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ARBITRATION AND THE UNIDROIT PRINCIPLES

-A Cross-Border Perspective on The Core of International Arbitration-

Since the release of their first edition in 1994, the UNIDROIT Principles of International Commercial Contracts have played a role in hundreds of arbitrations although they tend to be less well known among lawyers who act at the drafting stage of cross-border contracts. The article explains the apparent contradiction. It also invites lawyers to simplify their life by choosing the UNIDROIT Principles in the contract as applicable rules of law for arbitration.

Eckart J. Brödermann

I. PREMISES WHICH SHOULD BE COMMON GROUND

A GLOBAL WORLD

1 At least in trade, the world has always been global. Despite all trends towards nationalism, the world will remain global. Cross-border contracts will continue to exist. From a legal perspective, this mandates appropriate dispute resolution frameworks for international contracting.

INTERNATIONAL ARBITRATION PROVIDES THE ANCHOR

2 Contracts provide an important backbone for international trade. Merchants respect contracts better if non-performance of a contract entails enforceable consequences. In cross border scenarios, arbitration achieves this goal. The 1958 New York Convention ensures recognition and enforcement even across borders.

3 Arbitration clauses can be shaped to the needs of the parties (e.g., by adding a choice of the 2019 IPBA Guidelines on Privileges and Immunity to secure privileges also for in-house counsel). They can ensure due process by selecting a neutral seat, the composition and qualifications of the panel, and the procedure for the arbitration. Most importantly, the parties can determine what law the arbitrators will apply.

UNIDROIT PRINCIPLES PROVIDE ADDITIONAL SAFETY

5 The core of a contract dispute relates typically as much to contract interpretation as to fact and law finding. In this regard, the world is composed of over 200 different legal systems with differences, at least in nuances, of legal culture, legal language, techniques of interpretation, and qualification of legal questions (like prescription as an issue of substantiveor procedural law). Comparative private law teaches that the potential causes for misunderstanding between legal cultures are innumerable. It starts with the language; many contracts are written at least by one of the parties – and often both – using English (or another language) as a language of convenience.

6 Whenever a contract dispute emerges, agreement on the UNIDROIT Principles provides **a common ground** because they are functionally an "international UCC"[1] or an international restatement"[2] providing "general legal rules and principles".[3] They are easily accessible in multiple languages. They have been tested in hundreds of national and international court and arbitral decisions which have applied them (rarely) on a stand-alone basis or (usually) to interpret or supplement national law and sometimes international law.[4] Written from the perspective of cross-border needs, thoroughly developed over close to fifty years, the UNIDROIT Principles provide for most typical contract issues of a general nature "hard and fast rules"[5] which are so specific that there is "little substantive difference whether the UNIDROIT Principles or English law is the governing law"[6] or whether any other national law governs the contract.[7]

7 In practice, the UNIDROIT Principles have been used in multiple contracts in the past thirty years.[8] For example, during the writing of this article, I have been working on French-Italian and on German-US long-term contract projects under the UNIDROIT Principles, always combined with an arbitration clause. A Harvard graduate involved from the business side in the 69 billion USD acquisition in 2023 confirmed that he successfully proposed to contract under the UNIDROIT Principles to overcome the divide between Chinese and US law. The choice of the UNIDROIT Principles included the M&A contract and an accompanying long-term IP-license agreement. The contract also included an arbitration clause.[9]

8 In other scenarios, the identical international sales law in 95 jurisdictions plays a role, *i.e.*, the Convention on the International Sale of Goods (CISG). Sometimes the CISG applies because merchants start acting prior to finalizing their contract. Without an explicit derogation, the CISG then often applies as a matter of treaty law.[10] In all such cases, or when the application of the CISG is explicitly chosen,

the UNIDROIT Principles may also step in under article 7 of the CISG on interpretation. As the UNIDROIT Principles substantiate the principles of good faith and fair dealing, to which both CISG articles 7(1) and (2) – the latter indirectly – refer, they may be used, according to an official **Tripartite Legal Guide** issued *inter alia* by UNCITRAL (i.e. the international agency behind the CISG), "to corroborate the existence of general principles and, thus, can be **a tool to interpret the CISG** (CISG, art. 7, para. 1) or to **fill gaps** (CISG, art. 7, para. 2), whenever there is no conflict between the two instruments".[11]

II. IMPACT ON INTERNATIONAL ARBITRATIONS

REALITY CHECK

9 Lawyers tend to be conservative. The implementation of any new legal instrument takes time. Forty years after their adoption, the CISG still attracts new members states, last in 2024.[12] Numerous in-house departments, however, still prefer to disclaim application of the CISG and to choose a national law (often without any project-oriented reflection). If they cannot impose their own national law, their legal departments often "jump into the dark" *(Raape)* and agree on a foreign national law. Due to ignorance or lack of time, the parties often do not consider the UNIDROIT Principles at the level of contract drafting and negotiation. An arbitration under an explicit choice of the UNIDROIT Principles pursuant to their Preamble, para. 2, is thus rare. What role can the UNIDROIT Principles then play in the absence of a choice-of-the-UNIDROIT Principles-clause?

CHOICE OF THE UNIDROIT PRINCIPLES DURING THE ARBITRATION PROCESS

10 The UNIDROIT Principles can also be chosen by party agreement during arbitration' (Preamble, para. 2, and as assumed in many of the model clauses for the choice of the UNIDROIT Principles referred to in a footnote to the preamble). I have experienced this twice and heard the same from other arbitrator colleagues at conferences by way of anecdotal evidence.

For example, in an arbitration under the rules of the Chinese European Arbitration Centre (now: Asian European Arbitration Centre) in Hamburg, the parties agreed to apply the UNIDROIT Principles to avoid the costs of pleading the otherwise applicable Chinese law.[13] In a hearing on jurisdiction and applicable law in an arbitration in Switzerland with **(i)** relations to five jurisdiction, **(ii)** unclear choice of law clauses - with diverging agreements in the main contract and in an annex - and **(iii)** with parties pleading English versus Swiss law, the Chairman proposed to the parties to consider the UNIDROIT Principles as truly neutral legal regime. Both parties accepted within a short time frame of a few days.[14] Under just about all arbitration regimes, such choice will be honored, usually as a "choice of rules of law" and sometimes as "incorporation" of the UNIDROIT Principles into the contract. Article 28(1) of the UNCITRAL Model Law on International Arbitration explicitly provides for the possibility of such choice.[15]

APPLICATION AS GENERAL RULES OF LAW

11 If the parties have agreed on "international commercial law," "general rules of law", "general principles of law" or the like, the arbitrators may resort to the UNIDROIT Principles pursuant to the Preamble, para. 3. A recent example is the application of the UNIDROIT Principles as general principles of law occurred in the 2020 *Sulu case ad hoc, Nurhima Kiram Fornam et al. v. Malaysia* which led to a disputed $15 billion arbitral award (still pending as per March 2025 before the *French Court of Cassation* and at ICSID) whereby the application of the UNIDROIT Principles is not in dispute.[16] Similarly, a Chinese CIETAC arbitral tribunal has used the UNIDROIT Principles in 2019 as substantiating the law of Singapore which was not sufficiently pleaded by the parties.[17] Another arbitral tribunal has applied the UNIDROIT Principles in 1995 as Anglo-Saxon principles of law.[18] A 2020 UK decision has accepted to interpret the choice of "principles of law generally recognised in international transactions" as a reference to the UNIDROIT Principles.[19]

APPLICATION TO SUPPLEMENT INTERNATIONAL INSTRUMENTS

12 Sometimes an arbitral tribunal will have to apply an international instrument like the CISG. As discussed at (8) above, it may then rely on the UNIDROIT Principles, as also foreseen in para. 5 of their Preamble. For example, the CISG contains specific obligations for the parties which all impose some *specific* obligation of cooperation (*see. e.g.,* articles 32 paras. 2-3, 34 sentence 1, 37 CISG). In contrast, Article 5.1.3 UNIDROIT Principles contains a more general duty of co-operation between the parties. If an arbitration tribunal needs to argue with an obligation among the parties of a long-term contract to co-operate, it may leave open the academic question whether such a general obligation can be deduced implicitly under article 7 (2) CISG. With regard to the direction given by the Tripartite Legal Guide as discussed at no. (8) above, it can just use Article 5.1.3 UNIDROIT Principles to substantiate such duty with a reference to article 7 (2) CISG. Thus, the UNIDROIT Principles facilitate the life of arbitrators, and the life of counsels arguing under the CISG.

APPLICATION TO SUPPLEMENT NATIONAL LAWS

13 Most of the arbitral awards and national court decisions referring to the UNIDROIT Principles interpret national laws (Preamble, para. 6). For example, a 2014 judgement of the Jerusalem District Court describes that, when there exist several possible interpretations to a legal provision, the UNIDROIT Principles may serve as the "'breaker of balance', as a final word to make a decision between different opinions expressed in the literature".[20] In 2018, the Supreme Court of Paraguay described the UNIDROIT Principles "as an interpretative tool to complement our internal law,"[21] The book edited by *Garro/Moreno Rodriguez* on "Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law" provides more insights.[22]

14 From an arbitrator's perspective, when the contracts require application of a national law which is not the law of the parties, it helps to resort to the UNIDROIT Principles to demonstrate that the decision of the arbitral tribunal is also in line with general principles of contract law.

After all, in the modern understanding of arbitration, the arbitration is not only about deciding a dispute. It is also about communicating a result in a way which may be more convincing than a local decision of a court where there is usually neither the time nor the comparative legal training to underscore a decision with additional arguments.

APPLICATION AS TRADE USAGE

15 A number of arbitral awards have applied the UNIDROIT Principles as an expression of international trade usages.[23] Whether this is appropriate depends on context. From a European continental perspective, this would usually require proof of such trade usage. Yet, the concept of trade usages differs around the globe. In Ukraine, a 2008 letter of the Economic Supreme Court "On Some Issues in the Application of the Civil and Commercial Codes of Ukraine" authorizes courts to consider the UNIDROIT Principles as an expression of business custom.[24] Thus, when applying Ukrainian law, an arbitral tribunal will have to consider this approach and may well apply the UNIDROIT as trade usage to supplement Ukrainian national law.

DOING JUSTICE

16 The agreed arbitral regime and the tribunal ensure that the procedure of the arbitration respect of due process and, in particular, the right to be heard. Depending on the type of arbitration as a more continental European, common-law or mixed style arbitration, the chosen arbitral tribunal might also contribute to a settlement during the arbitration. When settlement does not occur, the parties are entitled to receive a well-reasoned award. It is in this context that, by corroborating the reasons of a decision on national law or an international instrument with the UNIDROIT Principles, an arbitral decision may become more convincing. The UNIDROIT Principles may thus contribute to peace and thereby to the very core of resolving a dispute by international arbitration.

DUE PROCESS

17 The UNIDROIT Principles are not currently commonly known (although it is arguably becoming malpractice to ignore them altogether). In an arbitration, if an arbitral tribunal considers that the UNIDROIT Principles might play a role in the arbitration process, it should raise the issue early in a management conference, in a procedural order, or at the hearing. If, however, an arbitrator develops an additional argument which merely helps to underline a decision already *taken* under the applicable national law, it does not need to re-open the proceedings to give the parties an opportunity to be heard. In contrast, if reliance on the UNIDROIT Principles becomes decisive it should act otherwise.

