Laying Down the "BRICs": Enhancing the Portability of Awards in International Commercial Arbitration

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Abstract

The drafters of the 1958 New York Convention intended Article V(2)(b) to be interpreted narrowly, and while most pro-arbitration national courts do maintain narrowly defined areas of public policy that are sufficient for refusal of the recognition and enforcement of a foreign arbitral award, this is not always the case. Developing states and jurisdictions that maintain corrupt or inefficient judicial systems have shown a greater willingness to invoke the public policy exception for a broader, amorphous variety of reasons. This phenomenon has created a sense of unpredictability among international investors, arbitrators, and business executives as to the amount of deference that will be given to arbitral awards rendered in their favor in foreign jurisdictions, a concept that can be described as portability. International commerce depends upon an effective dispute resolution mechanism, and thereby, a high degree of portability across jurisdictions. Brazil, Russia, India, and China (the BRICs) have emerged as the foremost economies of the twenty-first century. This article will analyze the portability of awards under Article V(2)(b) in each of these jurisdictions and suggest who did it best. It will also recommend that experienced judges be appointed to mitigate this problem across jurisdictions.
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Part I – Introduction: Why all the Fuss about Arbitration?

“The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself” – Jan Paulsson, Honorary Vice President, London Court of International Arbitration

The public policy exception is widely regarded as an “escape device” and an “unruly horse,” allowing business enterprises to elude the enforcement of international arbitral awards rendered against them. It has been interpreted “erratically” by jurisdictions around the world and is probably the “most misused ground of all.” The New York Convention

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1 Paulsson, Jan, Awards Set Aside at the Place of Arbitration, Enforcing Arbitration Awards under the New York Convention (June 10, 1998), at 24.


3 See id.; see also, Convention, infra note 61 (providing that the public policy exception is part of a larger international treaty known as the United Nations Convention of the Enforcement
entered into force in 1958, and it exists to promote the goals of international commerce, which include the successful resolution of disputes via methods of alternative dispute resolution through international commercial arbitration (ICA). \(^4\)

While the disadvantages of ICA are greatly outweighed by its advantages, a chasm still exists between the institution of ICA itself and the sovereignty of national courts. This phenomenon describes what can be called the “deference apparatus.” In sum, this apparatus exudes a tremendous amount of power with regard to the efficiency of ICA. \(^5\)

Inherent in a discussion of ICA is the concept of portability: the amount of deference a national court will give to a preceding international arbitral tribunal’s decision when deciding whether or not to enforce a foreign arbitral award. A prevailing party in an international arbitration will need to

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\(^4\) See generally Miccioli, infra note 12.

\(^5\) See generally Lew, infra note 13 (noting that international investors and business executives depend on the notion that national courts across the globe will follow the example of pro-arbitration jurisdictions in giving a great amount of deference to an international arbitral tribunal).
seek the assets of its counterpart to satisfy the award rendered in its favor.\(^6\) It must do so in a jurisdiction where the losing party is known to have assets, and it can only hope that this jurisdiction is one that espouses a high degree of portability. The portability of an award is significantly affected by the relevant jurisdiction’s interpretation of the public policy exception of Article V(2)(b) of the New York Convention.\(^7\) An analysis of jurisdictions crucial to modern international commerce can serve as an invaluable source of comfort to corporations involved in cross-border transactions looking for some sense of predictability in the world of ICA. The monetary value of the arbitral awards at stake in these jurisdictions have a significant impact on international business. Most notably, the BRICs, composed of Brazil, Russia, India, and China, have shown considerable significance in the twenty-first century economy, contributing to nearly half of global gross

\(^6\) See Maurer, infra note 10, at 2.

\(^7\) See Leyda, infra note 139 (providing that Article V(2)(b) is the most utilized and abused provision for refusal of recognition and enforcement of a foreign arbitral award, as parties to ICA know that it has the potential to be interpreted broadly).
domestic product (GDP).\textsuperscript{8} Part II of this comment will address the recent explosion of ICA in the past several decades. This section will also address the basics of the New York Convention and whether the finality of ICA actually exists in practice. Additionally, this section will discuss the “deference apparatus” and how it relates to portability via the public policy exception of Article V(2)(b). Part III will explain why an analysis of the BRICs with regard to the public policy exception is helpful, and will then proceed with an examination of each jurisdiction. This section will also question which of these jurisdictions embraces portability most efficiently. Finally, Part IV will discuss the appointment of experienced judges who would exclusively administer hearings dealing with the recognition and enforcement of foreign arbitral awards, as a viable solution to the inconsistency of portability.

**Part II – Portability: The Public Policy Exception in Modern International Commercial Arbitration**

“As healers of human conflicts, the obligation of the legal profession is to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible experience, and the minimum of stress on the

participants. That is what justice is all about” – Former US Supreme Court Chief Justice Warren E. Burger⁹

As perhaps one of the most elusive, yet formidable institutions of our society, ICA has transformed global commerce into a modern, arguably efficient mix of business entities. It has established itself as a powerhouse in the ever-evolving realm of twenty-first century alternative dispute resolution (ADR), reducing the costs of cross-border transactions by facilitating the resolution of disputes. Parties involved in cross-border business disputes can submit their disputes to the domestic courts of one of their home states for resolution. This process, however, inevitably imputes the involvement of one or more sovereign, invariably dissimilar judicial systems, resulting in a “national solution for an international conflict.”¹⁰

ICA is only one method of ADR, distinguished from mediation and conciliation. It is the most prominent of these private ADR

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mechanisms.\textsuperscript{11} The American Society of International Law (ASIL) has defined arbitration as the submission of a dispute to one or more impartial persons for a final and binding decision, known as an award.\textsuperscript{12}

Perhaps the most appealing aspect of ICA is the binding nature and finality of the arbitral tribunal’s decision.\textsuperscript{13} Disputes are an inescapable occurrence in the world of international business transactions (IBTs), as varying cultural approaches, political ramifications, geographic predicaments, and industry expectations all serve as sources for disagreement.

\textsuperscript{11} See United Nations Conference on Trade & Development, \textit{5.1 International Commercial Arbitration}, ¶ 4, UNCTAD/EDM/Msc.232/Add.38 (2005) (pointing out that the term “arbitration” is rarely defined; it is notably absent from the United Nations Commission on International Trade (UNCITRAL) Model Law on ICA, as a definition is particularly difficult to formulate).

\textsuperscript{12} See generally, Gloria Miccioli, American Society of International Law, \textit{International Commercial Arbitration} (providing that arbitration is unique in that it displaces traditional litigation in a judicial court system).

between contracting parties. For this reason, the number of arbitration proceedings in recent decades has exploded. From 1950 to the present, interest in ICA has increased globally at an exponential pace. Statistics from the International Chamber of Commerce (ICC), a leading international ICA organization, show that in 2000, 541 Requests for Arbitration were filed. Juxtapose that with statistics for 2014; the number of Requests

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14 See id.

15 See United Nations Conference, supra note 11, at ¶ 21-22 (providing that from 1920 to the outbreak of the Second World War, the amount of arbitration proceedings between commercial firms from various states was noticeably negligent, although the development of the institution of ICA did see some growth in Europe during this period).

16 See id at 23.

17 See International Chamber of Commerce Website, Statistics, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Oct. 3, 2015) (providing that in 2000, 334 awards were rendered, and 1,398 parties from 120 different states were involved with tribunals taking place at the ICC Court, while in 2014, 459 awards rendered, and the involvement of 2,222 parties from 140 states).
for Arbitration has increased to 791 in little more than a
decade. These numbers show that businesses prefer arbitration
over traditional domestic court litigation for cross border
disputes, especially when considering the number of arbitration
proceedings executed beyond the ICC. In fact, 52% of
businesses prefer ICA as opposed to a traditional court
lawsuit. A noticeable cognizance of the benefits of
arbitration has emerged. Most corporations agree that
arbitration is “well suited” to the resolution of disputes.

A. Is Finality Really a Key Advantage? The Deference Apparatus

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18 See id.

