of predictable case law. The new territorial-link requirement raises a doubt: may a foreign party, with no domicile in Brazil, validly elect a Brazilian forum, and, if so, is the choice restricted to the place of the obligation? (Dolinger; Tiburcio, 2020).

Scholarship has maintained that Article 63, § 5, of the CPC does not affect the concurrent international jurisdiction of Article 25, so that forum selection by foreign parties remains governed by rules of private international law (Marinoni; Arenhart; Mitidiero, 2024). The question remains controversial, and the absence of a definitive judicial pronouncement contributes to the prevailing uncertainty.

In practice, the uncertainty generated by the reform may discourage foreign parties from electing the Brazilian jurisdiction, favouring competing jurisdictions that offer greater predictability – notably England, New York, and Singapore – and encouraging recourse to arbitration (Lee, 2002).

4 THE QUESTION OF CURRENCY LIQUIDITY

4.1 Currency liquidity and the choice of jurisdiction

Liquidity, economically, refers to the ease with which an asset can be converted into a means of payment without significant loss of value (Keynes, 1936). For currency, it depends on universal acceptability, market depth, and the institutional stability of the legal system. Highly liquid currencies – the U.S. dollar, the euro, the pound sterling – are sustained by jurisdictional systems that confer high predictability on contract enforcement, the protection of property rights, and the resolution of commercial disputes (Pistor, 2019).

Keynes (1936) tied the preference for liquidity to uncertainty about the future. Transposed to contract law, the choice of jurisdiction in international financial contracts is ultimately a decision about the allocation of jurisdictional risk. Electing jurisdictions with specialised courts, predictable case law, and respect for contractual autonomy increases the "liquidity" of the contract itself – its capacity to generate enforceable rights and to serve as collateral for operations such as assignments of credit, securitisations, and security interests (Pistor, 2019).

4.2 Impacts on financial and business contracts

In *Banking & Finance* operations, the choice of jurisdiction shapes the structuring of credit operations, debt issuances, and structured financings. International creditors, when extending credit denominated in foreign currency or indexed to international benchmarks – the Secured Overnight Financing Rate (SOFR), the Euro Interbank Offered Rate (Euribor), among others – assess not only the borrower's credit risk but also the jurisdictional risk, i.e., the probability that their contractual rights will be adequately protected by the courts of the elected forum (Wood, 1980).

The restriction introduced by Law No. 14,879/2024 may adversely affect this risk assessment, insofar as it limits the parties' ability to channel disputes to jurisdictions with specialised financial-law expertise. In syndicated financings, where dozens of financial institutions seated in different jurisdictions act as creditors of a single Brazilian borrower, electing a single forum – typically São Paulo – serves as a mechanism of procedural coordination, avoiding the dispersion of disputes and ensuring decisional uniformity (Salomão Neto, 2020).

In M&A, the forum selection clause is part of the contractual architecture as an element of predictability regarding *post-closing disputes*, including disputes over price adjustments, representations and warranties, and indemnification clauses. The possibility of electing a forum with corporate and business-law expertise is valued by domestic and foreign investors as a factor of legal certainty (Pargendler, 2013).

In *Private Equity* operations, the restriction is equally relevant. Such funds frequently structure investments through special purpose vehicles (SPVs) domiciled in jurisdictions other than that of the target company, and investment contracts, shareholders' agreements, and mezzanine debt instruments often elect a forum corresponding to none of the parties' domicile, chosen instead for its expertise in complex business litigation (Metrick; Yasuda, 2021).

4.3 Forum-selection restriction and predictability in foreign-currency contracts

Jurisdictional predictability is essential to the pricing of contracts denominated in foreign currency or indexed to international indices. Asset-pricing theory shows that the risk premium demanded by international creditors is a direct function of uncertainty regarding the enforceability of their contractual rights (Duffie, 2001). The greater the jurisdictional uncertainty, the higher the risk premium and the cost of capital for the Brazilian borrower.

The restriction may thus produce a paradoxical effect: in seeking to protect vulnerable parties in adhesion contracts, it ends up raising the cost of financing for Brazilian companies that access international capital markets. Cross-border lending, bond issuances on the international market, and *project finance* operations frequently require the election of jurisdictions recognised for their financial expertise and their tradition of respect for *pacta sunt servanda* (Wood, 1980).

International experience shows that jurisdictions restricting forum selection tend to lose competitiveness as financial-contracting centres. A contract whose forum selection clause is vulnerable to challenge becomes less liquid, since potential assignees or secured parties face added uncertainty as to where disputes will be settled (Gilson; Schwartz, 2005). The pre-eminence of New York and London as seats of international financial contracts owes much to the robustness with which their legal systems enforce forum selection and choice-of-law clauses (Pistor, 2019). Brazil's departure from this trend may, in the long run, compromise its attractiveness for financial investment amid growing global jurisdictional competition.

4.4 Validity of foreign-forum selection in international financing operations

The application of Law No. 14,879/2024 to international financing contracts raises the question of the validity of clauses electing a foreign forum, especially where the election bears a connection to the domicile of one of the parties or to the place of payment. Article 63 of the CPC, in force since 5 June 2024, provides in the new wording of § 1:

> Forum selection only takes effect when it appears in a written instrument, expressly refers to a given legal transaction, and bears a connection to the domicile or residence of one of the parties or to the place of the obligation, save for consumer agreements when favourable to the consumer. (Brasil, 2015, art. 63, § 1; Brasil, 2024, art. 1)

In cross-border lending, international bond issuances, and *project finance*, it is common practice to elect foreign jurisdictions recognised for their financial-law expertise, such as New York or London. The validity of such an election, in light of the new legislation, depends on demonstrating that the elected forum corresponds to the domicile of one of the parties or to the place of performance.

Consider a contract with connected obligations in which New York is both the domicile of several parties and the place where payments are to be made: there are solid grounds to sustain that electing the New York courts is valid, although, given the novelty of the legislation, no precedent yet exists. The same rationale should hold for São Paulo or another Brazilian city.

This reading is supported by the literal terms of the provision, which admit forum selection tied to the domicile of any of the parties or to the place of the obligation. In syndicated financings, in which multiple financial institutions domiciled in different jurisdictions act as creditors, electing the forum of the domicile of any of them – even a foreign one – should be recognised as valid, provided it is expressly agreed in writing and refers to a determined legal transaction.

The absence of precedent, however, must be reserved, given the statute's recent entry into force. Consolidation of this reading will depend on the evolution of case law and eventual harmonisation by the higher courts, leaving until then a degree of uncertainty as to the provision's application to international operations.

5 THE FORCE OF BUSINESS CONTRACTS AND DISPUTE RESOLUTION

The binding force of contracts (*pacta sunt servanda*)

The principle of the binding force of contracts, synthesised in the maxim *pacta sunt servanda*, is the cornerstone of contract law in Western legal systems. Under this principle, a valid and duly formed contract is law between the parties, binding them to perform the obligations assumed with the same cogent force as legal norms (Gomes, 2019). In Brazilian law, the principle is expressed in Articles 421 and 422 of the Civil Code (CC), which enshrine contractual freedom and objective good faith as vectors of the obligational relationship (Brasil, 2002).

The binding force of contracts is not, of course, absolute. The Brazilian order recognises exceptional situations justifying intervention – adhesion contracts with abusive clauses (Articles 51 and 54 of the CDC), lesion and the state of peril (Articles 156 and 157 of the CC), excessive onerousness (Article 478 of the CC), and the social function of the contract (Article 421 of the CC) – as temperaments to *pacta sunt servanda* (Tepedino; Konder; Bandeira, 2022). Such limitations, however, presuppose an imbalance between the parties or an extraordinary circumstance rendering performance unjust.

The question posed by Law No. 14,879/2024 is whether the forum-selection restriction constitutes a legitimate limitation on *pacta sunt servanda* in arm's-length business contracts. From the standpoint of contractual dogmatics, the answer appears to be no. In contracts between parties of equivalent bargaining power – M&A, structured financings, *Private Equity* investments – the vulnerability that would legitimise state intervention in the content of the transaction is absent (Forgioni, 2010).

Brazilian commercial scholarship stresses that business contracts enjoy a legal regime distinct from that of civil and consumer contracts, precisely because of the presumption of parity between contractors. Article 421-A of the CC, introduced by the Economic Freedom Act (Law No. 13,874/2019), presumes civil and business contracts to be arm's-length and symmetrical until concrete elements justify departing from that presumption (Brasil, 2002, art.

421-A; Brasil, 2019, art. 7). By applying indistinctly to all contracts, the restriction disregards this legal presumption and contradicts the logic of the business-contract microsystem.

5.2 Party autonomy in arm's-length business contracts

Forgioni (2010) teaches that the business contract is distinguished from other contractual types by the economic function it performs in the market and by the presumption of equality between the contractors – a distinction central to assessing the legitimacy of the restriction.

In business contracts, party autonomy is exercised not by vulnerable parties needing state protection but by sophisticated economic agents, assisted by specialised counsel, who negotiate each clause in light of risk and cost-benefit analyses. Forum selection in such contracts is the product of rational and informed deliberation, not unilateral imposition: the parties elect a given forum for the court's expertise, jurisprudential predictability, judicial infrastructure, and procedural speed (Wald; Gialluca, 2022).

Contemporary business law recognises the need to respect economic agents' autonomy in structuring their transactions. The Economic Freedom Act advanced this by guaranteeing, in Article 3, VIII, that arm's-length business transactions will be freely stipulated by the contracting parties (Brasil, 2019, art. 3, VIII). This directive, of constitutional matrix (Brasil, 1988, art. 170, caput), obliges the legislature and the interpreter to preserve economic agents' contractual freedom, restricting it only where adequate constitutional justification exists.

Law No. 14,879/2024, by restricting forum selection without distinguishing between vulnerable and sophisticated parties, directly strains this directive. Imposing a territorial limitation in arm's-length business contracts is a state intervention that finds no basis in the premise of vulnerability – the only constitutionally admissible justification for restricting contractual autonomy.

5.3 Impact of the new Article 63 on dispute resolution clauses

Dispute resolution clauses are an essential element of the contractual architecture in complex business transactions. They encompass not only forum selection but also arbitration agreements, escalation clauses, pre-arbitral mediation, and expert determination mechanisms (Born, 2021b).

The restriction directly affects state-jurisdiction clauses, impacting the parties' ability to channel judicial disputes to specialised fora. In M&A, the parties commonly agree a hybrid clause submitting certain matters to arbitration and others to state jurisdiction (Carmona, 2021);

judicial forum selection – for urgent relief, enforcement, or non-arbitrable matters – then becomes subject to the territorial restriction of the new Article 63.

In *Private Equity* operations, shareholders' agreements frequently contain forum selection clauses for disputes not submitted to arbitration, such as those over the exercise of voting rights, non-compete obligations, and drag-along and tag-along clauses. The territorial limitation may hinder concentrating these disputes in a single forum, generating procedural fragmentation and decisional inconsistency (Gorga, 2013).

In structured finance, the forum selection clause is an essential component of the documentation, especially in master agreements under which multiple operations are carried out within a single contractual framework. The standardisation promoted by bodies such as the International Swaps and Derivatives Association (ISDA) and the Loan Market Association (LMA) presupposes freedom of forum selection as a fundamental premise (Wood, 1980).

5.4 Alternatives to judicial forum selection: arbitration, mediation, and international fora

Faced with the restrictions imposed by Law No. 14,879/2024, parties to business contracts tend to seek alternatives that preserve predictability and expertise in dispute resolution. The principal one is arbitration, governed in Brazil by Law No. 9,307/1996 (the Arbitration Act) (Brasil, 1996).

Arbitration, unlike state jurisdiction, is not subject to the limitations of Article 63 of the CPC. The parties are free to elect the seat, the arbitrators, the procedural rules, and the applicable law, with no territorial restriction (Carmona, 2021). The expectation is that the restriction will accelerate the migration of business disputes to arbitration – a phenomenon that, while positive in some respects, may have undesirable consequences for the judicial system and for parties lacking the resources to fund arbitral proceedings (Levy; Pereira, 2021).

Mediation, regulated by Law No. 13,140/2015, offers another alternative, especially where preserving the commercial relationship is a priority. As a consensual mechanism dependent on both parties' voluntary adherence, however, it is not a full substitute for the forum selection clause (Brasil, 2015b).

Another likely alternative is the election of international fora. Parties that formerly elected a Brazilian forum may opt for foreign jurisdictions (New York, London, Singapore) that impose no territorial restrictions, especially in contracts with a foreign element (Tiburcio, 2009). Such migration, though legitimate, may represent a loss of jurisdiction for the Brazilian

Judiciary and reduce the relevance of national courts in resolving highly complex commercial disputes.

5.5 Critical analysis: constitutional compatibility of the restriction

Assessing the constitutional compatibility of the restriction requires applying the principle of proportionality in its threefold dimension – suitability, necessity, and proportionality in the narrow sense (Alexy, 2017). As to suitability, the question is whether the territorial restriction is apt to achieve the legislature's end of protecting the weaker party against the abusive imposition of a distant forum. The answer is partly affirmative: it is apt to protect vulnerable parties in adhesion contracts, but unsuitable for arm's-length business contracts, since the protective end does not apply to balanced parties (Barroso, 2023).

As to necessity, the question is whether the restriction is the least burdensome means. The answer is negative: the Brazilian order already had effective mechanisms to curb abuses – the abusiveness review in §§ 3 and 4 of Article 63 (original wording) and the protective rules of the CDC – so that, applied indiscriminately, the territorial restriction exceeds what is necessary.

As to proportionality in the narrow sense, the question is whether the benefits outweigh the costs. The benefits – protecting vulnerable adherents – could be achieved by less restrictive means, while the costs – limitation of business autonomy, increased transaction costs, departure from international trends, reduced jurisdictional attractiveness – are significant and disproportionate (Marinoni; Arenhart; Mitidiero, 2024).

From a constitutional standpoint, restricting forum selection in arm's-length business contracts strains the principles of free enterprise (Brasil, 1988, art. 1, IV; art. 170, caput), contractual freedom (Brasil, 1988, art. 5, II), and legal certainty (Brasil, 1988, art. 5, XXXVI). The limitation finds no proportionate justification when applied to sophisticated and balanced parties, configuring an excessive restriction on private autonomy (Sarlet; Marinoni; Mitidiero, 2024).