RECOGNITION AND ENFORCEMENT

18 There are no examples known where recognition or enforcement of an arbitral award failed because of the application of the UNIDROIT Principles as a matter of law. To the contrary, in 1998, the U.S. District Court for the Southern District of California has refused to reject recognition and enforcement of an arbitral award based on the UNIDROIT Principles.[25]

III. CONCLUSIONS

19 For a cross-border contracts, combining an arbitral clause with a choice of the UNIDROIT Principles provides a functional and neutral option of **"Simplified Global Contracting".**[26] It establishes a neutral basis for future dispute resolution. Further, when arbitrations are based on the interpretation of a national law, an international instrument like the CISG, or a vague choice of law clause calling for the application of "general principles of law" or the like, the UNIDROIT Principles can be helpful. In hundreds of decisions of domestic courts which have relied on the UNIDROIT Principles to interpret or supplement national law, or international instruments, arbitrators were well advised to consider the UNIDROIT Principles.

For arbitration tribunals which are composed internationally with arbitrators form different jurisdictions, the UNIDROIT Principles may also be helpful in the discussion of the substance.

When invoking the UNIDROIT Principles, it is important to respect the principle of due process, at least when the UNIDROIT Principles play a decisive role. Agreement on the application of the UNIDROIT Principles during an arbitration is possible and sometimes done to reduce costs (of proving foreign law) or to overcome disputes on the choice of law.

20 Given the multiple functions which the UNIDROIT Principles may play in international arbitrations, the UNIDROIT Principles have become a "must-to-know" asset for international arbitrators and a state-of-the-art tool for practitioners engaging in the drafting and negotiation of international commercial contracts. To cite *Timothy Nelson*, a New York practitioner: "[…] the [UNIDROIT Principles] are important because they are there. [...] They are capable of being cited and deployed in modern international disputes. They are part of the corpus of"soft law" that, for better or worse (and depending on contingencies), are capable of being swept into the decision-making process of arbitration. And, if incorporated into an individual national law (or expressly opted for in a contract), they could even become "hard law." They cannot go unexplored."[27]

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1 Marc Dedman of Nashville, Tennessee, is the first U.S. lawyer encountered by the author who has made this comparison when describing the UNIDROIT Principles to other lawyers in discussions in 2018.

2 See, M.J. Bonell, An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts (3d ed. 2005).

3 ICC Award No. 7110 (1995), Unilex No. 713; cited at E. Brödermann, UNIDROIT Principles of International Commercial Contracts (2d. ed. 2023), Annex to Preamble no. 13.

4 Available at www.unilex.info; for an overview see E. Brödermann, op. cit. (note 3), Annex to Preamble no. 10-34.

5 UNCITRAL, HCCH and Unidroit, Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales ("Tripartite Legal Guide") (2021) no. 332.

5 UNCITRAL, HCCH and Unidroit, Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales ("Tripartite Legal Guide") (2021) no. 332.

6 R. See/D. Prasad, 2018/2 Hamburg Law Review pp. 83, 105 as cited by E. Brödermann, op. cit. (note 3), Annex to Preamble no. 4 and 1-51 (with further references and examples of similar statements from other national perspectives, and with multiple examples of national courts and arbitral tribunals describing the UNIDROIT Principles as "general legal rules and principles").

7 E. Brödermann, op. cit. (note 3), Annex to Preamble no. 5.

8 See e.g. the examples given by E. Brödermann, op. cit. (note 3), Introduction no. 3, 9c.

9 Brödermann/Etgen, CIETAC Arbitration Rules 2024, Article-by-Article Commentary (2024), Art. 52 no. 8.

10 Art. 1 (1) CISG.

11 UNCITRAL et al., op. cit. (note 5), no. 332; see also no. 352-353.

12 Saudi-Arabia, Ruanda.

13 See E. Brödermann, op. cit. (note 3) at Introduction no. 19a.

14 See op. cit. (note 3) at Introductory Remarks to Section 7.4 no. 2 and Annex to Preamble no. 28.

15 See op. cit. (note 3) at Preamble no. 3.

16 See op. cit. (note 3) at Annex to Preamble no. 1.

17 See op. cit. (note 3) at Preamble no. 12.

18 See op. cit. (note 3) at Annex to Preamble no. 18.

19 See op. cit. (note 3) at Annex to Preamble no. 30.

20 See op. cit. (note 3) at Annex to Preamble no. 30.

21 See op. cit. (note 3) at Annex to Preamble no. 32.

22 Switzerland 2021. See also op. cit. (note 3) at Annex to Preamble no. 32-33.

23 See op. cit. (note 3) at Annex to Preamble no. 24-27.

24 See op. cit. (note 3) at Annex to Preamble no. 7.

25 See op. cit. (note 3) at Annex to Preamble no. 34.

26 See op. cit. (note 3) at Introduction no. 2. The term was developed by a group of experts whereby HLS graduate Evan Slavitt, then inhouse counsel of a multinational company, had the casting ballot.

27 T. Nelson, UNIDROIT Principles of International Commercial Contracts : An Article-by-Article Commentary, by Eckart Brödermann, Second Edition, Kluwer, 2023. Pp. 832, The American Review of International Arbitration (ARIA) Vol. 34 (3), p.599, 603.

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ARE EFFORTS TO CURTAIL ISDS RIGHTS THROUGH FTC DECISIONS BINDING?

Francisco X. Jijón

I INTRODUCTION

For decades, U.S. nationals and enterprises have enjoyed the right to bring international arbitration claims directly against foreign governments pursuant to investment treaties and trade agreements providing for investor-state dispute settlement (ISDS). ISDS is a mechanism that enables private parties to hold a state accountable for its illegal conduct without having to seek relief in the state's own courts. Historically, the policy of the United States has been that ISDS is a "more peaceful, better way to resolve trade conflicts between countries" than gunboat diplomacy, and that "ISDS strengthens and promotes the rule of law by creating incentives for governments to follow basic due process and rights that are recognized around the world."[1]

In the final days of the Biden administration, the U.S. Chamber of Commerce reported that the Office of the United States Trade Representative (USTR) was attempting to secretly renegotiate the investment chapters in U.S. free trade agreements, among them the U.S.-Colombia Trade Promotion Agreement (Colombia TPA).[2] While USTR's actions elicited bipartisan concerns on Capitol Hill,[3] a minority of Members of Congress encouraged USTR "to act urgently to eliminate or drastically reduce" ISDS and "work with any willing trade partners to end the ongoing harm caused by ISDS."[4]

On January 20, 2025, Inauguration Day, USTR announced an agreement with Colombia "interpreting" provisions of the investment chapter of the Colombia TPA.[5] The agreement in question is set forth in Decision No. 9 of the Free Trade Commission (FTC) of the Colombia TPA.[6] After underscoring President Biden's and United States Trade Representative Katherine Tai's shared opposition to ISDS, the USTR announcement concludes that the Decision shall be binding on ISDS tribunals.[7]

In fact, Decision No. 9 purports to interpret several key provisions of the Colombia TPA purports to interpret various provisions of the TPA relating to investment protection and ISDS, including the substantive rights owed to investors under the minimum standard of treatent, expropriation and environmental measures, as well as conditions for the submission of claims, among other things.[8] While the specific nature of the purported interpretation is outside the scope of this Note, it is reasonable to presume that they may be relevant in future ISDS proceedings.

Despite USTR's assertion, the Decision may not be binding, for reasons that this Note briefly summarizes. States have a variety of means at their disposal to voice interpretations of their own treaties, and such interpretations merit cautious consideration by ISDS tribunals as a general matter. In the context of the Colombia TPA, the United States and Colombia have agreed that the FTC—which is comprised of cabinet-level representatives of each party[9] —may issue binding interpretations of the provisions of the treaty,[10] but review by tribunals remains relevant, at least insofar as some such agreements may be *ultra vires.*

II TREATY INTERPRETATIONS BY STATES IN GENERAL

A feature of ISDS is that arbitral tribunals are often required to interpret treaties concluded by the very states appearing in the arbitration. What weight should a tribunal give a treaty interpretation proffered by a state respondent? A tribunal is not bound to accept arguments advanced by a state in the context of the dispute. As one arbitrator explained, "it must be very rarely indeed that an [ISDS tribunal], confronted with a disputed issue of interpretation of a [treaty], will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up."[11] Indeed, for a tribunal to automatically defer to a respondent on a question of interpretation could amount to improper failure to perform its duties; for a state to have ultimate decision-making power on such a potentially determinative issue would violate the venerable maxim *nemo iudex in causa sua* [no one is judge in his own case]. In practice, it is a fundamental rule of procedure that tribunals shall consider the arguments of both parties, including as to issues of treaty interpretation.

State parties are not limited to interpreting treaty provisions in arbitral pleadings. Insofar as the state parties retain the right to amend or modify treaty terms,[12] likewise they may also agree on interpretations thereof.[13]

The general rule of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties (VCLT)—which is generally accepted as reflecting customary international law[14]—specifically contemplates the possibility of subsequent agreements between state parties regarding the interpretation of the treaty or the application of its provisions, and provides that any such agreement "shall be taken into account, together with the context" as part of the interpretation of the treaty.[15] According to the Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties of the International Law Commission adopted by the U.N. General Assembly (ILC Conclusions), such interpretative agreements are "objective evidence of the understanding of the parties as to the meaning of the treaty," and thus "are authentic means of interpretation."[16]

The purpose of an interpretative agreement is not to modify, but to explain the meaning of existing treaty terms. While relevant, such agreements are not necessarily binding nor do they automatically prevail over the ordinary meaning to be given to treaty terms in their context and in the light of the treaty's object and purpose.[17] In practice, interpretive agreements have been applied as a means of interpretation by various international adjudicatory bodies, including, *inter alia*, the International Court of Justice and WTO Appellate Body.[18] This has not been the case in the context of ISDS, as arbitral tribunals have less frequently had occasion to apply interpretative agreements.[19] Putting aside cases dealing with FTC decisions,[20] tribunals have declined to recognize interpretative agreements or, in any event, refused to treat them as dispositive.[21]

III

FTC DECISIONS AND THEIR EFFECTS

In addition to the general practice of subsequent treaty interpretation, states may be entitled to make interpretative agreements within the framework of specific mechanisms in various treaties, including U.S. free trade agreements. For example, Articles 20.1.3 and 10.22.3 of the Colombia TPA provide, respectively that "[t]he Commission may: […] issue interpretations of the provisions of this Agreement,"[22] and "("A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 20.1.3 (Free Trade Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision."[23]

The United States and its treaty partners have used the FTC mechanism to interpret treaty provisions on multiple occasions.[24] Prior to the recent Decision No. 9, however, the only instance of an FTC decision addressing investment protections was in the context of the Notes of Interpretation (Notes) adopted by the FTC the North American Free Trade Agreement (NAFTA) on July 31, 2001. Among other things, the Notes addressed the minimum standard of treatment prescribed by Article 1105 of NAFTA, which the FTC stated was limited to customary international law,[25] which some decried as an ineffective effort to amend the treaty, as opposed to a proper interpretation.[26]

The nature and effect of the Notes was addressed by several NAFTA tribunals, resulting in a series of contradictory (and potentially confusing) decisions. In *Pope & Talbot Inc v Canada*, the tribunal declared that it was obliged "to not simply to accept that whatever the Commission has stated to be an interpretation is one;"[27] but although it appeared inclined to consider the Notes to be an amendment,[28] it nevertheless proceeded to treat the Notes as an interpretation, albeit one that yielded a result consistent with the tribunal's own prior holdings.[29] Subsequently, the tribunal in *Mondev International Ltd. v. United States of America* analyzed the Notes and concluded that they did not amount to an amendment.[30] On the other hand, tribunals held that they were obliged to treat the Notes as binding in both *ADF Group Inc v United States of America*[31] and *Methanex Corp v. United States of America*.[32] Other cases mentioning the Notes did not consider them at length.[33]