19 See PwC, International Arbitration Survey 2013: Corporate
Choices in International Arbitration (last visited Oct. 3, 2015), http://www.pwc.com/arbitrationstudy (providing that ad
hoc arbitration invariably involves parties establishing their
own procedural rules governing the execution of the tribunal).

20 See id. (noting that 56% of businesses in the energy sector,
68% in construction, and 23% in financial services prefer ICA
over traditional litigation).

21 See id. (pointing out that although arbitration is least
favored in the financial services sector, its benefits there are
increasingly recognized in recent years).

22 See id.
An award intended to be enforceable globally intrinsically creates a tension between the notion of finality, national sovereignty, and adherence to the process of ICA. In comparison with traditional national court litigation, ICA theoretically provides finality in the process of rendering an award.\textsuperscript{23} This directly contradicts the national court process. A key disadvantage of traditional litigation is that judgments are always subject to a number of opportunities for appeal, a process that can drag on for years.\textsuperscript{24} This drawback becomes more potent when a national appellate court focuses on doctrines of law that it wants to articulate by way of an overarching mechanism compatible with its own case precedent.\textsuperscript{25}

\textsuperscript{23} See generally Maurice Kenton et al., The International Comparative Legal Guide to: International Arbitration 2015 22 (2015), http://www.klgates.com/files/Publication/5a9db022-927b-40b2-84a0-0143571fcb47/Presentation/PublicationAttachment/44421d91-ffde-4d47-89db-58224c443661/IA15_Chapter%2062_USA.pdf.

\textsuperscript{24} See id. (explaining that finality means that a judgment rendered by an international tribunal cannot be appealed except in an extremely limited set of circumstances).

\textsuperscript{25} See id. (providing that, in doing so, the appellate court emphasizes a wider legal landscape of its choice and inevitably
diverges from the just decision necessitated by the impasse faced by the parties and instead issues a verdict congruent with the court’s own elucidation of the law itself.\textsuperscript{26}

Through ICA, parties largely circumvent national courts, yet the importance of the relationship between these courts and international arbitral tribunals cannot be escaped. Arbitration simply cannot be fully divorced from national courts.\textsuperscript{27} Many of the procedural aspects of a national court lawsuit are superimposed onto the arbitral process.\textsuperscript{28} Often, the losing party will not have sufficient assets in the jurisdiction where decides the case at hand without reference to the case’s particular circumstances and facts).

\textsuperscript{26} See id. (pointing out that the intent of the element of finality in ICA is to circumvent this delay and diversion towards scrutiny of legal principle created by the opportunity for appellate review).

\textsuperscript{27} See Susan Choi, Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions, 28 \textit{N.Y.U. J. Int’l L. \\ & Pol.} 175, 175 (1997).

\textsuperscript{28} See id. (providing examples such as the parties’ voluntary compliance with an award, where the losing party is responsible for paying the entirety of the award, although this is not always the case as with traditional litigation).
the award was rendered to satisfy the judgment, necessitating recognition and enforcement elsewhere.\textsuperscript{29} If the unsuccessful party fails to comply with the award voluntarily, the successful party will need to find a way to compel compliance.\textsuperscript{30} However, the national court’s deference to the arbitral tribunal’s decision can be an obstacle to the recognition and enforcement of an award.\textsuperscript{31}

In the United States (US), the degree of deference that federal courts should bestow upon international tribunals is an issue that has troubled judges and judicial panels for quite some time.\textsuperscript{32} As Supreme Court Justice O’Connor explained:

\textsuperscript{29} Maurer, supra note 10, at 2.

\textsuperscript{30} See id. (pointing out that a common way to do this is to seek the recognition and enforcement of a foreign award in a state where the unsuccessful party is thought to have assets).

\textsuperscript{31} See Roger P. Alford, Federal Courts, International Tribunals, and the Continuum of Deference, 43 Va. J. Int’l L. 675, 675 (2003); see also Maurer, supra note 10, at 3 (explaining that although arbitrators do decide the substantive merits of the dispute at hand and render an award, they do not possess the power to make their awards enforceable abroad).

\textsuperscript{32} See Alford, supra note 31, at 676 (observing that courts in the US reflect a limited understanding of the role of
[A]s . . . international tribunals gain strength both in numbers and in authority, their relationship with the domestic courts of member nations will be of critical importance . . . our courts will have to interpret specific provisions of the different treaties and authorizing statutes to determine what effect to give to the judgment of various international tribunals.\(^{33}\)

The minority of cases in which the losing party does not voluntarily comply with the award is a major setback and must be addressed as businesses continue to rely on the finality of ICA decisions as a key factor in the successful resolution of their disputes.\(^ {34}\) While most arbitration-friendly national courts will emphasize their willingness not to refuse recognition and enforcement of an award, this is not the case in less

\(^{33}\) See id. at 677 (pointing out that the sheer quantity of international arbitral tribunals now taking place only aggravates this problem of deference).

\(^{34}\) See Efrén C. Olivares, Recognition and Enforcement of Arbitration & Mediation Review, 4(3) World Arbitration & Mediation Review 185 (2010) (reporting that a considerable majority of awards are accepted and voluntarily complied with by the losing party without the need to start an enforcement procedure).
arbitration-friendly jurisdictions. In the latter case, the scope by which an award can be unenforced may be much wider. This problem exists because international law will not necessarily force a national court to recognize and enforce a foreign arbitral award. These factors exacerbate the problem of deference in the relationship between national courts and international arbitral tribunals. It is imperative that a proper balance is found between finality of awards and the integrity of the arbitral process, a task incumbent on national courts to undertake.

35 See id. (providing an example of a major violation of procedure as the denial of a party’s due process rights).

36 See id.

37 See Maurer, supra note 10, at 3 (observing that international law does not espouse any specifics for prohibiting such a national court from discriminating against foreign arbitral awards); see also, President Lyndon B. Johnson, Message from the President of the United States transmitting the New York Convention to the Senate (Apr. 24, 1968) (providing that the United States has concluded commercial treaties containing provisions regarding the enforcement of arbitral awards with Colombia, the Republic of China, Ireland, Japan, Nicaragua, and many other states).
B. What is the Process for having an Award Recognized and Enforced Elsewhere?

The chief mechanism for having an arbitral award recognized and enforced by the national courts of a foreign jurisdiction is the international convention known as the United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards (New York Convention), signed in New York City in 1958, to which nearly every state in the world is a signatory. According to UNCITRAL, the objective of the New York Convention is to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.  


39 See id. (pointing out that non-domestic refers to awards that, are treated as “foreign” due to some foreign element in the proceedings, such as the application of another’s state’s procedural law); see also id. (observing that UNCITRAL further
The New York Convention obliges parties to ensure these awards are recognized and generally capable of enforcement in the parties’ respective jurisdictions. The New York Convention is a bold attempt to liberate ICA from the fulcrum of a national legal system.

The New York Convention “provides a carefully structured framework for the review and enforcement of international arbitral awards.” The winning party seeking to have the award enforced must do so by presenting a copy of the award to the

states that the New York Convention’s principal aim is the nondiscrimination of foreign arbitral awards).

See id.

Edward Okeke, Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondoggle?, 10 N.Y. Int’l L. Rev. 29, 36 (1997) (providing that the New York Convention so liberates by limiting the grounds upon which a party can seek to have the recognition and enforcement of an award refused).

See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287-88 (5th Cir. 2004) (providing that the New York Convention requires that a national court enforce a foreign award unless it finds that one of the exceptions for refusal of enforcement spelled out in the New York Convention have been satisfied).
national court.\textsuperscript{43} Article V of the New York Convention defines these grounds, which were narrowly drafted, creating only a few specific avenues for procedural challenges to arbitral awards.\textsuperscript{44} This suggests that parties bound to an arbitration agreement will remain bound to that agreement without evidence of some error in the arbitral process itself that would cast considerable doubt on the equitable nature of the award.\textsuperscript{45}

Accordingly, the party against whom the award was invoked may seek refusal of enforcement in a national court based on several exceptions including, among others, the parties incapacitation or the invalidity of the agreement under the law of the state where it was rendered.\textsuperscript{46} Additionally, enforcement

\textsuperscript{43} See id. (providing that the defendant party bears the burden of proof in showing that one of the grounds for refusal of enforcement have been met).


