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Public Interest in International Commercial Arbitration Involving States and State Entities

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PUBLIC INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION INVOLVING STATES AND STATE ENTITIES

I. Introduction

International commercial arbitration has long been understood as a private mechanism for resolving disputes between commercial parties. Its core features (party autonomy, confidentiality, and limited judicial intervention) have made it the forum of choice in cross-border commerce.[1] Over the last two decades, however, States and State-owned enterprises (SOEs) have turned to commercial arbitration with increasing regularity, and their participation ends up unsettling the traditional paradigm by carrying significant public-law dimensions to contractual disputes, including questions of public finance, essential services, and regulatory authority.

This development tracks broader shifts in the organization of public functions. Public-private partnerships, the outsourcing of services, and complex procurement programs have expanded the State's role as a contracting party, and globalization has inserted a foreign variable to this equation. In this scenario, two concurrent trends seem particularly salient. First, the weakening of the non-arbitrability doctrine has broadened the reach of arbitration to cover not only disputes concerning the creation, interpretation, and performance of commercial contracts, but also – in some instances – statutory claims with potential social impact.[2] Second, the rise of the "contracting state" has brought public and private sectors into closer alignment, with governments increasingly relying on private actors to carry out public functions across most industrialized economies.[3] Therefore, the boundary between private dispute resolution and public accountability has become more porous, particularly in infrastructure, energy, telecommunications, and public procurement.[4]

The "2025 International Arbitration Survey: Public Interest in Arbitration", conducted by White&Case LLP, indicates that "commercial arbitration is the type of arbitration in which public interest issues are most frequently encountered by respondents", with specific public

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[1] Gary B. Born, International Commercial Arbitration (3rd edn, Kluwer Law International 2022 update), §1.02[A][2]; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) ch 1.

[2] Jan Paulsson, 'Arbitrability' in Stavros Brekoulakis and Loukas Mistelis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), p. 47-48.; George A Bermann, 'Arbitrability Trouble' (2017) 34 *Arbitration International* 341.

[3] Stavros Brekoulakis, 'The Protection of the Public Interest in Public-Private Arbitrations' (Kluwer Arbitration Blog, 8 May 2017) https://legalblogs.wolterskluwer.com/arbitration-blog/the-protectionof-the-public-interest-in-public-private-arbitrations/ accessed 3 August 2025.

[4] CIEL & IISD, 'Revising the UNCITRAL Arbitration Rules to Address State Arbitrations' (December 2007) https://ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf accessed 3 August 2025.

interest issues including white collar crime (32%), environmental issues (30%), corporate social responsibility (26%), public health (20%), and human rights (15%).[5]

A paradigmatic case in this respect is the United Kingdom's *e-Borders* dispute, in which confidential arbitral proceedings produced substantial financial consequences for the public purse and raised concerns about border-security policy, while the underlying reasoning remained largely inaccessible to the public.[6] Such cases suggest that commercial arbitration can generate outcomes with far-reaching public implications.

That's what this thesis is about. It challenges the still-underexplored question of how, and to what extent, public-interest considerations shape international commercial arbitration when a State or SOE is a party, and how arbitral process and reasoning might be refined to produce legitimate, enforceable awards. Although investment arbitration has generated a substantial literature on transparency, legitimacy, and public accountability, commercial arbitration is still commonly analyzed primarily through a private-law lens, even where a public actor is involved.[7-8]

The working hypothesis is that, without a principled and structured approach to identifying, weighing, and integrating public-interest concerns, arbitral reasoning tends to become uneven, which could represent three risks: annulment or refusal of recognition on public-policy grounds; political and reputational backlash; and, ultimately, diminished confidence in arbitration's capacity to handle disputes involving public responsibilities.[9] As it will be demonstrated, courts have already shown a willingness to intervene where they perceive systemic public-law concerns to be insufficiently managed. The Court of Justice of the European Union's judgment in *Achmea*, for example, is a prominent reminder that institutional

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[5] White & Case LLP, 'International Arbitration Survey: Public Interest in Arbitration' (2 June 2025) https://www.whitecase.com/insight-our-thinking/-international-arbitration-survey-publicinterest-in-arbitration accessed 3 August 2025.

[6] UK Home Office, 'Letter to the Home Affairs Select Committee on the e-Borders arbitration' (18 August 2014); National Audit Office, *E-borders and Successor Programmes* (HC 608, 2015); *The Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC); Raytheon, 'Raytheon Receives Arbitration Award Relating to the e-Borders Program' (Press Release, 18 August 2014).

[7] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); Anthea Roberts, *Is International Law International?* (OUP 2017) ch 6; Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 *AJIL* 361.

[8] CIEL & IISD (n 4).

[9] *Fosmax LNG*, CE (Ass), 9 November 2016, no 388806, ECLI:FR:CEASS:2016:388806.20161109; *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763; *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm).

safeguards may limit arbitration when judicial oversight and legal-order autonomy are thought to be at stake.[10]

To analyze this hypothesis, the thesis proceeds in two steps. First, it maps how public-interest issues arise in international commercial arbitration involving public actors, specifically focusing on materials and caselaw from four relevant jurisdictions on the matter: France, the United Kingdom, Germany, and Brazil. Secondly, it proposes practical solutions – or guidelines – to better accommodate public interest and, in the end, to produce an enforceable award that would comply with public policy concerns. This proposal intends to be a principled test for "public-interest-sensitive" reasoning; soft-law guidance for institutions and tribunals; and suggestions for courts to support, rather than undercut, public-interest considerations at the enforcement stage. The aim is not to convert commercial arbitration into public-law adjudication, but to ensure that tribunals state their reasons in a manner that public law can recognize and reviewing courts can sustain, preserving both efficiency and enforceability.

II. Methodology and Scope

This study adopts a comparative legal methodology to examine how public interest is addressed in international commercial arbitration involving States and SOEs. The analysis focuses on four jurisdictions – France, Germany, the United Kingdom, and Brazil – chosen for their diverse legal traditions and for the distinctive ways in which they reconcile public and private interests in arbitration. After research, it is my understanding that these jurisdictions offer a balanced comparative framework, encompassing civil law and common law systems.

The methodology is structured around four complementary components. First, a doctrinal analysis is conducted through the examination of primary legal sources, including statutory provisions, case law, and regulatory instruments governing arbitration in each jurisdiction with emphasis on (i) the capacity of public entities to arbitrate, (ii) the operation of public-policy controls, and (iii) transparency provisions in arbitrations involving public actors.[11] Second, a

[10] Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158; Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (2020) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) accessed 3 August 2025.

[11] France**:** Code de procédure civile, arts 1442–1527; CE (Ass), 9 November 2016, no 388806, *Fosmax LNG* (n 9); Tribunal des conflits, 17 May 2010, no 3754, *INSERM*; CE, 17 October 2023, *SMAC v Ryanair*; CE, 30 July 2024, no 485583, *Collectivité Territoriale de Martinique*. Germany: Zivilprozessordnung (ZPO) §§ 1025–1066; BGH, 27 September 2022, KZB 75/21. United Kingdom: *Arbitration Act* 1996; *Dallah Real Estate and Tourism Holding Co v*

comparative analysis identifies recurring patterns, national specificities, and normative trends in the handling of public-interest concerns by tribunals and courts. Third, an empirical element draws on recent practitioner surveys (in particular the 2025 White & Case / Queen Mary survey) to capture how public-interest issues are perceived in practice and how procedural choices align (or not) with expectations of legitimacy, transparency, and State accountability.[12] Fourth, selected case studies are used to analyze how arbitral tribunals and national courts have reasoned in disputes involving public entities. The case studies were selected from commercial arbitration involving public interest and related enforcement proceedings. Investment arbitration (ISDS) is referenced only where it clarifies doctrines or review standards that may influence commercial practice.[13]

It is important to highlight that the scope of this research is limited to international commercial arbitration and, therefore, this study addresses arbitrations in which public entities act in a commercial capacity, not in the exercise of sovereign prerogatives.[14] The focus here is on how the presence of a public actor affects (i) procedural structure (e.g., transparency, record-building, public-law expertise), (ii) substantive reasoning (e.g., necessity and proportionality, mandatory-law constraints), and (iii) enforceability (e.g., public-policy review, immunity from execution).

Three central research questions guide this study:

1. **Jurisdictional Frameworks**: How do France, Germany, the United Kingdom, and Brazil conceptualize and protect the public interest in international commercial arbitration involving public entities? To what extent do these systems distinguish between

Pakistan (n 9); *Halliburton v Chubb* [2020] UKSC 48; *Nigeria v Process & Industrial Developments Ltd* (n 9). Brazil: Law 9.307/1996 (as amended by Law 13.129/2015); Decree 10.025/2019 (infrastructure arbitration).

[12] White & Case and Queen Mary University of London, *2025 International Arbitration Survey: The Path Forward* (White & Case/QMUL 2025) 22–24.

[13] While there may be procedural commonalities among different types of arbitration, state-to-state disputes remain largely unaffected by the developments and principles of international commercial arbitration, due to the distinct profiles of arbitrators involved and the dominance of public international law in those proceedings. Eduardo Silva Romero, 'Remarks by Eduardo Silva Romero' (2021) 115 *Proceedings of the ASIL Annual Meeting* 144.

[14] George A Bermann (n 2) ch 3; Stavros Brekoulakis, 'Public-Private Arbitration and the Public Interest under English Law' (2013) 30 *Journal of International Arbitration* 1.

different layers or functions of public interest and what legal consequences follow from these distinctions?[15]

2. **Public Repercussions**: What types of broader public consequences tend to arise from arbitral awards involving States and State-owned entities? Does the participation of a public party alter the private character of arbitration in a way that calls for heightened sensitivity to non-party interests?

3. **Tribunal Approaches**: How can arbitral tribunals respond to public interest concerns – both procedurally and substantively – without undermining core features of commercial arbitration such as party autonomy, efficiency, and finality? How might tribunals structure their reasoning to ensure enforceability while addressing legitimacy concerns when public entities are involved?

As to the selected jurisdictions for comparison, some aspects of each were taken into consideration. In France, the administrative courts' jurisdictions reveals high thresholds for public entities to engage in arbitration proceedings; in the UK, cases like *Fosmax*, *Dallah*, *P&ID* have demonstrated the opposite. Germany, by its turn, provides a civil-law perspective with strong competition-law and *ordre public* controls. Finally, Brazil is included because of its increasing number of arbitrations with public entities that arbitrate under a statutory framework tailored to public contracts, developing continuously debates and specific rules for this type of arbitration.

One limitation, however, must be disclosed: confidentiality limits access to full arbitral records and, therefore, the study relies on published awards, set-aside/enforcement decisions, institutional rules, legislative materials, and practitioner reports. Unlike court proceedings, many arbitration cases are conducted in private, and the details (including the reasoning behind decisions) are not always made public. Because of this, the study couldn't access the full range of arbitration records or every award rendered, especially those kept confidential by the parties. All sources are cited to ensure transparency and replicability.[16]

[15] Celso Antônio Bandeira de Mello, *Curso de Direito Administrativo* (34th edn, Malheiros 2019) 70–75; Maria Sylvia Zanella Di Pietro, *Direito Administrativo* (36th edn, Atlas 2023) 90–94.

[16] The author used ChatGPT (OpenAI) for editing, proofreading, and language clarity. All legal reasoning, interpretations, and conclusions are original and under the author's sole responsibility.