The NAFTA cases demonstrate a lack of consensus as to the effect FTC's decisions. Only in *ADF* and *Methanex* were the Notes deemed automatically binding, and neither tribunal engaged in significant analysis. In ADF, the tribunal declined to inquire into the distinction between an "interpretation" and an "amendment" because "[n]o document purporting to be an amendment has been submitted,"[34] and disclaimed authority to second-guess the FTC's

representation that the Notes were true interpretations on the circular grounds that this would "tend to degrade and set at naught the binding and overriding character of FTC interpretations."[35] For its part, the tribunal in Methanex merely stated that "[claimant] cites no authority for its argument that far reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties."[36] This position is problematic in the context of the provisions in NAFTA (and similar treaties, like the Colombia TPA) expressly providing that an amendment requires both an agreement of the parties and approval in accordance with the applicable legal procedures of each party.[37]

There are many reasons to doubt that ISDS tribunals owe blind deference to FTC decisions. Indeed, it is reasonably clear that ISDS would not be bound by decisions that are *ultra vires.* As a threshold issue, ISDS tribunals would be entitled to confirm whether a decision is facially valid (*e.g.*, whether there is an agreement among all parties to the treaty and/or whether all requisite formalities have been observed). In addition, it is reasonable for tribunals to confirm whether what the FTC has declared is an interpretation (as opposed to an amendment). While it may sometimes be difficult to draw the line, it is also easy to imagine cases where a tribunal would be justified in rejecting the FTC's characterization of its decision as an interpretation, including, for example, if the decision is inconsistent with an interpretation of the treaty in accordance with international law (*i.e.*, an interpretation of the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose), or contradicts the prior positions of the treaty parties.

IV CONCLUSION

ISDS tribunals have long been keenly aware that states may have self-interested reasons for advancing particular treaty interpretations. While it is sometimes appropriate for tribunals to take a state's interpretations into account, such interpretations are not binding as a general matter. FTC decisions are mechanisms enabling states to make binding interpretations. Even in this context, however, it is appropriate for tribunals to review purported interpretations before being bound thereby.

The recent Decision No. 9 under the Colombia TPA will require particularly careful review. Tribunals need not blindly defer to Decision No. 9, but rather should carefully consider whether it is truly an interpretaion, including whether it consistent with the longstanding policy of the United States, which recognizes ISDS as a key safeguard to the rule of law. The circumstances of Decision No. 9 may suggest that this was not the case. As already mentioned, Decision No. 9 was the result of eleventh-hour efforts by USTR to renegotiate the investment chapters in U.S. free trade agreements in the face of bipartisan opposition,[38] spearheaded by an administration openly opposed to ISDS,[39] and at the urging of allies calling for the elimination or drastic reduction of ISDS.[40] While similar efforts were reportedly made as to USMCA and CAFTA-DR, USTR was only able to come to an agreement with Colombia, whose president, tellingly, recently also had ordered the renegotiation of its ISDS treaty obligations following its most recent arbitration loss.[41] In lieu of renegotiation, which may not have been feasible in the time available, the parties agreed to issue Decision No. 9. Such circumstances may give tribunals legitimate reason to doubt whether Decision No. 9 was intended as an interpretation of the treaty, or, on the contrary, whether it was an attempt to subvert the original intent of the treaty and curtail the rights of investors.

1.See, e.g., *ISDS: Important Questions and Answers* | United States Trade Representative (available in: [https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers]).

2. *Chamber FOIAs USTR Over "Secret" Negotiations* | U.S. Chamber of Commerce (available in: [https://www.uschamber.com/international/trade-agreements/chamber-foias-ustr-over-secret-negotiations]); see also *Biden's Midnight Trade Sabotage - WSJ* (available in:[https://www.wsj.com/opinion/joe-biden-investor-state-dispute-settlement-trade-usmca-climate-301aad22?mod=article_inline]).

3.*Letter from Members of Congress to U.S. Trade Representative Katherine Tai* (Jan. 10, 2025) (available in: https://oversight.house.gov/wp-content/uploads/2025/01/USTR-re-investor-protections-in-USMCA.pdf); *Letter to President Biden on Trade Transparency* (available in:[https://www.finance.senate.gov/imo/media/doc/letter_to_president_biden_on_trade_transparency-011525pdf.pdf]); see also *Senators demand US trade chief Tai halt late talks on investor protections* | *Reuters* (available in: [https://www.reuters.com/markets/us/senators-demand-us-trade-chief-tai-halt-latet alks-investor-protections-2025-01-15/]).

4 *Letter from Members of Congress to U.S. Trade Representative Katherine Tai Urging Removal of Harmful ISDS Provisions in Trade Agreements* (Dec. 19, 2024) (available in: https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/12.19.24%20remove%20harmful%20ISDS%20provisions%20in%20trade%20agreements.pdf).

5 *The United States and Colombia Issue FTC Decision Interpreting Standards of Investment Protection Under the United States-Colombia TPA | United States Trade Representative* (available in: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/june/united-states-and-colombia-issue-ftc-decision-interpreting-standards-investment-protection-under-united-states).

6 *Free Trade Commission Decision No9* (available in: https://www.mincit.gov.co/getattachment/ministerio/mecanismos-de-participacion/consulta-previa/ftc-decision-9-2024.pdf.aspx)

7 *The United States and Colombia Issue FTC Decision Interpreting Standards of Investment Protection Under the United States-Colombia TPA | United States Trade Representative* (available in: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/june/united-states-and-colombia-issue-ftc-decision-interpreting-standards-investment-protection-under-united-states).

8 *Free Trade Commission Decision No9* (available in: https://www.mincit.gov.co/getattachment/ministerio/mecanismos-de-participacion/consulta-previa/ftc-decision-9-2024.pdf.aspx); see also Shifting Sands: How New Interpretations Could Reshape U.S.-Colombian Investments | White & Case LLP (available in: https://www.whitecase.com/insight-alert/shifting-sands-how-new-interpretations-could-reshape-us-colombian-investments).

9 Colombia TPA, Art. 20.1.

10 Colombia TPA, Arts. 10.22.3 and 20.1.3(c).7

11 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.* (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru, ICSID Case No. ARB/03/4, Dissenting Opinion of Sir Franklin Berman, 5 September 2007 ¶ 9 ("Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way around, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation (see paragraph 70 of the Committee's Decision). That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving).") cited approvingly in *Perenco Ecuador Limited* v. *Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6 ,Decision on Jurisdiction, 30 June 2011 n. 72. See also, Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Award, 03 June 2021 ¶¶ 338–39 (holding that concurrent submissions by Costa Rica and Canada merely "reflect legal arguments put forward in the context of this dispute to advance their respective interests.").

12. See, e.g., *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969), Arts. 39–41.

13. *See Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, 6 December 1923, P.C.I.J., Series B No 8, 37 (regarding the principle *eius est interpretare legem cuius condere*, observing that "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.").

14. *See ILC Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, (2018), adopted by the U.N. General Assembly (available in: [https://documents.un.org/doc/undoc/gen/n18/456/81/pdf/n1845681.pdf]) (A/RES/73/202) Conclusion 2(1) ("Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law."); *Restatement Fourth, the Foreign Relations Law of the United States* 55, 56 (May 22, 2017) Comment to 306 ("The international law principles of treaty interpretation are principally set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention on the Law of Treaties, these articles are now generally accepted as reflecting customary international law, including by the United States.")

15. *Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)*, Art. 31(3)(a).

16.ILC Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, (2018), adopted by the U.N. General Assembly (available in: [https://documents.un.org/doc/undoc/gen/n18/456/81/pdf/n1845681.pdf]) (A/RES/73/202) Conclusion 3.

17. *Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Art. 31(1). See also ILC Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties,* (2018), adopted by the U.N. General Assembly (available in: [https://documents.un.org/doc/undoc/gen/n18/456/81/pdf/n1845681.pdf]) (A/RES/73/202) Conclusion 10 ("such an agreement may, but need not, be legally binding for it to be taken into account."); *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018* (available in: [https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf]), Commentary 3(4) ("The characterization of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation that are referred to in article 31 (see draft conclusion 2, paragraph 5). For this reason, and notwithstanding the suggestions of some commentators, subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding.").

18. See, generally, First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur (available in: [https://legal.un.org/ilc/documentation/english/a_cn4_660.pdf]), A/CN.4/660 (2013) ¶¶ 31–41, 58–63.

19. In comparison, ISDS tribunals have considered the implications of subsequent state practice in the application of the treaty, which is another aid to be taken into account in interpretation pursuant to VCLT, Article 31(3)(b). See, e.g., *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent´s Objections to Jurisdiction, 21 October 2005 ¶ 251 ("The position taken by Bolivia in this proceeding and the statements made by Ministries of the Government of the Netherlands to the Parliament of the Netherlands, despite the fact that they both relate to the present dispute, are not a "subsequent agreement between the parties." The coincidence of several statements does not make them a joint statement. And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement. The Tribunal therefore examines whether the Bolivian position in these proceedings and the internal statements of Ministries of the government of the Netherlands constitute "subsequent practice … which establishes the agreement of the parties" regarding the interpretation of the BIT."). In some cases, tribunals appear to have conflated subsequent interpretative agreements and subsequent state practice. See, e.g., *Corn Products International Inc.* v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 ¶ 179 ("The Tribunal therefore agrees with Mexico that subsequent practice of the three NAFTA Parties must be taken into account in the interpretation of the NAFTA if that practice establishes the agreement of the three Parties regarding the proper interpretation of the relevant NAFTA provisions. It is essential, however, to consider precisely what agreement is said to be deduced from the practice of the Parties.").

20. See, infra § III.

21. See GPF GP *S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020 ¶354 ("joint interpretive declarations or agreements are not an exclusive and dispositive method of treaty interpretation. Pursuant to Article 31(3) of the VCLT, they are one element that 'shall be taken into account, together with the context' of the relevant treaty terms. What is more, context is itself one of the means of interpretation under Article 31(1) of the VCLT, together with the ordinary meaning and the object and purpose of the treaty. Thus, an interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning."); *Magyar Farming Company Ltd*, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, 13 November 2019 ¶ 218 ("joint interpretative declarations or agreements are not an exclusive and dispositive method of treaty interpretation. Pursuant to Article 31(3) of the VCLT they are but one circumstance that 'shall be taken into account, together with the context' of the relevant treaty terms."); *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, Award on Jurisdiction, 28 April 2008, ¶¶ 186–87 ("The Respondent maintains that there is such a 'subsequent agreement' and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico's Article 1128 submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case. All of this is certainly suggestive of something approaching an agreement, but does not rise to the level of a 'subsequent agreement' by the NAFTA Parties."); *The Renco Group Inc. v. Republic of Peru* I, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 ¶ 156 ("the Tribunal is not bound by the views of either State Party. Although the Tribunal must 'take into account' any subsequent agreement between the State Parties pursuant to Article 31(3)(a) of the VCLT, the proper interpretation of [the treaty] and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.")