\textsuperscript{45} See id.

\textsuperscript{46} See Richard Garnett, International Arbitration Law: Progress Towards Harmonisation, 3 Melb. J. Int’l L. 400, 404 (2002) (outlining other exceptions such as the award dealing with a difference not within or beyond the terms of the arbitration
may be refused if the national court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of the country or the recognition or enforcement of the award would be contrary to public policy.  

C. The Problem – The Portability of Awards Under the New York Convention via Article V

“International arbitration can provide an effective alternative dispute resolution if foreign arbitral awards will be enforced abroad” – Dr. Anton Maurer

Perhaps the most challenging problem experienced by parties in the national court-international tribunal deference apparatus is the variety of interpretations taken by national courts with regard to the public policy exception under Article V(2)(b) of the New York Convention. This particular exception, while

clause or the tribunal not being composed in accordance with the agreement of the parties).  

See id.

ostensibly simple on its face, is the source of most of the discussion in the ICA community surrounding the problems a party could potentially face. The question is whether the public policy exception builds upon the strengths that make ICA so attractive, or whether it only exploits the pre-existing weaknesses that make businesses considering the submission of disputes to ICA weary of such a decision. Not all jurisdictions approach Article V(2)(b) in a manner that is most favorable to the objectives of efficiency and finality inherent in the creation of the institution of ICA. An understanding of which jurisdictions adhere to the intent of the drafters in practice would be invaluable to any company and its advisors in its

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supra note 23, at 22 (providing useful information for parties seeking to have their arbitral tribunals take place in the US, as well as attitudes towards ICA in both US federal and state courts).

49 Maurer, supra note 10, at xi.

50 See id. (discussing that the drafting history of this particular exception shows that the signatories of the New York Convention intended that it be interpreted and applied narrowly).
effort to draft an effective arbitration clause.\textsuperscript{51} A measure of the ability of an arbitral award to be enforced globally across all jurisdictions can be described as the concept of portability.

The ambiguous wording chosen by the drafters of Article V(2)(b) presents a problem.\textsuperscript{52} This provision states that a competent authority "may" refuse recognition and enforcement of an award.\textsuperscript{53} Merely from the use of the word "may," we see that a

\textsuperscript{51} See id. (emphasizing that this would ensure that any foreign arbitral awards issued in favor of the company are enforced abroad).

\textsuperscript{52} See generally Hebei Import and Export Corp. v. Polytek Engineering Co., [1999] 2 H.K.C.F.A.R. 205 (C.F.A.) (stating that "when a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it").

\textsuperscript{53} Convention, supra note 38.
national court is not required to refuse to recognize and enforce an award, even if it does actually violate the public policy of its government.\textsuperscript{54} Additionally, the phrase “public policy” is innately subject to the vagaries of national courts’ political postures. This raises the question of scope with regard to what a national court will consider as “public policy” grounds sufficient to refuse the recognition and enforcement of an award. Article V(2)(b) alone essentially creates a right by which every national court is provided the opportunity to exercise ultimate control over arbitral awards and the arbitral process generally.\textsuperscript{55}

A number of arbitration-friendly states have attempted to further define “public policy” and narrow its application by applying a test of “international public policy.”\textsuperscript{56}

\textsuperscript{54} See generally, Elisabeth M. Senger-Weiß, Enforcing Foreign Arbitral Awards, 53 Disp. Resol. J. 1 (1998) (providing a discussion on how neither the New York Convention nor any other international treaty imposes an obligation on a national court to recognize and enforce a foreign arbitral award).

\textsuperscript{55} Maurer, supra note 10, at 3 (pointing out that this gives courts an inequitable amount of power and influence over ICA).

\textsuperscript{56} See generally New Delhi Conference, International Law Association (2002) (emphasizing one reason for the adoption of
International public policy is not “transnational public policy,” but should instead be understood as private international law.\(^57\) This is the area of a state’s public policy, which, if violated, has the potential to prevent a party from invoking a foreign law, foreign judgment, or foreign award.\(^58\)

Substantive fundamental principles, including good faith and the prohibition of abuse of rights, are examples of this test being that international public policy is generally considered to be narrower than domestic public policy).

\(^{57}\) See id. (clarifying that transnational public policy is public policy common to several states).

\(^{58}\) See id.; see generally Howard M. Holtzmann et al., A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, 919 (1989) (providing that although the concept of “international public policy” was considered by the drafters of the UNCITRAL Model Law, they concluded that the underlying idea was not generally accepted and that the term lacked precision); see also New Delhi Conference, supra note 57 (dividing international public policy into three different categories, including substantive fundamental principles, lois de police, and international obligations).
international public policy. Other examples include *pacta sunt servanda*, the prohibitions against uncompensated expropriation and discrimination. Some ICA commentators have suggested that national courts should apply “transnational” or “truly international” public policy. National courts should take into account the practice of other courts, the writings of commentators, and other sources in determining what is to be considered fundamental by the international community.

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59 See id.

60 See id.; see also id. (providing that the prohibition of activities prohibited under *contra bonos mores* include, among others, piracy, terrorism, genocide, slavery, smuggling, drug trafficking, and pedophilia); see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, (providing that examples of what a national court should consider as fundamental principles of good faith, the prohibition of the abuse of rights, *lois de police*, and international obligations can be found in international conventions).

61 New Delhi Conference, supra note 57 (suggesting that this might include principles of natural justice, *jus cogens*, and general principles of morality accepted by “civilized nations”).

62 See id.
National courts do not apply the international public policy test universally.\(^{63}\) This is because the definition of international public policy varies wildly across jurisdictions. US Judge Joseph Smith is often quoted in Parsons & Whittemore v. RAKTA, where he said enforcement of a foreign award should be denied “only where [it] would violate the forum state’s most basic notions of morality and justice.”\(^{64}\) Even with the advent of the international public policy test, some national courts still attempt to apply principles fundamental to the law governing the contract at the heart of the parties’ dispute, the law of the place of the performance of the contract, or even the law of the arbitral seat.\(^{65}\)

The ambiguous nature of the phrase “public policy” and the word “may” has created a mechanism that has allowed for their

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\(^{63}\) See id. (finding that developing states, in particular, take the perspective that their respective national courts should be protected from “perverse and/or prejudiced awards” and attempts to restrict the scope of public policy”).

\(^{64}\) Parsons & Whittemore Overseas Co. v. Societe Generale de L’industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

\(^{65}\) New Delhi Conference, supra note 56 (emphasizing that these areas of law should, in principle, be irrelevant to a national court in a recognition and enforcement proceeding).
open interpretation by national courts. The international public policy test has only exacerbated this problem, contributing to the dubious nature of portability. Recent changes in India and other economically strong, developing states, may indicate more trouble with this problem because “some states seem to expand the definition of public policy far beyond general international practice.”  

Consider, for example, a hypothetical situation in which Article V(2)(b)’s public policy exception could be problematic for the winning party. Imagine that you are counsel representing a German luxury auto manufacturer (Party A). Party A requires certain electrical components for its new model of luxury sedans to be released on the consumer market the following year. An Indian electrical producer (Party B) manufactures complex microchips used in airbag mechanisms, unique copper wiring commonly used in on-board computers for control of the automobile’s air conditioning system, and motherboards utilized

66 Maurer, supra note 10, at 4.

for monitoring tire pressure. Party A is respected globally for the quality of its automobiles, as well as the reliable, always-punctual release of its new lineup each year. Party A enters into three separate contracts with Party B, all of which are to be completed this year, and each of which deal with the components manufactured by Party B. The uninterrupted fulfillment of these contracts is essential to Party A’s timely release early next year. However, during Party B’s production of the components required for each of the contracts, its own computer systems are hacked, and its manufacture of the components is thus suspended indefinitely.