III. Theoretical Framework: Public Interest as a Structural Variable in State-Related Arbitration

In international commercial arbitration, the participation of a State or a State-owned entity may change the character of the dispute because the rights at issue do not concern only the entity acting in a commercial capacity; they also implicate a broader community of citizens and taxpayers on whose behalf the entity ultimately acts. Public entities do not enjoy unfettered autonomy over the interests entrusted to them, and their presence introduces normative concerns that reach beyond the logic of contract and private dispute resolution.[17] Even when the governing law is private law, public-interest dimensions affect expectations about transparency, standards of arbitrator independence and the legitimacy of the reasons given in the award, which may shape how domestic courts receive the award at the public-policy review stage.[18]

But one important goal must be kept in mind: the principal aim of international arbitration remains the delivery of a binding and enforceable award. Enforceability cannot be taken if it touches public interest issues – particularly in systems that interpret public policy broadly or attach heightened scrutiny to awards involving public entities, allowing even a stricter scrutiny of the reasoning of the final decision. In these cases, it is not sufficient to ensure formal compliance with procedural requirements authorizing a public entity to arbitrate. Therefore, it is this thesis propose that what matters equally is how the arbitral process and, especially, the reasoning in the award accommodate the substantive weight of public interest.[19]

Against this backdrop, it is important to examine how various legal systems conceptualize the relationship between public interest and arbitrability. The analysis starts with the thresholds of subjective and objective arbitrability, which often reveal how jurisdictions internalize public interest concerns, even if implicitly. For instance, when a jurisdiction excludes specific public-sector disputes from arbitration, it often signals that such matters are considered too sensitive for private resolution. These legal limits, therefore, provide insight into how each system balances arbitration with broader public considerations.

[17] Gary B Born (n 1) chs 1–2; Nigel Blackaby and others (n 1) ch 1.
[18] George A Bermann (n 2) ch 3; *Fosmax LNG* (n 9).
[19] Bermann (n 2) ch 3; *Fosmax LNG* (n 9).

3.1. The concept of public interest

In many legal systems, arbitration is still governed by a rigid division between two distinct branches of law, giving a binary division in the international setting. Investment arbitration, governed by public international law and investment treaties, is thought to manage sovereign interests and public policy; commercial arbitration, on the other hand, is treated as a domain of private law, focused on consent and general principles of contract law.[20] In my view, this dichotomy is increasingly inadequate because this binary framework is that it oversimplifies the diverse nature of modern arbitration. Under this assumption, if a dispute does not arise under an investment treaty, it is often treated as "purely private" even when public bodies, regulatory frameworks, or essential services are in play.

However, at the core of such disputes is the tension between privity of contract and public interest. While privity confines obligations to the parties, public interest concerns whether the State, even as a contracting party, remains bound by constitutional mandates, procurement rules, and political accountability. One cannot assume that the state is a neutral market actor, and contractual decision-making cannot be insulated from public values where public funds and public duties are engaged.[21] If this aspect is taken into account, and the strict separation in arbitration remains, it can result in the application of dispute resolution processes that may not fully capture the public dimensions of the case.[22]

For purposes of this study, "public interest" is used functionally rather than as a fixed moral category. Classic public-law scholarship explains that public interest serves three roles in a democracy: it gives citizens a standard to judge government action; it is invoked to justify policies that burden some for the benefit of the whole; and it guides officials where precise instructions are lacking. [23] However, these are solely its functions because its content is elastic and context-dependent.[24] Historically, the concept of public interest faced an evolution from natural-law notions of the "common good," through liberal commitments to peace, security,

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[20] Stavros Brekoulakis, 'The Public Interest in Arbitration' (2023) 39 *Arbitration International* 203, 205; Stavros Brekoulakis and Margaret Devaney, (n 14).
[21] Barry Bozeman, *Public Values and Public Interest* (Georgetown University Press 2007).
[22] ibid; Anthea Roberts, *Is International Law International?* (OUP 2017) ch 6.
[23] Anthony Downs, 'The Public Interest: Its Meaning in a Democracy' (1962) 29 *Social Research* 1, 4 https://www.jstor.org/stable/40969578 accessed 3 August 2025.
[24] Christoph Bezemek and Tomas Dumbrovsky, *The Concept of Public Interest* (Graz Law Working Paper No 01/2020, Charles University in Prague Faculty of Law Research Paper Series, 28 September 2020) https://ssrn.com/abstract=3701204 or http://dx.doi.org/10.2139/ssrn.3701204 accessed 3 August 2025.

and contract enforcement, to twentieth-century social legislation and – more recently – to human rights, environmental protection, cultural heritage, and global public goods such as climate stability and cybersecurity.[25] Due to the flexibility of its content, one can affirm that it shifts with context, and therefore public interest is best understood through balancing and process rather than through unitary or aggregative definitions.[26]

This study, therefore, proceeds on the premise that public interest refers to matters that require a structured, institutional process of decision-making by government to solve shared problems for the community as a whole, which cannot be efficiently addressed by purely individual or market-based action because when a public entity arbitrates, the rights at stake reach beyond the entity's patrimony.[27] This working definition captures why public-interest considerations surface in commercial arbitration whenever a public entity is a party and helps explain why reviewing courts sometimes demand more than private-law analysis from arbitral awards.[28]

When arbitration involves the public sector, transparency, tribunal authority, and the type of remedy ordered must all be handled carefully, because these cases can have public consequences. Since enforcement depends on courts reviewing the award through the lens of public policy, a tribunal's failure to engage seriously with public interest could undermine enforceability.[29]

3.2. The Dual Role of the State in International Commercial Arbitration: Between Sovereign Authority and Private Actor

Arbitration is usually seen as a private process, where parties voluntarily agree to resolve their disputes outside of court and have control over the procedure.[30] In systems like England's, this private approach to arbitration is deeply rooted in legal tradition and arbitrators often embrace this perspective,[31] which can result in them overlooking public values like transparency and

[25] Bozeman (n 21).
[26] Downs (n 23) 10–19 (realist strands); Jerry L Mashaw, *Greed, Chaos, and Governance* (Yale University Press 1997) ch 1.
[27] *Ibid*.
[28] George A Bermann (n 2) ch 3.
[29] Conseil d'État (Ass), 9 November 2016, no 388806, *Fosmax LNG* (n 9); *Collectivité Territoriale de Martinique*(n 11).
[30] Gary B Born (n 1) ch 10 §10.01[A].
[31] Brekoulakis (n 20), 203–210.

accountability.[32] Yet the state's participation introduces role-conflicts since it plays two different roles at once. On one hand, the state is like any other contracting party in a commercial contract, operating under private-law norms. On the other hand, it has public authority, accountable to the citizens of a certain government and subject to constitutional principles, procurement legality, and political responsibility, which go beyond private law. The conflict between these dual roles becomes especially clear in sensitive sectors, such as when a contract affects public funds, infrastructure, or government regulation – matters of public concern.[33]

The comparison with investment arbitration is instructive. In both inter-State and investor-State disputes, the State acts in a sovereign capacity, where public interest is shaped by diplomacy, regulatory autonomy, and long-term policy goals. In contrast, in commercial arbitration, the State often appears as a private actor, typically through state-owned enterprises or public procurement contracts. Yet, it remains bound by constitutional and administrative duties and, therefore, principles such as equality, legality, due process, and the prohibition against improperly restricting discretion prevent the State from acting solely according to commercial logic.[34] In this context, legal compliance might not always be enough. A decision made by the state, such as entering or settling a dispute through arbitration, might be perfectly legal, but if it appears unfair or hurts the public interest (e.g., wastes public money, threatens public services), it can still cause political backlash or public distrust.

Public entities remain accountable to the public and its actions must be transparent and justifiable, especially when involving public funds or affecting citizen's rights. Furthermore, public entities must follow constitutional principles such as equality, legality, and due process, which limit the state's ability to act solely on commercial grounds. Unlike private companies, which can freely choose suppliers and partners, the state is subject to strict rules that safeguard fairness, transparency, and competition.

[32] Stavros Brekoulakis and Margaret Devaney, (n 14).
[33] CE, *Compagnie Alitalia* (1989) Rec Lebon 190; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).
[34] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement; Constitution of the Federative Republic of Brazil 1988, art 37; HM Treasury, *Managing Public Money* (2023) https://www.gov.uk/government/publications/managing-public-money accessed on 3 August 2025.

Moreover, every decision by a public actor can carry political weight, shaping public trust, influencing elections, or triggering public debate. For these reasons, neither state nor SOEs can simply prioritize efficiency, cost-reduction, or contractual obligations in isolation; they must also consider their constitutional duties.

The tension reflects an internal conflict between "roles" which have been surfacing intensely in arbitration. In arbitration disputes, the state behaves like a private company making deals, entering contracts, and trying to operate efficiently or attract investment. At the same time, the State has non-negotiable public obligations which must protect as a government, such as public health, environment, or constitutional rights. But beyond law and policy, the state has also political concerns (maintaining public trust, international reputation, etc.) to preserve legitimacy within boarders and liability abroad.[35] The following comparative subsections consider how different jurisdictions manage this tension.

The concept of public interest, however, isn't always used in good faith. Although invocation of public interest by public entities may reflect genuine constitutional or budgetary concerns, it can also serve more strategic purposes. For example, a government might cancel a contract claiming that honoring the award would undermine essential public services such as education or healthcare. Although framed as protecting the common good, such claims can mask underlying motives like administrative mismanagement, shifts in political priorities, or attempts to escape contractual liability. In these instances, public interest becomes not a neutral legal standard but a contested and malleable justification, which risk underscores the need for institutional safeguards and nuanced legal scrutiny.[36] Therefore, arbitrators and national courts must go beyond surface-level claims and examine what's really going on behind the invocation of public interest.

3.2.1. France – Conseil d'Etat Doctrine

The participation of French public entities in international commercial arbitration has evolved through a complex interaction of legal doctrine, legislative reform, and judicial decisions, gradually adjusting to the demands of global commerce while preserving the structural principles of French public law. French law traditionally forbids public bodies from using

[35] *Fosmax LNG* (n 9); *Dallah Real Estate and Tourism Holding Co v Pakistan* (n 9).
[36] Eduardo Silva Romero, 'The Dialectic of International Arbitration Involving State Parties: Observations on the Applicable Law in State Contract Arbitration' (2004) 15(2) *ICC International Court of Arbitration Bulletin* 79

arbitration and this rational comes from public law logic since arbitration is viewed as of private and informal for matters involving public money or interests.

This restriction finds its normative foundation in Article 2060 of the *Code civil*, which prohibits public entities from agreeing to arbitration unless a specific law or treaty authorizes it.[37] Three rationales support this prohibition: jurisdictional competence is of public order, i.e., are not negotiable or waivable,[38] public funds must be protected, i.e., public money disbursement is under strict control,[39] and administrative justice is preferred, i.e., public law matters should stay in public courts. The prohibition, however, is not constitutional;[40] which means that exceptions can be granted by express legislative or treaty-based authorizations, yet narrowly interpreted by courts.[41]

Starting in the late 1950s, and reaching a clear understanding in 1966 with *Galakis* case, the French courts allowed narrow exceptions where public entities could arbitrate international contracts that were clearly commercial in nature and tied to international trade, relying in part on the 1961 European Convention on International Commercial Arbitration.[42] Even with *Galakis* case, the law remained strict but, in 1975, a reform clarified that only some public entities – those with a commercial or industrial function – could arbitrate, and only if authorized by a government decree.[43]

A reaffirmation of the restrictive approach came with the *Walt Disney* advisory opinion by the *Conseil d'État* in 1986, which emphasized the public-order character of competence rules and confirmed that only the legislature can authorize arbitration for public entities, meaning that, non-binding forms of dispute resolution (e.g., mediation or advisory opinions) are acceptable, but binding arbitration requires legal basis.[44] This episode is important because it illustrates the tension in French law between maintaining control over public interest (such as the

[37] *Code civil* art 2060.
[38] Conseil d'État, 23 December 2015, no 376018, *Territory of Wallis and Futuna Islands* case, ECLI:FR:CESSR:2015:376018.20151223, *Recueil Lebon*.
[39] Conseil d'État, 19 March 1971, no 79962, *Mergui* case, ECLI:FR:CESEC:1971:79962.19710319, Rec Lebon 216.
[40] *Territoire des îles Wallis-et-Futuna* (n 38); *Mergui* (n 39).
[41] CE, avis, 6 March 1986, *Walt Disney*; CE, 17 October 2023 ; *SMAC v Ryanair* (n 11).
[42] Cour de cassation, 1re civ, 2 May 1966, *Galakis* case, Bull. civ. I, No 256; *European Convention on International Commercial Arbitration* (Geneva, 21 April 1961) arts II–IV.
[43] Loi n° 75-596 du 9 juillet 1975 (amending *Code civil* art 2060).
[44] *Walt Disney* case (n 41).

expenditure of public funds) and the practical needs of engaging in complex international commercial agreements, especially with powerful multinational corporations.[45]

This position had important practical consequences for French public entities in their international contractual relations. Due to this restrictive framework, various sector-specific laws were passed over time to authorize arbitration in certain areas, creating a fragmented and complex legal landscape, rather than a unified policy,[46] which is notably manifested in the provisions of the Public Procurement Code relating to arbitration.[47]

A decisive jurisprudential shift occurred with the *SMAC v Ryanair* decision of the *Conseil d'État* in 2023, which refused to enforce an international arbitral award rendered in London under contracts governed by French law, emphasizing that public entities may only enter arbitration where an express legal or treaty-based authorization exists.[48] The decision effectively overruled *Galakis*, narrowing the scope of exceptions and reaffirming the primacy of legislative control over the arbitrability of public contracts, even in international contracts.