Given this picture, the partial unconstitutionality of Article 63, caput, in the wording conferred by Law No. 14,879/2024, is plausibly arguable through interpretation in conformity with the Constitution – confining the territorial limitation to cases of effective imbalance and preserving freedom of forum selection in arm's-length business contracts (Mendes; Branco, 2024).

6 CONCLUSION

This work undertook a critical analysis of the amendments made by Law No. 14,879/2024 to Article 63 of the CPC, focusing on the impacts of the forum-selection restriction on business contracts and on Brazil's attractiveness as a jurisdiction for complex financial operations.

From the perspective of domestic law, the reform – though motivated by legitimate aims of protecting the weaker party – adopted over-inclusive legislative technique that restricts contractual autonomy where protection is unwarranted. The lack of a clear distinction between adhesion and arm's-length contracts in the caput generates interpretive uncertainty and compromises legal certainty. The comparative analysis showed that the reform departs from consolidated international trends, both in common law and in European civil law systems, in which freedom of forum selection in commercial contracts is widely recognised without territorial restriction; by imposing a limitation without parallel in the compared systems, Brazil risks losing competitiveness for international transactions.

The study further demonstrated the relationship among currency liquidity, jurisdictional confidence, and contractual attractiveness, arguing that the restriction may raise the cost of capital for Brazilian companies, reduce the liquidity of financial instruments, and discourage foreign investment. Finally, the reform's impact on *pacta sunt servanda* and on dispute resolution clauses was analysed, concluding that the restriction is a disproportionate state intervention in business contractual autonomy and tends to accelerate the migration of disputes to arbitration and to foreign jurisdictions.

In sum, Law No. 14,879/2024, however well-intentioned, produced disproportionate effects on the Brazilian business-contract ecosystem. Interpretation in conformity with the Constitution – confining the territorial limitation to situations of effective imbalance – is the appropriate solution for reconciling the rule with the principles of free enterprise, legal certainty, and private autonomy. Preserving freedom of forum selection in arm's-length business contracts is a necessary condition for maintaining Brazil's attractiveness as a reliable jurisdiction for highly complex financial and business operations.

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THE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE FUTURE OF ARBITRATION AS A DISPUTE RESOLUTION METHOD

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1. Introduction

1.1 The Growing Use of Artificial Intelligence in the Legal Sector

Richard Susskind has long argued that technological innovation is transforming both the organization of legal work and the delivery of legal services. The increasing adoption of artificial intelligence in research, document analysis, and dispute management can therefore be understood as part of a broader restructuring of legal practice.

Among the innovations that have drawn the most attention, Artificial Intelligence (AI) stands out as one of the most significant.

As Harry Surden explains, contemporary legal AI generally relies on techniques such as machine learning and natural language processing to perform narrowly defined tasks, including document classification, legal research, pattern recognition, and prediction. These capabilities have supported the growing use of AI-based tools in document review, contract analysis, predictive analytics, and case management.

As a result, lawyers and dispute resolution institutions are looking into how to integrate these technologies into international arbitration.

The digitalization of arbitration was sped up by the widespread use of virtual hearings, electronic document management systems, and online communication platforms. In this context, introducing AI seems like a natural step in the ongoing modernization of arbitral proceedings. AI systems can help lawyers and arbitrators by handling repetitive tasks, organizing evidence, identifying relevant precedents, and improving procedural management.

However, the rising use of AI also brings important legal and ethical concerns. While these technologies offer significant opportunities to enhance efficiency and reduce costs, their use also poses potential risks to the fundamental principles underpinning the legitimacy of arbitration. Issues related to procedural fairness, transparency, confidentiality, and the role of human judgment have become central to current academic and professional discussions.

1.2 The Importance of International Arbitration in Global Commerce

As Gary Born observes, international arbitration has become a central mechanism for resolving cross-border commercial disputes because it combines party autonomy, procedural flexibility, relative neutrality, and the international enforceability of awards.[1]

Businesses often prefer arbitration over domestic litigation because it is confidential, allows for the selection of specialized arbitrators, and enables easier international enforcement of arbitral awards under the 1958 New York Convention. As international transactions grow more complex and generate larger volumes of information, the potential for using technology to process and organize data becomes increasingly appealing.

1.3 Research Question

This study aims to answer the following research question: How is artificial intelligence transforming international arbitration, and what challenges arise from its adoption?

1.4 Hypothesis

The working hypothesis of this paper is that AI has the potential to improve efficiency and lower the costs associated with international arbitration. However, its use must be closely monitored to avoid the risks related to due process, transparency, confidentiality, and the overall legitimacy of arbitral proceedings.

2. Artificial Intelligence and International Arbitration

The increasing use of artificial intelligence is transforming legal services and dispute resolution worldwide. As international arbitration embraces digital technologies to improve efficiency and accessibility, understanding both AI and the digital evolution of arbitration is essential for assessing the opportunities and challenges that AI presents to contemporary arbitral practice.

2.1 Understanding Artificial intelligence

Surden describes legal AI not as a single form of machine intelligence, but as a collection of computational techniques capable of performing particular tasks traditionally

[1] Gary B. Born, International Commercial Arbitration, 3rd ed., Kluwer Law International, 2021.

associated with human cognition. These tasks include classification, prediction, language processing, and the identification of patterns within large datasets.

Ryan Abbott further argues that the increasing ability of AI systems to perform functions previously reserved for human professionals requires legal institutions to reconsider how responsibility, incentives, and accountability are allocated.

Artificial Intelligence (AI) refers to the capability of computer systems to perform tasks that traditionally require human intelligence, such as learning, reasoning, problem-solving, decision-making, and language understanding. AI systems operate through algorithms and computational models that analyse large amounts of data, identify patterns, and generate predictions or recommendations.

Recent advancements in machine learning, deep learning, and natural language processing have significantly expanded AI's capabilities, enabling it to perform increasingly complex functions across various sectors.

The concept of AI originated in the mid-twentieth century, but its practical applications have accelerated in recent years due to the availability of vast datasets, increased computing power, and sophisticated algorithms. Today, AI is widely used in industries such as healthcare, finance, transportation, education, and legal services.

In the legal field, AI tools assist with document review, legal research, contract analysis, and predictive analytics, improving efficiency and reducing the time required for routine tasks.

Despite its benefits, AI also raises important concerns regarding transparency, accountability, privacy, and potential bias. Because AI systems rely on data and algorithmic processes, incomplete or biased datasets can produce errors or discriminatory outcomes.

Consequently, scholars and policymakers emphasize the importance of responsible AI governance to ensure that technological innovation remains aligned with legal principles, ethical standards, and fundamental rights.

2.3 Digital Transformation of Arbitration

International arbitration has undergone significant digital transformation over the past two decades, driven by technological innovation and the increasing globalization of commercial relationships. Traditionally, arbitration proceedings relied heavily on physical documentation, in-person hearings, and manual case management processes. However, advances in digital technologies have reshaped how disputes are administered, communicated, and resolved, making arbitration more efficient and accessible.

The ICC Commission on Arbitration and ADR has recognized that technology now forms an integral part of contemporary arbitral practice. Its report on leveraging technology in international arbitration examines how digital tools can improve efficiency and cost-effectiveness while also creating procedural, confidentiality, and fairness concerns.

The adoption of electronic filing systems, digital document management platforms, virtual hearing technologies, and online case administration tools has streamlined procedural aspects of arbitration.

These developments became particularly prominent during the COVID-19 pandemic, when travel restrictions and public health concerns accelerated the use of remote hearings and digital communication platforms. As a result, arbitral institutions and practitioners increasingly embraced technology as a permanent feature of modern dispute resolution.

Digital transformation has also created opportunities for the integration of advanced technologies, including artificial intelligence, into arbitration processes. AI-powered tools can assist with document review, legal research, translation, case management, and data analysis, potentially reducing costs and improving procedural efficiency.

Nevertheless, the growing reliance on digital technologies raises challenges related to cybersecurity, data protection, confidentiality, and due process.

Consequently, arbitral institutions and legal professionals continue to develop frameworks and best practices that balance technological innovation with the fundamental principles of fairness, impartiality, and procedural integrity that underpin international arbitration.

3. Current Applications of AI in International Arbitration

Artificial intelligence is already influencing various stages of international arbitration. Rather than replacing human decision-makers, AI primarily serves as a support tool that enhances efficiency, accuracy, and organization. Its most significant applications include document review, legal research, case management, and arbitrator selection, each contributing to a more streamlined arbitral process.

3.1. Document Review and E-Discovery

One of the most significant applications of artificial intelligence in international arbitration is document review and electronic discovery (e-discovery). Modern commercial disputes often involve thousands, or even millions, of documents, including contracts, emails, financial records, and internal communications.

The review of such extensive datasets can be costly, time-consuming, and prone to human error. AI-powered systems address these challenges by rapidly analysing large volumes of information and identifying documents that are relevant to the dispute.

As Surden explains, machine-learning systems are particularly effective when legal tasks can be expressed as problems of classification, pattern recognition, or information retrieval. In arbitral proceedings, these capabilities allow AI-assisted review systems to classify documents, prioritize potentially relevant material, and identify relationships within large evidentiary datasets.

The ICC has similarly emphasized that the use of electronic document-management tools should preserve the efficiency and cost-effectiveness of arbitration rather than create disproportionate procedural burdens.

These systems can also assist in detecting duplicate files, organizing evidence, and uncovering connections between documents that would otherwise be difficult to identify. As a result, legal teams can focus their efforts on substantive analysis rather than administrative review.

The use of AI in e-discovery significantly reduces the time and costs associated with arbitration while improving the consistency of document analysis.

Nevertheless, concerns remain regarding transparency, data security, and the reliability of automated assessments. Consequently, human oversight continues to play an essential role in ensuring that AI-assisted document review supports, rather than replaces, professional legal judgment.

3.2. Legal Research

Artificial intelligence has also transformed legal research within international arbitration. Traditionally, lawyers and arbitrators were required to manually review legislation, arbitral awards, scholarly literature, and case law to identify relevant authorities. AI-powered research platforms can now analyse vast legal databases in a matter of seconds, significantly accelerating this process.

Using natural language processing, these systems can understand legal queries, identify relevant sources, and generate targeted results based on contextual meaning rather than simple keyword matching.

Surden notes that AI systems can support legal research by identifying patterns, ranking materials, and retrieving potentially relevant sources. However, these systems do not necessarily understand legal doctrine in the same contextual and normative manner as a trained lawyer. Their outputs therefore require independent verification and professional evaluation.

By improving the speed and accuracy of legal research, AI enables practitioners to devote more time to legal strategy and case preparation. However, the quality of AI-generated results depends on the data available and requires careful verification by legal professionals.

3.3. Case Management

Case management represents another area in which artificial intelligence is increasingly being utilized in international arbitration. Arbitral proceedings involve numerous administrative tasks, including scheduling hearings, monitoring deadlines, managing communications, organizing submissions, and tracking procedural developments. AI-driven case management systems help streamline these activities by automating routine processes and improving the overall organization of proceedings.

These technologies can assist tribunals, arbitral institutions, and legal teams by generating reminders for procedural deadlines, organizing case documents, coordinating calendars, and facilitating communication among participants.

Advanced systems are also capable of analysing procedural data to identify potential delays and recommend more efficient case-management strategies. By reducing administrative burdens, AI allows arbitrators to focus on substantive legal issues rather than logistical concerns.

The increasing adoption of digital case management tools contributes to greater efficiency, cost reduction, and procedural transparency. Nevertheless, the use of AI in this context raises concerns regarding cybersecurity, confidentiality, and data protection, particularly given the sensitive nature of many international commercial disputes.

For this reason, robust security measures and continued human supervision remain essential components of AI-assisted case administration.

3.4. Arbitrator Selection

Artificial intelligence is also beginning to influence the process of arbitrator selection. Choosing an appropriate arbitrator is a crucial aspect of international arbitration, as the tribunal's expertise, experience, and impartiality can significantly affect the conduct and outcome of proceedings. Traditionally, parties and counsel have relied on professional networks, institutional recommendations, and personal experience when evaluating potential candidates.

AI-powered platforms can assist this process by analysing large datasets containing information about arbitrators, including their professional backgrounds, prior appointments, areas of specialization, published writings, and previous decisions. By processing this information, AI systems can identify candidates whose expertise aligns with the specific characteristics of a dispute.

These tools can also enhance transparency by providing more comprehensive information about prospective arbitrators and reducing reliance on informal professional networks.

However, concerns remain regarding the quality of available data, the risk of algorithmic bias, and the possibility that excessive reliance on data-driven analysis could overlook important qualitative factors. Consequently, AI should be viewed as a decision-support tool rather than a substitute for professional judgment in arbitrator appointments.

4. Benefits of AI in International Arbitration

The growing adoption of artificial intelligence in international arbitration has generated numerous advantages for practitioners, arbitral institutions, and disputing parties. By automating repetitive tasks and enhancing data analysis, AI contributes to more efficient proceedings, lower costs, greater consistency in legal processes, and broader access to arbitration services.

4.1 Efficiency

Efficiency is widely regarded as one of the most significant benefits of artificial intelligence in international arbitration. Arbitral proceedings often involve substantial volumes of documents, complex legal issues, multiple parties, and extensive procedural requirements.

Managing these elements can require considerable time and resources. AI technologies help address these challenges by automating repetitive and time-consuming tasks, allowing legal professionals and arbitrators to focus on substantive aspects of disputes.

One of the primary ways AI improves efficiency is through the rapid processing of information. Tasks that previously required weeks of manual review, such as document analysis, evidence classification, and legal research, can now be completed in a fraction of the time.

AI-powered systems can quickly identify relevant documents, extract key information, and organize large datasets according to predetermined criteria. This accelerates the preparation of cases and reduces delays throughout the proceedings.

AI also enhances procedural efficiency through automated case management tools. These systems assist in scheduling hearings, monitoring deadlines, organizing submissions, and facilitating communication between parties and tribunals. By minimizing administrative burdens, arbitration participants can dedicate more attention to legal analysis and dispute resolution.

Furthermore, the ability of AI to process and analyze large amounts of data with speed and accuracy contributes to more informed decision-making throughout the arbitration process. While human oversight remains essential, the use of AI significantly reduces inefficiencies associated with manual procedures, supporting the objective of resolving disputes in a timely and effective manner.