Accordingly, early next year, Party A requests arbitration at the ICC in Paris due to Party B’s failure to fulfill its contractual obligations. French law governs all of the contracts, and the tribunal renders an award in favor of Party A. Party B, however, only partially pays what is owed to Party A per the award, so Party A seeks to have the French-issued award enforced in India, where Party B is known to have considerable assets. Party B successfully articulates before an Indian national court that the award should not be enforced because it would violate Indian public policy under Article V(2)(b) of the New York Convention. Party B was aware of recent policy developments in India that allowed for a wide interpretation of the public policy exception.
This hypothetical provides just one example of how a company can be left empty-handed due to the erratic manner by which national courts can interpret Article V(2)(b). As made clear from this hypothetical situation, however, the public policy exception undercuts confidence in ICA as a successful method of ADR, and relegates the supposed portability and efficacy propagated by the New York Convention. In the international business context, complex disagreements can cause corporate headaches that need efficient, reliable solutions.

The public policy exception under Article V(2)(b) has the power

68 See generally id. (emphasizing that businesses will only assent to dispute resolution by ICA if they are certain that arbitration is preferable to litigation, and that any arbitral award issued in their favor will be enforceable where their business partners have assets).


70 See id. at 587 (observing that businesses carrying out IBTs see an element of unpredictability with international litigation, which ICA has for some time now successfully mitigated as an alternative).
to undermine ICA’s ability to create these solutions if it is not narrowly construed by national courts consistently.

Part III – The BRICs: Who Does It Best?

From the perspective of an ICA practitioner, whether general counsel for a large cross-border corporation or an arbitrator working at the ICC, knowledge of where the greatest amount of deference to the arbitral tribunal will be given is invaluable. The most efficient way for garnering this knowledge is to gain an understanding of which jurisdictions respect the notion of portability most favorably. Likewise, it is imperative to study the jurisdictions that are most relevant to international commerce and highly utilized for ICA. In the past decade, the BRIC economies: Brazil, Russia, India, and China, have shown a tremendous amount of economic growth, greatly affecting the international economy.\footnote{See The BRIC Countries: Brazil, Russia, India, China, Economy Watch (June 29, 2010), http://www.economywatch.com/international-organizations/bric.html (noting that these four states alone account for nearly three billion people, which is nearly half of the world’s population).} These four states together
account for an astounding 40% of global GDP. In fact, Goldman Sachs, which first coined the BRICs acronym, forecasted that by 2050, the BRICs will exceed the six major industrialized economies in terms of GDP. With regard to arbitration, the BRICs have recently emerged as highly-concentrated, relevant centers of ICA, even though as recently as twenty years ago, none possessed effective ICA national laws, national arbitration institutions, or international arbitration bars.

72 See Ben Chu, The World’s Fastest Growing Economies Attempt to Complete the BRICS Wall, The Independent (Mar. 29, 2012), http://www.independent.co.uk/news/business/news/the-worlds-fastest-growing-economies-attempt-to-complete-the-brics-wall-7595045.html (observing that these states have even created a BRIC bank, which will function similarly to the International Monetary Fund (IMF), allowing the states to pool their resources for infrastructure improvements).


74 See Hanessian, supra note 73, at 246; see generally, David Wilkins et al., The Rise of the Corporate Legal Elite in the
Unfortunately, a significant amount of the minority of foreign arbitral awards that are not enforced occurs in the BRICs.\textsuperscript{75} For these reasons, a comparative analysis of the approaches taken by the national courts of these four jurisdictions with regard to portability would be invaluable.

A. Brazil

In 2002, Brazil became a state party to the New York Convention.\textsuperscript{76} Brazilian courts have since adopted a pro-arbitration approach, and there has been an “explosion” of arbitration institutions.\textsuperscript{77} Brazilian parties are involved in


https://www.law.berkeley.edu/files/csls/WilkinsPaper11May.pdf

(providing background information on how the BRICs have embraced and developed international arbitration, with some of them strategically positioning themselves as hubs for ICA).

\textsuperscript{75} See Maurer, supra note 10, at 195.

\textsuperscript{76} See Hanessian, supra note 73, at 248 (observing that this was preceded by Brazil’s Supreme Court’s declaration in 2001 that its national arbitration law is constitutional).

\textsuperscript{77} See id. (noting that it is estimated that there are now more than 100 of these bodies in Brazil, with approximately ten of them actively utilized and relevant).
55% of ICC arbitrations in Latin America.\textsuperscript{78} Since 2004, the body with the power to recognize and enforce a foreign arbitral award switched from the Brazilian Supreme Court to the Superior Court of Justice (SCJ), speeding up this procedure in Brazil.\textsuperscript{79}

It is important to consider how Brazil defines public policy. In \textit{Thales Geosolutions, Inc. v. Fonseca AlmeidaRepresentações e Comércio Ltda.}, a 2005 case from the SCJ, it is important to consider how Brazil defines public policy. In \textit{Thales Geosolutions, Inc. v. Fonseca AlmeidaRepresentações e Comércio Ltda.}, a 2005 case from the SCJ, statistical report, ICC International Court of Arbitration Bulletin, Vol. 21, n. 1, 2010 (observing that only the US, Germany, and France have more nationals than Brazil involved in ICC arbitrations).\textsuperscript{80}

\textsuperscript{78} \textit{Statistical Report}, ICC International Court of Arbitration Bulletin, Vol. 21, n. 1, 2010 (observing that only the US, Germany, and France have more nationals than Brazil involved in ICC arbitrations).

\textsuperscript{79} See Joaquim T. de Paiva Muniz, \textit{Current Framework of International Arbitration}, The Fordham Papers 2011 (July 25, 2012), at 264 (estimating that having an award enforced in Brazil today will take around seventeen months); see also Adler Martins, \textit{International Contracts within the BRIC}, http://de.slideshare.net/Adlermartins/international-contracts-within-the-bric (last visited Oct. 3, 2015) (explaining that in Brazil, it is important to note that foreign arbitral awards need to first be approved by the SCJ; thus, if a company knows that its contracting partner has assets in Brazil and wants to have an award easily enforced there, it can avoid the SCJ process entirely by having the award rendered in Brazil).
Thales, the US party, entered into a contract with Fonseca, a Brazilian company, involving some work in the Amazon and Madeira Rivers in Brazil.\(^{80}\) After a dispute, a tribunal in Houston, Texas, rendered an award in favor of Thales, and Thales later sought enforcement before the SCJ.\(^{81}\) Fonseca’s principal argument was that under Article 1092 of the Brazilian Civil Code, enforcing the award would violate Brazilian public policy as a means of satisfying Article V(2)(b) of the New York Convention.\(^{82}\) The SCJ dismissed Fonseca’s argument, arguing that the tribunal’s decision to ignore Article 1092 of the civil code did not amount to a violation of public policy justifying refusal to enforce under the public policy exception.\(^{83}\)

\(^{80}\) Baker & McKenzie, *International Arbitration Yearbook: 2011-2012* 272 (2007); see also Mauricio Gomm-Santos, *Latest Developments in Arbitration Country Focus: Brazil*, Mgalhas International (Jan. 21, 2009) (explaining that the contract resulted in a dispute, as Fonseca argued that Thales did not provide essential technical data, which caused it to lose a state permit and made it incapable of fulfilling its end of the contract’s requirements).

\(^{81}\) See Yearbook, *supra* note 80, at 89.

\(^{82}\) See *id*.

\(^{83}\) See *id*. 

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In Thales, the court struggled with clarifying the meaning of public policy, but pointed out specific bodies of law that it would consider as grounds for public policy violation. The court’s list was rather expansive in scope, but several of the bodies included do not apply to ICA, and Brazilian courts have employed a particularly narrow interpretation of the public policy exception even when a foreign award would potentially conflict with a Brazilian domestic law.

Nonetheless, determination of whether an award breaches public policy in Brazil is said to be determined on a case-by-case basis. For example, even though gambling is illegal in Brazil, a foreign award has previously been granted that

See Maurer, supra note 10, at 199 (providing examples of bodies of law the Thales court did consider including constitutional, administrative, criminal, and tax law, as well as lois de police, laws of economic organization, laws concerning the organization of the family, and several other categories).

See id.