As for the judicial control, in *Fosmax LNG* in 2016, the *Conseil d'Etat* established clear rules for when French administrative courts can review arbitral awards involving public entities: illegality of the arbitration agreement, procedural irregularity, and violation of public order (especially rules that public bodies cannot override).[49] The *Fosmax* decision established the framework for effectiveness of arbitral awards involving French public entities, i.e., the preservation of the structural integrity of public law.[50]

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[45] In this opinion, the *Conseil d'État* reaffirmed a strict view of the prohibition against arbitration involving public entities in France, emphasizing that this prohibition is not just based on Article 2060 of the Civil Code, but stems from a deeper general principle of French public law: the public order nature of jurisdictional competence rules. In other words, the power to resolve disputes involving public entities must remain with state courts as a matter of fundamental legal structure.

[46] *Loi n° 82-1153 du 30 décembre 1982* relative à l'orientation des transports intérieurs*; Loi n° 83-675 du 7 juillet 1983* sur la démocratisation du secteur public art 9; *Ordonnance n° 2004-559 du 17 juin 2004* relative aux contrats de partenariat art 11; *Treaty between France and Italy on the Mont Blanc Tunnel* (14 March 1953); *Treaty of Canterbury* (12 February 1986); *Agreement between France and the UAE on the Universal Museum of Abu Dhabi* (6 March 2007).

[47] *Code de la commande publique*, arts L2197-6, R2197-25, L2221-2, L2223-2; *Code général des collectivités territoriales* (CGCT) art L1414-2.

[48] *SMAC v Ryanair* case (n 11).

[49] *Fosmax LNG* case (n 9).

[50] On the merits, the *Conseil d'État* partially annulled the arbitral award on the basis that the tribunal had failed to apply a non-derogable rule of public law: namely, the entitlement of the contracting public authority to proceed with the performance of public works at the expense and risk of its co-contractor, even absent prior termination of the contract, where necessary to protect the public interest. Conversely, the portion of the award upholding the economic rebalancing of the contract's lump sum price was not annulled, as it did not involve a

This jurisprudential foundation proved instrumental in shaping later decisions, including the 2024 *Martinique* ruling of 2024, which meant a significant step toward legal coherence.[51] After being condemned in arbitration to pay over 1.6 million Euros under a public contract, the Territorial Collectivity of Martinique (CTM)[52] challenged the award before the *Conseil d'Etat*. In this decision, the court confirmed the competence of administrative courts and emphasized that, even in international arbitration, public entities are bound by non-derogable rules such as the prohibition on liberalities, the inalienability of public domain, and other core principles of French and EU law.

In France, therefore, arbitration is allowed for public bodies only when the law expressly permits it, and any award involving a public entity is subject to strict judicial review, especially to ensure it complies with non-negotiable rules of public law.

3.2.2. Germany - Functional Separation Between Sovereign Power and Commercial Conduct

Germany's arbitration framework is built around its Code of Civil Procedure (*Zivilprozessordnung* - ZPO), specifically Book 10, which implements the UNCITRAL Model Law, the standard for international arbitration legislation. However, Germany has also added national rules to reflect local legal values, particularly regarding public policy and the conduct of public entities. [53]

Public entities in Germany are allowed to arbitrate, but they cannot act unilaterally. They must obtain formal internal approvals, which vary depending on the level of government involved (federal, state, or municipal). This reflects Germany's federal structure, where each level has autonomy over its own budget and procedures.[54] At the federal level, agreeing to arbitrate or to settle a dispute generally requires the relevant minister approval. Where the decision affects the federal budget, for example, it also requires the Finance Ministry consent, as per Federal Budget Code (*Bundeshaushaltsordnung*).[55] At the state level (*Länder*), parallel consent rules

rule of public order but rather fell within the scope of party autonomy and contractual risk allocation (*Fosmax LNG* case (n 9)).

[51] *Fosmax LNG* case (n 9).

[52] Organisation of Eastern Caribbean States (OECS), 'Territorial Collectivity of Martinique (CTM)' https://oecs.int/en/oecs-partnership-hub/territorial-collectivity-of-martinique-ctm accessed 3 August 2025.

[53] *Zivilprozessordnung* (ZPO) (Germany) Book 10, §§ 1025–1066.

[54] ZPO §§ 1030–1031.

[55] *Bundeshaushaltsordnung* (BHO) § 58; *Allgemeine Verwaltungsvorschriften zur Bundeshaushaltsordnung* (AVV-BHO) zu § 58.

appear in each state's budgetary code, and the concrete approval path depends on the state and the dispute.[56] For municipalities, approval flows from municipal codes, which normally established that major decisions (such as submitting to arbitration or approving a settlement) often require city council approval, ensuring democratic oversight.[57]

Therefore, there is no automatic prohibition for public entities to participate in arbitration proceedings, but the nature of the dispute and the applicable rules of public finance and authority will determine whether arbitration is permitted.[58]

German legal system draws a clear line between commercial actions of public entities (*privatwirtschaftliche Tätigkeit*) and sovereign authority (*hoheitliche Gewalt*), distinguishing the disputes that are arbitrable from those that are not arbitrable. Public entities can only use arbitration if the dispute arises from their business-like functions, not from their sovereign powers.[59]

In this context, one can conclude that German setting allows for a relatively predictable engagement with public interest issues, particularly in distinguishing between aspects that include essential public security, essential public services, and constitutional obligations; and aspects related to economic regulation, market stability, and environmental protection. German Courts respect arbitral autonomy but will intervene where awards conflict with mandatory law or EU public policy upon a full review of the facts of the case, as recent competition-law jurisprudence illustrates.[60]

These structural safeguards may bring clarity and legal predictability to arbitration involving States because they help avoid confusion about who can arbitrate and under what conditions, making it easier for arbitral awards to be recognized and enforced by courts. However, the key to ensuring fairness and legal certainty in arbitration with State parties is not found in abstract notions since they might not address the practical risks involved. Therefore, the solution would be a well-drafted contract that carefully considers the State's dual nature (as

[56] *Landeshaushaltsordnung für das Land Nordrhein-Westfalen* (LHO NRW) § 58; *Bayerische Haushaltsordnung* (BayHO) art 58.
[57] *Gemeindeordnung für das Land Nordrhein-Westfalen* (GO NRW) § 41; *Gemeindeordnung für den Freistaat Bayern* (BayGO) art 30.
[58] International Bar Association (IBA), *Arbitration Guide – Germany* (IBA Arbitration Committee, December 2023) https://www.ibanet.org/document?id=Germany-country-guide-arbitration accessed 3 August 2025.
[59] *Münchener Kommentar zur ZPO*, § 1030.
[60] *Bundesgerichtshof* (BGH), 27 September 2022, KZB 75/21.

both a commercial party and a sovereign actor) can prevent or mitigate disputes before they arise.[61]

3.2.3. United Kingdom – Functional assimilation of the State to private actors

In contrast to countries like France or Germany, England does not have a separate administrative legal system to handle disputes involving public authorities. Until the 20th century, English administrative structures were developed *ad hoc*, and review of public decisions was done by ordinary courts. This stems from the constitutional tradition associated with Dicey, who argued that all persons, public or private, should be subject to the same common law rules, rejecting the idea of special court or legal regime for the state.[62] As a consequence, even when public interests are at stake, English courts tend to treat government entities like private parties, especially in contractual and arbitration contexts.[63]

The Arbitration Act 1996 (AA 1996) is the primary statute governing arbitration in England, Wales, and Northern Ireland. It emphasizes freedom of contract and limiting court interference in arbitration proceedings.[64] However, the State Immunity Act 1978 (SIA 1978) provides parameters to what might be considered non-arbitrable through the concept of restrictive immunity, distinguishing *jure imperii* from *jure gestionis*. Section 9 confirms that immunity from execution remains unless the state explicitly waives it and the assets are in commercial use.[65]

Because arbitration grew within a private-law setting, it wasn't designed to deal with public law questions and, when public bodies began entering arbitration clauses in contracts during the 20th century, there was no shift in the legal framework to adapt arbitration to its new, hybrid public–private reality. Even as judicial review of public decisions expanded in regular courts, arbitration remained untouched, continuing to treat all disputes (including those

[61] Eduardo Silva Romero, *"La Distinción entre 'Estado' y 'Administración' y el Arbitraje Resultante de 'Contratos de Estado'"* (2004) 1(1) *Revista Brasileira de Arbitragem* 73
[62] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 213-17.
[63] Stavros Brekoulakis and Margaret Devaney, 'Public-private arbitration and the public interest under English law' in Thomas St John and José Manuel Álvarez Zárate (eds), *The Elgar Companion to the Hague Rules on Business and Human Rights Arbitration* (Edward Elgar 2023) 298–315.
[64] *Arbitration Act 1996*, ss 1(b)–(c), 4, 5, 34, 69 and Sch 1.
[65] *State Immunity Act 1978*, ss 3, 9, 13

involving public entities) as essentially private contractual matters, which reflects a strong commitment to upholding party autonomy and honoring arbitration agreements.[66]

A notable case illustrating the application of the SIA 1978 and the distinction between sovereign and commercial acts is *LR Avionics v Nigeria* case, in which the Commercial Court upheld immunity from execution, ruling that Nigerian assets used for visa/passport services were tied to sovereign activity, even if the service had a commercial element.[67] In *Dallah* case, the UK Supreme Court examined whether Pakistan had really agreed to arbitrate by conducting a detailed, independent review of the facts, showing courts' willingness to scrutinize consent to arbitration in state-involved cases.[68] Furthermore, more recently, the English High Court confirmed that simply signing onto the New York Convention doesn't waive immunity at enforcement, meaning that there must be a clear, express, and unequivocal agreement to submit to jurisdiction, showing how arbitration awards involving States must navigate public-law boundaries beyond mere consent to arbitrate.[69]

Nevertheless, under English law, public bodies may agree to arbitrate only if acting within their legal authority. Where a public body acts *ultra vires*, the arbitration clause (and potentially the whole contract) will be considered invalid bearing in mind that, by virtue of separability, the arbitration clause remains valid unless the capacity issue directly affects the arbitration agreement itself.[70] Courts will examine these questions *de novo* under section 67 and, at the recognition/enforcement stage, the court may still refuse to enforce the award if it finds non-arbitrability or violation of public-policy.[71] UK government departments are advised to avoid prolonged disputes, spend money wisely and prepare for audit or parliamentary scrutiny,[72] which means that serious misuse of powers or bad faith exposes arbitral decisions to judicial review and public-law liability.[73]

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[66] Stavros Brekoulakis. The public interest in Arbitration (2023) 39, *Arbitration International* 203–210

[67] *LR Avionics Technologies Limited v The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm)

[68] *Dallah* case (n 9).

[69] CC/Devas et al. v The Republic of India [2025] EWHC 964 (Comm)

[70] *Arbitration Act 1996*, ss 7, 30; *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL); *Credit Suisse v Allerdale BC* [1997] QB 306 (CA); cf Local Government (Contracts) Act 1997, ss 1–3.

[71] *Arbitration Act 1996* ss 67, 81, 103(2)(b)-(3); *Dallah* case (n 9).