22. Colombia TPA, Art. 20.1.3(c).

23. Colombia TPA, Art. 10.22.3.

24. Of the free trade agreements now in force, there have been five (5) FTC decisions under the United States-Mexico-Canada Agreement (USMCA), Free Trade Commission Decisions | United States Trade Representative (available in: [https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/free-trade-commission-decisions]), eleven (11) under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), Free Trade Commission Outcomes | United States Trade Representative (available in: [https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/free-trade]), five (5) under the United States-Panama Trade Promotion Agreement (Panama TPA), Panama TPA Free Trade Commission Outcomes | United States Trade Representative (available in: [https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/panama-tpa-free-trade-commission-outcomes]), and nine (9) under the Colombia TPA, Colombia TPA Free Trade Commission Outcomes | United States Trade Representative (available in: [https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/free-trade-commission-outcomes]).

25. *NAFTA Notes of Interpretation* (available in: [https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng]) ("1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."); compare NAFTA, Art. 1105.1 ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.").

26. See, e.g., *Methanex Corp v. United States of America*, Second Opinion of Professor Sir Robert Jennings, Q.C., 6 September 2001, 6 ("The issue, in a nutshell, is this: if the three governments are suggesting that NAFTA (and the hundreds of BITs) does not require a State to provide fair and equitable treatment, the suggestion is preposterous. It cannot be reconciled with the text of Article 1105(1), nor with any canon of interpretation of international law. If that is indeed the position of the three governments, then the Tribunal should treat the 'interpretation' as an attempted amendment that has no binding effect."); Charles H. II Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article* 1105, 46 Va. J. I L. 347, 363 (2006) ("To the extent that the Notes prevent the direct incorporation of free-standing treaty obligations into the minimum standard, one may greet them as a reasonable interpretation, as most tribunals have done. By contrast, to the extent that the Notes purport to exclude general principles from the minimum standard, one may regard them as an unlawful and ineffective attempt to amend Article 1105(1). Consistent with this view, tribunals have quietly led a partial revolt against the FTC´s action by continuing to treat general principles as a source of 'international law' under the minimum standard despite contrary instructions so clearly expressed by the Notes of Interpretation."); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*: NAFTA Chapter 11, 28 YALE J. INT L L. 365, 397 (2003) ("To date no satisfactory way has been found to resolve the potential conflict between the requirements for amendment under Article 2202

and the provisions of Article 1131 that permit Free Trade Commission interpretations. If the requirement of proper approval for amendments is to make any sense, some limits must exist on the power of the Commission to change the meaning of the established text.").

27. *Pope & Talbot Inc v Canada*, Award in respect of Damages, 31 May 2002, ¶ 23.

28. Id. ¶ 47 ("[W]ere the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter.").

29. Id. ¶¶ 48–69. Ultimately, the tribunal concluded that its own interpretation of the applicable standard, though based on different elements, was not incompatible with the FTC Notes.

30. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 120–22.

31. *ADF Group Inc v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 177 ("Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an 'amendment' which presumably may be disregarded until ratified by all the Parties under their respective internal law.").

32. *Methanex Corp v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, §IV ¶ 20 ("[E]ven if Methanex's assertions of the existence of a customary rule were correct, the FTC interpretation would be entirely legal and binding on a tribunal seised with a Chapter 11 case. The purport of Article 1131(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it).").

33. *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 127 ("Although Claimants, in their written materials, submitted that the Commission's interpretation adopted on July 31, 2001 went beyond interpretation and amounted to an unauthorized amendment to NAFTA, Claimants did not maintain that submission at the oral hearing."); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002, ¶ 97 ("We do not address the question of the power of the Tribunal to examine the Interpretation of the Free Trade Commission.")

34. *ADF Group Inc v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 177.

35. Id.

36. *Methanex Corp v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, §IV ¶ 20.

37. *NAFTA*, Art. 2202. Compare Colombia TPA, Art. 23.2 ("1. The Parties may agree on any amendment to this Agreement. 2. When so agreed, and approved in accordance with the legal requirements of each Party, an amendment shall constitute an integral part of this Agreement and shall enter into force on such date as the Parties may agree.").

38. *Chamber FOIAs USTR Over "Secret" Negotiations | U.S. Chamber of Commerce* (available in: [https://www.uschamber.com/international/trade-agreements/chamber-foias-ustr-over-secret- negotiations]); see allso *Biden's Midnight Trade Sabotage - WSJ* (available in: [https://www.wsj.com/opinion/joe-biden-investor-state-dispute-settlement-trade-usmca-climate-301aad22?mod=article_inline]); [wto2025_0032a.pdf] *Letter to President Biden on Trade Transparency-01.15.25.pdf* (available in: [https://www.finance.senate.gov/imo/media/doc/letter_to_president_biden_on_trade_transparency_-_011525pdf.pdf]); see also *Senators demand US trade chief Tai halt late talks on investor protections* | Reuters (available in: [https://www.reuters.com/markets/us/senators-demand-us-trade-chief-tai-halt-late-talks-investor-protections-2025-01-15/]).

39. T*he United States and Colombia Issue FTC Decision Interpreting Standards of Investment Protection Under the United States-Colombia TPA | United States Trade Representative* (available in: [https://ustr.gov/about-us/policy-offices/press-office/press-releases/2025/january/united-states-and-colombia-issue-free-trade-commission-decision-interpreting-standards-investment]).

40. *Letter from Members of Congress to U.S. Trade Representative Katherine Tai Urging Removal of Harmful ISDS Provisions in Trade Agreements* (Dec. 19, 2024) (available in: https://doggett.house.gov/media/press-releases/doggett-delauro-whitehouse-and-coalition-urge-removal-trade-provisions-abused

41. Colombia buscará renegociar los TLC con Estados Unidos y la Unión Europea en lo relacionado a laudos arbitrales (available in: [https://www.presidencia.gov.co/prensa/Paginas/Colombia-buscara-renegociar-los-TLC-con-Estados-Unidos-y-la-Union-Europea-en-lo-relacionado-a-laudos-arbitrales-241121.aspx]).

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ARBITRATION CLAUSES AND *EFFICIENCY:*

A PRACTICAL PERSPECTIVE

Sol Czerwonko
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INTRODUCTION

Corporate clients are becoming increasingly concerned about the growing cost and length of arbitral proceedings. This issue has attracted a tremendous amount of interest, which is often focused on the role of arbitral tribunals and institutions. But little attention has been paid to how parties can foster more efficient arbitral proceedings through well-drafted arbitration clauses.

The goal of this article is to provide practical recommendations for drafting arbitration clauses that promote efficiency in arbitrations. A carefully constructed arbitration clause – drafted considering the nature of the parties' contractual framework and the type of disputes that might arise – can help foster efficiency in the arbitration process and address problems before they arise. Although drafting a good arbitration clause requires the parties to devote time and strategic thinking at a time when they might not even be envisioning a dispute, these efforts are important to foster significant time and cost savings further down the line.

1 PROVIDE FOR EXPEDITED PROCEDURES WHERE APPROPRIATE

Providing the option of an expedited procedure in the arbitration clause can lead to a more efficient proceeding. Expedited procedures mandate short, strict time limits. They can also include other elements like defaulting to a sole arbitrator, limiting witness examination, or limiting written submissions. Parties can provide for this option by referencing or incorporating institutional rules, or by expressly requiring an expedited procedure and setting out their own guidelines for it.

Many institutions require an expedited procedure where the amount in controversy is below a certain threshold and the parties do not opt out. For example, expedited procedure provisions automatically apply under the International Chamber of Commerce (ICC) rules if the amount in controversy is less than $3 million unless the parties opt out. Likewise, the Hong Kong International Arbitration Centre and Singapore International Arbitration Centre have similar provisions with slightly higher monetary thresholds.

2 KEEP OPEN THE OPTION OF HAVING A SOLE ARBITRATOR

The number of arbitrators is a key strategic decision that should not be taken lightly. Tribunals are often composed of three arbitrators: one appointed by the claimant, one by the respondent, and a third one who is appointed by the parties or the co-arbitrators, and who serves as the chair of the tribunal. However, a three-arbitrator panel is not the only option. Appointing a sole arbitrator may increase efficiency and reduce costs when the amount in dispute is not significant or the legal and factual issues are not highly complex.

In an arbitration clause, parties can choose to specify that they will submit disputes to a sole arbitrator or stipulate in advance which category or types of disputes will be submitted to a sole arbitrator versus a three-person tribunal. Alternatively, the parties can remain silent about the number of arbitrators but expressly mention institutional arbitration rules that will govern the arbitration, including the tribunal composition. Institutional rules often provide that where parties have not agreed on the number of arbitrators, the institution will appoint a sole arbitrator unless the dispute is very complex. This option allows for adjustment depending on the type of dispute that arises.

3 INCLUDE A PROVISION FOR JOINDER OR CONSOLIDATION TO AVOID MULTIPLE SIMULTANEOUS PROCEEDINGS

Complex transactions typically involve multiple parties and a complex contractual framework. For example, M&A deals often involve a buyer, seller, target company, shareholders, guarantors, subsidiaries, among other participants, and a number of agreements that are closely related to one another.

For multiparty or complex contracts, parties should consider having the same, or at least compatible arbitration clause, in all underlying contracts. This will prevent unnecessary and costly procedural debates when a dispute involves more than one contract, as it is often the case in complex projects. Moreover, having compatible clauses is relevant for the consolidation of parallel arbitration proceedings that can help parties avoid having multiple arbitrations

with different tribunals, which can lead to inconsistent results.

If parties would benefit from consolidation, they should consider including consolidation provisions in the arbitration clause. Because of the importance of consent in arbitration, consolidation and joinder are sometimes limited to situations where parties have agreed, either explicitly or implicitly. Courts and tribunals will often find that parties have impliedly agreed to consolidation of separate arbitral proceedings. However, some courts require express agreement for consolidation. For example, U.S. courts have recently held that the Federal Arbitration Act does not permit consolidation of multiple arbitrations without party agreement, even where multiple separate proceedings would be inefficient. Courts expect that parties who wish to have disputes arbitrated together will expressly say so in an arbitration clause.

4 CONSIDER MULTI-TIER ARBITRATION CLAUSES

Arbitration is not the only meaningful dispute resolution mechanism available. In certain circumstances, parties should consider having a multi-tier arbitration clause—namely, a clause that provides for different ways to resolve disputes, such as mediation, negotiation, or dispute boards, before resorting to arbitration.

Construction contracts often include provisions under which certain issues are resolved through dispute boards. These boards help address technical and operational issues that arise during the construction process, which allows an expedited resolution of the dispute so that the project can continue its course. Contracts that refer issues to a dispute review board or a dispute adjudication board must be clear. Assigning all disputes to a dispute review board or adjudication board is good practice because it helps avoid disputes about whether arbitration is appropriate. Alternatively, parties may pinpoint specific issues that should be decided by such a board.

Certain types of disputes can be resolved through means other than arbitration entirely. For example, in M&A disputes, it is possible to carve out purchase price adjustment ("PPA") from arbitration. Many U.S M&A agreements include PPA provisions, and provide that disputes in connection with PPA provisions can be resolved by technical panels or independent experts. It is important that the contract clearly distinguish the types of disputes that may be referred to the expert procedure versus arbitration, since disagreement about which step is appropriate may otherwise arise and prolong proceedings.

Multi-tier clauses must be drafted with care because parties can sometimes attempt to misuse them to delay arbitration. For example, multi-tier clauses should specify a time period for negotiation or mediation and clarify when this time period begins (e.g., when there is a written request to negotiate under the clause) and when the time frame ends. These clauses should also be clear that these steps are mandatory and that if they cannot be resolved by negotiation or mediation, the disputes will be submitted to arbitration.