Joaquim T. de Paiva Muniz, Arbitration Law of Brazil: Practice and Procedure, 184 (2006) (providing that foreign awards are usually only denied if they disregard a “high principle of the Brazilian legal system,” such as a constitutional provision).
collected gambling debts from a Brazilian citizen.\textsuperscript{87} The court there held that for reasons of international comity, respect for the legal system of the foreign party (there, the US) should prevail.\textsuperscript{88}

Two areas that are uniquely sensitive procedural public policy issues in Brazil are that of \textit{carta rogatória}, or letter of request, and \textit{ratio decidendi}, or the principle of motivation. Brazilian national courts will consider a violation of \textit{carta rogatória} as a means for refusal of enforcement under Article V(2)(b).\textsuperscript{89} In fact, from 2005 to 2008, the SCJ decided upon the homologation, or recognition of a foreign arbitral award, in 17 cases and refusal was only granted in just four cases, one of which under Article V(2)(b).\textsuperscript{90} The latter, \textit{ratio decidendi}, is

\textsuperscript{87} See id.

\textsuperscript{88} See Yearbook, supra note 80, at 89; see also Joaquim, supra note 86, at 185 (explaining that \textit{carta rogatória} was designed to ensure that parties that are residents in Brazil were ensured due process of law and given the opportunity to a full defense and a proper response in the preceding arbitral tribunal).

\textsuperscript{89} See id.

\textsuperscript{90} See Maurer, supra note 10, at 202 (emphasizing that corporations seeking to do business with a party that is a resident of Brazil, and thus wanting to have awards enforceable
an integral component of both the Brazilian Constitution and the Brazilian Arbitration Act.\textsuperscript{91} Essentially, foreign arbitral awards must state the reason for which they were granted in a manner that reduces the probability of bias or arbitrary decisions.\textsuperscript{92} However, refusal to enforce via the public policy exception really is best understood as a case-by-case process. \textit{L’Aiglon S/A v. Textil Uniao S/A} provides the most salient example of this, where the tribunal did not include its

\begin{quote}
in Brazil, should always ensure that their arbitration agreements and/or applicable procedural rules include a mechanism for delivery of notice that will be sufficient under \textit{carta rogatória}).

\textsuperscript{91} See International Arbitration Act, at 87 (providing that in Brazil, \textit{ratio decidendi} is sure to contravene a “high principle,” and it simply involves the reasoning for the arbitral award).

\textsuperscript{92} See id.; see also Lei No. 9.307, de 23 de Setembro de 1996, \textit{Lex Mercatoria}, Setembro 1996 (Braz.); see also, STF, No. 2521-3, \textit{Diário da Justiça} [D.J.], 07.11.1980 (Braz.) (providing an example of a case where recognition of a foreign arbitral award was refused by the SCJ on the basis of no reasoning).
reasoning behind its decision.\textsuperscript{93} However, the SCJ held that because the arbitral rules of procedure agreed to by the parties stated that reasoning was not required, there was no violation of public policy under ratio decidendi.\textsuperscript{94}

B. Russia

The Russian Federation has quite a different story than that of Brazil. Out of all of the BRICs, it probably has the most elusive, indefinable policy of enforcing and/or refusing to recognize foreign arbitral awards under Article V(2)(b), making portability in Russian national courts quite murky and unpredictable. In 1993, Russia implemented a federal law specifically designed for ICA.\textsuperscript{95} Parties carrying out a contract with a Russian counterpart will not be able to bring a dispute

\textsuperscript{93} See International Arbitration Act, supra note 91, at 87 (observing that in this case, the respondent party opposed an award issued in London by the Liverpool Cotton Association).

\textsuperscript{94} See id.

\textsuperscript{95} See Martins, supra note 79 (providing that this law was inspired by UNCITRAL Model Law and UNCITRAL Arbitration Rules); see also International Arbitration Act, supra note 91 (explaining that Article 1, § 2 of this federal law is explicit in its listing of the types of disputes that can be subjected to ICA in Russia).
to ICA if it involves, among others, real estate located in Russia or registration of trademarks and patents in Russia.\textsuperscript{96}

This federal law contains its own provision regarding refusal of enforcement based on Russian public policy, namely that of Article 36, Paragraph 2.\textsuperscript{97} This is in addition to that of Article V(2)(B) in the New York Convention.\textsuperscript{98} This provision states that the relevant national court can refuse to recognize and enforce an award if it “would be contrary to the public policy of the Russian Federation.”\textsuperscript{99} Federal commercial courts

\textsuperscript{96} See International Arbitration Act, supra note 91 (pointing out several other categories of disputes not attachable in an ICA proceeding involving Russian assets).

\textsuperscript{97} See id.

\textsuperscript{98} See id.

called arbitrazh courts handle recognition and enforcement of all ICA awards in Russia.\textsuperscript{100} According to recent court statistics, in over 80% of the awards that were not enforced, public policy was the most common ground for doing so.\textsuperscript{101} Arbitrazh judges have attempted to define what they consider as public policy under Article V(2)(b), but considerable confusion has resulted from phrases such as “[public policy] is somewhat unshakeable, not depending on the political forces changing. Public policy is . . . mostly the fundamental principles of state structure and public life.”\textsuperscript{102}

\textsuperscript{100} See Nikiforov, supra note 99, at 789 (explaining that recognition and enforcement must be sought in an arbitrazh court within three years from the date the award was rendered).


\textsuperscript{102} B. Korabelnikov, Ogorvorka o Publichnom Poryadke v. Noveishei Praktike Rossiiskikh I Zarubezh Sudov, Mezhdunarodny Kommerchesky Arbitrazh 19, 2006, No. 1(9) (Russ.).
One case in particular, United World Ltd. v. Krasny Yakor (Red Ancor), has become the poster child in Russia for non-enforcement based on public policy grounds.\textsuperscript{103} In fact, the case “has been mentioned so many times among lawyers and in the mass media that it has virtually become a joke.”\textsuperscript{104} In the Red Ancor case, the arbitrazh court held that the enforcement of the tribunal’s award would lead to Red Ancor’s bankruptcy and thereby cause serious damage to the regional Russian economy and the national economy as a whole.\textsuperscript{105} In July 2002, Russia implemented the Arbitrazh Court Procedure Code (CPC), which essentially gave arbitrazh courts the power to review awards issued by an ICA tribunal.\textsuperscript{106} However, some arbitrazh court judges have shown resentment towards arbitration and appeared to

\textsuperscript{103} See Martins, supra note 79.
\textsuperscript{104} Maxim Kulkov, Enforcement of International Arbitral Awards in Russia, ABA Teleconference Handout (Nov 18, 2009) at 2.
\textsuperscript{105} See id. (emphasizing that the value of the award was less than 40,000 USD).
\textsuperscript{106} Hiroshi Oda, Enforcement of International Commercial Arbitral Awards in Russia, VDRW Mitteilungen 28-29 (2006), at 35.
have been skeptical of non-governmental international arbitration institutions and party autonomy.\textsuperscript{107} 

Article 239(3) of the CPC is a source of much confusion regarding what arbitrazh courts consider as public policy.\textsuperscript{108} This article provides that fundamental principles of Russian law constitute grounds for refusal of enforcement of an award, which corresponds to “public order,” or \textit{publichny poryadk}.\textsuperscript{109} Most telling is a quote by then president of the Supreme Arbitrazh Court, V.F. Iakovlev, who said grounds for refusal of enforcement were “practically the same for domestic and foreign tribunals” and that the aforementioned provision of the CPC is no different than Article V(2)(b) of the New York Convention.\textsuperscript{110} In 1998, the Russian Supreme Court attempted to define the public policy reservation of Article V(2)(b) as “possible only in specific cases when the application of foreign law could

\textsuperscript{107} See \textit{id.} (noting that these judges have even been said to believe that the decisions of these private institutions should not be enforced without being examined on the merits).

\textsuperscript{108} See Maurer, supra note 10, at 209.

\textsuperscript{109} See \textit{id.} (observing that Russian academics and lawyers consider fundamental principles and \textit{publichny poryadk} as one and the same).