[72] *Managing Public Money* (n 34) chs 3.5, A5; Cabinet Office, *The Sourcing Playbook* (2023; 2025 updates) and *Model Services Contract* guidance; *National Audit Act 1983,* s 6.

[73] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *Bromley LBC v Greater London Council* [1983] 1 AC 768 (HL); *Roberts v Hopwood* [1925] AC 578 (HL).

English law generally allows a wide variety of disputes to be arbitrated, including those involving statutory duties or public entities, as long as the remedy being sought is not something only a court has authority to grant.[74] This reflects England's arbitration-friendly stance, while also protecting core judicial functions. Since England has no codified administrative law or special administrative courts, the limits between arbitral freedom and public oversight are not always clear. These limits are defined gradually, through case law and individual statutes, creating flexibility, but also uncertainty.

3.2.4. Brazil – Pragmatic arbitration access with differentiated oversight

Given the wide variety of jurisdictions and legal traditions involved in Latin America, which comprises over 20 States, the Brazilian model was chosen particularly because, while it has not signed the ICSID Convention and does not participate in the international investment arbitration system, it allows both domestic and foreign contractors to equally access arbitration against the State and SOEs through commercial arbitration.

Although public and private entities both have access to arbitration, public entities remain bound by public-law constraints: public entities remain subject to audit courts, transparency requirements, and political scrutiny, which means that public entities have additional duties and controls when resorting to arbitration, in comparison with private companies. Article 37 of the Brazilian Constitution of 1988 preserves the principles governing public administration, including legality, impersonality, morality, publicity, and efficiency, which operate in parallel to the arbitral process and act as a filter, guiding both the choice to arbitrate and the scope of what can be submitted to arbitration.[75]

When Brazil first passed its Arbitration Law in 1996, the law did not mention public entities.[76] As a result, there was legal uncertainty and institutional resistance to involving public actors in arbitration, which changed with Law 13,129/2015, which explicitly allows public entities to arbitrate.[77] Due to the status of Federal Law, this provision applies to all levels of government

[74] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333; *Sian Participation Corp (In Liquidation) v Halimeda International Ltd (Virgin Islands) [2024] UKPC 16*. See also *Arbitration Act 1996* s 9 and *Companies Act 2006* s 994.
[75] *Constitution of the Federative Republic of Brazil* (1988) art 37.
[76] *Law No 9.307 of 23 September 1996* (Brazilian Arbitration Act) art 1.
[77] The amendments added paragraph 1 to Article 1 of the Arbitration Law, which states: "The direct and indirect public administration may use arbitration to resolve disputes relating to disposable patrimonial rights.".

(federal, state, and municipal), as well as both direct administration (ministries, secretariats) and indirect administration (autarchies, public foundations, state-owned enterprises, mixed economy companies), as long as the public entity has the legal capacity to enter into contracts. While the 2015 law is federal and applies nationwide, some states (like São Paulo or Minas Gerais) have passed additional rules that require special approvals, impose procedural constraints and mandate transparency or oversight mechanisms.[78] These measures aim to safeguard the public interest and prevent misuse of arbitration by public officials.

However, not all rights can be arbitrated by public entities in Brazil. Only rights that are "disposable" or negotiable (i.e., economic rights, not core public duties) can be submitted to arbitration.[79] In the public entity context, these rights include financial compensation for breach of contract, economic rebalancing of long-term public contracts, technical performance disputes, and pecuniary penalties, always framed by the principle that public entities cannot dispose of rights that are essential to the public interest or that are subject to mandatory legal rules.[80] According to the most recent Brazilian doctrine, public contracts are no longer viewed merely as vehicles of sovereign authority but rather as instruments of legal certainty, fostering stability and predictability in complex public-private partnerships.

This evolution has led to broader acceptance of the arbitrability of disputes arising from public contracts, including those involving regulatory mechanisms, oversight functions, penalties, or even unilateral termination, provided that the dispute centers on patrimonial consequences and not on the exercise of non-delegable sovereign powers such as legislation, taxation, or criminal enforcement. This transformation supports the idea that arbitration, when properly framed, does not weaken but can enhance the public interest by enabling efficient, fair, and expert adjudication in contexts that demand technical sophistication and procedural agility.[81] Therefore, the public-private divide remains significant in Brazil, but arbitration has become a legitimate and often preferred tool for resolving disputes involving SOEs and public contracts, as long as it doesn't compromise the public interest.

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[79] *Decree No 64.356/2019* (State of São Paulo); *Law No 46.254/2018* (State of Rio de Janeiro).

[79] Gustavo Justino de Oliveira, *Arbitragem com a Administração Pública* (2nd edn, Thomson Reuters Brasil 2019) 143–64; Carlos Alberto Carmona, *Arbitragem e Processo* (3rd edn, Atlas 2009) 78–85.

[80] Decree No 10.025 of 20 September 2019 (Federal Decree on Arbitration in the Infrastructure Sector), art 2; Law No 14.133 of 1 April 2021 (Public Procurement and Administrative Contracts Act), arts 151–154.

[81] Paula Butti Cardoso, *Arbitrabilidade Objetiva em Contratos Adminsitrativos.* (PhD thesis, Universidade de São Paulo 2023).

3.3. Partial conclusion.

This section has explored how different legal systems conceptualize the tension between the public interest and the traditional framework of international commercial arbitration. Through the comparative lens of France, Germany, the United Kingdom, and Brazil, it becomes evident that arbitrability is not merely a technical threshold, it is a legal expression of how each jurisdiction balances contractual freedom with the structural role of the State.

Across these jurisdictions, we observed four broad patterns. France preserves a strong administrative-law identity, limiting the State's ability to arbitrate unless expressly authorized and upholding non-derogable public law norms in award review. Germany adopts a functional distinction between sovereign and commercial activity, permitting arbitration only within the State's business-like conduct while policing public law concerns *ex post*. The UK assimilates the State into the private legal order but retains checks at the boundaries, particularly via public policy and *ultra vires* controls. Brazil, in turn, embraces a pragmatic model that allows arbitration broadly but filters arbitrability through constitutional principles and administrative oversight, particularly via the disposable patrimonial rights test and the primary/secondary public interest distinction.

While each system frames the role of the State differently, all reveal that public interest is not external to arbitration, it enters with the state and shapes the process from within. In this context, it is my opinion that the more these systems allow the state to be treated like any other contracting party, the more arbitration runs the risk of overlooking regulatory duties, public accountability, and constitutional safeguards. Conversely, the more robust the mechanisms of legal oversight (whether *ex ante* or *ex post*), the greater the chance that arbitral proceedings can accommodate the structural public functions carried out by states and SOEs.

In sum, this comparative inquiry shows that the participation of public entities in commercial arbitration reconfigures the foundational assumptions of the field. Arbitrability becomes a proxy for deeper institutional questions: To what extent can public interests be delegated to private dispute mechanisms? When is arbitration an effective tool for balancing efficiency and accountability? And how should arbitrators respond to the normative friction between party autonomy and public responsibility?

The next section builds on this foundation by examining how these conceptual tensions translate into procedural and substantive challenges. Specifically, how public interest shapes the arbitral process, the reasoning in awards, and the enforceability of decisions when States or SOEs are involved.

This dynamic interplay between contractual freedom and public responsibility reveals an evolving dialectic in the field. International arbitration involving State parties is evolving through a dialogue of opposing forces and gradually reaching new legal compromises. Arbitrators and some courts are not treating state contracts as purely domestic issues anymore. Instead, they're slowly starting to apply international standards to these contracts, but in a moderate way, avoiding going to the opposite extreme, that is, treating state contracts only under national law.[82] Thanks to this balanced (moderate) approach, arbitral awards can be enforced even in difficult or controversial cases. However, this internationalizing trend might trigger a backlash. Some States could push back harder against arbitral awards they see as undermining sovereignty. In response, national courts will be forced to strike a new balance, they'll need to adjust how they supervise, recognize, or enforce arbitral awards, especially when they involve State parties and public interest concerns.

IV. Procedural Tensions and Safeguards: Navigating Public Interest in Commercial Arbitration with States

This section investigates the unique procedural challenges that arise when a public entity is a party in an international commercial arbitration. The core argument is that traditional arbitration procedures, which were designed for disputes between private companies, may not be adequate when broader public interests are involved. Unlike disputes between purely private parties, these cases often carry budgetary exposure, essential services and regulatory discretion that transcend the bilateral commercial relationship.[83] This section assesses whether core features of commercial arbitration (confidentiality, party control, limited third-party participation) can accommodate those public-interest dimensions; identifies where courts step in; and maps procedural adaptations that emerge within institutions and practice.

[82] Eduardo Silva Romero, 'The Dialectic of International Arbitration Involving State Parties: Observations on the Applicable Law in State Contract Arbitration' (2004) 15(2) *ICC International Court of Arbitration Bulletin* 79.
[83] Stavros Brekoulakis (n 20).

4.1. Confidentiality and Transparency

In standard commercial arbitration between private parties, confidentiality is one of the key advantages and often an explicit expectation. It can arise from contractual terms, institutional rules (like those of the ICC or LCIA), or even as an implied duty.[84] This means the claims, evidence, hearings, and even the final award are usually not available to the public. In disputes involving private parties, this is widely acceptable and even recommended, being one of the most attractive features of arbitration.[85]

However, when public entities participate in arbitration, confidentiality raises serious public interest concerns. If taxpayers' money is involved, or if the dispute touches essential services or public duties, secrecy can impair transparency and democratic oversight, and without access to key information, such as the reasoning behind decisions, the conduct of the parties, or how risks were managed, the public cannot assess whether the administration acted lawfully, efficiently, or in good faith. In short, secrecy may erode trust, shield misconduct, and undermine accountability.[86]

Transparency, then, becomes more than just a principle, it becomes a safeguard for legitimacy. When arbitration affects public procurement, competition rules, or the use of public funds, transparency enables courts, stakeholders, and citizens to scrutinize decisions that go beyond private interest. In these situations, sparse reasoning or fully confidential proceedings may result in arbitral awards that fail to stand up to judicial scrutiny, especially where domestic courts expect a public-law-aware analysis at the enforcement or annulment stage.[87]

In response to these concerns, some progress has been made toward greater openness in arbitrations involving public interest. For instance, investor-State arbitration has led the way: the UNCITRAL Rules on Transparency (2014) explicitly recognize the need to balance

[84] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA); Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) §§2.173–2.183.
[85] Queen Mary University of London and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF accessed 3 August 2025.
[86] Stavros Brekoulakis (n 20).
[87] Born (n 1) §26.06; Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) §§1648–1656.

procedural efficiency against the public's right to know.[88] While commercial arbitration remains largely confidential, a growing literature argues that disputes implicating public budgets or essential services justify similar disclosure obligations.[89]

Institutional rules have started to reflect this trend. The ICC, for example, now presumes that anonymized versions of awards will be published two years after they are issued, unless parties object.[90] The LCIA publishes anonymized extracts and statistics,[91] while other institutions publish reasoned summaries.[92]

At the judicial stage, transparency tends to increase. In England, court proceedings to challenge or enforce arbitral awards (under sections 67–69 of the Arbitration Act 1996) are governed by the principle of open justice and, even if the arbitration was private, the court's reasoning and final judgment are generally public.[93] In France, although the arbitration remains confidential, *exequatur* proceedings are public and allow for the application of public-law limits.[94] Similarly, in Germany, courts publish set-aside and enforcement decisions, bringing transparency into the process once it reaches the judiciary.[95] Following the pattern of civil law jurisdictions, Brazil's legal system treats publicity as a rule in the Judiciary, expressing allowing confidentiality if demonstrated the need for it. When involving public entities, however, publicity is the rule even for arbitration, being confidentiality an exception for sensitive information such as trade secrets or national security matters. That architecture preserves party autonomy and efficiency while conforming with the principle of accountability.[96]

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[88] UNCITRAL, 'FAQs - UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' (United Nations Commission on International Trade Law, 2014) https://uncitral.un.org/en/texts/arbitration/transparency/faqs accessed 3 August 2025

[89] International Institute for Sustainable Development (IISD), 'Transparency and the UNCITRAL Arbitration Rules' (IISD, undated) https://www.iisd.org/projects/transparency-and-uncitral-arbitration-rules accessed 3 August 2025

[90] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration* (1 Jan 2019, updated 1 Jan 2021; 1 Jan 2024) paras 43–47.