4.2. Cost Reduction

Another important benefit of artificial intelligence in international arbitration is its potential to reduce costs. Arbitration is often perceived as a more flexible alternative to litigation, but complex international disputes can still involve substantial expenses related to legal representation, document review, expert analysis, and case administration.

By automating labour-intensive tasks, AI reduces the amount of time required for activities traditionally performed by legal professionals. Document review, legal research, and procedural administration can be completed more efficiently, resulting in lower professional fees and reduced operational costs. The ability to analyse large volumes of information rapidly also minimizes the resources needed to prepare and manage cases.

Additionally, AI-supported virtual platforms and digital case management systems contribute to cost savings by reducing travel expenses, printing costs, and logistical expenditures associated with in-person proceedings. These efficiencies can be particularly beneficial for parties involved in cross-border disputes.

Although implementing AI technologies often requires an initial investment, the potential long-term reduction in administrative and legal costs makes their adoption increasingly attractive to arbitral institutions and users.

4.3. Consistency and Predictability

Artificial intelligence can also contribute to greater consistency and predictability in international arbitration. Although arbitration is valued for its flexibility, parties often seek a degree of certainty regarding procedural management and the interpretation of legal issues. AI technologies support these objectives by analyzing large amounts of historical data and identifying recurring patterns within arbitral practice.

Through advanced data analytics, AI systems can examine previous arbitral awards, procedural decisions, and legal authorities to identify trends potentially relevant to ongoing disputes. This capability assists legal practitioners in evaluating possible outcomes, assessing risks, and developing more informed litigation and arbitration strategies. By providing access to structured information and comparative analysis, AI promotes a more consistent approach to legal research and case preparation.

Furthermore, AI tools can help standardize certain administrative and procedural functions, thereby reducing variations arising from human oversight or inconsistent practices. This contributes to a more predictable arbitration process and may increase confidence among parties regarding the management of their disputes.

Nevertheless, predictability should not be confused with certainty. Arbitration remains highly dependent on the specific facts, evidence, and legal arguments presented in each case. Therefore, while AI can enhance consistency and provide valuable insights, final decisions must continue to rely on the independent judgment and expertise of arbitrators.

4.4. Access to Arbitration

Drawing on Susskind’s analysis of technology and access to justice, digital tools can reduce certain informational, geographical, and administrative barriers to dispute resolution. In arbitration, remote participation, automated document organization, and AI-assisted legal research may similarly broaden access by reducing some of the costs associated with cross-border proceedings.

However, improved technological access should not be equated with universal accessibility. Parties with limited digital infrastructure, technical expertise, or financial resources may remain disadvantaged.

High costs and procedural complexity have traditionally limited the ability of some individuals and smaller businesses to participate effectively in international arbitration.

By reducing administrative burdens and lowering operational costs, AI can make arbitration more financially viable for a broader range of users. Automated legal research, document review, and case management tools enable parties to access services that would otherwise require significant professional resources

In addition, digital platforms supported by AI facilitate remote participation in arbitral proceedings, allowing parties from different jurisdictions to engage in the process without extensive travel or logistical expenses. These developments contribute to a more inclusive arbitration system and support the broader objective of expanding access to efficient and effective dispute resolution mechanisms in the international arena.

5. Risks and Challenges of AI in Arbitration

While artificial intelligence presents several practical benefits, its integration into international arbitration is not without risks. Arbitration is based on legal principles that ensure fairness and legitimacy. If AI tools are implemented without proper safeguards, they could undermine the parties' trust in the arbitral process.

5.1 Due Process Concerns

Born emphasizes that the legitimacy and enforceability of international arbitration depend on compliance with basic procedural guarantees, including equal treatment and a meaningful opportunity for each party to present its case.

The use of AI becomes problematic when it prevents a party from understanding, testing, or responding to information that materially influences the tribunal.

Principles like the right to be heard, equality of arms, and procedural fairness guarantee both parties a fair chance to present their arguments and evidence before an impartial tribunal.

The use of AI presents specific challenges to the effective preservation of these guarantees. Excessive reliance on automated systems may prevent the parties from fully understanding how particular conclusions were reached.

The principle of equality of arms does not necessarily require the parties to possess identical financial or technological resources. Nevertheless, a due-process concern may arise where one party's exclusive use of an AI system materially affects the evidentiary or analytical basis of the proceedings and the opposing party lacks a meaningful opportunity to understand or challenge its operation.

A further concern is that AI-generated analyses may influence the decision-making process without providing the parties with an effective opportunity to examine or challenge the methods employed. Since arbitration relies on the parties' trust in the fairness of the process, any technological tool should be subject to human oversight and procedural safeguards.

Thus, AI should be viewed as a supportive tool rather than an independent decision-maker. This ensures that fundamental due process rights are fully protected.

5.2 Transparency and Explainability

Surden and other AI-law scholars describe technological opacity as a central difficulty in the legal use of machine-learning systems. In some cases, even the system's developers may be unable to provide a straightforward explanation of the relationship between particular inputs and outputs. In arbitration, such opacity becomes legally significant when an AI-generated assessment influences a procedural or substantive determination that the parties must be able to examine and challenge.

Arbitral proceedings require that parties understand the basis for decisions made. If an AI system is used for evidence analysis, legal research, or selecting arbitrators, its inability to explain its workings may raise doubts about the reliability and legitimacy of its results.

Transparency is also linked to the parties' right to challenge procedural decisions. If an algorithm's functions are not verifiable or audit-able, identifying potential errors or inaccuracies becomes difficult.

For this reason, many experts argue that AI systems used in arbitration should meet minimum standards of explainability, allowing arbitrators and parties to comprehend the factors that shaped the results generated.

5.3 Algorithmic Bias

Artificial intelligence systems learn from existing data. If the training data contains historical biases, the algorithm may reproduce or even enhance those same patterns.

In international arbitration, algorithmic bias can emerge in various situations, particularly in selecting arbitrators and evaluating evidence. AI platforms used to recommend arbitrators risk favoring individuals with an extensive history of appointments, thereby limiting diversity and concentrating appointments among a relatively small group of professionals.

Similarly, AI tools used to analyse documents or identify patterns in disputes can produce unreliable results when the underlying datasets are incomplete, unrepresentative, or biased. Such outcomes pose a risk to the neutrality and impartiality expected in arbitral proceedings.

Since arbitration aims to provide independent and impartial dispute resolution, it is crucial for human decision-makers to critically review AI-generated recommendations. Human oversight is necessary to identify and correct any algorithmic biases.

5.4 Confidentiality and Data Protection

Confidentiality is a highly valued aspect of international arbitration. Commercial disputes often involve sensitive business information, trade secrets, financial records, and private contractual arrangements.

The ICCA–NYC Bar–CPR Cybersecurity Protocol recognizes that international arbitration frequently involves commercially sensitive information and that cybersecurity responsibilities must be addressed throughout the proceedings. The use of AI systems intensifies these concerns because confidential data may be uploaded to, processed by, retained within, or used to improve third-party technological platforms.

Unauthorized access, data breaches, or poor management of confidential information could compromise the integrity of the arbitral process.

Moreover, international arbitration often involves parties in different jurisdictions, complicating compliance with data protection laws. Legal frameworks like the General Data Protection Regulation (GDPR) in the European Union and the Brazilian General Data Protection Law (LGPD) impose important obligations regarding personal data handling.

As AI use increases, it necessitates strong cybersecurity measures, clear data management protocols, and strict adherence to privacy laws. Protecting sensitive information is essential for maintaining trust in arbitration as a dispute resolution method.

5.5 Can AI Replace Arbitrators?

Susskind's work on technology and adjudication demonstrates that automated systems may perform increasingly sophisticated legal and analytical functions. Nevertheless, Surden cautions against equating proficiency in narrow computational tasks with general human intelligence or legal understanding. This distinction is particularly important in arbitration, where decision-making involves not only information processing but also credibility assessment, contextual interpretation, procedural discretion, and normative judgment.

Abbott's broader account of AI and legal responsibility also raises the question of whether legal systems should focus solely on the identity of the decision-maker or instead on the reliability, accountability, and consequences of the decision-making process.

Proponents argue that AI systems could provide greater speed, consistency, and the ability to process vast amounts of information without fatigue or emotional bias. Automated analysis also has the potential to reduce costs and enhance predictability in certain procedural tasks.

However, there are compelling arguments against replacing human arbitrators. International arbitration goes beyond simply applying legal rules. It often requires interpreting complex contractual relationships, evaluating witness credibility, considering commercial practices, and balancing equitable principles.

Human judgment, professional experience, and ethical responsibility are vital components of the arbitral function. Arbitrators must understand cultural differences, assess the unique details of each dispute, and make discretionary decisions where strict logical analysis may not suffice.

Therefore, the best approach seems to be using AI as a supportive tool rather than as a replacement for arbitrators. Technology can improve efficiency, but the ultimate decision-making responsibility should remain with human professionals.

6. Future Perspectives

As artificial intelligence continues to evolve, its role in international arbitration is expected to expand beyond administrative support functions. Future developments may include AI-assisted drafting, predictive analytics, automated dispute resolution mechanisms, and the creation of regulatory frameworks designed to ensure the responsible use of emerging technologies.

6.1 AI-Assisted Drafting of Awards

One of the most discussed future applications of artificial intelligence in international arbitration is the possibility of AI-assisted drafting of arbitral awards. While current AI tools are primarily used for research, document review, and case management, advances in natural language processing have created the potential for systems capable of generating draft sections of procedural orders, summaries of facts, and even preliminary versions of arbitral awards.

Institutions and organizations such as the International Chamber of Commerce (ICC), the International Council for Commercial Arbitration (ICCA), and UNCITRAL have generally emphasized that AI should serve as a support tool rather than a substitute for arbitrators. The ICCA–NYC Bar–CPR Working Group on Cybersecurity and AI has highlighted the importance of preserving the independence, impartiality, and accountability of decision-makers, particularly when AI is involved in the preparation of legal documents.

In practice, AI-assisted drafting could significantly reduce the time required to prepare lengthy awards by organizing evidence, summarizing submissions, and identifying relevant legal authorities. Such tools have the potential to enhance efficiency and consistency while allowing arbitrators to devote greater attention to substantive legal analysis.

However, significant concerns remain regarding transparency, accuracy, confidentiality, and the risk of excessive reliance on automated outputs. Since arbitral awards require the exercise of legal judgment and reasoning, most commentators agree that final responsibility for drafting and issuing awards must remain with human arbitrators. Consequently, future developments are likely to focus on AI-assisted rather than AI-generated awards.

6.2. Predictive Analytics

Predictive analytics represents another area with substantial potential for future development in international arbitration. By applying machine learning techniques to large datasets, AI systems can identify patterns in previous arbitral awards, procedural decisions, and legal outcomes. These insights can assist parties, counsel, and arbitrators in assessing risk and making more informed strategic decisions.

Several studies and reports discussed within ICC, ICCA, and legal technology initiatives suggest that predictive tools may eventually provide estimates regarding procedural timelines, likely costs, settlement prospects, and possible outcomes based on comparable disputes. Such capabilities could enhance efficiency and support more realistic case assessments at an early stage of proceedings.

Nevertheless, predictive analytics presents important limitations. Arbitration disputes are often highly fact-specific and confidential, meaning that available datasets may be incomplete or unrepresentative. Furthermore, excessive reliance on predictive models could undermine the flexibility and individualized nature of arbitration. For this reason, international organizations generally emphasize that predictive analytics should supplement, rather than replace, professional legal judgment. Future adoption will likely depend on maintaining transparency regarding how predictions are generated and ensuring that parties understand the limitations of algorithmic assessments.

6.3. Smart Contracts and Automated Dispute Resolution

The increasing use of blockchain technology and smart contracts may fundamentally transform aspects of international dispute resolution. Smart contracts are self-executing agreements in which contractual obligations are automatically performed when predefined conditions are satisfied. As these technologies become more common in international commerce, arbitration frameworks may need to adapt to address disputes arising from automated contractual relationships.

Organizations such as UNCITRAL have already examined legal issues associated with electronic commerce, digital transactions, and emerging technologies. Future developments may involve integrating arbitration clauses directly into smart contracts, enabling certain procedural steps to be initiated automatically when disputes arise. In some cases, artificial intelligence could assist in the preliminary assessment of claims, management of evidence, or facilitation of settlement negotiations.

More ambitious proposals envision forms of automated dispute resolution in which AI systems help resolve low-value or highly standardized disputes with minimal human intervention. Such mechanisms could significantly reduce costs and increase accessibility, particularly in digital and cross-border transactions.

Despite these possibilities, important legal and ethical challenges remain. Questions concerning due process, transparency, enforceability, jurisdiction, and accountability continue to require careful consideration. Consequently, while smart contracts and automated dispute resolution may become increasingly relevant, human oversight is expected to remain essential for complex commercial disputes and matters involving significant legal interpretation.

6.4. Need for Regulation

The growing integration of artificial intelligence into international arbitration has generated increasing calls for regulatory guidance and governance frameworks. Although AI offers substantial benefits, its use also raises concerns regarding transparency, confidentiality, cybersecurity, bias, accountability, and procedural fairness. Without appropriate safeguards, these risks could undermine confidence in arbitral proceedings

International organizations have already begun addressing these challenges. UNCITRAL has explored the implications of digital technologies for dispute resolution, while ICCA and other arbitration bodies have issued reports and recommendations concerning the responsible use of AI and related technologies. These initiatives generally emphasize principles such as human oversight, transparency of AI use, protection of confidential information, and preservation of arbitrator independence.

Future regulation may take various forms, including institutional guidelines, professional ethical standards, national legislation, or international soft-law instruments. Rather than restricting innovation, the primary objective of regulation will likely be to ensure that AI technologies are used consistently with the fundamental principles of international arbitration.

As AI becomes increasingly sophisticated, the development of clear regulatory frameworks will be essential to balancing technological innovation with fairness, legitimacy, and trust in the arbitral process. The future success of AI in arbitration may ultimately depend not only on technological advancement but also on effective governance.

7. Conclusion

Artificial intelligence is already impacting the practice of international arbitration and is likely to play an increasingly important role in the future. AI-based tools have shown significant potential to enhance procedural efficiency, lower costs, aid legal research, and streamline case management.