\textsuperscript{110} See \textit{id.}
create results inadmissible from the point of the Russian legal mentality.” In 1999, the Supreme Court published a bulletin changing “legal mentality” to “legal conscience.” As is clear, Russia struggles with defining what it considers public policy capable of rejecting enforcement of an award. In 2006, however, the Supreme Arbitrazh Court published Informational Letter No. 96, in which the court attempted to clarify what exactly would be contrary to public policy. Based on Section 29, arbitrazh courts have to consider whether the consequences of the foreign arbitral award would violate Russian public policy, even if the award on its face does not.

111 See id. at 210-11 (clarifying that the Russian Supreme Court was the court with jurisdiction over ICA only until 2002).

112 Bulletin of the Supreme Court of the Russian Federation 1999, no. 3.

113 Daniel J. Rothstein, An Introduction to Enforcement in Russia of Foreign Arbitral Awards, and Barriers to Entry to American Courts, Russia/Eurasia Committee Newsletter (2009), at 4.

114 See Maurer, supra note 10, at 215 (observing that Section 29 also attempted to define Russian public policy as “based on the principles of equality of parties to civil-law relations, their good-faith behavior, and the proportionality of civil-law
Case law over the past several years has shown some consensus as to areas that arbitrazh courts consider as public policy.\textsuperscript{115} One area is social and economic interest represented by the Red Ancor case, which could include the social and economic interest of a city, a region, or all of Russia.\textsuperscript{116} This particular area of Russian public policy becomes even more salient when taking into account the physical enormity of Russia.\textsuperscript{117} In an interview of Alexander Komarov, Chairman of the ICA Court, he admitted that “it cannot be denied that some courts in a remote part of Russia may review the merits of a case or deny enforcement of an arbitral award by interpreting the public policy clause of the New York Convention too

\underline{liability to the effects of the breach of duty, taking into account fault”}.\textsuperscript{115}

\textsuperscript{115} See id. at 221-29 (providing examples of areas including social and economic interest, review of the merits, mandatory Russian rules and national property, and the misapplication of Russian law).

\textsuperscript{116} See id. at 221.

\textsuperscript{117} See id. (pointing out that rural national courts have refused to enforce awards more often than those of Moscow and St. Petersburg).
broadly.”118 In Moscow National Bank Ltd. v. MNTK Microhirurgia glaza, the court held that enforcing an award against a state-owned company would violate public policy because it would "indirectly damage national property."119 With regard to Russian law, enforcement has been refused when the defending party alleged that it was misapplied or facts were misunderstood.120 In one case in particular, the Russian legal concept of unjust enrichment was used as grounds for refusal of enforcement, when the Supreme Arbitrazh Court determined that the party seeking enforcement could recover double the amount of the award, as the damages payable to the Russian party were assessed as equivalent to the foreign party’s contribution to the joint venture.121


120 See Maurer, supra note 10, at 225.

121 Boris Karabelnikov, Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture, ICC International Court of Arbitration Bulletin, Vol. 19/No. 1 (2008), at 72
C. India

It is no secret that India has long been considered a jurisdiction that can be highly problematic when attempting to enforce a foreign arbitral award.\textsuperscript{122} Fali Nariman, a distinguished Indian constitutional jurist, even famously titled an article “Finality in India: The Impossible Dream.”\textsuperscript{123} India has gone through quite a transformation over the past couple of decades in this regard. In 1996, India adopted the Arbitration and Conciliation Act (ACA).\textsuperscript{124} This was India’s attempt at modernizing its federal arbitration regime, and the Indian

\begin{footnotesize}
(providing the background for this case, as well as that of Pressindustria v. Tobolsk Petrochemical Combine, another case from the Supreme Arbitrazh Court in 2003, where enforcement was also refused based on similar facts).


\textsuperscript{123} See generally Fali S. Nariman, \textit{Finality in India: The Impossible Dream}, 10(4) \textit{Arb. Int’l} 373 (1994) (noting that Mr. Nariman is also a senior advocate to the Indian Supreme Court).

\textsuperscript{124} See Martins, \textit{supra} note 79 (pointing out that the ACA replaced an earlier federal arbitration law implemented in 1940).
\end{footnotesize}
Supreme Court (ISC) in *Konkan Railway Corp. v. Mehul Construction Co.* recognized that its intent was to “attract the confidence of [the] International Mercantile community and the growing volume of India’s trade and commercial relationship with the rest of the world . . . .” 125 Yet India’s stance toward ICA is quite unique. Surprisingly, India only recognizes foreign arbitral awards by states that are “notified” in the central government’s Official Gazette, for a total of only 47 states. 126 Attempting to define what constitutes public policy grounds for refusal of enforcement in India is a task no less confounding. Section 48(2) of the ACA stipulates the Indian Parliament’s position: enforcement may be refused if “the enforcement of the award would be contrary to the public policy of India.” 127

125 *Id.*

126 *See* Maurer, *supra* note 10, at 243-44 (emphasizing that a majority of New York Convention signatories are left out, including, most notably, Brazil, China, Hong Kong, Argentina, Canada, and South Africa).

127 *See* The Arbitration and Conciliation Act, http://www.ficci-arbitration.com/htm/acts.pdf (last visited Oct. 18, 2015) (noting that the drafters knew this provision would be interpreted ambiguously, as they included an explanation, which states “an award is in conflict with the public policy of India
Chengalvaraya Naidu v. Jagannath, the ISC explained the ACA’s use of the phrase “induced by fraud” as public policy grounds to mean that the arbitral tribunal was led to give the award “by the influence of deception . . . to secure the award to the detriment of the other party.” The ACA also uses the term corruption, and India has defined this area of public policy violations very broadly.

Based on this information, it may appear that there are only two issues that India considers sufficient for refusal under public policy; case law, however, tells a different story. In Central Inland Water Transport Co. v. Brojo Nath Ganguly, the ISC stated “[public policy] connotes some matter if the making of the award was induced or affected by fraud or corruption”).


129 Id. at 132 (explaining that, essentially, some improper relationship must exist between the arbitrator, a party, and/or legal counsel).

130 See generally Krishna Sarma, Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution?, CDDRL Working Papers, Number 103 (Oct. 2009).
which concerns the public good and the public interest.”

Perhaps the most notorious case in Indian law that has expanded the scope of Indian public policy most widely is Indian Public Sector Undertaking Oil and Natural Gas Corp. (ONGC) v. Saw Pipes, Ltd. There, the ISC developed what became known as the “patent illegality” test, with which it created four categories of public policy sufficient for denying an award under Article V(2)(b). These categories offer no help, as they are infinitely amorphous, and have allowed awards to be challenged “in court taking shelter of the broad observations made in [the]

131 Central Inland Water Transport Corp. v. Brojo Nath Ganguly, 1896 SCR (2) 278, 284 (noting that the ISC also stated, “[public policy] . . . has varied from time to time . . . [and] must be . . . capable . . . of expansion or modification”).

132 See Gearing, supra note 122.

133 Dinesh Singh, Enforcement of Foreign Arbitral Awards: Need for Reform, http://legallyvalid.in/enforcement-of-foreign-arbitral-awards-need-for-reform/ (last visited Oct. 18, 2015) (noting that these categories included the award being contrary to fundamental policy of Indian law, to the interest of India, to justice or morality, or, additionally, if it is patently illegal).
Saw Pipes case.”\textsuperscript{134} It has even been argued that any award that violates a domestic law or a decision by the Indian Supreme Court, even without the “patent illegality” test, could potentially be grounds for refusal of enforcement under Indian public policy.\textsuperscript{135}

The Indian Supreme Court went on to create even more confusion as to what constitutes public policy with its decision in Venture Global Enginerring, LLC v. Satyam Computer Services, Ltd., where it held that Indian courts were empowered to “reopen” awards rendered in tribunals outside of India.\textsuperscript{136} With some light emerging at the end of the tunnel, however, the Indian Supreme Court did later overturn Venture Global, and seems keen to direct the development of Indian law towards a pro-arbitration path.\textsuperscript{137} According to scholar Fari Mariman,

\textsuperscript{134} Ajit Shah, Need to Bring Reforms in Arbitration Law, Indian Council of Arbitration Quarterly (2008), at 3.
\textsuperscript{137} See id.; see generally Sumeet Kachwaha, Enforcement of Arbitraiton Awards in India, 4(1) Asian Int’l Arb. J. 64 (2008).
Indian courts cannot continue to hold that they have the last word on fact and on law; if they do, “the 1996 [ACA] might as well be scrapped . . . [and] the Court [will have] altered the entire road-map of arbitration law and put the clock back to where we started under the old 1940 Act.”