[91] LCIA Arbitration Rules 2020, art 30.3; LCIA, *Notes for Parties* (2021).

[92] SCC, *Policy on Publication of Awards* (2019); see also HKIAC, *Practice Note on Publication of Awards* (2019).

[93] *Department of Economic Policy of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 [39]–[45]; *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 [119]–[128]; *Arbitration Act 1996*, ss 67–69.

[94] *Fosmax LNG* case (n 9)*; Collectivité Territoriale de Martinique* case (n 11).

[95] KZB 75/21 (n 11); see also OLG and BGH case law published in *Neue Zeitschrift für Kartellrecht (NZKart)* and *SchiedsVZ*.

[96] Eliana Baraldi and Giovanna Martins de Santana, 'A arbitragem e a administração pública: desafios da transparência' (2024) 16(1) *Publicações da Escola Superior da AGU* 94

4.2. Public Law Expertise and Applicable Law

When a dispute arises from a contract between a public entity and a private company, it often involves more than just contractual issues, it may touch on public law principles, which govern how the state exercises its powers and duties. However, arbitrators are not required – nor always trained – to apply public law, such as administrative law doctrines. As a result, important doctrines such as *ultra vires* (the idea that government action must be authorized by law), and "fettering of discretion" (which prohibits governments from binding themselves in ways that prevent them from exercising discretion in the future), may be ignored or undervalued in arbitration, risking the enforcement of the arbitral award, especially if the award seems to bypass or misapply mandatory rules or public policy considerations.[97]

Arbitration, however, is not inherently unfit to handle public law elements. Across different systems, therefore, courts give arbitrators practical guardrails so that awards remain enforceable without sacrificing effectiveness. English courts, as seen in the *Dallah* case, conduct a *de novo* (independent) review of whether the State actually consented to arbitrate, especially where public funds are at stake. French administrative courts, in cases like *Fosmax* and *Martinique*, examine whether an award violates non-waivable public law rules, such as rules about public finance or inalienability of public assets. German courts, including in competition cases like KZB 75/21, enforce public policy *ex post* by ensuring arbitral awards do not undermine mandatory economic regulations or EU law. The result is clear: tribunals retain autonomy on the merits, but awards survive only if their reasons withstand the relevant forum's public-policy review.

4.3. Institutional Role: Arbitrators v Judges

Judges, especially those working in public law (constitutional, administrative, or human rights cases), have a broader duty than merely settling disputes between parties. They are embedded within a State or institutional framework and must ensure that their decisions reflect justice, fairness, legal precedent, and public interest. Their judgments are typically public, subject to appeal or review, and can impact the legal system as a whole, setting binding precedent for future cases. [98]

[97] Brekoulakis (n 20).
[98] Jan Paulsson, 'Arbitration in Three Dimensions' (2004) 20 *Arbitration International* 113

Even international judges that typically serve fixed terms in permanent courts or tribunals (e.g., the ICJ, ECtHR, ECJ) serve public justice and are expected to consider broader legal principles and public interest. They operate within a permanent institutional framework, applying international treaties, customary law, and general principles in proceedings established by their courts, and their decisions carry precedential value.[99] Judges' legitimacy is tied to transparency, neutrality, and consistency; and their decisions may be subject to appeal or revision within the judicial system, being their conduct monitored by the institutions they serve.

By contrast, arbitrators are more like service providers: they are paid to solve a specific conflict between two parties and nothing more. They are private individuals, often with backgrounds as lawyers or academics, who are appointed and paid by the parties for the specific purpose of resolving a single dispute. Arbitrators are typically not embedded in a permanent legal institution, nor do they operate with a public law mandate. They do not produce binding precedent, and their decisions are only enforceable between the specific parties involved.[100] This contractual nature of arbitration means that arbitrators focus on delivering a decision that meets the parties' expectations under the agreed legal framework, often without any obligation to account for public policy, broader societal impact, or legal development.[101] Unlike judges, they are not required to weigh constitutional values, transparency, or the democratic implications of their rulings, unless these are explicitly raised by the parties or built into the applicable law.[102]

This divergence becomes particularly problematic in disputes involving public entities, where one party represents public interests and acts under constitutional and legal constraints. If public-law norms are not raised, or are downplayed by arbitrators, the award may ultimately ignore critical public-interest considerations, leading to outcomes that may be legally sound but democratically questionable. And because most arbitration awards are confidential and

[99] Charles N Brower and Massimo Lando, 'Judges ad hoc of the International Court of Justice' (2020) 33 *Leiden Journal of International Law* 467.
[100] Gilberto Giusti, 'O Árbitro e o Juiz: Da Função Jurisdicional do Árbitro e do Juiz' (2005) 2(5) *Revista Brasileira de Arbitragem*.
[101] Brekoulakis (n 20).
[102] Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21(4) *Arbitration International* 631.

rarely reviewed on the merits, there is often no built-in safeguard to correct or expose such distortions.

4.4. Limits of procedural safeguards

While arbitration offers flexibility and party autonomy, certain built-in safeguards – such as objective arbitrability rules, admissibility doctrines, and options for third-party participation – are under pressure when public authority and regulatory interests are in play.

Objective arbitrability refers to whether the subject matter of a dispute is suitable for arbitration at all. As seen in section 3.2. above, some legal systems exclude certain types of public disputes in advance (*ex ante*): France, for example, does not allow arbitration of administrative contracts unless specific legislation or treaty expressly permits it, and Germany bars arbitration of matters involving sovereign powers. These *ex ante* limitations provide predictability and protection for public interest, but they may be too rigid, excluding disputes that could be fairly resolved through arbitration. Other countries, such as the UK and Brazil, allow a broader range of claims to go to arbitration through the absence of such rules, and the courts review awards *ex post* to ensure compliance with public policy. This approach is more flexible, but it depends heavily on the quality and reasoning of the arbitral award, especially when it touches on sensitive public matters.

Admissibility concerns whether a particular claim is fit to be heard at a given time and in a given manner, assuming a valid arbitration agreement and a competent tribunal. Basically, it filters claims that are premature, procedurally defective, abusive, or non-justiciable without denying the tribunal's power to decide other aspects of the dispute.[103] This is relevant in disputes over public budgets, essential services, or regulatory decisions, where courts should remain involved in assessing whether such claims are admissible, not just defer to arbitrators. That's especially true if non-derogable public norms are at stake.

A growing body of authority treats failures to satisfy escalation clauses as admissibility to be policed by arbitrators, not as jurisdictional defects to be policed by courts.[104] If an issue called

[103] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) 601; Gary Born (n 1) vol I, chs 5 and 8.

[104] Michael Hwang and John Choong, 'Jurisdiction, Admissibility and Choice of Law in International Arbitration' (2005) 18(4) *Journal of International Arbitration* 265.

admissibility in fact involves a mandatory norm, courts can move it to the right gate: a precondition to a public entity's valid consent is about jurisdiction, and a tribunal's failure to address mandatory rules is reviewed as public policy at set-aside or enforcement.

In investor-State arbitration, it's common to allow third parties (like NGOs or affected communities) to submit observations as *amici curiae*, given the strong public dimension.[105] But commercial arbitration usually excludes such input, which is understandable under confidentiality and privity principles. That does not mean tribunals are closed systems: with party consent or under their general case management powers, tribunals can (i) invite or appoint independent experts to address regulatory or public-law issues, and (ii) accept targeted input from third parties, such as regulators or oversight bodies.[106] Tribunals can still accept targeted non-party input by consent or invite expert evidence to cover regulatory deficits; institutions increasingly issue case-management guidance to structure such engagement.[107] Rather than fully open hearings (which might breach confidentiality), tribunals can build a well-documented record, including procurement documents, budget rules, or regulatory decisions. Soft laws that can be incorporated to arbitral proceedings facilitate this kind of structured, balanced participation, without undermining efficiency.[108]

4.5. Innovations and Procedural Adaptations

In Brazil, the CAM-CCBC (Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce) has led institutional innovation in public-entity arbitration. It has issued specific operational guidance, for example, in its 2022 model rules and Complementary Norm 02/2023, that imposes reason-giving obligations for tribunals in cases involving public bodies; formal processes for interaction with audit and control bodies, and calibrated transparency protocols, which align with statutory mandates protecting public funds while preserving confidentiality where necessary.[109] This institutionalization reduces frictions between arbitral

[105] See the UNCITRAL Transparency Rules and ICSID Arbitration Rule 67 on non-disputing party submissions.
[106] ICC Arbitration Rules (2021); LCIA Arbitration Rules (2020); HKIAC Administered Arbitration Rules (2018) (none of which include provisions on amicus curiae participation).
[107] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration* (1 January 2019, updated 1 January 2021) paras 36–42; IBA, *Guidelines on Conflicts of Interest in International Arbitration* (2014); IBA, *Rules on the Taking of Evidence in International Arbitration* (2020).
[108] IBA *Rules on the Taking of Evidence in International Arbitration* (2020) arts 3–9; *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules, 2018) arts 4–6.
[109] CAM-CCBC Arbitration Rules (as amended 1 November 2022) arts 2.4, 9.9; CAM-CCBC, 'Transparency and Public Administration Arbitration' (Guidance Note).

autonomy and accountability, ensuring that arbitrations involving public entities operate within a procedural framework sensitive to public-interest demands.

Globally, arbitral institutions have incrementally introduced transparency mechanisms without abandoning confidentiality. The ICC now operates an *opt-out* regime for anonymized publication of awards and key decisions two years post-issuance, and publishes tribunal compositions and procedural data.[110] The LCIA regularly issues anonymized extracts of challenge decisions, facilitating insights into due-process and ethics without revealing identities.[111] The SCC provides summaries of awards and jurisdictional rulings, creating a public corpus of reasoning.[112] These practices matter in public-entity disputes because they allow scrutiny of reasoning that may affect public finances or essential services while still protecting trade secrets.

Further, rules addressing transparency when there is the participation of third-party funding align with public-interest safeguards. The ICC Rules (2021) require parties to disclose any non-party with a direct economic interest in the outcome, an essential conflicts check when SOEs, sovereign wealth funds, or politically exposed funders may be in the background.[113] HKIAC's rules make funding disclosure mandatory and require identification of the funder; even where not expressly required (e.g., the LCIA Rules), tribunals can order disclosure under their general case-management powers.[114] These disclosures reinforce the impartiality of arbitrators and reduce later challenges based on undisclosed conflicts.

Soft-law frameworks also reinforce these adaptations across institutions. Concerning evidence-taking with protection of sensitive information, modern procedural rules support targeted access to sensitive documents, enabling arbitration to build lawful and accountable records. The IBA Rules (2020) support targeted production (procurement files, audit reports, budget acts) under protective measures (redactions, confidentiality clubs, data rooms), allowing a proper record on public-law constraints without jeopardizing security or

[110] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2019, updated 1 January 2021) pts 43–47; ICC Arbitration Rules 2021, art 11(4), app II.
[111] LCIA Arbitration Rules 2020, arts 30.1–30.3; LCIA, 'LCIA Court Decisions on Challenges to Arbitrators – Anonymised Extracts' https://www.lcia.org accessed 3 August 2025.
[112] SCC Arbitration Rules (2023), *Policy on Publication*; SCC, 'Summaries of SCC Awards and Decisions' https://sccinstitute.com accessed 3 August 2025.
[113] ICC Arbitration Rules 2021, art 11(7).
[114] HKIAC Administered Arbitration Rules 2018, art 44; Hong Kong Arbitration Ordinance (Cap 609), pt 10A; LCIA Arbitration Rules 2020, arts 14.5, 22.1(viii), 23.1.

commercial secrecy.[115] The Prague Rules (2018) encourage tribunal-led fact-gathering and expert questioning, enabling efficient resolution of regulatory or administrative claims (e.g., procurement legality, competition, non-fettering concerns).[116]

The IBA Guidelines on Conflicts of Interest (2014) structure disclosures around public-sector appointments and sovereign influences.[117] The ICCA–Queen Mary Task Force Report on Third-Party Funding (2018) provides integrity best-practices, such as security for costs and funding transparency, which tribunals can integrate.[118] Anti-corruption instruments, such as the OECD Anti-Bribery Convention and UNCAC, are frequently cited as interpretive anchors for illegality, burden-shifting, and red-flag analysis in procurement-linked disputes, providing a shared normative vocabulary beyond any single national law.[119] Finally, even though the UNCITRAL Rules on Transparency (2014) formally apply to investment arbitration, many commercial tribunals borrow its calibrated features – such as redacted awards or targeted regulatory briefs – especially when public funds or essential services are at stake.[120]

Collectively, these institutional adaptations demonstrate that public-interest-sensitive arbitration is not theoretical; it's now a practical reality, particularly in Brazilian practice but increasingly reflected worldwide. They offer a procedural toolkit allowing tribunals to produce transparent, review-proof records on topics like capacity, procurement legality, and public policy compliance, without sacrificing confidentiality or undermining party autonomy. By enabling reasoned, substantiated decision-making, these measures help ensure that commercial arbitration involving public entities remains both legitimate in the eyes of stakeholders and enforceable in court.