At the same time, the growth of AI presents considerable legal and ethical challenges. Issues regarding due process, transparency, algorithmic bias, confidentiality, and data protection affect the legitimacy and credibility of arbitral proceedings. The adoption of technological solutions without appropriate safeguards risks compromising the fundamental principles on which arbitration's legitimacy as a trusted method of dispute resolution depends.

The debate over the possibility of replacing arbitrators with AI highlights the limitations of technological progress in the legal field. While automated systems can assist with analytical and administrative tasks, they cannot fully replicate the human judgment, ethical reasoning, and contextual understanding needed to resolve complex international disputes.

Thus, the future of international arbitration is unlikely to involve complete automation of decision-making. Instead, it is more realistic to anticipate a model where human arbitrators utilize artificial intelligence as an additional tool to improve the quality and efficiency of their work while maintaining essential guarantees of fairness and justice.

In this regard, the responsible integration of AI into international arbitration should be paired with clear ethical standards, regulatory guidance, and ongoing human oversight. This will ensure that technological innovation strengthens, rather than undermines, the legitimacy of the arbitral process.

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PUBLIC POLICY AS A GROUND FOR SETTING ASIDE AND REFUSING RECOGNITION OF ARBITRAL AWARDS: CONVERGENCE AND DIVERGENCE ACROSS FRANCE, ENGLAND, SINGAPORE, AND BRAZIL

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1. Introduction

International arbitration rests on two correlative promises: that the parties may withdraw their disputes from the jurisdiction of the State and entrust them to a tribunal of their own choosing, and that the resulting decision will be final. Party autonomy and the finality of the award are, at one and the same time, the very rationale of the institution and its principal attraction. Neither promise, however, is absolute. Every legal order that embraces arbitration reserves to the State judge a power of control — narrow but indispensable — to prevent private justice from becoming a space immune to the fundamental values of the legal community. Public policy is, par excellence, the safety valve of that system.

This paper examines precisely that safety valve. Its object is the use of public policy as a ground (i) for setting aside the award before the courts of the seat and (ii) for refusing the recognition and enforcement of the foreign award. The analysis is comparative and bears on four jurisdictions deliberately chosen because they represent distinct traditions and postures: France, the historical home of international arbitration and the laboratory of an autonomous "international" public policy; England, whose *Arbitration Act 1996* cultivates a regime of minimal intervention; Singapore, the Asian hub that has elevated non-intervention into a policy of State; and Brazil, which in little more than two decades has been transformed from a jurisdiction hostile to arbitration into a reliable partner of the international arbitral community.

The thesis advanced here is that, beneath a largely shared rhetoric — all four jurisdictions proclaim that public policy must be construed n]arrowly and that the judge does not review the merits — lies a significant divergence in practice as to the *intensity* of the control. That divergence is at its sharpest in cases of corruption and money laundering, where France has taken a "maximalist" path that openly contrasts with English, Singaporean, and Brazilian restraint. Understanding why jurisdictions that share the same vocabulary reach such different results is the thread that runs through the pages that follow.

2. The conceptual architecture of public-policy control

Before turning to each jurisdiction, three structuring distinctions must be fixed. The first opposes annulment to refusal of recognition. Annulment (*set aside*, *annulation*) is the challenge to the award before the courts of the seat — that is, of the legal place of the arbitration; its effect is in principle erga omnes, since it strikes at the very existence of the award. Refusal of recognition, by contrast, operates in the forum of enforcement and has relative effect: the award remains valid and may be enforced elsewhere, simply producing no effect in that territory. The 1958 New York Convention governs this second situation and, in article V(2)(b), allows the enforcing State to refuse recognition where it would be contrary to that State's public policy.[1]

The second distinction separates *procedural* public policy from *substantive* public policy. The former concerns the regularity of the arbitral process — adversarial debate, equality of the parties, impartiality of the adjudicator, the giving of reasons. The latter concerns the content of the award and the material values of the forum: the prohibition of corruption, the protection of free competition, the bar on unjust enrichment. Most systems are more tolerant in respect of procedural control and extremely sparing in respect of substantive control, precisely because the latter invites a review of the merits. The UNCITRAL Model Law, adopted by dozens of countries, enshrines the formula in article 34(2)(b)(ii), treating public policy as an exceptional and residual head of control.[2]

The third distinction, finally, opposes *domestic* public policy to *international* public policy. The former encompasses all the mandatory rules of a legal order; the latter, narrower, comprises only the core of principles whose breach is intolerable even in a relationship marked by foreign elements. It is a commonplace of the literature that only international — and not domestic — public policy may bar an international arbitral award, on pain of emptying out the State's very openness to transnational commerce.[3] These three distinctions, as will be seen, are handled unevenly by the four jurisdictions under examination.

[1]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), art. V(2)(b). In Brazil, the Convention was incorporated by Decree n. 4.311 of 23 July 2002.
[2]UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), art. 34(2)(b)(ii). On public policy as a residual and exceptional form of control, see BORN, Gary B. *International commercial arbitration*. 3. ed. Alphen aan den Rijn: Kluwer Law International, 2021. p. 3.692 et seq.
[3]GAILLARD, Emmanuel; SAVAGE, John (ed.). *Fouchard Gaillard Goldman on international commercial arbitration*. The Hague: Kluwer Law International, 1999. p. 952-955.

3. France: from "minimalist" public policy to "maximalist" review

France is at once the most liberal and the most interventionist jurisdiction of the set — and the apparent contradiction is revealing. On the one hand, French law does not even recognise the category of domestic public policy as a ground for annulling international awards: article 1520, 5°, of the Code of Civil Procedure authorises annulment only where recognition or enforcement of the award would be contrary to *international* public policy.[4] On the other hand, it is precisely France that, in recent years, has most boldly expanded the depth of judicial scrutiny.

For a long time a stance the literature has labelled "minimalist" prevailed. Beginning with the *Thalès* case, decided by the Paris Court of Appeal in 2004, the breach of international public policy had to be "flagrant, effective and concrete" to justify annulment; the judge could neither review the arbitral tribunal's findings nor admit fresh evidence.[5] The test of "flagrancy" meant, in practice, that only an ostensible and incontestable breach — evident at first sight — warranted intervention. The solution prized finality, but it was criticised for its superficiality: it sufficed for the wrongdoer to clothe the illegality in a plausible façade to escape control.

The turning point came with the *Belokon* saga. In 2017 the Paris Court of Appeal set aside an award of roughly US$ 15 million, concluding on the basis of "serious, precise and concurring indications" that the investor had used the arbitration to legitimise the proceeds of money laundering. On 23 March 2022 the Cour de cassation confirmed the annulment and, beyond that, reformulated the test itself: it abandoned the triptych "flagrant, effective and concrete" and now requires, simply, a "characterised" breach of international public policy, declaring that the annulment judge is neither confined to the evidence produced before the arbitral tribunal nor bound by its findings.[6]

The consequences are profound. By admitting fresh evidence and a full re-examination of the facts, the French judge has come to exercise, in matters of corruption and money laundering, a control that many describe as *de novo*. The Court went so far as to hold that the criminal offence need not be proven, indications of fraudulent activity revealing a characterised breach being enough. For the defenders of this orientation, it is a legitimate response to a real

[4]French Code of Civil Procedure, art. 1520, 5°, which permits annulment where recognition or enforcement of the award would be contrary to international public policy.
[5]Paris Court of Appeal, 18 Nov. 2004, *Thalès Air Defence v. Euromissile*. The formula required a "flagrant, effective and concrete" — later "manifest, effective and concrete" — breach of international public policy.
[6]Cour de cassation, 1re ch. civ., 23 March 2022, n. 17-17.981, *Belokon v. Kyrgyz Republic*. The Court abandoned the earlier triptych and now requires merely a "characterised" breach of international public policy, allowing a full re-examination of the facts and the production of fresh evidence not submitted to the arbitral tribunal.

problem: arbitral tribunals do not always have the means or the inclination to investigate corruption thoroughly, and the international community has a pressing interest in awards not becoming instruments of laundering. For its critics, however, the boundary with the prohibited *révision au fond* has become dangerously thin: if the judge re-examines facts, admits new evidence, and is not bound by the tribunal, what remains of the finality of the award?[7]

The French experience thus demonstrates that the narrowness of the *list* of annulment grounds (only five heads in article 1520) is not the same as the narrowness of the *control*. One may admit few grounds and yet examine them with great intensity. It is this dissociation that places France on a collision course with the other jurisdictions of the study.

4. England: public policy as a "long stop"

English law approaches public policy from a different angle. Under the *Arbitration Act 1996*, a challenge to awards rendered in an English seat is brought not through a free-standing "public policy" ground but by way of the "serious irregularity" of section 68. Among the enumerated species, section 68(2)(g) covers an award obtained by fraud or one whose procurement is contrary to public policy. The decisive feature is the cumulative requirement of "substantial injustice": the irregularity is not enough; it must have caused, or be about to cause, substantial injustice to the applicant.[8]

English case law describes section 68 as a "long stop", reserved for extreme cases in which something has gone seriously wrong with the arbitral process. The threshold is deliberately high and successful challenges are exceedingly rare. The underlying philosophy is that parties who chose arbitration also chose its risks, including the risk of a wrong decision; an error of fact or of law by the arbitrator does not, by itself, open the doors of judicial control.

Two classic precedents map the field of substantive illegality. In *Soleimany v. Soleimany*, the Court of Appeal denied effect to an award giving force to a contract aimed at smuggling carpets out of Iran: no English court would lend its authority to an unlawful agreement recognised as such.[9] In *Westacre Investments v. Jugoimport*, by contrast, the allegation of bribery of Kuwaiti officials had been considered and rejected by the arbitral tribunal under the applicable Swiss law; the English court, respecting the tribunal's competence,

[7]Commentators have warned that the "maximalist" review draws the annulment judge dangerously close to the prohibited *révision au fond*. See BORN, Gary B. *International commercial arbitration*, op. cit., p. 3.700-3.705.
[8]Arbitration Act 1996 (United Kingdom), s. 68(2)(g). The case law describes the provision as a *"long stop"* reserved for "extreme cases" in which something has gone seriously wrong with the arbitral process.
[9]*Soleimany v. Soleimany* [1999] QB 785. The Court of Appeal refused to enforce an award giving effect to a contract designed to smuggle carpets out of Iran.

upheld enforcement.[10] The contrast is instructive: England distinguishes between illegality already adjudicated by the arbitral tribunal — which, absent fraud, is not reopened — and patent illegality that the tribunal ignored.

The most resonant case of the last decade, *Nigeria v. Process & Industrial Developments*, shows that the high threshold is not insurmountable. Faced with robust proof that the award — which, with interest, had reached some US$ 11 billion — had been obtained through the bribery of witnesses and the corruption of Nigeria's own lawyers, the High Court set it aside under section 68(2)(g).[11] It is, however, the exception that proves the rule: the court stressed the extraordinary nature of the case and the magnitude of the fraud. In *K1 v. B*, of 2025, the court reaffirmed, *obiter*, that the head of an award substantively contrary to public policy — as distinct from a procedural defect — is exceedingly narrow, requiring as a rule that the award form part of an overall fraudulent enterprise.[12] The recent 2025 reform did not alter this picture: it preserved the restrictive architecture of section 68 and the requirement of substantial injustice.[13]

The English posture is therefore the opposite of the French on one crucial point: whereas France expands the depth of the inquiry in order to reach corruption, England prefers to entrust that task to the arbitral tribunal itself, intervening only where fraud taints the process by which the award was procured. English public policy is less a lens for re-examination than a shield against manifest abuse.

5. Singapore: non-intervention as a policy of State

Singapore adopted the UNCITRAL Model Law and, with it, the formula of article 34(2)(b)(ii), which allows an award to be set aside where it conflicts with the public policy of the State.[14] The content of that clause was refined in *PT Asuransi Jasa Indonesia v. Dexia Bank*, in which the Court of Appeal laid down a test of the highest demand: judicial intervention is warranted only where upholding the award would "shock the conscience", be clearly injurious

[10] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd.* [1999] QB 740. As the arbitral tribunal had rejected the bribery allegation under the applicable Swiss law, the English court upheld enforcement.
[11] *Federal Republic of Nigeria v. Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm). The award — which had reached some US$ 11 billion with interest — was set aside as having been obtained through fraud and corruption of the arbitral process.
[12] *K1 and others v. B* [2025] EWHC 2539 (Comm). The court suggested, *obiter*, that the head of an award "contrary to public policy" (as distinct from a procedural defect) is exceedingly narrow, requiring as a rule that the award be the object of an overall fraudulent enterprise.
[13] The Arbitration Act 2025, which received Royal Assent on 24 Feb. 2025, modernised several aspects of the 1996 Act but substantially preserved the restrictive architecture of s. 68 and the high threshold of "substantial injustice".
[14] International Arbitration Act (Singapore, Cap. 143A), which gives the UNCITRAL Model Law force of law; Model Law, art. 34(2)(b)(ii).

to the public good, or be wholly offensive to the ordinary, reasonable and fully informed member of the public, or violate the forum's most basic notions of morality and justice.[15]

The leading case on illegality and public policy is *AJU v. AJT*. The High Court had, for the first time in Singaporean history, set aside an award on public-policy grounds, concluding that the underlying agreement — relating to the rights to stage a tennis tournament in Bangkok — sought to stifle the prosecution of non-compoundable offences in Thailand. The Court of Appeal reversed the decision and established a principle of "minimal review": errors of fact made by the arbitral tribunal do not, as a rule, ground a public-policy objection, and the court does not reopen the tribunal's findings of fact save in the presence of fraud or another factor vitiating the adjudication.[16]

The difference from France is stark and almost mirror-like. Where the French judge, after *Belokon*, admits fresh evidence and re-examines the facts to probe for corruption, the Singaporean judge refuses, as a matter of principle, to reopen the facts decided by the tribunal. The premise is that treating the arbitral findings — including those on foreign law — as findings of fact renders the award all but impregnable. Recent decisions of the Singapore International Commercial Court confirm this orientation, drawing from it an unmistakable signal of predictability addressed to international users.

It is worth noting, moreover, that Singaporean case law applies the same public-policy *standard* both to set-aside (article 34) and to refusal of recognition (article V(2)(b) of the New York Convention).[17] This symmetry reinforces the coherence of the model: an award that survives the set-aside test will scarcely meet an obstacle at recognition, and vice versa. Non-intervention, in Singapore, is not mere judicial deference but a conscious instrument of a policy of State aimed at consolidating the country as a first-rate arbitral seat.