D. China

The importance of China on the global ICA stage cannot be understated. China’s chief arbitral institution, the China International Economic and Trade Arbitration Commission (CIETAC) heard only 37 disputes in 1985; in 1995, it handled approximately 1,000. The 9th Standing Committee Session of the 8th National People’s Congress implemented China’s national

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139 Kelley B. Snyder, Denial of Enforcement of Chinese Arbitral Awards on Public Policy Grounds: The View from Hong Kong, 42 Va. J. Int’l Arb. 339, 340 (2001) (noting that CIETAC is now the largest international arbitration tribunal in the world); see generally Jose Leyda, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong, and Taiwan, 6(2) Chinese J. Int’l L. 345 (2007) (providing an analysis of public policy decisions between mainland China, Hong Kong, and Taiwan).
arbitration law in 1994.\textsuperscript{140} It represents a major effort on the part of the national government to unify and reform the fragmented arbitration laws in China, making China a jurisdiction more favorable to international investors.\textsuperscript{141} However, the experience of arbitration practitioners has indicated that it is not easy to have a foreign arbitral award enforced in China because enforcement there is regarded as unpredictable, as there are no official statistics on the number of foreign arbitral awards that are enforced in China.\textsuperscript{142} In comparison to other jurisdictions, China is generally seen as pro-arbitration with regard to enforcement via the public policy exception of the New York Convention.\textsuperscript{143} It is the policy of the


\textsuperscript{141} See id.

\textsuperscript{142} Ariel Ye, Enforcement of Foreign Arbitral Awards and Foreign Judgments in China, 74 \textit{Def. Counsel J.} 248, 250-51 (2007).

\textsuperscript{143} See id. at 100-101 (noting that Hong Kong and Taiwan also hold a pro-arbitration reputation in the eyes of international investors with regard to the public policy exception).
Supreme People’s Court (SPC) to uphold foreign arbitral awards.\textsuperscript{144}

Since China became a signatory to the New York Convention in 1987, the SPC has followed the intent of the Convention’s drafters and narrowly interpreted the public policy exception.\textsuperscript{145}

On several occasions, Chinese courts have held that a “mere breach of mandatory provisions of Chinese law or regulations” would not satisfy refusal to enforce under Chinese public policy.\textsuperscript{146}

However, as we have seen with both Russia and India, there is a lack of consistency across national courts in China with regard to enforcement via public policy because of the sheer

\textsuperscript{144} See id. (clarifying, however, that lower and midlevel courts often refuse enforcement based on public policy).


\textsuperscript{146} See id. (observing that the SPC holds the view that “the issue of public policy shall only be restricted to the circumstances where recognizing the arbitral award will violate [the] Chinese basic legal system and damage Chinese basic social interest).
physical size of the Chinese mainland. 147 If both the published and unpublished records of enforcement in China are examined, a mixed picture emerges – rural cities, not subject to international scrutiny, are often the source of this amalgam of court decisions. 148 Local protectionism often results in biased decisions. 149 Most unsettling is the treatment of awards rendered in Hong Kong or Taiwan. 150 This is because the Hong Kong Arrangement, implemented by Mainland China in 2000, provides that “a court of the Mainland may refuse to enforce the [Hong Kong] award if it considers that the enforcement of such award in the Mainland is contrary to the social and public


148 See id. (emphasizing that this is important because international investors often wish to initiate commercial contracts with rural Chinese businesses, yet rural judges often lack even a general knowledge of the New York Convention).

149 See id.

interests of the Mainland.” Commentators have found no reasoning behind the dichotomy created here between this phrasing and that of Article V(2)(b) of the New York Convention. “Social and public interests” is ill-defined wording and could be used by a mainland court to refuse enforcement of an award.

Several areas have been identified by Chinese case law as areas that China will at least consider as public policy grounds for refusal of enforcement. Judge Gao Xioli of the SPC explained that enforcement of an award may breach “social and public interests” when it is, among others, damaging to the sovereignty or state security of China or violative of the Four

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151 Robert Pe, Two Steps Forward, One Step . . . Sideways – Recent Developments in Arbitration in China, 25 J. Int’l Arb. 407, 411 (2008); see also Fishburne, supra note 147 (noting that Mainland China considers these as foreign awards, and has an inconsistent record of enforcement on public policy grounds in this regard).

152 See id.

153 See id. (providing an example of “social and public interests” as placing a significant Chinese employer under financial strain).
Fundamental Principles of China.\textsuperscript{154} Additionally, it is worth nothing that the SPC does not consider a breach of mandatory provisions of Chinese law as a violation of public policy sufficient for refusal of recognition of an award, although there are a few exceptions.\textsuperscript{155}

Several other areas identified by case law as potential grounds for public policy refusal include insensitivity to the “feelings of Chinese people,” unfairness or injustice, and violations of China’s judicial sovereignty.\textsuperscript{156} With regard to a violation of China’s judicial sovereignty, the SPC has employed this as grounds via the “social and public interests” of China in Hemofarm D.D. v. Jinan Yongning Pharmaceutical Co., a case

\footnotesize{\textsuperscript{154} See Maurer, supra note 10, at 334 (pointing out other examples such as a violation of the basic principles reflected in the Chinese Constitution); see also id. (noting that the Four Principles include adhering to (a) the socialist road, (b) the people’s democratic dictatorship, (c) the leadership of the Communist Party, or (d) Marxism-Leninism and Maoist thinking).}

\footnotesize{\textsuperscript{155} See Nadia Darwazeh, Recognition and Enforcement of Awards under the New York Convention, 25(6) J. Int’l Arb. 837, 846 (2008); see also Maurer, supra note 10, at 336-38.}

\footnotesize{\textsuperscript{156} See Maurer, supra note 10, at 335-43.}
from 2008. There, problems surfaced as to rental payments for leased assets, and Yongning had an award issued in its favor in the Henan Intermediate People’s Court. Hemofarm challenged the court’s jurisdiction at the ICC based on the arbitration clause in the contract signed by both parties to the joint venture. The ICC ultimately rendered an award in Hemofarm’s favor, and Hemofarm sought to have it enforced in China. The SPC, however, held that the litigation initiated by Yongning in the national court was purely domestic and could not be governed by the arbitration agreement. The SPC held that the ICC had exceeded the scope of the arbitration agreement by re-adjudicating a dispute that had already been heard before a

157 See id. at 340.

158 See id. (explaining that Hemofarm and Yongning formed a joint venture company under the name Jinan-Hemofarm Pharmaceutical Co., whose assets were frozen as a result of the tribunal’s decision).

159 See id.

160 See id. at 341 (providing that the value of the award was over eight million USD).

161 See id. at 341-42.
The award rendered in Hemofarm’s favor had thus violated China’s “judicial sovereignty.”

E. Who Does It Best?

Which of the BRICs maintains the best record of portability? Based on these analyses, the most obvious answer is Brazil. Brazil’s case record shows the greatest amount of consistency in terms of foreign arbitral awards rejected on public policy grounds via Article V(2)(b). The drafters of the New York Convention intended for Article V(2)(b) to be interpreted narrowly, yet also that it should take into account domestic interests of the particular jurisdiction. Brazil’s

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162 See id. at 342 (pointing out that the SPC held that the award rendered in Hemofarm’s favor had violated China’s “judicial sovereignty”).

163 See id.

164 See id. at 195 (observing that Brazil has shown an interest in increasing foreign investment by applying the public policy exception narrowly, which is in accordance with the New York Convention and the practice of most of the Convention’s signatories).