In some jurisdictions, multi-tier clauses are not enforceable or may even lead to more delays because the decisions themselves are subject to arbitration. Arbitral tribunals and local courts have also ruled that mandatory negotiation periods may be unenforceable if negotiation would be manifestly futile. Multi-tier clauses may be useful in particular situations, but parties need to carefully assess the benefits and risks of including them in contracts.

5 CAREFULLY SELECT A SEAT OF ARBITRATION

The seat of arbitration is an important decision with ramifications for the entire arbitration. Having the seat of the arbitration where the relevant assets are located is generally considered good practice. This is because if the assets are in the same jurisdiction as the seat, a party can more easily execute the arbitral award and will not need to go through a separate award recognition process before local courts—which adds cost and length to the overall proceedings.

However, the seat of arbitration can also have drawbacks in terms of efficiency. In some jurisdictions, the parties can file constitutional actions, often referred to as "amparo" proceedings, against the award or the local court's decision on recognition or enforcement. This will inevitably delay the recognition and enforcement of an

award or decision and add a layer of litigation before local courts.

Parties should also consider the availability of interim measures against assets in the seat. Different jurisdictions take diverse approaches to the types of temporary relief that can be ordered and the enforceability of these measures. While there is a growing trend in favor of enforcement, some jurisdictions will only enforce interim measures issued by tribunals seated within their jurisdiction. Parties should consider what interim measures they might need. Whether these measures are effective will depend on the powers of the court in that jurisdiction.

6 *SPECIFY PROCEDURES FOR THE TAKING OF EVIDENCE*

Arbitration clauses are often silent on the taking of evidence, and there are good reasons for that. The main purpose of an arbitration clause is for the parties to consent to arbitration, not to lay down procedural rules for a potential arbitration. The procedural aspects may be defined once a dispute arises and an arbitral tribunal is constituted.

However, it is also common to encounter arbitration clauses that reference the IBA Rules on the Taking of Evidence or other soft law instruments as a parameter for the tribunal to follow on evidentiary issues. In such cases, the parties should avoid specifying a particular version of the instrument they wish to apply (e.g., the "2020" IBA Rules on the Taking of Evidence), as these rules are regularly updated, and the version mentioned in the arbitration clause may not be the most current version at the time of the dispute.

Another practical consideration parties should consider relates to the application of domestic discovery laws. Specifically, if a party has a U.S. presence, advocates should also add language to the arbitration clause to prevent discovery under 28 U.S.C. § 1782(a). This federal law allows a district court to compel production of evidence from a person found within its jurisdiction for use in an arbitration. This type of discovery can be long, expensive, and strategically disadvantageous to the party that has a U.S. presence.

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BEYOND DELAYS:

PRACTICAL TECHNIQUES TO *IMPROVE EFFICIENCY* IN ARBITRATION

Aleksandra Zanowska

INTRODUCTION

It is generally known that arbitration provides certain benefits to its users, such as a neutral forum for cross-border disputes or flexibility of the process. Efficiency is sometimes listed as an additional benefit of arbitration. While this may be true at times, especially when comparing arbitration to litigation in jurisdictions with less efficient court systems, objectively, arbitration still takes time.

In the context of commercial arbitration, average arbitration proceedings under the Arbitration Rules of the International Chamber of Commerce ("**ICC Rules**") concluded in 2023 lasted 27 months, with a median duration of 25 months.[1] For other institutions, the times reported are slightly shorter, with the Singapore International Arbitration Center ("**SIAC**") reporting the mean duration of its cases at 13.8 months and a median duration at 11.7 months[2], and the London Court of International Arbitration ("**LCIA**") reporting that cases under its rules last on average 20 months.[3]

In the context of investment arbitration, the process is less efficient. For example, in the context of arbitrations administered by the International Centre for Settlement of Investment Disputes ("**ICSID**"), between 2009 and 2024, the average duration of cases concluded with an award was 54 months.

The question that is often asked is what may be done to increase the time efficiency of the proceedings, without increasing their costs or compromising the quality of the outcome.[4] This requires acknowledging that, depending on the stage of the proceedings, different actors have different amounts of power to impact the efficiency of the process:

1. At the preliminary stage, before the tribunal is formed, it is either the parties (in ad hoc arbitrations) or the arbitral institutions (in administered arbitrations) that have the power to streamline the process.

2. During the main phase of the proceedings, after the tribunal has been formed and parties present their case either in written or oral submissions, the power to streamline the case is shared by the parties and the tribunal.

3. In the final phase of the proceedings, after all the evidence and arguments have been presented and the tribunal deliberates before rendering the award, the power to ensure efficiency lies with the tribunal.

This practice report discusses five different techniques that may be used to increase the efficiency of the proceedings, considering the division of powers described above. Some of the discussed techniques are well-known but not applied frequently enough in practice. Some of them have been proposed in the past, but now may be re-emerging. Some of them are new proposals that may be of use to parties and tribunals who wish to take control of the process.

WELL-KNOWN TECHNIQUES

1. Word limits for parties' submissions

While there is no reliable empirical data on the average length of parties' written submissions in arbitration, anecdotal evidence suggests that, in light of technological advancements, parties started presenting increasingly longer submissions in arbitration. With the ability to transmit files electronically and no need to print documents, there are no objective obstacles to lengthy submissions.

Focusing on investment arbitration, it is noticeable that memorials submitted by the parties are often longer than 150 pages, with some reaching a length of over 400 pages. Adding to volumes of evidence, each party's submission may contain thousands of pages.

This does not help the efficiency of the process—it takes parties more time to reply to the memorials, it takes the tribunal more time to read and understand the submissions, and then it takes the tribunal more time to write an award addressing comprehensively the parties' arguments. Since most lawyers bill by the hour, longer proceedings also increase costs.

As acknowledged by the arbitration users themselves, submissions should be limited. According to the 2021 International Arbitration Survey,[5] the majority of parties and counsel are willing to sacrifice their right to unlimited written submissions to ensure faster or cheaper arbitrations.[6]

So why are page limits not a reality in all arbitrations? Parties often do not want to limit their rights, as they are uncertain what arguments they may need to face in the process. And their counsels do not want to leave arguments unaddressed. In some cases, this may be the result of the strategy, especially if the facts and law are not favorable to the parties' position, it may be easier to hide the weakness in the forest of feeble arguments.

So how can the use of page limits be increased? While the tribunal would ultimately establish page limits, parties can facilitate the process by actively requesting such page limits from the outset of the proceedings. If page limits are established in the first procedural order, there will be less dispute between the parties at a later stage. Tribunals should also ensure that they draft the procedural order in a way that prohibits parties from circumventing the page limitations through lengthy annexes.

2. Timeline for awards

When the parties complete their final submissions, there is nothing left for them but to wait for the tribunal's decision. At times, it takes a few weeks. More often, it takes a few months.

In the case of some arbitration rules, the time limit for issuing the award is explicitly addressed. For example, under the ICC Rules, the time limit for issuing the awards is 6 months from the signing of the terms of reference[7], which occurs at the outset of the proceedings. This timeline is unrealistic, as ICC cases on average last four times longer.[8] While the ICC Court oversees efficiency by controlling award deadlines, in most cases, parties do not know precisely when to expect their award.

The LCIA Rules require the tribunal to make its final award as soon as reasonably possible, preferably within three months following the last submission from the parties (whether made orally or in writing).[9] However, it is up to the tribunal to establish the timetable for the issuance of the award.

The newly introduced SIAC Rules address this issue more strictly, requiring the tribunal to inform the parties within 30 days of the last directed oral or written submission about the estimated timing of the award.[10]

At the same time, the award should be submitted by the tribunal for the scrutiny process no later than 90 days from the last directed oral or written submission.[11]

Given the differing approaches in different rules, the question is why parties do not endeavor to regulate the timing of the arbitral award in the procedural timetable. Theoretically, if the parties can assess from the outset how much time they will need to present their case, they should be able to estimate how long it may take to decide it. After all, the parties know the background of the case better than anyone and can help assess the complexity of the matter.

There is no empirical data that would explain why parties do not raise with the tribunal the timing of the award during discussions on the case's procedural timetable. However, in some instances, the parties do not want to constrain the tribunal as to the deadline of the award, fearing that setting a time limit could impact the tribunal's mandate in case of a "late" award. Another reason is that parties may hesitate to propose a deadline, fearing it could suggest a lack of confidence in the tribunal's organization. But neither is a compelling reason not to request a timeline for the award.

If arbitration is meant to be efficient, parties should have the right to request a specific timeline for the award. It should become the norm, not the exception. As for the concerns about the expiration of the tribunal's mandate in the event of a deadline for the award, it should suffice to state that the timelines established in the procedural timetable do not impact the tribunal's mandate, which shall not expire until the issuance of the award. While this will make the deadline for the tribunal's award more movable, setting a deadline in the first place should help organize the tribunal's calendar and encourage setting aside enough time to draft the award without delay.

But the timelines should be reasonable. If the parties submit thousands of documents, they cannot expect the tribunal to issue an award in a month or two. As such, this technique must be applied in conjunction with other tools aimed at efficient management of the proceedings.

RE-EMERGING TECHNIQUES

1. Kaplan Openings

One reason parties' written submissions become unfocused and unnecessarily long is that theydo not know what to focus on. As in most cases, they do not present the case directly to the tribunal until the hearing, they do not know what the tribunal thinks of the case. Assuming the tribunal reads all parties' submissions, there is always a risk that an argument the opposing side considers weak may be crucial for the tribunal. By the time the hearing finally takes place, the tribunal will have formed an initial view on the case, even if it is unlikely to be "*capable of taking in and proceeding all the submissions of the parties*."[12]

No counsel wants to risk leaving a crucial argument unaddressed.[13] However, this approach does not enhance efficiency.

In 2014, Neil Kaplan CBE KC SBS presented a proposal addressing these issues.[14] The proposal?
A Kaplan Opening.

A Kaplan Opening is a hearing fixed by the tribunal after the completion of the first round of submission by the parties, during which each party would present their opening of the case.[15] It may also include presentations by expert witnesses (if any) explaining the main differences between their report and the opposing side's report.[16]

While there may be many advantages to this proposal, the key ones are:

- Informing the tribunal[17] and the parties' counsels[18] of the case, which should allow further submissions to be more focused on the key issues.
- Understanding what the tribunal may consider key issues and what the peripheral points are.[19]
- Helping counsel identify gaps in evidence.[20]

In most cases, counsel will be reluctant to rely on this technique. However, it can help increase the precision of the submissions and enhance the quality of arguments presented in the case.

If a Kaplan Opening is held before the document production phase, it can also result in the tribunal being better equipped to decide on the relevance of the document production requests and limit the unnecessary costs associated with this phase.

Parties and tribunals should consider adding this phase to the procedural timetable at the outset of the proceedings.

NEW TECHNIQUES

1. Chess-clock written submissions

One of the issues that arises in arbitration is the parties' adherence to the deadlines established in the procedural timetable. In many jurisdictions, in particular civil law jurisdictions, deadlines established by courts are binding and will not be extended without good cause. Furthermore, missing a deadline by even one day may result in a default judgment or the exclusion of the written submission from the record.

In arbitration, failure to file a submission on time typically does not result in severe consequences. Moreover, parties often request time extensions for their submissions—sometimes multiple times for the same submission. To justify their time extension requests, parties frequently cite due process concerns, including the right to present their case; however, they rarely support this with relevant legal authorities.

While it may not be possible to prevent parties from requesting a week or two of time extension for their submissions, it might be possible to remove the burden of deciding on these requests from the tribunal. The solution is the chess-clock for written submissions.