6. Brazil: the dichotomy between domestic and foreign awards

The Brazilian regime stands apart from the others in operating with an explicit dichotomy between the domestic and the foreign arbitral award. For an award rendered in Brazil, Law n. 9.307/96 does not provide public policy as a free-standing ground of nullity: article 32 lists exhaustively the grounds of invalidation — among them the nullity of the arbitration agreement, an award rendered beyond its limits, the absence of reasons, and

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[15] *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597, [59].
[16] *AJU v. AJT* [2011] SGCA 41. The Court of Appeal reversed the first public-policy set-aside ever granted in Singapore, holding that errors of fact by the arbitral tribunal do not, as a rule, ground a public-policy objection.
[17] Singapore case law treats as identical the public-policy *standard* applicable to set-aside (Model Law, art. 34) and to refusal of recognition (New York Convention, art. V(2)(b)).

disregard of the adversarial principle, of equality, of impartiality, and of the free conviction of the arbitrator — and the annulment action must be brought within the short period of ninety days.[18] Public policy appears here in diffuse form, embedded in specific procedural guarantees, above all in the requirement of the arbitrator's impartiality.

For the foreign award, by contrast, public policy is expressly stated. Articles 38 and 39 of the Arbitration Act, in line with the New York Convention, condition recognition upon confirmation (*homologação*) by the Superior Court of Justice (STJ) and authorise refusal where the subject matter of the dispute is not arbitrable under Brazilian law or where the decision offends national public policy.[19] The central provision deserves to be quoted:

> *"Recognition or enforcement of the foreign arbitral award shall also be denied if the Superior Court of Justice finds that: I – under Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; II – the decision offends national public policy."*

It is telling that this should be, according to the literature, the only point at which the merits of the foreign award may be — however obliquely — touched by the STJ. Confirmation is a *juízo de delibação*, a screening review: the court verifies the formal requirements and respect for basic principles — adversarial debate, full defence, public policy — without re-trying the case.[20] The Court's settled tendency is markedly pro-recognition, with a restrictive reading of public policy: save for a real collision with fundamental principles, the foreign award is confirmed.

The cases in which the STJ has refused confirmation illuminate the content of the clause. In an emblematic decision, the Special Court denied the request on the ground that the arbitrator maintained, with one of the parties, a relationship that would amount to disqualification or suspicion, and that the breach of the duty of disclosure — essential to the fiduciary trust characteristic of arbitration — offended national public policy.[21] The example is eloquent because it shows that Brazilian public policy, like the English and the Singaporean,

[18]Law n. 9.307 of 23 Sept. 1996 (Brazilian Arbitration Act), art. 32, which lists the grounds of nullity of the arbitral award, and art. 33, § 1, which sets the 90-day time limit for the annulment action. The reform introduced by Law n. 13.129 of 26 May 2015 did not alter this structure.
[19]CARMONA, Carlos Alberto. *Arbitragem e processo*: um comentário à Lei n. 9.307/96. 3. ed. São Paulo: Atlas, 2009. p. 472-475.
[20]Brazilian Arbitration Act, art. 39, II and sole paragraph. The English rendering in the block quotation is the author's translation.
[21]STJ, Contested Foreign Judgment (SEC) n. 9.412/US, Special Court. Recognition was denied because the arbitrator had breached the duty to disclose circumstances liable to raise doubts as to his impartiality and independence — a breach held to offend national public policy.

operates above all in its procedural dimension: what is censured is not the economic content of the decision, but the defect of impartiality that corrupts the legitimacy of the adjudication.

It is apparent, then, that Brazil — although a civil-law system like France — aligns itself with a posture far closer to Anglo-Singaporean restraint. The dichotomy between domestic and foreign awards, the exhaustive character of article 32, the screening nature of confirmation, and the restrictive reading of public policy converge towards a model of minimal intervention — a model that was, moreover, a condition of the very affirmation of arbitration in the country after decades of judicial mistrust.

7. Comparative synthesis: convergent rhetoric, divergent practice

Placed side by side, the four jurisdictions share a remarkably uniform vocabulary. All affirm that public policy is the exception and not the rule; all repudiate, at least nominally, the re-examination of the merits; all confine control to the hard core of fundamental values. Yet the rhetorical convergence dissolves once one observes the *intensity* of the scrutiny actually practised.

The most visible fault line is that of corruption and money laundering. France, after *Belokon*, accepts re-examining facts and admitting fresh evidence in order to reach the illegality, even where it has not been criminally proven; the characterised breach suffices. England intervenes only where fraud taints the procurement of the award, leaving the adjudication of substantive illegality to the arbitral tribunal, as the contrast between *Soleimany* and *Westacre* illustrates. Singapore refuses, on principle, to reopen facts. Brazil, by reason of its screening structure, lacks even the instrument for an autonomous evidentiary inquiry at the confirmation stage. Faced with the same problem — the possibility that an award might legitimise corruption — the responses range from French interventionism to Brazilian abstention.

A second line of cleavage is that separating procedural from substantive public policy. England, Singapore, and Brazil concentrate their control on the procedural dimension — impartiality, adversarial debate, the integrity of the procedure — and treat the substantive dimension as a minefield, to be entered only in shocking cases. France, by reconfiguring the inquiry into the merits in corruption matters, is the one that most advances upon the material content of the award.

What factors explain the divergence? Three hypotheses deserve mention. The first is competition among seats: Singapore and, to a degree, England compete for the global arbitration market and make predictability and non-intervention a selling point; the lower the risk of annulment, the more attractive the seat. The second is the symbolic function each judiciary assigns to public policy: France assumes, above all in the fight against transnational corruption, the role of guardian of values that transcend the interests of the parties. The third is institutional trajectory: Brazil, which had to overcome a culture of mistrust in order to consolidate arbitration, has historical reasons to prefer restraint and to avoid public policy becoming a gateway for reopening the merits.[22]

The risk common to all the jurisdictions is that of a *révision au fond* disguised as public-policy control. The deeper the inquiry, the greater the temptation for the judge to substitute, under the pretext of defending fundamental values, his own judgment for that of the arbitral tribunal. The French experience after *Belokon* shows that this risk is not merely theoretical. The Anglo-Singaporean-Brazilian restraint, for its part, is exposed to the opposite risk: that of rendering the award all but immune even in the face of grave illegalities that the arbitral tribunal, through limitation or complicity, failed to confront. Between interventionism and abstention, each system chooses a different point of equilibrium between two values in permanent tension: the finality of arbitration and the integrity of the legal order.

8. Conclusion

In the law of international arbitration, public policy is an open-textured clause whose function lies not in being frequently applied but in existing as an ultimate limit. The four jurisdictions examined confirm that this limit is, in all of them, exceptional — and yet they diverge deeply as to the manner of exercising it. France has turned international public policy into an instrument of control of increasing intensity, especially against corruption, at the cost of eroding the boundary with the review of the merits. England preserves a regime of minimal intervention, anchored in substantial injustice and reserved for extreme cases. Singapore has made the non-reopening of facts a deliberate policy of self-affirmation as an arbitral seat. Brazil, through its screening confirmation and the restrictive reading of article 39, II, has aligned itself with restraint, consistent with the trajectory of the consolidation of arbitration in the country.

The comparative lesson is twofold. On the one hand, the shared vocabulary of “restrictive interpretation” and “no review of the merits” does not guarantee uniformity of results: the true variable is the intensity of the scrutiny, not the breadth of the list of grounds.

[22]BORN, Gary B. *International commercial arbitration*, op. cit., p. 3.690; LEW, Julian D. M.; MISTELIS, Loukas A.; KRÖLL, Stefan. *Comparative international commercial arbitration*. The Hague: Kluwer Law International, 2003. p. 720-724.

On the other hand, each system's choice between intervening and abstaining reflects less a technical disagreement than a decision of legal policy as to which of the two values at stake — finality or integrity — should prevail in the limiting case. To recognise that political dimension is the first step towards enabling parties and counsel, when choosing the seat and the forum of enforcement, to understand that they are also choosing the degree to which their award will be exposed to the scrutiny of public policy.

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THE NEW YORK CONVENTION IN ITS SEVENTH DECADE: INTERPRETIVE DIVERGENCES AND THE QUESTION OF MODERNIZATION

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1. Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958, remains the central legal instrument for the circulation of arbitral awards across borders. It entered into force on 7 June 1959 and, as of June 2026, binds 172 contracting parties.[1] Its practical importance is difficult to overstate. International arbitration would be considerably less attractive if a successful party had to relitigate the merits of a dispute in every jurisdiction where the losing party held assets. The Convention reduces that risk by requiring national courts to recognize arbitration agreements and by establishing a limited list of grounds on which recognition or enforcement of an award may be refused.

The Convention's success does not mean that its application is uniform. Its text deliberately leaves several concepts open. Article V(2)(b), for example, permits refusal when enforcement would be contrary to the public policy of the forum, but it does not define public policy. Article V(1)(e) allows refusal when the award has been set aside at the seat, yet the word "may" does not say whether annulment should normally be decisive. Articles II and IV were drafted in the language of signed documents, letters, telegrams and original paper awards, even though arbitration is now conducted through digital platforms and awards may be created, signed and transmitted electronically. These are not minor drafting curiosities. They affect the predictability of enforcement, which is the principal value that the Convention was designed to protect.

This paper examines three areas in which interpretive divergence is especially significant: the public policy exception, the enforcement of awards annulled at the seat, and the

[1] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*: status and explanatory materials. The Convention entered into force on 7 June 1959; the status page listed 172 contracting parties as of June 2026.

treatment of electronic arbitral awards. It argues that the Convention requires modernization, but not a general renegotiation of its text. The better course is targeted modernization through a combination of disciplined judicial interpretation, the more-favourable-right provision in Article VII(1), and authoritative UNCITRAL guidance. A broad amendment process would risk producing competing treaty regimes and uneven ratification. By contrast, interpretive modernization can address contemporary problems while preserving the Convention's pro-enforcement structure.

2. The Convention's Enforcement Architecture

The Convention is built around a simple allocation of responsibilities. Article III requires contracting States to recognize arbitral awards as binding and to enforce them under local procedural rules, while prohibiting substantially more onerous conditions than those imposed on domestic awards. Article IV identifies the documents that an applicant must produce. Article V then provides an exhaustive list of defenses. Some must be proved by the party resisting enforcement, including incapacity, invalidity of the arbitration agreement, lack of proper notice, excess of jurisdiction, irregularity in the composition of the tribunal, and the setting aside or suspension of the award at the seat. Other grounds, namely non-arbitrability and public policy, may be considered by the enforcing court on its own initiative.[2]

This structure embodies a pro-enforcement policy, but that expression must be used carefully. Pro-enforcement does not mean automatic enforcement. The Convention protects consent, procedural fairness and certain fundamental interests of the enforcing State. It does, however, reject a second review of the merits. National courts are not appellate courts for arbitral tribunals. The refusal grounds are exceptions to an international obligation, and the party resisting enforcement bears the burden of establishing most of them. The UNCITRAL Secretariat Guide accordingly treats Article V as a narrow safety mechanism rather than an invitation to reconsider whether the arbitrators interpreted the contract or the governing law correctly.[3]

The Convention also contains an important adaptive device. Article VII(1) preserves any more favourable right that a party may have under the law or treaties of the enforcement State. The provision makes the Convention a minimum standard rather than a maximum one.

[2] UNITED NATIONS. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, arts. III-V, New York, 10 June 1958.
[3] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. New York: United Nations, 2016, p. 240-248 and 261.

A party may rely on domestic law when that law permits enforcement in circumstances in which the Convention might not. This feature has allowed national systems to develop more liberal rules without waiting for treaty amendment. At the same time, Article VII(1) is asymmetric. It helps when domestic law is more favourable; it does not correct a national court that interprets the Convention too restrictively. The durability of the system therefore depends not only on treaty text, but also on judicial method and dialogue among courts.

3. Public Policy: Necessary Exception, Persistent Divergence

3.1 The case for a narrow standard

Public policy is indispensable because no legal system can be required to enforce an award that contradicts its most fundamental principles. The difficulty is that the expression can easily become a vehicle for protectionism or disguised review of the merits. A broad conception would allow an enforcing court to refuse an award whenever the tribunal applied the law differently from a domestic judge. That result would undermine finality and replace a uniform enforcement framework with 172 separate systems of substantive review.

The leading judicial formulations therefore emphasize exceptional gravity. In *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, the United States Court of Appeals for the Second Circuit held that enforcement may be refused only where it would violate the forum's "most basic notions of morality and justice"[4]. English courts have used similarly demanding language, referring to enforcement that would be clearly injurious to the public good or wholly offensive to an informed and reasonable member of the public, while warning that the defense must be approached with "extreme caution"[5]. French courts frame the inquiry through *ordre public international*: the rules and values whose violation the French legal order cannot tolerate even in an international situation.[6]

These formulas are not identical, but they share two propositions. First, the relevant policy is that of the enforcement forum. Second, the international context requires a narrower inquiry than ordinary domestic illegality. A mandatory rule is not automatically a rule of international public policy. The enforcing court must ask whether the violation is so serious that giving effect to the award would compromise a foundational value of the legal order.

[4] *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).
[5] *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Shell International Petroleum Co. Ltd.*, [1990] 1 AC 295; see also UNCITRAL, *Guide on the Convention*, 2016, p. 242.
[6] UNCITRAL, *Guide on the Convention*, 2016, p. 241, citing the formulation adopted by the Paris Court of Appeal.

That distinction also explains why some limited examination of the award is unavoidable. A court cannot decide whether enforcement would validate corruption, serious denial of due process or another fundamental violation without looking at the substance of the objection. Yet this examination is not a merits appeal. The question is not whether the tribunal reached the best legal answer, but whether enforcement would produce an intolerable result. The UNCITRAL Secretariat Guide expresses the point clearly: public policy does not permit the resisting party to reargue the case or merely allege that it was wrongly decided.[7]

3.2 The Indian experience and the importance of doctrinal separation

Indian jurisprudence illustrates both the risks of conceptual expansion and the possibility of correction. It is important, however, to distinguish decisions concerning domestic awards from decisions concerning foreign awards. In *Renusagar Power Co. Ltd. v. General Electric Co.*, the Supreme Court of India adopted a restrictive test for the enforcement of a foreign award. It identified three categories: the fundamental policy of Indian law, the interests of India, and justice or morality.[8] *Renusagar* was therefore not an invitation to general merits review.