4.6. Substantive Reasoning in Practice

Procedural design alone cannot ensure public-interest-sensitive outcomes. An important, yet undermined, aspect for enforceability is whether the award's reasoning identifies relevant mandatory norms and explains how they were weighed against contractual commitments.

[115] IBA Rules on the Taking of Evidence in International Arbitration (2020), arts 3–9.
[116] Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules, 2018), arts 2–6.
[117] IBA *Guidelines on Conflicts of Interest in International Arbitration* (2014).
[118] ICCA–Queen Mary Task Force, *Report on Third-Party Funding in International Arbitration* (ICCA 2018).
[119] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, 1997); United Nations Convention against Corruption (UNCAC, 2003).
[120] UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (2014); United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention, 2014).

Ultimately, it is substantive reasoning – by tribunals and by reviewing courts – that decides if values such as fiscal probity, democratic accountability, regulatory autonomy, EU legality, and competition policy meaningfully constrain outcomes. The following cases illustrate how different legal systems channel those values at the enforcement and review stages, even when the arbitration itself was framed as a private, contractual dispute.

4.6.1. France - what "public-interest-sensitive" reasoning requires

A paradigmatic example of the interaction between arbitral decision-making and public interest safeguards is the *Fosmax* case, which set an important standard for balancing arbitration with public law imperatives.[121] The case involved the construction of the Fos Cavaou LNG terminal. A public entity (the French State or one of its representatives) sought to recover costs after taking over the project.

The award was challenged before France's *Conseil d'État*, which confirmed that administrative courts – not civil ones – have authority to review awards involving French public entities, especially when public contracts are involved. Further, it reaffirmed a three-pronged standard of review: the legality of the arbitration agreement, the regularity of the procedure, and any conflict with public order. Applying this test, the Court annulled the part of the award that ignored a core rule of French public works law. Under that rule, a public authority can take over the works at the contractor's expense and risk without needing to formally terminate the contract first, especially when it's necessary to protect the public interest (e.g., to prevent delays in critical infrastructure). The Court, however, upheld the parts of the award that involved economic adjustments (like rebalancing a lump sum price), since those didn't raise public order concerns.

The decision sends a clear message that arbitrators must actively engage with public law when public entities are involved. Even if the arbitration seems a purely private contractual dispute, courts will scrutinize the award to ensure public interest wasn't ignored, especially if public funds, essential services, or government obligations are involved.[122] This decision implicitly set a standard of expectation for arbitrators and counsel to identify any public law norms relevant

[121] *Fosmax LNG* case (n 9).
[122] Eduardo Silva Romero (n 82).

to the dispute early on, to explain how those norms interact with the contractual terms, and to demonstrate that the public interest was considered, not sidelined.

4.6.2. Germany – competition law as *ordre public* in arbitral review

A strong proxy for public-interest scrutiny is the German Federal Court of Justice's decision KZB 75/21 (2022).[123] The dispute involved a quarry lease in the German state of Hesse. The lessor ended a lease early and pressured the lessee to transfer equipment to another operator, essentially trying to replace the lessee with a competitor. Germany's competition authority (Bundeskartellamt) investigated and concluded that this amounted to anticompetitive coercion and fined the lessor. Despite this fact, a commercial arbitration tribunal ordered the lessee to vacate the premises. The lessee challenged the award in court, arguing that the tribunal's decision clashed with German competition law. However, the Frankfurt Higher Regional Court declined to set the award aside.

On further appeal, the Federal Court of Justice (BGH) annulled the award, holding that core competition laws – particularly Sections 19–21 of the German Act Against Restraints of Competition (GWB) – are part of German public policy (i.e., fundamental principles of law that override party autonomy in arbitration), requiring full factual and legal review of an arbitral award under § 1059(2)(2)(b) ZPO (public policy). Therefore, when a tribunal's decision conflicts with these public norms, German courts must conduct a full review, including factual and legal findings, not just a superficial check for "manifest errors" or evidentiary plausibility check.

According to Germany's broader approach to public interest in arbitration, therefore, even in purely private disputes, if public law norms are implicated, German courts will not defer to arbitrators blindly. This opens the door to elevate public interest – specifically the interest in functioning, competitive markets – over the finality of arbitration awards and imposes to arbitrators to develop a tailored record on competition law issues and provide clear, legal reasoning about how they addressed the antitrust concerns.

4.6.3. UK – consent, fraud, and public-interest control at the enforcement stage

English courts play a gatekeeping role when it comes to enforcing arbitral awards that affect public funds or involve any public entity, irrespectively if under English law or not. They do this

[123] Case KZB 75/21 (n 11).

by Independently reviewing consent to arbitration (even after the award), setting aside awards procured by fraud or serious irregularity, and anchoring these interventions in public-policy safeguards to protect the public interest, not just party rights.

The first example is the *Dallah v Pakistan* case.[124] The dispute arose from an agreement between a private company (Dallah) and an entity connected to the Pakistani government. A tribunal seated in Paris issued an award against Pakistan and Dallah sought enforcement in England. The UK Supreme Court refused recognition of the award after conducting a *de novo* review of jurisdiction and holding that Pakistan (through its Ministry) was not a party to the arbitration agreement. The Court framed the point as one of consent and legality: before public money can be exposed to an award, English courts independently verify whether the State actually agreed to arbitrate, regardless of what the tribunal decided. The ruling is not based on public law, but on contract law principles, but it inserts a public interest safeguard at the New York Convention stage.

This decision implicitly states that international tribunals must do more than apply standard commercial reasoning when States are involved, bearing the obligation to assess the impact of enforcement on public funds and social services, especially when due process and transparency in State commitments are in question.[125]

A key example of the prevalence of public interest considerations is found in *P&ID v Nigeria* case.[126] This involved a gas processing contract between Nigeria and P&ID. A tribunal seated in London awarded over USD 6.6 billion to P&ID. Nigeria challenged the award, claiming it was obtained through fraud and corruption.

In set-aside and enforcement proceedings, the Commercial Court held that the award had been procured by fraud, setting it aside for serious irregularity under section 68 of the Arbitration Act 1996.[127] Nigeria's case was framed in public-interest terms: enforcing the award would drain public funds, and the record contained red flags (corruption, false evidence, non-disclosure) the tribunal had failed to investigate. The Court recognized that maintaining the fairness and reliability of arbitration is crucial and, if a case is built on fraud or corruption,

[124] *Dallah* case (n 9).
[125] Stavros Brekoulakis and Margaret Devaney, (n 63); Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) chs 15–17.
[126] *Nigeria v P&*ID (n 9).
[127] ibid (Knowles J) (setting aside on s 68 for fraud/serious irregularity).

letting it stand would harm the entire arbitration system. Moreover, enforcing a fraudulent award would unfairly burden public finances, and the protection of the system and the public interest are enough to reopen the case, even though arbitration decisions are usually final and binding.[128] Methodologically, *P&ID* signals that, where sovereign funds are at stake, English courts expect tribunals to engage with *indicia* of illegality (burden-shifting, disclosure failings, credibility analysis) and to explain why contractual remedies do not reinforce corrupt bargains. It showed that anti-corruption and transparency are core public values that may override even the usual finality of arbitral awards.

4.6.5. Brazil – corruption/public-funds concerns as secondary to contract and proof, drawing criticism on public-interest under-reasoning.

As already discussed in section 3.2.4. above, Brazil permits arbitration by the public administration over "disposable economic rights". The framework is rounded out by the 2021 Public Procurement Law, which institutionalizes ADR (arbitration, mediation, dispute boards) for public contracts, and by Decree 10.025/2019, which standardizes arbitration for federal transport and port projects (seat, language, applicable law, disclosure), aiming to make procedures replicable in public-interest-sensitive sectors.[129]

A useful illustration of the tension between private arbitration logic and the public-interest duties of Brazilian state-controlled entities is the *Vantage Deepwater v Petrobras* case.[130] This was a major arbitration dispute between Vantage, a U.S. company, and Petrobras, Brazil's state-controlled oil giant. The ICC tribunal seated in the US awarded Vantage more than USD 600 million after finding Petrobras wrongfully terminated a deep-water drilling contract. Given Petrobras's public ownership and the geopolitical importance of its operations, the dispute bore implications not only for private commercial interests but also for Brazilian public resources and political accountability.

[128] ibid [1], [587]–[594]; see also *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838, [2018] 2 Lloyd's Rep 193.

[129] Brazil, Law No 14.133 of 1 April 2021 (Public Procurement and Administrative Contracts Act), arts 151–154; and Brazil, Decree No 10.025 of 20 September 2019 (Federal Decree on Arbitration in the Infrastructure Sector), art 2.

[130] *Vantage Deepwater Co v Petrobras America Inc*, No 4:18-CV-02246, 2019 WL 2161037 (SD Tex, 20 May 2019); *Vantage Deepwater Co v Petrobras America Inc*, 966 F 3d 361 (5th Cir 2020).

The arbitral tribunal faced allegations that the underlying drilling contract had been procured through corruption connected to the *Operation Lava Jato* investigations in Brazil. Although the tribunal acknowledged that agreements tainted by bribery offend international public policy and thus cannot be enforced, it held that the mere invocation of a large-scale corruption scandal was insufficient to displace contractual obligations. Applying a heightened standard of proof, the tribunal required clear and convincing evidence that the alleged illicit payments had directly influenced the conclusion of the specific contract at issue. Finding no such causal link, and noting Petrobras's own failures in disclosure and cooperation, the tribunal rejected the corruption defense and upheld the contract's validity. This reasoning demonstrates the delicate balance between safeguarding public interest (by refusing to legitimize corrupt practices) and preserving the integrity and finality of arbitral adjudication. By doing so, the tribunal affirmed that while arbitrators must be vigilant in addressing indicia of illegality, unsubstantiated claims of corruption cannot be used by State entities to escape their contractual commitments.

From a public-interest perspective, the tribunal's reasoning, and the confirming courts' approach, has drawn criticism for treating corruption and exposure of public funds as ancillary to evidentiary and contractual questions. Under Brazilian administrative law, contracts tainted by corruption are generally void and cannot be validated by conduct; ratification is not available where illegality implicates public resources or mandatory norms. Brazilian doctrine and control-court practice emphasize legality, probity, and the non-disposability of the core public interest, which requires tribunals to analyze illegality as a threshold (not merely a defense in contract). The *Vantage* award reads instead as a private-law analysis of breach and reliance, with limited engagement with administrative-law constraints on a state-controlled enterprise.[131]

4.7. Partial conclusion.

Commercial arbitration's core features (party autonomy, confidentiality, and limited third-party participation) can be tuned to surface public-interest issues in State/SOE disputes (via calibrated transparency, targeted disclosure, expert input, and early issue-planning). But

[131] Joana Stelzer and Alisson Guilherme Zeferino, 'Corrupção na obtenção de contratos como argumento de defesa no caso *Vantage v Petrobras* (2018): repercussões da Operação Lava Jato no Brasil sobre a arbitragem comercial internacional' (2021) 42(89) *Sequência: Estudos Jurídicos e Políticos* 1–32.

procedure alone does not ensure public-interest-sensitive outcomes. What ultimately determines legitimacy and enforceability in this type of arbitration are the award's reasons, i.e., whether the tribunal identifies the relevant mandatory norms, explains their interaction with the contract's risk allocation, and justifies the remedy in terms a reviewing court recognizes as compatible with public law.