Most arbitration users will be well acquainted with the chess-clock rule applicable during the hearings. Under this rule, parties typically have the same amount of time to present their case during the hearing, but have the flexibility to choose how much time they wish to allocate to each witness or submission during the hearing.

The chess-clock for written submissions would work similarly, but with certain limitations:

- Parties would have the same or similar number of weeks to present all their submissions (typical practice);

- Parties would have the flexibility right, allowing them to decide how to allocate their time among the submissions (new proposal);

- The limit to the flexibility right should be below 10% of the total time for the submissions for each party, but the number should be equal for both (limitation to the new proposal).

Let us consider a hypothetical scenario. In this hypothetical arbitration, there are two parties, and each must file two submissions—the claimant has to file the statement of claim and the statement of reply, the respondent has to file the statement of defense and the statement of rejoinder. For each submission, the procedural timetable foresees 12 weeks for its preparation. As such, each party has a total of 24 weeks for their submissions. The flexibility limit in this case could be two weeks. So, for example, a claimant could choose to prepare the statement of claim in 10 weeks rather than 12 weeks and use the additional two weeks to prepare the statement of reply.

For it to work in practice, parties would need to notify the tribunal and opposing counsel in advance (at least one week before the original deadline) if they wish to exercise the flexibility right and specify the number of days they intend to use. The tribunal might consider monitoring the time used or rely on the counsel.

This approach would ensure both flexibility and predictability by establishing, from the outset, the scope of potential changes in the deadlines. It would also alleviate the burden on the tribunal when it comes to deciding on the time extensions, leaving it up to parties to manage their time strategically. The introduction of the limit on the flexibility right would ensure that no party could abuse this right (for example, by using 75% of its total time to draft an extremely lengthy submission, knowing that the opposing party will not have sufficient time to prepare the reply). If parties have different time allocations to prepare submissions (e.g., due to holidays), the limit should be based on the party with the shortest preparation period.

The tribunal still should have the ability to extend deadlines, but only in exceptional cases (which should not include typical issues with evidence collection or client access).

This approach might not be easily implemented in multi-party arbitrations, but it still might help manage cases with less complex party structures or when one counsel represents all parties on one side of the dispute.

2. Minimum contents of the award

In recent years, arbitral awards have become longer. One could say that the cause of that is the lengthy submissions of the parties, which the tribunals attempt to address in their awards. But the question is whether this is necessary.

Parties could agree at the beginning of the proceedings on what should be the minimum content of the award:

- Whether the award must contain a description of the full factual background or address the main facts relevant to the outcome.

- Whether the award must summarize the arguments made by the parties.

- Whether the award must address all arguments or only the main arguments justifying the outcome.

- What level of details of the procedural history is necessary—must the award describe each submission made by the parties or just the key submissions.

These questions should be raised at the first case management conference or before establishing the terms of appointment. Additionally, tribunals should require the parties to provide a

statement confirming that the agreed limited contents of the award will not jeopardize the enforceability in the jurisdictions of the parties and the seat of arbitration. This would help the tribunal assess the necessary level of detail in the award and avoid drafting unnecessary sections, particularly by addressing repetitive and irrelevant arguments from the parties.

Finally, the results of these discussions should be addressed in the terms of appointment (or a similar document) signed not only by the tribunal but also by the parties, to limit the risk of a party's challenge to the contents of the award at a later stage.

CONCLUSION

Inefficiency in arbitration is not inevitable—it is within the control of parties, tribunals, and institutions. If arbitration is to remain a preferred dispute resolution mechanism, efficiency must be actively prioritized rather than treated as a secondary concern.

Practitioners should take the initiative to propose procedural tools, such as word limits and Kaplan Openings, early in the process, rather than relying on tribunals to introduce them. Institutions should adopt and enforce realistic award timelines that align with the actual duration of cases. Tribunals, in turn, must take a proactive role in discouraging procedural inefficiencies, such as unnecessary extensions, excessive submissions, or tactical delays.

The solutions exist, but they require commitment from all actors involved. To truly benefit from arbitration's flexibility and neutrality, efficiency must become a fundamental part of the process, not just an after thought.

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2. Singapore Int'l Arb. Ctr., SIAC General FAQs, Question 15, https://siac.org.sg/faqs/siac-general-faqs.

3. London Ct. Int'l Arb., LCIA Releases Updated Costs and Duration Analysis 2024, LCIA (2024), https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis-2024.aspx.

4. See Jennifer Kirby, Efficiency in International Arbitration: Whose Duty Is It?, 32 J. Int'l Arb. 689 (2015).

5. Queen Mary Univ. of London, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, QMUL (2021), https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

6. Id. at 13.

7. ICC Rules of Arbitration, art. 31(1) (2021).

8. See note 1 above.

9. LCIA Arbitration Rules 2020, art. 15.10.

10. Arbitration Rules of the Singapore Int'l Arb. Ctr., R. 53.1 (7th ed. 2025).

11. d. R. 53.2.

12. See Neil Kaplan, If It Ain't Broke, Don't Change It, N.Y. Int'l Arb. Ctr. 2 (2014).

13. Id.

14. Id.

15. Id. at 3.

16. Id.

17. Id.

18. Anecdotal sources suggest that during the preparation for a hearing, counsel's understanding of the case also evolves, allowing them to focus on its key aspects.

19. See note 13 at 3.

20. Id.

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RISING TO THE CHALLENGE:

SIX PILLARS OF AN IDEAL ARBITRAL SEAT AND GUATEMALA'S EMERGING ROLE

Alejandro Solares M.
Estuardo J. Marchena
Julian Flores

In 2015, to commemorate its 100th anniversary, the Chartered Institute of Arbitrators (CIArb) convened the London Centenary Conference, which resulted in the formulation of the *CIArb London Centenary Principles*[1] —a set of benchmarks designed to identify the key characteristics that make a jurisdiction an effective, efficient, and "safe" seat for international arbitration. Unlike model rules for arbitral institutions, these principles focus on the structural, legal, institutional, and practical conditions that jurisdictions should fulfill to support modern arbitration practice. They encompass essential elements such as a modern and arbitration-friendly legal framework, an independent and competent judiciary, broad rights of representation, adequate facilities and accessibility, a commitment to legal education, and adherence to international enforcement standards.

The CIArb Principles reflect a growing consensus: the choice of the seat of arbitration—understood as the legal jurisdiction that anchors the arbitral process, beyond the physical location of the hearings—takes on a strategic significance of the highest order.[2] Selecting a seat is not merely a matter of convenience; it entails subjecting the arbitration to a specific legal framework, a particular judicial system, and a set of interpretative principles that govern both the validity of the arbitration agreement and the enforceability of the award.[3]

Given these demands, a series of technical criteria have emerged to objectively assess the suitability of a jurisdiction as a seat of arbitration. Among them, six essential conditions stand out: (1) the existence of a modern arbitration law aligned with international standards; (2) a robust and reliable system for the enforcement of arbitral awards; (3) a competent and arbitration-literate judiciary; (4) a broad and permissive conception of objective arbitrability; (5) a restrictive and clearly defined regime of remedies against arbitral awards; and (6) interpretative principles that promote consistency, internationality, and good faith in the application of the law.

This article identifies and analyzes these six conditions in light of Guatemala's current legal and institutional context—a country that, although not historically prominent in the field of international arbitration, has begun to construct the legal and institutional architecture necessary to position itself as an emerging arbitral seat in Central and Latin America.

Rather than presenting a definitive picture, the analysis highlights significant progress, identifies specific areas for improvement, and demonstrates that Guatemala stands at a pivotal moment. Accordingly, this article will explain how, with targeted reforms, the country can consolidate its standing as an attractive arbitral seat for both domestic and international stakeholders.

I. A Modern Arbitration Law Aligned with International Standards

The existence of a modern, clear, and internationally aligned legal framework constitutes the cornerstone of any robust arbitral seat. In this regard, the UNCITRAL Model Law on International Commercial Arbitration has been adopted by dozens of jurisdictions worldwide, establishing itself as the normative benchmark par excellence.[4]

Guatemala took a fundamental step in this direction by enacting its Arbitration Law through Decree No. 67-95, issued by Congress on October 3, 1995.[5] This law, which is primarily based on the 1985 version of the UNCITRAL Model Law, governs all essential aspects of arbitral proceedings, both domestic and international.

Broadly speaking, the Arbitration Law is largely consistent with international standards: it recognizes party autonomy, respects the competence-competence principle, and ensures the enforceability of arbitral awards as binding instruments.

However, the transposition of the Model Law into Guatemalan legislation was not literal, and two main deviations have created challenges for the development of arbitration practice in the country. These modifications—namely, the limitations on objective arbitrability and the authority of a judicial chamber to modify an arbitral award upon review—will be addressed in greater detail later in this article.

Despite these differences, Guatemala's Arbitration Law presents a functional and technically

sound framework, capable of supporting complex arbitral proceedings. With targeted reforms, Guatemala could achieve full alignment with the Model Law and other international standards.

II. A Robust System for the Enforcement of Arbitral Awards

The ability to enforce an arbitral award efficiently and without undue obstacles is a central element in assessing the quality of an arbitral seat. A system that offers clarity in enforcement procedures, imposes precise limits on judicial interference, and maintains a deferential stance toward arbitral decisions significantly enhances users' confidence. In this regard, the cornerstone at the international level is the 1958 New York Convention, ratified by over 170 States and widely regarded as one of the most successful instruments in the field of private international law.

In this context, two features in particular merit attention, as they endow Guatemala with a solid framework for the enforcement of arbitral awards.

First, Guatemala ratified and adopted the New York Convention in 1984.[6] Since then, its application has become so deeply entrenched that the country's Arbitration Law expressly acknowledges the obligation of domestic courts to apply the Convention, unless another more favorable instrument exists for the enforcement of the award.[7] Moreover, Guatemalan courts have consistently reiterated and applied the Convention, emphasizing its importance in facilitating the enforcement of decisions arising from international commercial disputes resolved through arbitration. This direct integration allows for the Convention's smooth application and avoids normative redundancies.[8]

Second, Guatemala has an effective system for the enforcement of arbitral awards. With some variations, the enforcement of arbitral awards generally follows the procedural rules applicable to the execution of national court judgments. Under this regime, the award debtor has very limited grounds to oppose enforcement, and the exceptions that may be raised are narrowly circumscribed.

In this regard, Guatemalan jurisprudence has firmly established that, during the enforcement stage, the judge must restrict the admissibility analysis to verifying the authenticity of the arbitral award and determining whether enforcement is procedurally viable—without revisiting the substantive issues of the dispute. Courts have acknowledged that such substantive matters fall within the jurisdiction of the arbitral tribunal and, where applicable, may be reviewed by a judicial body through a limited challenge to the award.[9]

Taken together, these features suggest that Guatemala's enforcement framework meets appropriate international standards for the enforcement of both domestic and foreign arbitral awards. The country's early accession to the New York Convention, its normative incorporation into national legislation, and the consolidated jurisprudence of its higher courts together establish a legal environment that ensures efficacy, legal certainty, and deference to arbitral decisions.

III. Competent Judges: Between Institutional Progress and Technical Challenges

An arbitral seat cannot be consolidated solely on the basis of sound legislation. The interpretation and application of such laws ultimately rests with the judiciary. For this reason, the presence of well-trained judges—those with specialized knowledge in arbitration and a deferential attitude toward the autonomy of arbitral proceedings—is an essential criterion in the assessment of any arbitral jurisdiction.