Confusion arose after *ONGC Ltd. v. Saw Pipes Ltd.*, which introduced the concept of "patent illegality" in proceedings concerning a domestic award. Attempts were later made to transfer that broader approach to foreign-award enforcement. In *Shri Lal Mahal Ltd. v. Progetto Grano S.p.A.*, the Supreme Court rejected that transfer and reaffirmed the narrower *Renusagar* standard under the statutory provision corresponding to Article V(2)(b).[9] The distinction matters because the New York Convention governs international circulation, where the justification for finality is strongest and the enforcement court's connection with the merits may be limited.

The Indian cases reveal a broader lesson. Divergence often results not from the wording of Article V alone, but from the failure to separate annulment standards, domestic award review and foreign award enforcement. A modernized interpretive framework should insist on that separation. The public policy defense under the Convention must remain autonomous from broader domestic grounds for setting aside an award.

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[7] UNCITRAL, *Guide on the Convention*, 2016, p. 248.

[8] *Renusagar Power Co. Ltd. v. General Electric Co.*, Supreme Court of India, 1994 Supp. (1) SCC 644.

[9] *Shri Lal Mahal Ltd. v. Progetto Grano S.p.A.*, Supreme Court of India, (2014) 2 SCC 433, judgment delivered on 3 July 2013.

3.3 A workable methodology

A more uniform application of Article V(2)(b) does not require a universal catalogue of public-policy rules. Such a catalogue would be unrealistic because constitutional structures, mandatory laws and social priorities differ. Uniformity can instead be pursued through methodology.

The enforcing court should first identify the precise principle allegedly violated. General references to sovereignty, legality or national interest should be insufficient. Second, it should determine whether that principle belongs to the forum's international public policy rather than merely to its ordinary mandatory law. Third, the violation should be manifest and causally connected to enforcement of the award. Finally, the court should consider whether partial enforcement or severability can protect the fundamental interest without refusing the award in its entirety. This sequence preserves a genuine safety valve while reducing the risk that public policy becomes an unpredictable residual defense.

4. Awards Annulled at the Seat

4.1 The ambiguity of Article V(1)(e)

Article V(1)(e) permits refusal when an award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. The provision reflects the supervisory role of the seat. It also uses the permissive word "may", which leaves the enforcement court a degree of discretion.[10] The resulting debate concerns the legal identity of an international award. Is the award dependent on the legal order of the seat, so that annulment ordinarily ends its international life? Or can it retain an autonomous existence and be enforced under a more favourable legal regime elsewhere?

The territorial approach gives substantial weight to the seat. It promotes coordination by recognizing one jurisdiction as the primary forum for challenges to the award. If every enforcement court could disregard annulment freely, the same award might be valid in one country and legally nonexistent in another. The approach also respects comity and the parties' choice of seat. The decision of the United States Court of Appeals for the District of Columbia Circuit in *TermoRio S.A. E.S.P. v. Electranta S.P.* reflects this position. The court refused to enforce an award annulled in Colombia and emphasized that enforcement of a lawfully vacated award should be exceptional.[11]

[10] UNITED NATIONS. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V(1)(e).
[11] *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 937-939 (D.C. Cir. 2007).

The delocalized approach, most closely associated with France, starts from a different premise. French law treats an international award as an act of international justice rather than a judgment integrated into the legal order of the seat. In *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, French courts enforced an award that had been set aside in Switzerland.[12] The Cour de cassation later stated in *Putrabali Adyamulia v. Rena Holding* that an international award is not anchored in any national legal order and remains an international judicial decision whose validity is examined under the law of the country where enforcement is sought.[13] Article VII(1) supports this result by allowing the award creditor to rely on France's more favourable domestic enforcement rules.

United States practice demonstrates the tension between the two approaches. In *Chromalloy Aeroservices v. Arab Republic of Egypt*, a federal district court enforced an award despite its annulment in Egypt, relying partly on the Convention's permissive language and the parties' agreement to a final and binding award.[14] Later decisions, particularly *TermoRio*, adopted a more deferential attitude toward the courts of the seat. The difference is not adequately explained by saying that one decision was pro-arbitration and the other was not. Both sought to protect the legitimacy of arbitration; they disagreed about which legal order should have primary authority over the award.

4.2 Toward a restrained judgments approach

Neither unconditional deference nor unrestricted delocalization is fully satisfactory. Automatic deference may give extraterritorial effect to an annulment based on a parochial rule that is inconsistent with the Convention's basic standards. Unrestricted discretion, however, encourages forum shopping and weakens the parties' selection of the seat.

A more convincing approach is to begin with a presumption that a final annulment decision by the competent court at the seat should be respected. That presumption should be rebuttable when the annulment judgment itself is not entitled to recognition under the enforcement forum's rules governing foreign judgments or when it is incompatible with fundamental procedural standards. This method treats the annulment decision as a legal act that

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[12] *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de cassation, First Civil Chamber, 23 Mar. 1994, Rev. Arb. 1994, p. 327.

[13] *PT Putrabali Adyamulia v. Rena Holding et al.*, Cour de cassation, First Civil Chamber, 29 June 2007, no. 05-18.053.

[14] *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, 939 F. Supp. 907, 909-913 (D.D.C. 1996).

deserves comity, but not blind obedience. It also directs judicial attention to the quality and legitimacy of the annulment process rather than inviting a new review of the underlying award.

Jan Paulsson's discussion of "local standard annulments" remains useful in this context. He argued that an award should not necessarily lose international effectiveness merely because it was set aside for a reason peculiar to the law of the seat and not recognized by the international enforcement system.[15] The argument should not be transformed into a general license to ignore annulment. It instead supports a narrow exception where the seat's decision depends on a local rule that the enforcement forum regards as incompatible with the Convention's transnational purpose.

A treaty amendment could attempt to codify such a test, but consensus would be difficult. States differ fundamentally on the role of the seat. For the present, clearer judicial reasoning and comparative guidance are more realistic than an amendment that might attract only partial ratification.

5. Electronic Awards and the Limits of 1958 Language

5.1 From paper formalities to functional equivalence

The digital problem is more concrete. Article II(2) refers to an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Article IV(1)(a) requires the duly authenticated original award or a duly certified copy. Those words reflected commercial practice in 1958. Today, arbitration agreements are routinely concluded by email or through digital platforms, proceedings are administered electronically, signatures may be digital, and an award may exist first—or only—in electronic form.

UNCITRAL already responded to a similar difficulty in 2006. Its Recommendation on Articles II(2) and VII(1) stated that the circumstances described in Article II(2) should be treated as non-exhaustive and that Article VII(1) should permit reliance on more favourable national or treaty rules concerning the validity of arbitration agreements.[16] This was an important interpretive modernization. It preserved the Convention's text while directing courts away from a literal rule that would discriminate against modern communications.

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[15] PAULSSON, Jan. Enforcing arbitral awards notwithstanding a local standard annulment. *ICC International Court of Arbitration Bulletin*, v. 9, n. 1, p. 14-31, 1998.

[16] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Adopted on 7 July 2006.

Electronic awards raise a related but distinct question. An enforcing court may accept that an electronic document is an award and still ask whether it is an "original" for purposes of Article IV. A purely physical understanding of originality would be difficult to defend in a system where reliable electronic signatures, audit trails and integrity controls may provide stronger authentication than a paper document. The relevant functions are authenticity, integrity and accessibility, not the material on which the award is recorded.

5.2 UNCITRAL Working Group II through June 2026

UNCITRAL Working Group II has considered the recognition and enforcement of electronic arbitral awards over several sessions. Its official work programme records a colloquium and working paper at the eightieth session in 2024, further papers and State responses at the eighty-first session in February 2025, a report and working paper at the eighty-second session in October 2025, and document WP.244 together with draft-report materials at the eighty-third session in February 2026.[17] As of June 2026, this record shows continuing work rather than the adoption of a final new recommendation by the Commission.

An updated proposal submitted by Bahrain in October 2025, building on discussions with Mexico and Switzerland, offers a useful statement of the issue. It proposes that the Convention be interpreted in a technologically neutral manner, that electronic awards not be excluded from the term "arbitral awards", and that an electronic award qualify as an original where there is reliable assurance of the integrity of the information and the information can be displayed to the intended recipient.[18] The proposal is not itself binding law, but its functional approach is persuasive and consistent with UNCITRAL instruments on electronic commerce and electronic communications.

Technology neutrality is preferable to prescribing a particular signature system or file format. Any detailed technical standard would age quickly and might disadvantage States with different digital infrastructures. A functional test can remain stable: the applicant should demonstrate that the electronic record is complete, has not been altered after the award became final, can be attributed to the tribunal, and can be made accessible to the court and the opposing

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[17] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW. *Working Group II: Dispute Settlement*. The official page lists documents A/CN.9/WG.II/WP.238, WP.240, WP.242 and WP.244 for the sessions held from 2024 to February 2026.

[18] KINGDOM OF BAHRAIN. *Interpreting the New York Convention in line with Dispute Resolution in the Digital Economy: Updated Proposal of the Kingdom of Bahrain*. UNCITRAL Working Group II, 11 Oct. 2025, paras. 4-6.

party. National procedural law may determine the evidence required, but it should not discriminate merely because the award is electronic.

6. Modernization: Amendment or Interpretation?

A case can be made for formal amendment. The Convention contains genuine ambiguities, and non-binding guidance cannot guarantee uniform national outcomes. A protocol could define electronic awards, clarify the effect of annulment at the seat, and perhaps articulate a narrower public policy standard. In theory, a binding text would offer greater certainty.

In practice, a general amendment process would create serious risks. The Convention's value depends on the breadth and simplicity of its network. A protocol would bind only the States that ratified it. During what could be a long transitional period, courts would need to determine whether the original Convention, the protocol, domestic law or another treaty applied. States might also use negotiations to reopen settled features of the enforcement system. The result could be fragmentation rather than modernization.

The updated Bahrain proposal identifies this concern directly, noting that amendment among a limited number of the Convention's 172 parties could produce incompatible obligations and that a universally accepted protocol could take years to negotiate and decades to implement.[19] The concern is particularly strong in relation to technology, where legal reform moves more slowly than technical change.

Interpretive modernization is therefore the better general strategy, but it should not be confused with passivity. It requires institutional work. UNCITRAL can adopt recommendations and explanatory texts; the Secretariat Guide can be updated to incorporate new national decisions; courts can cite foreign judgments and explain departures from the dominant approach; arbitral institutions can establish reliable protocols for electronic signatures and delivery; and States can modernize domestic legislation while preserving Article VII(1)'s more-favourable-right principle.

Different problems also call for different levels of intervention. Electronic awards are well suited to a UNCITRAL recommendation based on functional equivalence and non-discrimination. Public policy is better addressed through a judicial methodology that limits review to manifest violations of fundamental international public policy. Annulled awards

[19] Ibid., paras. 29-31.

present the hardest question because the disagreement is normative rather than technological. Here, soft law should encourage a rebuttable presumption in favour of the seat's annulment judgment, subject to ordinary recognition standards and exceptional Convention-based concerns.

This differentiated approach respects the Convention's design. It does not pretend that every divergence can be eliminated. Instead, it seeks to reduce unnecessary divergence while preserving legitimate differences among legal systems. Uniformity in international arbitration should concern the structure and rigor of analysis, not the mechanical production of identical results in every case.

7. Conclusion

The New York Convention has remained effective for nearly seven decades because it combines a clear enforcement obligation with limited safeguards and enough flexibility to operate across different legal traditions. Its open language, however, creates recurring uncertainty. Public policy may be transformed into merits review; courts disagree on the international effect of annulment at the seat; and paper-based terminology does not map neatly onto electronic awards.

These difficulties justify modernization, but they do not justify reopening the entire treaty. A broad amendment process could weaken the very universality that gives the Convention its value. The preferable response is targeted and functional. Courts should apply Article V(2)(b) only to manifest violations of international public policy and should state the fundamental principle at issue with precision. Annulment decisions at the seat should receive a rebuttable presumption of respect, rather than automatic or negligible effect. Electronic awards should be recognized through a technology-neutral test based on authenticity, integrity and accessibility.

UNCITRAL's current work on electronic awards demonstrates that the Convention can be updated without being replaced. The 2006 Recommendation provides a successful precedent, and Article VII(1) permits national law to move toward more favourable enforcement. These mechanisms are imperfect because they do not create a supranational appellate body or eliminate all national variation. Nevertheless, they offer a more realistic path to coherence than a new treaty regime with uncertain participation.

The Convention's next decades will depend less on adding words to its text than on applying its existing words with discipline. Modernization should preserve the bargain made in

1958: national courts retain authority to protect fundamental legal values, but that authority must not destroy the finality and international circulation of arbitral awards.

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IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS CONTEMPORARY FRONTIERS IN DISCLOSURE, BIAS AND ACCOUNTABILITY

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1. Introduction

Arbitration owes its existence to the consent of the parties, and it owes its legitimacy to the neutrality of the person who decides. Unlike a national judge, the arbitrator enjoys none of the structural guarantees that a permanent judiciary provides. There is no security of tenure, no fixed public salary insulated from the dispute, and no hierarchy of appeal to correct a biased decision on the merits. What the parties receive instead is a private adjudicator chosen for the occasion, frequently nominated by one of the very litigants whose case will be judged. In that setting the requirement that the arbitrator be impartial and independent is not a formality but the load-bearing wall of the entire structure, for it is what justifies the deference that courts and the New York Convention extend to awards, and what distinguishes arbitration from a negotiated outcome dressed in adjudicative clothing.

