

INTERNATIONAL ARBITRATION ALERT

IN THIS ISSUE

CHALLENGES, OPPORTUNITIES AND ROAD AHEAD FOR INTERNATIONAL ARBITRATION IN BRICS

On 27 August 2016, the Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead took place in New Delhi, India. The conference was initiated by the Indian government within the spirit of the theme of India's chairmanship of BRICS to, amongst others, foster new co-operation mechanisms for the BRICS nations. The purpose of the conference was to discuss and debate the need to develop and establish an efficient and effective international arbitration mechanism for BRICS member states.

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At the conference, the government of India pledged its full support for the development and establishment of an international arbitration mechanism for the resolution of commercial and investment disputes amongst BRICS nations. The BRICS nations regard themselves as the de facto vanguard of emerging economies, duty-bound to ensure that an international arbitration mechanism is developed which has regard to factors relevant to emerging economies in the resolution of disputes.

Whilst there was absolute consensus regarding the need for an arbitral mechanism, independent from the established arbitral bodies of the developed world, that caters for the unique needs of emerging economies, it was less clear whether this mechanism would be developed as an independent arbitral body, or whether the arbitral bodies already established in the regions concerned should be utilised for this purpose.

During the conference the following salient features were identified as necessary for the development of a BRICS international arbitration mechanism:

- a forum for the resolution of intra-BRICS commercial and investment disputes;
- a forum which is neutral and fosters an unbiased applicability of laws;
- uniformity between domestic laws governing international arbitration to ensure a uniform approach between respective jurisdictions;
- flexible and innovative rules for the resolution of disputes;

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- ease of enforcement of arbitral awards in any BRICS member state, as well as any other nation;
- developing the expertise and skills of legal professionals in international arbitration among BRICS nations to support and ensure the success of the BRICS international arbitration mechanism;
- adequate representation of arbitrators from emerging economies to avoid structural bias and partiality or the perception thereof by arbitrators originating from the developed world;
- reforming the existing investor state arbitration mechanism under ICSID and bilateral investment treaties to account for, amongst others, the following features:
 - the unique circumstances and challenges of emerging economies, specifically with reference to cultural and socio-economic factors when assessing the merits of a bilateral investment claim or the quantification of the damages that flow from such claim;
 - a mechanism to summarily dismiss frivolous claims by investors;
 - measures to prevent/avoid forum shopping.

The Honourable Minister Arun Jaitley, India's Minister for Finance and Corporate Affairs, has committed his government to the establishment of a task team in collaboration with other BRICS nations to initiate the process of developing the BRICS international arbitration mechanism. As part of this initiative, it will be important not to duplicate efforts, which have already been realised with the establishment of the BRICS Dispute Resolution Shanghai Centre under the auspices of the BRICS Legal Form. It will further be important for the success of the BRICS international arbitration mechanism to ensure all stakeholders, specifically the relevant governments and their judiciaries are actively involved in this development.

Notwithstanding the (substantial) challenges facing the BRICS nations in this endeavour, the economic opportunities and benefits for cooperation and ultimate success appear to far outweigh such challenges. Following the establishment of the task team, the next step is to map-out the road to be followed to establish an independent and inclusive mechanism for the resolution of disputes amongst BRICS participants and nations, by means of international arbitration.

Jackwell Feris and Jonathan Ripley-Evans



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OUR INTERNATIONAL ARBITRATION TEAM

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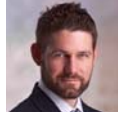
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