Across systems, courts supply three main types of judicial control that set the standard and arbitral tribunal must meet in its reasoning: issues genuinely about legal authority or mandatory norms are treated as jurisdiction/public policy by courts; timing/escalation disputes remain matters of admissibility for tribunals; and superficial engagement with public-law constraints are likely to be set aside by national courts or refused enforcement internationally.

For parties and tribunals, the operational lesson is clear: front-load public-interest mapping; build the evidentiary record around procurement legality, sanctions/competition, and integrity concerns; apply necessity/proportionality where sovereign measures collide with performance; and tailor remedies to public-finance and service-continuity constraints. These practices preserve arbitral autonomy and produce review-resistant awards. Section V now turns to comparative patterns, i.e., how seat, applicable law, tribunal background, sector, and transparency regime shape whether these techniques are used consistently, and which combinations correlate with outcomes that are both legitimate and enforceable.

V. Comparative Assessment and Patterns

This section brings together the practical ways in which public-interest concerns are already being addressed in international commercial arbitration involving States and State-owned entities (SOEs). Rather than arguing that arbitration needs to be fundamentally restructured to accommodate public interests, the section highlights that existing procedural and doctrinal tools are often sufficient.

In practice, arbitrators apply well-established techniques, such as interpreting contracts in light of their broader context, adapting contractual obligations in cases of changed circumstances (like hardship or force majeure), and applying mandatory legal norms (including public policy or regulatory requirements), to engage with public-interest issues. These tools allow tribunals to remain within the conventional framework of commercial arbitration while still being

sensitive to the wider implications of their decisions, especially when public funds, services, or regulatory prerogatives are involved. In short, the message is that arbitration doesn't need to be reinvented, it just needs to be applied thoughtfully.

5.1. Recurring techniques arbitrators already use

Arbitral procedure may open space for public-interest arguments, but it is the tribunal's reasons (not the label "public interest") that carry an award through review. In practice, tribunals rely on orthodox tools: (i) careful contract interpretation (including change-in-law and stabilization clauses) to price regulatory risk; (ii) hardship/adaptation doctrines to rebalance performance in the face of system-level shocks; and (iii) mandatory-law analysis to give effect to non-waivable norms (competition, anti-corruption, sanctions, procurement). Used transparently, these techniques connect the merits to constitutional and regulatory concerns without exceeding the arbitral mandate.[132]

5.1.1. Public powers doctrine

In arbitration cases involving public contracts, tribunals often need to assess whether a State or State-owned entity acted within the limits of its public powers, especially when its actions affect contractual obligations. Different legal systems offer comparative benchmarks, or reference points, that guide how tribunals can handle such questions while respecting the public interest: France's non-fettering and unilateral-variation principles in public contracts, the UK bar on fettering statutory discretion, German proportionality, and Brazilian administrative legality.[133]

To apply these ideas in arbitration, tribunals typically follow a three-step method: (a) identify the legal source of power (statute/constitution/regulatory mandate), (b) explain its interaction with party autonomy, and (c) justify any contractual consequence (adaptation, excuse, or denial of relief). This method helps arbitrators respect the legal boundaries of State conduct while still resolving disputes under the contractual framework. It brings public-law principles into the analysis in a structured and legally defensible way.

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[132] Born (n 1) 3043–3048, 3751–3778; Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) [on mandatory rules].

[133] CE, *Compagnie nouvelle du gaz de Deville-lès-Rouen* (1902); CE, *Compagnie générale française des tramways* (1910); *Padfield v Minister of Agriculture* [1968] AC 997; *R v Secretary of State ex p Fire Brigades Union* [1995] 2 AC 513; *BVerfGE* 19, 342; *Constitution of the Federative Republic of Brazil* 1988 art 37.

5.1.2. Margin of appreciation

Inspired by human rights law, this technique allows tribunals to defer carefully to sovereign choices, like public tariffs or health regulations. A calibrated deference to sovereign policy can appear in commercial awards addressing utilities, health, or tariff regulation, as tribunals still examine whether the aim is legitimate, the means suitable and necessary, and less restrictive alternatives realistically available within legal and budgetary constraints, while also considering the contract's allocation of regulatory risk.[134] This structured deference travels across systems (French *ordre public* and EU constraints; English reasonableness/legality review; German proportionality; Brazilian principles of legality, efficiency and equality).

5.1.3. Hardship

This private-law doctrine helps address unexpected disruptions that affect State/SOE performance (e.g., inflation, sanctions, regulatory overhaul). Under the UNIDROIT Principles, unforeseeable events fundamentally altering performance (hyperinflation, sanctions, sweeping regulatory shifts) trigger renegotiation and may justify adaptation or termination[135] and, therefore, it may offer a private-law gateway for public-interest realities. Under the UNIDROIT Principles, unforeseeable events fundamentally alter performance (hyperinflation, sanctions, sweeping regulatory shifts) trigger renegotiation and may justify adaptation or termination.[136] In State/SOE cases, tribunals should map facts to the legal test, respect contract adjustment mechanisms, and choose remedies that preserve continuity of essential services and fiscal integrity. [137]

5.1.4. Mandatory law override and *ex ante* mapping

Certain rules bind irrespective of party choice, such as EU/Member-State competition law, anti-corruption and AML norms, sanctions, procurement legality, and constitutional limits on public spending. Tribunals then should (i) identify the precise rule (source/scope), (ii) explain

[134] *Handyside v UK* (1976) 1 EHRR 737; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.
[135] *UNIDROIT Principles of International Commercial Contracts* (2016), arts 6.2.1–6.2.3.
[136] The UNIDROIT Principles are referred to here solely as a comparative source. As a soft-law instrument on contract law prepared by jurists from both common law and civil law traditions, they serve as a neutral point of reference rather than a governing standard. Their relevance and application must, in any event, be adapted to the specific circumstances and to the law applicable to the dispute.
[137] *Code civil* (France) art 1195 (Ordonnance 2016-131); *Bürgerliches Gesetzbuch* (BGB, Germany) § 313; *Davis Contractors v Fareham UDC* [1956] AC 696; *Civil Code* (Brazil) arts 478–480.

why it applies (seat law, EU law, place of performance, recognition/enforcement risks), and (iii) state its concrete effect (nullity, unenforceability, damages limits).[138]

This orthodox conflicts method aligns with review practice: French administrative courts police non-derogable public-law constraints (*Fosmax*), German courts treat antitrust as *ordre public* (BGH KZB 75/21), English courts set aside/refuse enforcement for fraud or public policy (P&ID), and Brazilian law renders corruption-tainted contracts void or unenforceable.

5.2. Variables that shape outcomes

In arbitrations involving States or SOEs, the actual impact of public interest arguments isn't determined by rhetoric or abstract principles. Instead, it is possible to affirm that center on five key structural variables – mostly set before the dispute even arises – which influence how tribunals reason through sovereign conduct and how courts review those awards later.

5.2.1. Applicable law.

The law governing the contract shapes how tribunals articulate public-interest claims. (e.g., *imprévision*, ultra vires, non-fettering, proportionality). Even when parties choose a law, mandatory norms (like EU competition law or anti-corruption rules) – normally related to the law of the state party or the SOE – may override party autonomy. Tribunals that clearly identify these rules, justify their application, and explain how they affect the outcome tend to issue awards that survive court scrutiny.[139]

5.2.2. Seat and review forum

The seat fixes the *lex arbitri* and the court that will police the award. France channels public-entity awards to administrative review limited to (i) legality of the arbitration agreement, (ii) procedural regularity, and (iii) violations of public order, capturing non-derogable administrative norms.[140] Germany conducts intensive review where antitrust is implicated.[141] The UK keeps merits review narrow but tests consent *de novo* and is unforgiving on fraud.[142]

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[138] *Regulation (EC) No 593/2008* of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*Rome I*), art 9; *Eco Swiss China Time Ltd v Benetton* (C-126/97) EU:C:1999:269; *Ingmar GB Ltd v Eaton Leonard* (C-381/98) EU:C:2000:605.

[139] *Ibid.*

[140] *Code de justice administrative* art L.321-2; CE, *Fosmax LNG* case (n 9); *Collectivité Territoriale de Martinique* case (n 11).

[141] ZPO § 1059(2)(2)(b); BGH, KZB 75/21 (n 11).

[142] *Dallah* case (n 9); *Nigeria v P&ID Ltd* case (n 9)

Brazil front-loads safeguards (arbitration "on the law", calibrated publicity) and sectoral decrees standardize key parameters for public contracts.[143]

5.2.3. Tribunal background and epistemic community

Panels with public-law and regulatory literacy (administrative, competition, procurement, public finance) is better equipped to understand and apply public law principles – such as proportionality, necessity, and mandatory-law effects – that may affect the dispute, even if it looks like a purely commercial issue on the surface. If a tribunal is made up only of commercial lawyers or arbitrators with no public-law experience, there's a risk they will probably treat government acts (like new regulations or early termination for public reasons) as if they were just ordinary contract breaches, and reduce complex sovereign behavior to a simple question of liability or excuse under contract law. [144]

5.2.4. Sector and regulatory density

Networked/regulated sectors (energy, water, transport, telecoms, public works) embed public duties (continuity of service, tariff legality, environmental/health protections, procurement integrity). Dense frameworks supply objective benchmarks and facilitate tailored remedies (adaptation, staged performance, limits on specific performance). Thin frameworks demand explicit reasoning about policy trade-offs.

5.2.5. Transparency regime and record-building

Commercial confidentiality can mute public-interest analysis unless parties and tribunals deliberately widen the record. Modern practices such as calibrated publication (ICC opt-out anonymized awards; LCIA anonymized extracts; SCC summaries), reasoned treatment of targeted non-party input, and protective disclosure (IBA Rules; Prague Rules) strengthen the evidentiary basis for weighing public values while safeguarding trade secrets.

5.3. Patterns of inconsistency and their impact on award legitimacy

A central problem in international commercial arbitration involving States and SOEs is inconsistency, which is different from bad faith. The issue is not the rejection of public interest,

[143] Brazil, Law No 9.307 of 23 September 1996 (*Arbitration Law*), art 2 §3; Law No 14.133 of 1 April 2021 (*Public Procurement and Administrative Contracts Act*), arts 151–152; Decree No 10.025 of 20 September 2019 (*Federal Decree on Arbitration in the Infrastructure Sector*) .
[144] Brekoulakis and Devaney (n 14).

but how differently it is handled depending on who is deciding, where the arbitration sits, and what label is used. Therefore, the difficulty is not hostility to public interest, but inconsistency in how tribunals and courts weigh it.

A government measure in one case might be called a legitimate exercise of public power, in another a contractual breach, or in a third a mandatory legal rule. These labels come with different burdens of proof and standards of review, which can lead to wildly different outcomes for similar facts. Some tribunals use vague concepts such as public policy or margin of appreciation without explaining which law or rule makes them relevant, or how they relate to the contract's risk allocation, which makes the award vulnerable on review because the reasoning is seen as vague or shallow.

Different legal systems have different expectations. France expects tribunals to engage with non-waivable public law rules, especially in public contracts (*Fosmax* case). Germany demands substantive analysis of antitrust law if competition issues are involved (KZB 75/21). The UK focuses on consent to arbitrate and fraud, and courts independently assess those even after the award (*Dallah* case; *P&ID* case).

In some cases (e.g., *P&ID*), tribunals over-defer to states during arbitration (avoiding tough calls on public law), only for courts to step in forcefully after the fact, overturning awards due to fraud, corruption, or ignored public norms. This makes results unpredictable and undermines fairness and trust in the system.