The two concepts are related but distinct. Independence is an objective, relational notion that concerns the existence of connections, whether financial, professional or personal, between the arbitrator and a party, its counsel, or the dispute. Impartiality is subjective and attitudinal, concerning the arbitrator's state of mind and the absence of bias, favour or predisposition toward an outcome.[1] An arbitrator may be perfectly independent yet partial, having prejudged the case, or wholly without bias yet not independent, by reason of a relationship that a reasonable observer would find troubling. Most modern instruments fuse the two into a single operative test. Article 12(2) of the UNCITRAL Model Law permits a challenge where circumstances give rise to justifiable doubts as to impartiality or independence, and the leading institutional rules adopt the same formula.[2] The common-law tradition expresses it as

[1]On the conceptual distinction see G. Born, *International Commercial Arbitration* (3rd ed., Kluwer 2021), ch. 12; independence looks to relationships, impartiality to the absence of bias of mind.
[2]UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006), Art. 12(2); see also ICC Arbitration Rules (2021), Art. 11(1); LCIA Arbitration Rules (2020), Art. 5.3–5.4.

the appearance of bias measured through the eyes of the fair-minded and informed observer, while United States law speaks of evident partiality under the Federal Arbitration Act.[3]

Whatever the precise wording, the enforcement consequences are uniform and severe. A tribunal that is improperly constituted, or whose member is shown to lack the required neutrality, exposes the award to annulment at the seat and to refusal of recognition abroad under Article V of the New York Convention.[4] The operative mechanism that the system uses to protect that neutrality is disclosure. The arbitrator is obliged to reveal, on a continuing basis, anything that might reasonably cause doubt, and the parties may then challenge. That model has served well, but it was conceived for a particular world of bilateral commercial disputes, three-member tribunals and conflicts that take the form of an identifiable relationship. The pressures examined in this paper arise precisely where that world has changed. Third-party funders have inserted a hidden economic actor into the proceeding; social media has created a permanent and searchable record of an arbitrator's opinions; the recurrence of the same legal questions before a small pool of specialists has sharpened the problem of prejudgment; cost pressures have multiplied sole-arbitrator proceedings in which there is no colleague to provide a check; and a more demanding culture of accountability has begun to ask whether the institutions that appoint arbitrators can themselves be held responsible. Each section that follows takes one of these frontiers, sets out the governing standards and the most instructive authorities, and asks whether the existing safeguards are sufficient.

2. Third-Party Funding and Conflicts of Interest under the IBA Guidelines on Disclosure

Third-party funding, the financing of a claim by an outsider in exchange for a share of any recovery, has moved from the margins to the mainstream of international arbitration.[5] It raises a conflict problem that is genuinely novel rather than merely a variation on familiar themes. The difficulty is threefold. First, the funder is an economic stakeholder in the outcome who is not formally a party, so the conventional conflict check, which asks whether the arbitrator has a relationship with the named litigants, may simply miss it. Second, the same funders appear repeatedly before the same comparatively small group of arbitrators, generating

[3] *Halliburton Co. v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (fair-minded and informed observer); *Commonwealth Coatings Corp. v Continental Casualty Co.*, 393 U.S. 145 (1968) (evident partiality under FAA §10(a)(2)).
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Art. V(1)(d) (composition not in accordance with the parties' agreement) and Art. V(2)(b) (public policy).
[5] See the foundational study of the ICCA–Queen Mary Task Force, *Report on Third-Party Funding in International Arbitration* (April 2018).

a repeat-player familiarity whose effect on neutrality is impossible to verify and easy to suspect. Third, and most acutely, funding arrangements have historically been confidential, so an arbitrator cannot disclose, and a party cannot investigate, a relationship with a funder whose very identity is concealed. The conflict is invisible by design.

The principal regulatory answer has been mandatory disclosure of the funder's identity, and the high-water mark is the 2022 revision of the ICSID Arbitration Rules. Rule 14 imposes, for the first time in that system, a standing obligation on a party to disclose the name and address of any third party from which it receives funding for the proceeding, at registration or as soon as the arrangement is concluded, and to keep that information current throughout the case.[6] The provision goes further than any institutional rule that preceded it. Where the funder is a legal person, the notice must identify the persons and entities that own and control it, so that the ultimate beneficial owner is exposed for conflict-checking, and the tribunal retains a discretionary power to order disclosure of further information about the funding agreement itself.[7] The ICC has likewise required disclosure of the existence of funding and the identity of the funder in its Note to Parties, and the jurisdictions that legalised funding for arbitration, namely Hong Kong and Singapore in 2017, paired that liberalisation with disclosure obligations, while in Europe the Parliament's 2022 resolution on responsible private funding signalled an appetite for more systematic regulation.[8]

Against this background the 2024 revision of the IBA Guidelines on Conflicts of Interest is best understood as an attempt to align the leading soft-law instrument with the trend toward transparency without abandoning its established structure.[9] The Guidelines do not regulate the funder directly; they work by treating the funder as if it were the party for conflict purposes. General Standard 6 now provides that a third-party funder may be considered to bear the identity of a party where it has a direct economic interest in the award, a controlling influence on a party, or influence over the conduct of the proceedings, a deliberately broader

[6] ICSID Arbitration Rules (2022, in force 1 July 2022), Rule 14(1). The stated purpose is to allow arbitrators to identify conflicts arising from funding arrangements.
[7] ICSID Arbitration Rules (2022), Rule 14(1) (ownership and control of a juridical funder) and Rule 14(4) (tribunal's power to order disclosure of further information).
[8] ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), §§ on third-party funding; Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Hong Kong); Civil Law (Amendment) Act 2017 (Singapore); European Parliament resolution of 13 September 2022 on responsible private funding of litigation (the Voss Report).
[9] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), approved by the IBA Council on 25 May 2024, replacing the 2014 edition. The instrument retains its two-part architecture of seven General Standards (Part I) and the traffic-light Application Lists, namely the Non-Waivable Red, Waivable Red, Orange and Green lists (Part II).

formulation than the narrower definition the 2014 text had used.[10] In parallel, the duty of the parties under General Standard 7 has been expanded, so that a party must inform the tribunal not only of relationships with persons having a direct economic interest in the dispute, but also with entities over which it exercises a controlling influence, and indeed with any person or entity the party believes the arbitrator should take into account, explaining the relationship.[11] The arbitrator's conflict with a funder is thus to be assessed by collapsing the distance between funder and litigant, and the burden of surfacing the relevant relationships is placed squarely on the parties, reinforced by the continuing duty to make reasonable enquiries.

How adequate is this response? The revision is a real and welcome improvement. The interest-based attribution test is conceptually sounder than a closed definition, it is consistent with the ICSID approach, and the expanded duty of the parties recognises that the information needed to detect a funding conflict lies with them rather than with the arbitrator. Yet three limitations temper the assessment. The first is the irreducible problem of legal nature, for the Guidelines are soft law. They bind no one of their own force, they impose no obligation on the funder, and the entire mechanism depends on the party actually disclosing a funder whose identity it may have a tactical interest in concealing. Where a seat or institution does not mandate funder disclosure, the Guidelines cannot supply it. The second is the imprecision of the central criterion. The notion of a direct economic interest does not draw a clean line between a litigation funder and the array of other economically interested non-parties such as after-the-event insurers, indemnifying parent companies and contingency-fee counsel, and the drafters themselves debated whether the word economic should remain, ultimately retaining it for fear that direct interest alone was too vague.[12] The third, and deepest, is that disclosure addresses identification but not the structural concern. Knowing that a funder stands behind a claim, and even knowing that the funder has appeared before this arbitrator before, does not resolve whether systemic familiarity between a handful of large funders and a small arbitral pool erodes neutrality; it merely makes the relationship visible. On balance the 2024 Guidelines modernise the mapping of funding conflicts competently, but the genuinely demanding work of compelling disclosure and confronting the repeat-player dynamic is being done elsewhere, by

[10]IBA Guidelines (2024), General Standard 6(b) and accompanying commentary; the 2024 revision removed the more restrictive 2014 description of a third-party funder in favour of an interest- and influence-based test.
[11]IBA Guidelines (2024), General Standard 7; see *Commentary on the Revised Text of the 2024 IBA Guidelines* (IBA Arbitration Committee, 2024), discussing the expansion of the parties' duty to inform.
[12]See *Commentary on the Revised Text of the 2024 IBA Guidelines* (IBA Arbitration Committee, 2024), recording that the word 'economic' was reinserted after the public consultation because 'direct interest' was considered too broad, with non-economic interests left to the 'controlling influence' criterion.

binding instruments such as ICSID Rule 14, to which the Guidelines are a useful but subordinate complement.

3. Social Media, Scholarship and Prior Statements as Sources of Disqualifying Bias

Arbitrators are, by design, drawn from the ranks of those who think and write publicly about the law. They publish treatises, deliver lectures, sit on earlier tribunals, and increasingly maintain an active presence on social media. The question is when that record of expression crosses from the legitimate manifestation of expertise into a disqualifying appearance of bias. The 2022 survey that preceded the latest IBA revision identified social media as one of the areas requiring attention, a recognition that the problem is no longer hypothetical.[13]

The cautionary authority is the *Sun Yang* affair. A panel of the Court of Arbitration for Sport, chaired by the former Italian foreign minister Franco Frattini, had imposed an eight-year ban on the Chinese swimmer for an anti-doping violation. After the award, the athlete discovered a series of tweets posted by the chair in 2018 and 2019 containing violent and racially charged language directed at Chinese nationals in the context of animal-cruelty controversies, including references to the skin colour of the people he targeted.[14] The Swiss Federal Tribunal set the award aside on revision in December 2020, holding that the apprehension of bias toward a party associated with a national group the arbitrator had publicly disparaged was objectively justified, whatever the context of the remarks.[15] Two features of the decision are instructive. The disqualifying element was the content, namely animus toward an ethnic or national group connected to a litigant, which goes to impartiality in its most classical sense. And procedurally, the court accepted that the challenge could succeed even after the ordinary deadline, because the so-called duty of curiosity does not oblige a party to maintain continuous surveillance of an arbitrator's social-media output; a party cannot be expected to scan an arbitrator's posts throughout the proceedings.[16]

Sun Yang must not, however, be read as a licence to disqualify on the basis of any public expression. The case law and the Guidelines distinguish among categories of expression by reference to their content and their connection to the dispute, not the medium through which

[13]The IBA's 2022 survey of practitioners identified arbitrator disclosure, third-party funding, expert witnesses, issue conflicts and social media as the areas warranting modernisation in the 2024 Guidelines.
[14]*WADA v Sun Yang & FINA*, CAS 2019/A/6148; the chair's posts denounced practices in China in extreme terms and, in the tribunal's later assessment, referred to the skin colour of certain Chinese individuals in a manner unrelated to the conduct criticised.
[15]Swiss Federal Tribunal, Judgment 4A_318/2020 of 22 December 2020, annulling the CAS award and removing the chair; the matter was remitted to a differently constituted panel.
[16]Swiss Federal Tribunal, 4A_318/2020; on the limits of the parties' duty of investigation see also the commentary describing the 'duty of curiosity' as not requiring continuous monitoring of an arbitrator's social networks.

they are conveyed. Expressions of prejudice or animus toward a party or a group to which a party belongs are genuinely disqualifying. General scholarly writing on contested legal questions, by contrast, is ordinarily not, a point that overlaps with the issue-conflict problem discussed below, since an arbitrator who has published views on a doctrine has not thereby prejudged the specific dispute, and was very likely appointed because of that expertise.[17] Public commentary on a pending case, or contemporaneous statements aligned with one side's position, occupy a riskier middle ground; in the *Crescent Petroleum* litigation, for instance, the relevant institution disqualified arbitrators on grounds that included public comments, although the Swiss Federal Tribunal subsequently declined to revise the award because the grounds for challenge must have existed at the time the award was rendered.[18] Consistently with this, the 2024 Guidelines treat the routine fact of professional or academic activity, including a general social-media presence and the mere holding of opinions, as not in itself requiring disclosure or creating a conflict; what matters is whether the specific content, read by a fair-minded observer, reveals a real possibility of bias against a party.

The analytical key, then, is content plus nexus rather than the form of the utterance. The genuine difficulties social media introduces are evidentiary and temporal. It produces a durable, searchable archive that can surface long after appointment, as *Sun Yang* shows, which strains the doctrines of waiver and timely challenge and forces them to accommodate late discovery. It also creates a risk of over-deterrence running in the opposite direction, because if every intemperate post or provocative lecture were a potential ground of disqualification, arbitrators would be pushed toward bland self-censorship, and disqualification would become a tactical instrument deployed by losing parties to unsettle awards. The defensible balance protects against demonstrated animus and case-specific prejudgment while tolerating the ordinary scholarly and professional expression that is, after all, the reason particular arbitrators are chosen in the first place.

4. The Issue-Conflict Problem and Whether Prior Published Opinions Disqualify

An issue conflict is the concern that an arbitrator has become so committed to a position on a legal or factual question that he can no longer approach it with an open mind. It is conceptually distinct from a relationship conflict, because nothing connects the arbitrator to

[17]See *Urbaser S.A. v Argentine Republic*, ICSID Case No. ARB/07/26, Decision on the Proposal to Disqualify (12 August 2010), rejecting a challenge founded solely on the arbitrator's prior academic publications, discussed in section 4 below.
[18]*Crescent Petroleum v National Iranian Oil Co.*; Swiss Federal Tribunal, decisions 4A_288/2023 and 4A_572/2023, holding that grounds for a challenge advanced on revision must have existed when the award was made and confirming the absence of any post-award duty of independence.

the parties, yet his settled view on a decisive point may itself appear to compromise the fairness of the decision. The problem is felt most acutely in investment arbitration, where a confined set of recurring questions, such as the reach of most-favoured-nation clauses, the operation of umbrella clauses, the defence of necessity and the content of fair and equitable treatment, arises repeatedly before a small community of specialists who have very probably expressed themselves on those questions in print or in earlier awards.