In Guatemala, this factor has undergone significant evolution, although notable challenges remain. At the jurisprudential level, the Constitutional Court has adopted a decidedly pro-arbitration stance. In multiple rulings, it has affirmed that national judges must limit their intervention in arbitral proceedings to the specific circumstances legally provided for judicial assistance[10]; it has underscored that arbitral tribunals are fully competent to rule on their own jurisdiction[11]; and it has emphasized that arbitration agreements are to be presumed valid.[12]

This development is particularly relevant in Guatemala's mixed model of constitutional review, in which the Constitutional Court establishes binding jurisprudence for all other courts in the country.

However, this jurisprudential clarity does not always translate into uniform application across all levels of the judiciary. Significant gaps in technical training on arbitration persist in the trial and appellate courts. The relative infrequency of arbitral proceedings, combined with the limited exposure of many judges to international arbitration practice, generates uncertainty in resolving procedural issues such as the admissibility of interim measures, judicial cooperation in the production of evidence, or the -limited- oversight of due process within arbitration.

In response to this situation, institutional measures have been adopted to address these shortcomings. One of the most noteworthy initiatives has been the signing of the "Memorandum of Understanding for Interinstitutional Cooperation between the Judiciary and the Guatemalan Arbitration Association (AGA)", recently executed on October 3, 2024. This instrument aims to lay the groundwork for the development of academic training programs in arbitration, specifically targeted at judges and magistrates within Guatemala's justice system.

In sum, Guatemala has embarked on a promising path toward the specialized judicial training required for arbitration. While there remains a considerable distance to travel before reaching thelevel of leading arbitral jurisdiction, recent developments reflect institutional will and a growing awareness that arbitration demands a technical, specialized, and autonomy-respecting approach.

IV. Objective Arbitrability: A Still Restrictive Conception

The breadth of subject matters that may be submitted to arbitration—commonly referred to as objective arbitrability—is one of the fundamental pillars of a modern arbitral seat. The general principle, as reflected in the UNCITRAL Model Law, provides that all disputes of a patrimonial nature over which the parties have dispositive power should be capable of resolution through arbitration, except for a limited number of cases expressly established and tied to public policy or rights not subject to private disposition.[13]

Guatemala, however, maintains a restrictive legal framework in this regard. Article 3, paragraphs 1 and 2 of the Arbitration Law provide that arbitration is only admissible in matters over which the parties have free disposal under the law, or when expressly authorized by other legal provisions[14].
This clause, already narrow in scope, is further constrained by paragraph 3 of the same article, which sets forth a closed list of exclusions from arbitration. These include matters already resolved by a final judgment, disputes inseparably linked to non-disposable issues, and any matter in which the law expressly prohibits arbitration or mandates a special procedure[15].
The result of these restrictions on arbitrability is the creation of a legal environment that discourages the use of arbitration. This normative constraint leads to a loss of competitiveness compared to other jurisdictions that have embraced a broader conception of arbitrability.

Moreover, Guatemalan jurisprudence has yet to develop a robust doctrinal framework that would allow for a narrow and principled interpretation of these exclusions. In the absence of clear precedent, there remains a tangible risk that local courts may refuse to uphold arbitration agreements based on an overly expansive reading of statutory limitations—posing a serious source of legal uncertainty.

Correcting this situation does not require a structural overhaul but rather a targeted legislative amendment: the adoption of a general clause affirming that all patrimonial matters over which the parties have dispositive power are arbitrable, with exclusions limited strictly to cases justified by compelling public policy concerns. This reform would significantly broaden the scope of arbitration in Guatemala and align the country with the international trend toward a liberal interpretation of the principle of arbitrability.

V. Limited Remedies Against the Award: A Partially Aligned Framework

The stability and effectiveness of an arbitral award largely depend on limiting the available remedies for challenge to a set of specific, exceptional, and clearly defined grounds. The possibility of reviewing or setting aside an award must not become a disguised avenue for reopening the merits of the dispute, as this would undermine the very purpose of arbitration:

to provide a swift, final, and autonomous method of dispute resolution.

In this regard, the UNCITRAL Model Law establishes a restrictive regime, allowing only for an application to set aside the award on a limited set of expressly defined grounds. These include the invalidity of the arbitration agreement, lack of proper notice to the parties, inability to present one's case, the tribunal exceeding its jurisdiction, procedural irregularities contrary to party agreement, the non-arbitrability of the dispute, or violations of public policy[16].

Guatemala has, in general terms, adopted a structure similar to the annulment mechanism through the "recourse for revision" regulated under Article 43 of its Arbitration Law[17]. This remedy constitutes the sole procedural avenue through which an arbitral award may be challenged before national -appellate- courts. The grounds for "revision" are clearly defined and correspond—albeit with minor variations—to those set out in the UNCITRAL Model Law.

However, the Guatemalan framework introduces a caveat that is problematic from the perspective of international arbitration. Article 43 of the Arbitration Law provides that the Court of Appeals, when deciding on the challenge of and award may not only confirm or set aside the award but also modify it[18].

Notwithstanding this provision, it is worth noting that, in practice, instances in which a Court of Appeals has actually modified an arbitral award have been rare to say the least, with courts demonstrating a high degree of deference to the decisions rendered by arbitral tribunals. To illustrate this deference, in one of the few known cases in which a Court did modify an arbitral award, the alteration was limited solely to an overseen error in the amount of compensation awarded by the arbitral tribunal[19].

Therefore, although in practice there have been few instances of substantive modification of arbitral awards, this provision is nevertheless ripe for reform. By amending it, the Guatemalan system would achieve full alignment with the international model law and would offer parties the assurance that, once issued, the arbitral award will not be subject to a second merits-based determination by bodies external to the arbitral tribunal.

VI. Principles of Legal Interpretation: A Pending Harmonization

One distinguishing feature of the most sophisticated legal frameworks in arbitration is the incorporation of interpretive principles that guide the application of the law in accordance with its international character. The UNCITRAL Model Law provides that, in interpreting its provisions, regard must be had to its international origin, the need to promote uniformity in its application, and the principle of good faith[20].

Guatemala, by contrast, has not incorporated an interpretive clause of this kind into its Arbitration Law. Article 36 allows the arbitral tribunal to take into account the principles of international commercial law, as well as generally accepted commercial usages and practices—but this is expressly limited to international arbitrations. In domestic arbitrations, such openness is not explicitly provided for, resulting in unequal treatment between proceedings that, while differing in territorial scope, often share similar legal, economic, and technical foundations.

To address this shortcoming, Guatemala should consider incorporating a general interpretive clause requiring that its Arbitration Law be construed with due regard to its international origin and the need to promote uniformity in its application. While such a reform would not constitute a structural transformation, it would have a substantial qualitative impact by imbuing the entire legal framework with coherence and comparative perspective.

Conclusion:

Becoming an internationally attractive arbitral seat is neither an automatic process nor one that depends solely on legislation. It requires structural alignment between the legal framework, the judiciary's attitude, consistent interpretation of the law, and the elimination of friction points that hinder the effectiveness of arbitral proceedings. Within this analysis, six criteria emerge as fundamental: a modern legal framework harmonized with the Model Law; an effective system for the enforcement of awards; competent and arbitration-friendly judges; a broad conception of arbitrability; limited remedies against the award; and clear international interpretive principles.

Guatemala has made significant progress in at least three of these six areas. Its legislation is sound and functional, it has ratified the New York Convention and applies it consistently, and it has initiated an institutional process of judicial and arbitration focused training. In the remaining three areas—limiting remedies to a single recourse while still allowing for substantive modification of awards, maintaining restrictive rules on objective arbitrability, and lacking interpretive principles—the country faces ongoing challenges that could be addressed through targeted reforms.

International arbitration demands not only rules but also trust. Guatemala has begun to build the conditions necessary to become a reliable, technically sound, and legally compatible arbitral seat for both domestic and foreign users, aiming to become a hub for central american arbitrations. Its recent evolution shows that the country has moved beyond mere legislative promises and entered a phase of institutional consolidation. Addressing the remaining asymmetries would allow Guatemala not only to aspire to be an alternative forum, but also to establish itself as a serious actor within the regional and international arbitration system.

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1 Ciarb London Centenary Principles, developed with the assistance of The Rt Hon the Lord Goldsmith QC, Doug Jones AO, Judith Gill QC, Julian Lew QC, Constantine Partasides QC, Karyl Nairn QC, Toby Landau QC, The Hon Sir Vivian Ramsey, Wendy Miles QC, Peter Rees QC, Dr Maxi Scherer and Audley Sheppard QC.

2 Jus Mundi, Seat of Arbitration, Jus Mundi Wiki.

3 María Fernanda Vásquez Palma, Relevancia de la sede arbitral y criterios que determinan su elección, Revista Chilena de Derecho Privado, no. 16, pp. 75–134 (2011).

4 United Nations Commission on International Trade Law (UNCITRAL), Status of UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006).

5 Congress of the Republic of Guatemala. (1995). Decree No. 67-95, Arbitration Law.

6 Government of Guatemala. (1984). Decree-Law No. 9-84.

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8 Constitutional Court of Guatemala, judgments issued in Case Files No. 5895-2023 (May 29, 2024), 6689-
2022 (August 8, 2023), 7461-2024 (January 21, 2025), among others.

9 Constitutional Court of Guatemala, judgment issued in Case File No. 6689-2022 (August 8, 2023),
reiterated in judgment issued in consolidated Case Files Nos. 5862-2022 and 5871-2022 (September 26, 2023).

10 Constitutional Court of Guatemala, Judgment issued in Case File No. 1076-2012 (July 5, 2012).

11 Constitutional Court of Guatemala, Judgment issued in Case File No. 5092-2017 (Mar. 7, 2018).

12 Constitutional Court of Guatemala, Judgment issued in Case File No. 114-2020 (May 26, 2020), concerning the validity of arbitration agreements.

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CLAIMS FOR COMPENSATION BY INVESTORS DUE TO INFORMATIONAL FAILURES UNDER BRAZILIAN LAW:

AN ANALYSIS DRAWN FROM
THE ***PETROBRAS V. PREVI AND PETROS*** CASE

Marcela Levy
Pablo Piassa Granello

I. INTRODUCTION

In early 2025, Petrobras S.A., the Brazilian state-controlled oil multinational at the core of the *Operação Lava-Jato* – the landmark anti-corruption probe beginning back in 2014 –, announced that an arbitration brought by foreign investors who had acquired shares on the Brazilian Stock Exchange (B3), alleging financial losses due to informational failures, had been resolved. Although the arbitration was confidential, Petrobras stated in a public disclosure that the Arbitral Tribunal *"dismissed the claim, among other reasons, on the grounds that, under Brazilian law, investors cannot bring an action for compensation against the company for indirect damages, such as those related to the devaluation of the value of shares"* .[1]

The announcement reignited debate in Brazil about whether investors in capital markets are entitled to compensation for losses arising from informational failures. A recent study found that, of 59 lawsuits filed by investors before state courts against companies on such grounds, only one was successful.[2]

II. ARBITRAL PROCEEDING CAM N. 99-100/17 – *PETROBRAS V. PREVI AND PETROS*

This article analyses the Partial Arbitral Award rendered on May 25, 2020, in a dispute involving Petrobras shareholders – specifically, Caixa de Previdência de Funcionários do Banco do Brasil - PREVI and Fundação Petrobrás de Seguridade Social - PETROS. We examine the Arbitral Tribunal's legal reasoning, key issues under Brazilian law, and compare Brazil's approach to investor damages in capital markets with that of the United States.