165 See generally Fernando Serec, Arbitration – Brazil: Overview, (Jul. 2008), at 5,
Superior Court of Justice has created a list of areas considered to be public policy, such as constitutional law, *lois de police*, and tax law.¹⁶⁶ Brazil has also shown respect to the laws of foreign jurisdictions.¹⁶⁷

Unlike Brazil, both Russia and India have struggled to define what their national courts consider as violations of public policy. Russia’s Supreme Arbitrazh Court imposed broad guidelines for refusal via public policy grounds with “equality of parties to civil law relations, their good-faith behavior, and proportionality of civil law liability.”¹⁶⁸ Russian

¹⁶⁶ See id. at 199; see also Joaquim, supra note 86, at 186.
¹⁶⁷ See id.
¹⁶⁸ See Rothstein, supra note 113, at 4 (noting that these instructions to lower courts impose infinite possibilities for substantive review of tribunal decisions inconsistent with international norms and the policy of pro-arbitration jurisdictions).
arbitrazh judges may also assert the sovereignty of their national judicial system over ICA.\textsuperscript{169}

India’s case record with regard to enforcement has similarly manifested a mixed picture. While India’s national arbitration legislation narrowly defines public policy grounds as fraud or corruption, case law indicates sundry other areas such as “patent illegality,” which has created a sense of unease among practitioners.\textsuperscript{170} The situation in China is likewise murky; while the SPC has shown an effort to reject refusal decisions of lower courts based on public policy, unease still exists due to Chinese case law.\textsuperscript{171} Most notably, the SPC has accepted a violation of sovereignty as grounds for public policy

\textsuperscript{169} See Maurer, \textit{supra} note 10, at 231 (observing that this tendency has has created a sense of unpredictability with regard to the future of enforcement in Russia).

\textsuperscript{170} See id. at 243-44 (emphasizing that India, interestingly, also does not recognize foreign arbitral awards by either Brazil or China, as these jurisdictions are not mentioned in its Official Gazette).

\textsuperscript{171} See id. at 334 (noting that there are instances where lower courts have accepted areas such as a violation of the Four Fundamental Principles of China or national sovereignty as grounds for non-enforcement of a foreign arbitral award).

Local protectionism has also played a part in the decisions of lower courts to accept public policy arguments.

**F. Why Should We Care About Portability?**

ICA is an indisputably fundamental element of the success and efficiency of international commerce. The recognition and support of arbitration by the global business community demonstrates the ever-growing vitality and persistence of the concept of private resolution of disputes. In today’s often

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172 See id. at 340.

173 See Alford, supra note 2, at 8.


175 See generally Martin Domke et al., *Domke on Commercial Arbitration* (2015); see also id. (observing that ICA is a business interest that fosters both fruitful commercial relationships and peaceful collaboration among today’s global citizens engaged in and affected by that commerce).
puzzling, multicultural IBT, it becomes equally as important for the businesswoman to plan for how to handle a potential dispute as the execution of the business agreement itself. Thus, it is imperative that corporate in-house counsel familiarize themselves with ICA, as it remains undeniably linked to businesses’ revenues from overseas transactions.

Portability plays a crucial role in determining just how fundamental ICA is to the success of global commerce. States that do not embrace portability in a pro-arbitration manner weaken international commerce, which negatively impacts businesses. International merchants depend on judicial systems that embrace portability, enforce contractual provisions to arbitrate, and recognize and enforce foreign arbitral awards.

176 See Ellyn Law LLP, The Role of Arbitration in International Business, JD Supra Business Advisor, Mar. 21, 2013; see also Gibson, supra note 174 (noting that many multinational corporations now initiate commercial contracts in states where corruption and fraud are rampant, which may include the corresponding judicial system).


178 See Joseph T. McLaughlin, Enforcement of Arbitral Awards under the New York Convention – Practice in U.S. Courts, 3 Int’l
Companies choose ICA because it enhances their ability to carry out cross-border transactions; as a result, businesses do not have to be afraid of never-ending, expensive national court litigation.\textsuperscript{179} Businesses want disputes resolved as quickly as possible and hope that these disputes cause the least amount of disruption to their day-to-day operations as possible.\textsuperscript{180} When a national judiciary ignores these desires, it creates risks for these businesses that they may not be able to take on. In the past decade alone, cross-border corporations have witnessed a rapid increase in investment activities in developing and underdeveloped states.\textsuperscript{181} In recent years, there has been a

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\textbf{Tax & Bus. Law} 249, 250 (1986) (noting that judiciaries that acknowledge very few exceptions to recognition and enforcement and ICA generally bolster the global commercial system).
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\textsuperscript{180} See id.

notable increase in the promotion of international trade and foreign direct investment (FDI) throughout a broad range of industry sectors. Multinational enterprises (MNEs) dominate international business today, and transactions can involve tens or even hundreds of millions of dollars. MNEs are inextricably involved in the manufacture of goods and services that are vital to the economic expansion of developing and underdeveloped states. Global commerce is thus directly

(last visited Oct. 17, 2015) (noting that these investments have been particularly strong in the field of oil industry).


184 See id. at 590 (providing an example where an MNE is responsible for mining the production of oil and gas that will be used to install an entire telecommunications system in a newly developing state - this MNE would invariably be involved in a considerable number of IBTs with businesses within that
affected by the notion of portability, and this Comment’s analysis of several economically-dominant states will be helpful for international investors and business individuals.

**Part IV – Advancing the Concept of Portability**

It is easy to see that Brazil is doing the best job at enhancing the portability of foreign arbitral awards in its national courts and thereby fostering the goals of finality and promotion of international commerce inherent in ICA. Nonetheless, this Comment only analyzes the BRICs. Although the global economic influence of the BRICs is indisputable, there are many more jurisdictions where one may wish to avoid the unpredictability of Article V(2)(b) of the New York Convention.\(^{185}\) In fact, many of these jurisdictions cannot be said to be as arbitration-friendly as that of the BRICs. This Comment recognizes that most of the stigma surrounding the recognition and enforcement of foreign arbitral awards is a result of abuse of the public policy exception and recommends a viable solution.

\(^{185}\) See generally Alford, supra note 2.
A. The Appointment of Experienced Judges

Often, in jurisdictions where arbitration is viewed in a less-friendly light, recognition and enforcement decisions regarding foreign arbitral awards based on public policy are subject to the whims and vagaries of domestic courts and their judges.186 This problem relates back to the deference apparatus upon which ICA is so dependent, and it is further impaired when domestic judges lack experience with ICA generally. These judges may possess little to no knowledge about the functionality of the international arbitral tribunal or that corporations doing business internationally prefer it as a dispute resolution over domestic litigation. A judge’s docket may involve tax issues in the morning, divorce issues at mid-day, and arbitration in the afternoon. This is a major contributor to problems with broad interpretation of the public policy exception in rural areas, such as that experienced by practitioners in Russia and China.187 Seeing the need to protect local jobs and businesses from the seizure of assets by a large, foreign company as sufficient

186 See generally Oda, supra note 106; see also Fishburne, supra note 147.

187 See Alford, supra note 2, at 8.
public policy grounds, rural judges who hold a large amount of power in their communities may embrace local protectionism.\textsuperscript{188}

A viable solution to this could be the appointment of judges who have actual experience working with ICA, the New York Convention, and the institution of arbitration generally. These judges would only hear cases involving ICA and the recognition and enforcement of foreign arbitral awards. The judges could be from different regions of the particular state, which might include one judge from a rural town, another from a suburban community, and another from a large city. This would absolve problems with biased public policy decisions. National governments could appoint regional arbitration-specific judges, who have presided over enforcement and recognition cases before. This would enhance the dual advantages of finality and efficiency so appealing about ICA. These judges would not only hear recognition and enforcement cases involving the public policy exception, but also cases involving the six other exceptions listed in Article V as means of refusal of recognition and enforcement.

Conclusion

This Comment argues that out of the BRICs, Brazil has exemplified the best record of portability with regard to the

\textsuperscript{188} See id.
recognition and enforcement of foreign arbitral awards under Article V of the New York Convention. This Comment recognizes that the problem of deference inherent in the relationship between ICA and sovereign, national courts continues to exist, and that it is further exploited by abuse of the “unruly horse” known as the public policy exception of Article V(2)(b). ICA is crucial to international trade and international commerce in the twenty-first century. The appointment of experienced judges, knowledgeable in ICA, who would handle a docket composed singularly of recognition and enforcement cases, serves as one viable solution to this problem.