The tension at the heart of the issue is between expertise and open-mindedness, and it does not admit of a comfortable resolution. Parties want experienced arbitrators precisely because experience yields informed judgment; but experience is inseparable from prior views, and a rule that treated the expression of a prior view as disqualifying would hollow out the pool and would penalise the most distinguished candidates most heavily. The authorities accordingly draw the line not at the existence of a prior opinion but at its specificity and the arbitrator's stake in it. At one pole, an arbitrator who had repeatedly and emphatically committed to a view on a question decisive in the case, expressed across earlier tribunals and defended in a textbook, has been found to give an objective observer reason to doubt his capacity to decide afresh.[19] At the opposite pole, in *Urbaser v Argentina*, a challenge resting solely on an arbitrator's prior academic writing on the most-favoured-nation clause and the defence of necessity failed; the tribunal treated the abstract expression of a general legal opinion as categorically different from the prejudgment of the particular dispute, the arbitrator having confirmed that his earlier writing would not bear on the case.[20]

The sharper edge of the problem appears where the arbitrator is not merely the author of a past view but a contemporaneous advocate of it. In *Telekom Malaysia v Ghana* the arbitrator was acting at the same time as counsel seeking the annulment, in a separate case, of an award on which Ghana relied in the proceedings before him. The District Court of The Hague did not accept that he was actually biased, but it held that the dual role was incompatible with the appearance of impartiality and required him to relinquish one of the two hats; he resigned as counsel in the other matter.[21] The contrast with *Urbaser* is telling, since a past scholarly

[19]See the challenge in *CC/Devas v India*, as recounted in Charles Russell Speechlys, 'Conflicts of Interest in International Commercial Arbitration' (2023), where an arbitrator who had pronounced a settled view on a key legal issue in three previous tribunals and a textbook chapter was held to raise doubts about his open-mindedness.
[20]*Urbaser S.A. v Argentine Republic*, ICSID Case No. ARB/07/26, Decision on the Proposal to Disqualify (12 August 2010), holding that general academic opinions on legal questions do not amount to prejudgment of the specific case.
[21]*Telekom Malaysia Berhad v Republic of Ghana*, PCA Case No. 2003-03; District Court of The Hague, decisions of 18 October and 5 November 2004, requiring the arbitrator to abandon either the arbitrator role or his concurrent role as counsel attacking an award relied upon in the arbitration.

opinion is tolerated, but a present, interested commitment to the opposite of the position the arbitrator must judge is not. This same anxiety drives the most significant recent regulatory development in the field, the Code of Conduct for Arbitrators in International Investment Disputes jointly produced by ICSID and UNCITRAL, adopted in July 2023 and published in 2024. After six years of debate in which the regulation of double-hatting, that is, the practice of sitting as arbitrator in one case while acting as counsel or expert in another, was the most contested question, the Code reinforced the duties of independence, impartiality and disclosure and introduced a dedicated provision restricting concurrent roles, but it conspicuously stopped short of a blanket prohibition and contains no free-standing issue-conflict disqualification rule.[22]

The better view, reflected in this body of practice, is that prior published opinions should not, as a general rule, disqualify. The governing standard is an open mind, not a blank one, and the decisive considerations are three. The first is the specificity of the prior view, that is, whether it addresses the very issue in the very case or merely a general doctrine. The second is its recency and contemporaneity, a present commitment weighing more heavily than a historic one. The third is whether the arbitrator has a personal or financial stake in how the question is resolved elsewhere, as the double-hatting counsel plainly does. The 2024 Guidelines are consistent with this calibration, treating an arbitrator's previously expressed legal view, including one set out in a publication, as generally not even requiring disclosure. A categorical rule barring those who have written or decided on a question would be simultaneously unworkable, because it would exclude the most qualified, and counterproductive, because it would reward strategic silence over scholarly candour. Prejudgment of the actual dispute should disqualify; the possession of expertise should not.

5. Independence in Sole-Arbitrator Appointments without a Co-Arbitrator Counterbalance

A three-member tribunal contains its own internal safeguard against partiality. The members deliberate; party-appointed co-arbitrators scrutinise each other's reasoning and that of the chair; collegial decision-making tends to dilute individual idiosyncrasy, and a single partial member can be outvoted and confronted with a dissent. None of this exists where the dispute is entrusted to a sole arbitrator. There the neutrality of one person is the entire safeguard,

[22] Code of Conduct for Arbitrators in International Investment Disputes (UNCITRAL/ICSID, adopted by UNCITRAL on 14/21 July 2023, approved by the UN General Assembly on 7 December 2023 and published in February 2024), which reinforces independence and impartiality, regulates rather than bans double-hatting, and elaborates disclosure obligations.

with no internal counterweight, no peer scrutiny of the analysis, and no structural redundancy if that neutrality fails. The question the heading poses is whether the standards governing sole-arbitrator appointments are rigorous enough to compensate for the loss of that counterbalance.

The concern is not academic, because sole-arbitrator regimes are expanding. The default rules of leading institutions incline toward a sole arbitrator where the parties have not agreed otherwise. Under the LCIA Rules a sole arbitrator is to be appointed unless the parties agree or the circumstances warrant three, and under the ICC Rules the Court appoints a sole arbitrator save where the dispute appears to warrant three.[23] More pointedly, the mandatory expedited procedures that institutions have adopted to control cost and delay typically impose a sole arbitrator on lower-value disputes, and the ICC's provisions may do so even over a contrary clause in the parties' agreement.[24] The no-counterbalance scenario is therefore becoming more common precisely in the segment of cases where efficiency is prioritised over procedural redundancy.

There is a respectable argument that the standards remain adequate. The operative test of justifiable doubts applies identically regardless of the size of the tribunal, and the challenge mechanism is the same. Moreover, a sole arbitrator is ordinarily appointed not unilaterally by a party but by the institution or appointing authority, frequently through a list procedure under which each side strikes and ranks candidates, which arguably makes the sole arbitrator more neutral than a party-appointed member of a panel.[25] Institutions screen candidates for conflicts, vet their statements of independence, and apply the well-established rule that a sole or presiding arbitrator should normally hold a nationality different from those of the parties.[26]

The counter-argument is that identity of standard is not identity of protection. Although the legal test is the same, the consequence of an undetected partiality is graver because there is no structural redundancy to absorb it; the risk is concentrated in a single person rather than spread across three. The expedited context compounds the difficulty, since the compressed timetable that makes expedited arbitration attractive also shortens the window in which a party can perform due diligence and mount a challenge, making the duty of curiosity harder to

[23] LCIA Arbitration Rules (2020), Art. 5.8; ICC Arbitration Rules (2021), Art. 12(2).

[24] ICC Arbitration Rules (2021), Art. 30 and Appendix VI (Expedited Procedure Provisions), under which the Court may appoint a sole arbitrator notwithstanding any contrary stipulation; comparable expedited regimes operate under the SIAC, SCC, HKIAC and Swiss Rules.

[25] See, e.g., UNCITRAL Arbitration Rules (2013/2021), Art. 8, setting out the list-procedure for appointment of a sole arbitrator by the appointing authority.

[26] ICC Arbitration Rules (2021), Art. 13(5); UNCITRAL Arbitration Rules, Art. 6(7); WIPO Arbitration Rules, Art. 20(b).

discharge in practice. Institutional appointment, for its part, is no panacea, since institutions draw on a narrow pool and their own repeat appointments generate familiarity dynamics, and reliance on the institution merely transfers the locus of trust to a body whose own potential responsibility is examined in the next section. There is, finally, an access-to-justice dimension. The lower-value disputes that typically fall to a sole arbitrator tend to involve less well-resourced parties and to attract less scrutiny, so that partiality is both less likely to be detected and less likely to be effectively challenged. The conclusion is that the formal standard is identical and adequate on paper, but the practical safeguards of deliberative counterbalance and time for investigation are materially weaker, with the result that the integrity of sole-arbitrator proceedings depends more heavily than that of panels on robust institutional vetting, candid disclosure and transparent appointment criteria. The sensible direction of reform is to demand more on each of those fronts where the sole arbitrator stands alone.

6. Institutional Liability for Appointing a Partial Arbitrator as an Emerging Frontier

As arbitral institutions have assumed ever more substantial gatekeeping functions, nominating and confirming arbitrators, vetting declarations of independence and deciding challenges, a question that was once unthinkable has begun to be asked in earnest. If a party is harmed by a partial arbitrator the institution appointed or confirmed, can the institution itself be sued? The starting point is a strong presumption of immunity. The leading rules grant the institution either qualified or near-absolute protection. The ICC and the LCIA confer a qualified immunity that does not extend to conscious and deliberate wrongdoing, the Stockholm rules exclude liability save for wilful misconduct or gross negligence, and several Asian institutions approach absolute immunity, with most provisions tying the limitation to whatever the applicable law allows.[27] The rationale tracks that of judicial immunity, since adjudicative and quasi-adjudicative functions require insulation from collateral attack, lest every disappointed party convert its loss into a suit against the institution, when the proper channel for impugning an award is annulment or resistance to enforcement, with its own grounds and time limits.[28]

That immunity is not, however, absolute, and French law has become the principal laboratory for testing its limits. In the *SNF* litigation the Paris Court of Appeal held that the

[27]ICC Arbitration Rules (2021), Art. 41 (limitation of liability); LCIA Arbitration Rules (2020), Art. 31 (immunity excluding conscious and deliberate wrongdoing); SCC Rules (excluding wilful misconduct and gross negligence); the SIAC and certain other rules approach absolute immunity, frequently subject to the mandatory law of the forum.

[28]On the rationale and the abuse it guards against see Hans van Houtte, 'The Liability of Arbitrators and Arbitral Institutions', in *Arbitral Institutions Under Scrutiny* (ASA Special Series No. 40), warning against the use of liability claims as a substitute for annulment proceedings.

exclusion-of-liability clause in the then-current ICC Rules was unenforceable under French law as an unfair term, thereby establishing in principle that an institution can be contractually liable, even though on the facts the ICC was found not to have breached its obligations.[29] The premise is that the relationship between the institution and the parties is contractual, being a contract for the organisation and administration of the arbitration, so that the institution owes obligations capable of breach. A later decision arising from the *Garoubé* arbitrations confirmed and contained that principle, holding that only the most serious institutional misconduct can defeat the limitation of liability, thereby setting the threshold at grave fault rather than ordinary negligence.[30]

The most suggestive analogy comes from the parallel French case law on the personal liability of arbitrators for defective disclosure. In a 2018 decision the Paris Court of Appeal annulled an ICC award because an arbitrator had failed to disclose links between his firm and one party's group, a ruling later confirmed at the highest level, after which the disappointed party pursued the arbitrator personally. The French courts reasoned that the duty to disclose is not part of the arbitrator's jurisdictional mission to decide, and therefore falls outside the immunity that protects that adjudicative function, so that a breach can ground civil liability.[31] That logic is readily transposable to institutions. If the duty to police independence is an administrative rather than an adjudicative obligation, then an institution that negligently, or on the higher French threshold gravely, appoints or confirms an arbitrator it knew or should have known to be conflicted, or that mishandles a challenge, occupies the same exposed position as the non-disclosing arbitrator. The frontier question is therefore no longer whether institutional liability is conceivable, but how grave the fault must be and how the appointment function is to be characterised.

The competing considerations are familiar from the immunity debate but acquire new force as institutions professionalise. In favour of accountability, institutions market their vetting as a value they provide, charge substantial fees for it, and wield genuine power in confirming nominations and deciding challenges; an immunity so complete that it removes every incentive

[29]*S.N.F. SAS v Chambre de Commerce Internationale*, Paris Court of Appeal, 22 January 2009, holding the exclusion-of-liability clause in Art. 34 of the 1998 ICC Rules unenforceable under French law, although the ICC was not found to have breached its duties on the facts.
[30]*Garoubé v ICC*, Paris Court of Appeal (2021); see Library of Congress, Global Legal Monitor, 'France: Court of Appeal Holds Only Most Serious Institutional Misconduct Can Nullify Arbitration Rules Limitation of Liability Clauses' (16 September 2021).
[31]Paris Court of Appeal, 27 March 2018, annulling an ICC award for the arbitrator's breach of his disclosure obligation, subsequently confirmed by the Cour de cassation; on the ensuing liability proceedings and the characterisation of the disclosure duty as outside the protected jurisdictional function see August Debouzy, 'Clarification of the civil liability regime of arbitrators and arbitration institutions' (2021).

to diligence, and leaves a wronged party without remedy where the award nonetheless survives, is difficult to defend on principle. Against it, expansive liability would chill the institutions, raise their costs, and invite the very tactical suits that immunity exists to prevent, while the finality of awards and the existence of the annulment remedy already protect the substantive interest, and challenge decisions are often summary and confidential by design. The likely point of equilibrium is a narrow liability confined to gross fault or conscious wrongdoing in the administrative functions of appointment, confirmation and challenge-administration, preserving immunity for the exercise of adjudicative judgment, an equilibrium that mirrors the carve-out already recognised for the arbitrator's disclosure duty. Institutional liability for appointing a partial arbitrator is thus a real and growing frontier, anchored in the contractual conception of the institution's role and in the disclosure carve-out, but it remains exceptional and gated by a high threshold of fault.

7. Conclusion

The five frontiers examined here are, on their surface, disparate, but they share a single diagnosis. The classical architecture of arbitral neutrality, which asks the arbitrator to disclose and then allows the parties to challenge, was built for relationship conflicts in three-member commercial tribunals, and it is being stress-tested by developments it was never designed to absorb. These include the insertion of a hidden economic actor through third-party funding, the permanent and searchable record that social media makes of an arbitrator's opinions, the recurrence of the same legal questions before a narrow pool of specialists, the multiplication of sole-arbitrator proceedings in which no colleague provides a check, and a rising expectation that the institutions which appoint arbitrators should themselves answer for their choices.

The principal soft-law instruments have responded with deliberate moderation. The 2024 IBA Guidelines broadened the mapping of funding conflicts and expanded the parties' duty to inform, and the 2023 Code of Conduct reinforced the duties of independence and impartiality and regulated double-hatting; but both reaffirmed the existing framework rather than overhauling it, and both declined the more radical options, whether a binding disclosure regime or a prohibition on concurrent roles. The harder edges have been forged elsewhere, by binding rules such as ICSID Rule 14, which made funder disclosure mandatory and reached through to ultimate beneficial owners, and by national courts, above all the French courts, which have pierced institutional and arbitrator immunity for grave fault and for the breach of duties lying outside the adjudicative function.

If there is a single throughline, it is that disclosure is necessary but seldom sufficient. Disclosure illuminates relationships; it does not by itself resolve the structural problems, whether the repeat-player familiarity between funders and arbitrators or the absence of a counterbalance in sole-arbitrator cases, nor does it guarantee accountability when the safeguards fail. The most promising path is not a single rule but a set of calibrated responses matched to the problem. These are mandatory disclosure where the information asymmetry is most acute, as with funders; a content-and-nexus test for expression that disqualifies demonstrated animus and case-specific prejudgment while tolerating scholarship; an open-mind rather than a blank-mind standard for issue conflicts; intensified vetting and transparency where the sole arbitrator stands without a colleague; and a narrow, gross-fault liability for institutions in their administrative role. Underlying all of them is the recognition that the legitimacy of arbitration is ultimately a question of trust, and that each of these frontiers is a negotiation between the autonomy and flexibility that make arbitration attractive and the procedural integrity that makes its awards worth enforcing.