In the arbitration, Claimants sought compensation for losses allegedly caused by misrepresentations in Petrobras' financial statements during the period in which it was under investigation for systemic corruption.[3]

A. CONTEXT: CIVIL LIABILITY UNDER BRAZILIAN LAW

Before delving into the award's reasoning, it is helpful to outline the principles of civil liability in Brazil. Under Brazilian law, anyone who causes harm through an unlawful act must pay damages[4]. Compensation is measured by the extent of the loss suffered.[5] Liability requires a direct and immediate causal link between the unlawful act and the loss.

For investors to claim damages based on actions by corporate officers, the prevailing interpretation demands proof of direct loss[6]. Brazilian legal doctrine distinguishes direct damages from indirect ones, with direct damages arising from a proximate cause-effect relationship .[7]

Within this context, the Partial Arbitral Award in CAM n. 99-100/17 presents noteworthy insights. Notably, the award (a) affirmed that investors have standing to sue the company directly for misrepresentations in financial statements, and (b) recognized the company's liability for harm resulting from its officers' actions.

B. FACTUAL BACKGROUND

The arbitration was based on a clause in Petrobras' bylaws. The claimants were minority shareholders at the time of the facts and when the arbitration commenced. They alleged that between January 22, 2010, and July 28, 2015 ("the relevant period"), Petrobras disclosed false information to the market, which then led to a decline in share value.

Operação Lava Jato revealed that Petrobras officers appointed by the Federal Government colluded with large construction companies to inflate contracts, yielding excessive profits that were partly redirected to Petrobras officials and political parties[8].

According to the Partial Arbitral Award, Claimants argued that their losses stemmed not from the corruption itself, but from Petrobras' failure to disclose accurate information.

C. STANDING TO SUE

The Arbitral Tribunal's recognition of Claimants' standing is particularly significant. It found that misrepresentations led directly to investor losses. The Tribunal distinguished between the harm caused to Petrobras by corruption and the informational failures affecting shareholder decisions.

The Tribunal understood that the misrepresentations resulted in direct harm to the shareholders: *"the accounting records and the preparation of balance sheets and financial statements with defective information do not, in and of themselves, constitute a loss to the company's assets — these had already suffered harmful effects from acts of corruption and the payment of overpricing resulting from the construction companies' cartel and the unlawful acts committed by politicians and political parties connected to the criminal organization that controlled the highest levels of the Federal Government – in this case, the controlling shareholder of the Respondent. However, such practices may have contributed to misleading shareholders and investors who operated with the company's securities (purchasing, selling, and subscribing to shares, subscribing to debt securities and their subsequent trading, etc.), as well as third parties who conducted business with the Respondent, including the extension of credit, based on a financial position with falsely positive profitability prospects due to the disclosure of quarterly balance sheets and annual financial statements containing defective information regarding non-current assets, in significant amounts".*[9]

Notwithstanding this decision, some legal scholars understand that illicit acts committed by officers which affect the company's market value will only cause indirect losses to shareholders, not subject to indemnification. Under these opinions, the shareholder can only be compensated if the harm in question is not merely a reflection of the loss suffered by the company.[10]

Under article 159 of the Brazilian Corporation Act ("BCA"), officers shall be liable for losses caused to the company, because of acts performed with fault (negligence or imprudence) or intent (fraud, bad faith), in violation of the law or the company's bylaws. Shareholders may file the claim on behalf of the company in certain circumstances (derivative claims).

One could understand that if the company is awarded damages in a claim under art. 159 of the BCA, its shareholders will be indirectly compensated (and thus do not have a direct claim). According to the recent Petrobras disclosure[11], it seems that this was the understanding expressed by the Arbitral Tribunal in the case brought by international investors.

Regardless of whether this solution is correct, it is undeniable that, in general, companies have deeper pockets than their officers. Therefore, determining that shareholders affected by informational failures can only be compensated indirectly may imply that they are unlikely to receive compensation in practical terms.

D. COMPANY'S LIABILITY FOR OFFICERMISCONDUCT

The Partial Arbitral Award concluded that a company can be held liable for damages due to illicit acts of its officers, citing to legal scholars who understand that an act carried out by an officer in their capacity as an organ of the company is equivalent to an act of the legal entity, and it is the company's assets that are liable for compensating any losses caused to third parties. In sum, under this understanding, in the case of a regular act by the officer, only the company is liable; however, an officer who acts with fault or intent, or in violation of the law or the bylaws, is also personally liable — with their own assets. In cases where both the officer and the company are jointly and severally liable, the harmed parties could choose against whom to file the claim. If only the company were held responsible, it could then seek reimbursement from the officers.

Petrobras argued that the BCA did not foresee a claim by an investor against the company, except for specific situations involving, for example, errors or irregularities in share registration services. In all other cases, liability would rest solely on the officers (or the controlling shareholder, as set forth in art. 246 of the BCA).

The Arbitral Tribunal ruled in favor of Claimants, citing provisions of the Brazilian Civil Code on general civil liability, notably articles 927, 47 and 932, III which provide that a party that unlawfully harms another must pay damages, that "*entities are bound by the acts of their officers carried out within the limits of their powers as defined in the articles of incorporation*", and that the employer or principal shall be liable for the acts of their employees, servants, and agents, in the exercise of their duties.

The arbitrators gave great weight to how the issue is dealt with in other jurisdictions, including Spain and Italy. The decision stated that these countries have corporate law provisions which are "*virtually identical*" to Brazil's and that most legal scholars in those jurisdictions conclude that the company should also be held liable for losses caused to shareholders by the illicit acts of its officers.

In recent years, a growing number of Brazilian legal scholars argue that in cases of informational failures, the publicly held company should be held liable,[12] citing: (i) statutory duties to disclose accurate information (Articles 19 and 21, BCA), (ii) companies' liability for the acts of their agents, and (iii) the principle that officers' liability does not exclude corporate liability.[13] The Arbitral Tribunal appeared to embrace the latter two principles in its decision.

Finally, the Tribunal deferred quantification of damages – such as share devaluation and opportunity costs – to a later phase following expert evaluation. Claimants were required to present their damages "*objectively, clearly, and indisputably*". No final award has yet been rendered, as Petrobras initially succeeded in annulling the partial award. An appeal is currently pending.[14]

Nonetheless, this Partial Arbitral Award stands as a landmark decision, challenging prevailing jurisprudence and affirming shareholders' right to seek compensation directly from the company for informational harm.[15]

III. INVESTOR PROTECTION IN BRAZIL AND THE U.S.: A COMPARATIVE PERSPECTIVE

Since 2020, Petrobras has disclosed at least seven arbitration proceedings involving investor claims for misrepresentation in financial statements. As of the 2024 annual report, the only award issued was the Partial Arbitral Award[16].

In early 2025, as previously mentioned, a notice to the market was issued indicating that in one of these arbitrations, a ruling was issued against the investors' interests.[17] Even though the *Operação Lava Jato* began more than 10 years ago, it seems no investor has been directly compensated through arbitrations brought in Brazil.

In contrast, in the U.S., between December 8, 2014, and January 7, 2015, five class actions were filed in the District Court of New York by Petrobras investors who were holders of ADRs traded on the NYSE (New York Stock Exchange). Judge S. Rakoff, judging the motion to dismiss concerning all five class actions, ruled that the court had jurisdiction to adjudicate the alleged violations of the Securities Exchange Act for investors who purchased ADRs on the NYSE. In July 2018, an agreement was certified in which respondents, including Petrobras, agreed to pay around US$ 2.95 billion to settle the class actions.

In the U.S., following the Supreme Court's decision in *Basic Inc. v. Levinson*[18], investors benefit from a presumption of reliance in securities fraud cases. To succeed, they must show a material misstatement, scienter, loss causation, and damages. Brazil does not offer similar presumptions.

While U.S. courts still debate whether harm occurs at the time of purchase (inflation theory) or upon corrective disclosure, Brazilian jurisprudence has not significantly addressed this issue.

A frequent counterargument in Brazil is that capital markets involve inherent risk, and investors should not be compensated for price fluctuations. While this is true regarding economic volatility, exposure to false information is not a risk investors should bear.

The Petrobras case underscores how the U.S. offers stronger legal mechanisms for investor redress. Investors who brought claims in the U.S. received compensation; their Brazilian counterparts did not.

A final note: one can argue that the solution applied to the Petrobras case for investors who acquired ADRs through the NYSE in the class action resulted is unfair. After all, with arbitration proceedings in Brazil failing to make substantial progress and the company being held liable in the U.S. to indemnify investors who purchased securities in that jurisdiction, those who acquired shares during the relevant period of informational failure on the Brazilian Stock Exchange are not only failing to be compensated but are also being adversely affected by the devaluation stemming from the class action settlement in the U.S.[19]

IV. CONCLUSION

The Partial Arbitral Award in CAM Arbitration Procedure n. 99-100/17, *Previ and Petros v. Petrobras* case, as discussed in this article, serves as an important reference for understanding the main controversies in Brazil surrounding the possibility – or impossibility – of investors directly suing a company for informational failures.

The award is considered a significant milestone, as it departed from prevailing case law that typically rejects such claims, by distinguishing between the harm suffered by the company due to officers' illicit acts and the liability of officers and the company for damages caused to investors through informational failures. It further concluded that the investors had suffered direct harm.

Nevertheless, in a broader context, given that none of the seven arbitration proceedings initiated by investors against Petrobras has resulted in compensation – one even resulting in a decision of dismissal – the mechanism for direct indemnification under Brazilian law can only be seen as ineffective.

In stark contrast, investors holding ADRs appear to have been duly compensated in the U.S., which may support the conclusion that, in the case of companies whose securities are traded on both stock exchanges, investors are better protected when investing through the U.S. market.

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2 Lucas C. G. M. Barros, A responsabilidade civil das companhias abertas perante investidores 418 419 (Singular 1th ed., 2023).

3 The Partial Arbitral Award was later submitted as evidence in a public court proceeding (Tribunal de Justiça de São Paulo [São Paulo State Court of Justice], case n. 1059739-77.2020.8.26.0100). In a ruling, the judge assessed the request that the lawsuit be processed under seal but deemed the assignment of confidentiality to the case unconstitutional.

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5 Brazilian Civil Code, section 944 https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm.

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14 Petrobras, Petrobras on motion to vacate partial award in arbitration (07.21.2020) https://s3.amazonaws.com/mz-filemanager/25fdf098-34f5-4608-b7fa-17d60b2de47d/39813c7e-df8f-4636-9f74-.776027f54eca_comunicado_sentenca%20arbitral_ing.pdf; Petrobras, Petrobras on partial overturn of arbitral award (11.11.2020) https://s3.amazonaws.com/mz-filemanager/25fdf098-34f5-4608-b7fa-17d60b2de47d/39813c7e-df8f-4636-9f74-776027f54eca_comunicado_sentenca%20arbitral_ing.pdf; As per the information in Petrobras' 2023 reference form, the claim was annulled in the ruling, and an appeal was subsequently filed, which has yet to be judged. Petrobras, reference form 2023 (07.25.2025) https://api.mziq.com/mzfilemanager/v2/d/25fdf098-34f5-4608-b7fa-17d60b2de47d/8692bbaa-13f1-bead-c8f3-3bb868b77e03?origin=1

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16 Petrobras, reference form 2023, supra note 14.

17 Petrobras, supra note 1.

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19 In this sense, see Carlos Rabello, Empresas com ADR: investidores brasileiros, tenham cautela! Capital Aberto (Jan. 22, 2016). https://capitalaberto.com.br/regulamentacao/empresas-com-adr-investidores-brasileiros-tenham- cautela/.

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