Legitimacy then improves when tribunals identify the precise mandatory norms, explain why they bind, apply a transparent proportionality/reasonableness test, and align remedies with both contractual allocation and public functions.

5.4. Partial conclusion

Across the compared systems, arbitrators already possess the tools to address public interest without turning commercial arbitration into public-law adjudication. The decisive variables are structural (seat, enforcement *fora*, sectoral density, tribunal expertise, and transparency choices) and methodological (how clearly the award identifies and applies mandatory norms). Germany's antitrust public policy and France's administrative review increase the pay-off to robust public-interest reasoning; the UK's narrow merits review is counter-balanced by unforgiving consent/fraud controls; Brazil front-loads public interest through statutory design.

A principled, transparent use of existing private-law techniques – hardship, mandatory-law analysis, careful interpretation – paired with explicit record-building, is the surest path to enforceable awards that respect public values.

VI. Normative and Policy Proposals

Unless international commercial arbitration develops the tools to address the public-interest dimension of disputes involving public entities, it will likely face stronger judicial control and a gradual loss of legitimacy. This section summarizes the comparative findings into method-focused reforms for arbitrators, administering institutions, and reviewing courts. The objective is not to transplant public law into commercial arbitration, but to discipline reasoning by identifying the relevant mandatory norms, justifying their legal relevance and interaction with contractual risk allocation, and crafting proportionate remedies that respect public functions and can withstand scrutiny.

6.1. A principled test for "public-interest-sensitive" reasoning (three-step matrix: identification → justification → proportionality)

I propose that arbitrators should incorporate a short, explicit section in every award involving a State/SOE applying a three-step matrix, which can demonstrate parties and enforcement authorities that public values are squarely addressed, and awards remain enforceable.

Identification. Specify the public interests engaged (e.g., fiscal integrity, continuity of essential services, health/environment, competition) and map the binding norms that operationalize them, such as applicable law, *lois de police* or *ordre public*, EU law (where relevant), procurement and constitutional constraints, sanctions and anti-corruption, and likely enforcement *fora*. This conflicts analysis should explain why a mandatory rule applies notwithstanding party autonomy.

Justification. Evaluate the State measure or omission against a legality/necessity standard anchored in the identified norms, such as statutory authority or constitutional mandate, legitimate aim, evidential basis, non-discrimination, and contract's risk allocation (including stabilization, change-in-law, hardship). Where corruption or procurement illegality is credibly raised, state the evidentiary framework (red flags, burden shifts, adverse inferences) and precise factual findings.

Proportionality and remedy. Calibrate relief to preserve both contractual expectations and non-waivable public duties. Explain least-restrictive means and why the chosen remedy (adaptation, phased performance, declaratory relief, monetary relief with tailored interest, or denial of specific performance) best aligns the contract's purpose with the State's public functions and enforcement realities (immunity from execution, asset specificity). This closes the loop between public interest and outcome.

By embedding this three-step matrix into the reasoning of awards involving States or SOEs, arbitral tribunals can strike a practical and principled balance between contractual autonomy and public accountability. Such structured reasoning not only enhances the legitimacy and enforceability of awards, but also provides clarity to parties, courts, and reviewing authorities. It shows that arbitrators are not blind to public stakes, but are capable of addressing them within arbitration's framework, thus preserving both the integrity of the process and its suitability for complex public-private disputes.

6.2. Public-Interest Protocol for Arbitrations Involving States or SOEs (Opt-In)

In cases involving a State or SOE, the parties and tribunal may find value in adopting a light, optional protocol that creates a standing "public-interest track" from the first case-management conference through the award. If used, the track can invite short submissions on the items listed below, including where a party's position is that an item is inapplicable. The tribunal can simply record those positions and, where helpful, its own preliminary view. The purpose is modest: to facilitate a reasoned record that is intelligible on review.

On registration or constitution, the institution might note the presence of a public entity and draw the protocol to the parties' attention. If the parties and tribunal agree to use it, PO1/Terms of Reference can annex a brief Public-Interest Matrix and indicate when each heading is expected to be addressed: preliminary (capacity, procurement, immunity), production (corruption/procurement files), liability (change-in-law, necessity/proportionality), quantum (causation, mitigation, public-finance calibration), and award (severability and remedies). Where an item appears irrelevant at the outset, PO1 can record that stance, provide a point for revisiting as facts develop, and note that the award will explain either why the item remained irrelevant or how it was resolved. A concise case-management checklist can be reflected in PO1 and revisited at later conferences as needed.

Public-interest mapping. At the outset, the parties may find it useful to identify which mandatory rules may apply, which approvals or capacity requirements bind the public entity, and where enforcement is likely to be sought. A brief map might note competition and procurement rules, sanctions and anti-corruption laws, constitutional limits on spending, and any *lois de police* in probable enforcement fora. The value lies in anticipation, as participants can see early which non-derogable norms may shape both reasoning and relief.

Record-building. Targeted disclosure could be agreed to enable reasoned analysis without exposing trade secrets. Illustrative materials include procurement files, tender evaluations, permits or regulatory decisions, and relevant budget or appropriate documents. Protective tools, such as redactions, confidentiality clubs, or secure data rooms, can preserve sensitivity while equipping the tribunal to address public-law constraints.

Third-party input. Where the subject matter is technical or regulatory, the tribunal might consider a narrow protocol for amicus briefs, for example from a regulator or oversight body on a discrete legal question. A short ruling on admissibility and weight can clarify scope and expectations. Used sparingly, this may close knowledge gaps without opening the proceedings.

Issues plan. Early flagging of potentially dispositive public-law issues, such as capacity or *ultra vires*, indicators of illegality or corruption, sanctions, or competition concerns, may help sequence the case efficiently. The tribunal might decide to resolve some issues in stages, for instance taking capacity as a preliminary matter if it could dispose of the claim. Sensible sequencing often saves cost and reduces surprise near the award stage.

Reason-giving. It may assist review to include a concise “Public-Interest Impact” section applying the three-step matrix: identification of public interests and binding norms; justification against legality and necessity; and proportionality with a remedy calibrated to service continuity and fiscal integrity. Making the method visible helps courts see how contractual allocation and public functions were reconciled.

Publication. Subject to the rules and party agreement, limited, anonymized publication of public interest section, with agreed redactions, may be appropriate. This can preserve confidentiality while contributing to a modest public record on comparable issues, which in turn supports predictability and trust.

6.3. Checklist for drafting review-resistant awards in State and SOE disputes

The comparative analysis in this thesis indicates that, in disputes involving States and SOEs, legitimacy and enforceability depend less on labels, such as “public interest” or “private law”, and more on whether the tribunal reasons carefully and transparently about the public law issues. Tribunals need not transform commercial arbitration into a public-law trial; but they stand to gain from a structured record that identifies applicable mandatory norms, explains how those norms interact with the parties’ contractual risk allocation, and calibrates remedies with public functions and execution realities in view. If such elements are not relevant for the case, the arbitral tribunal will demonstrate such circumstances and give the parties the opportunity to fully present their case, in case of disagreement.

The fact is that courts, for their part, shape incentives by signaling through their review practices what counts as sound reasoning to tribunals and what is likely to be enforceable to parties. Given that context, the checklist is offered as a voluntary, neutral aid to help tribunals and parties test whether their process and award meet a basic standard of method that tends to survive court scrutiny across different jurisdictions. Used this way, it encourages sincere engagement with public interest issues without sacrificing party autonomy or confidentiality. In compliance terms, it is a lightweight policy that improves consistency and creates an audit trail.

Using the checklist can also show that everyone acted responsibly. For tribunals, it evidences attention to capacity, mandatory norms, and proportionality, and it records reasons in a format courts recognize. For parties and institutions, it promotes focused disclosure, realistic planning of issues, and measured transparency. While none of this guarantees any particular result, it does reduce avoidable review risk and supports the perception that the proceedings were fair, coherent, and mindful of the public responsibilities accompanying State and SOE participation.

Framing and structure. It often helps to signal at the outset how the award is organized. Many tribunals find it useful to note that they will consider (i) the legality of the arbitration agreement and the parties’ capacity, (ii) procedural regularity, and (iii) any conflict with non-derogable norms. Where public interest issues appear, a short *ordre public* analysis can clarify the approach. If there is any uncertainty about State identity or the signatory’s status, a clear consent analysis tends to aid review.

Mandatory norms and conflicts. Awards travel better, i.e. face fewer enforcement problems, when they identify the precise mandatory norms at stake and explain why those norms bind despite party autonomy, whether by reference to the seat law, the place of performance, or likely enforcement *fora*. Where relevant, EU competition and protective norms can be treated as overriding.

State Regulatory Measures and Contractual Risk. When a State measure affects performance, a transparent path is to set out legality, necessity, and proportionality by explaining the aim pursued, the evidential basis, and any non-discrimination concerns. Stakeholders also benefit from a brief account of how that public measure interacts with the contract's allocation of risk (for example, stabilization, change-in-law, or hardship provisions).

Integrity and procurement. If corruption or procurement illegality is credibly raised, tribunals often state the evidentiary framework they will use – red flags, potential burden shifts, and the possibility of adverse inferences – before recording precise factual findings. Citing the specific materials relied upon (procurement files, audit reports, approvals) can make the reasoning more traceable.

Record and calibrated transparency. A targeted record tends to support enforceability: procurement legality, regulatory decisions, budget and appropriation documents, and any competition-agency findings. Protective measures (redactions, confidentiality clubs, secure data rooms) can safeguard sensitive information. Where appropriate, a short protocol for targeted non-party input, coupled with a reasoned note on admissibility and weight, may assist without opening the proceedings, i.e. transparent, accountable and documented.

Remedies and proportionality. Remedies are more likely to be effective, enforceable and respected when they align with contractual allocation and public functions, using the least restrictive means, i.e when they don't go further than necessary. Tribunals should justify why they choose a particular type of remedy, such as adaptation, phased performance, declaratory relief, or monetary relief. If specific performance is considered, they should explain their reasoning for granting or denying it. Noting which parts of the award can stand independently and alternative or backup remedies, when requested, allows a reviewing court to send the defective part back for correction rather than annul the entire award.

These measures preserve finality while ensuring that awards involving public entities survive scrutiny because they earned it through clear engagement with mandatory norms.

VII. Conclusion

This thesis examined how public interest operates in international commercial arbitration when a State or a SOE is a party, and how tribunals can address that dimension without losing the core virtues of commercial arbitration. The comparative analysis across France, Germany, the United Kingdom, and Brazil supports three main claims. First, public interest is not a fixed concept; it is contextual, contested, and shaped by institutional practice. Second, a public entity brings non-waivable duties and mandatory norms into what is otherwise a private forum; those duties do not disappear when the State contracts as a market actor. Third, enforceability depends not only on procedural regularity but also on the quality of the tribunal's reasons. Where an award identifies the relevant mandatory norms, explains how they interact with the contract, and calibrates the remedy accordingly, courts have fewer grounds to intervene. Where it does not, review expands and legitimacy suffers.

The first research question asked how the four systems conceptualize and protect public interest, and whether they recognize layers or functions of public interest and what legal consequences follow. The systems differ in design, but they converge on a small core of non-waivable rules that arbitrators must respect, and courts will enforce.

French law preserves the structural integrity of public law through a narrow front door and a disciplined form of review. Article 2060 of the *Code civil* sets a baseline prohibition on arbitration by public entities. That prohibition is set aside only where the legislature or a treaty expressly authorizes arbitration. Public contracts remain under the oversight of the administrative courts, and review is focused and structured. The *Conseil d'État* has confined control of awards involving public entities to three prongs: (i) the legality of the arbitration agreement, (ii) the regularity of the procedure, and (iii) respect for public order, including rules from which a public authority cannot depart. This template does not turn review into a re-hearing, but it does require tribunals to recognize mandatory public-law constraints, such as rules governing public works, the inalienability of the public domain, and the ban on liberalities, not to mention to explain openly how those rules fit with the contract's risk

allocation. By narrowing arbitrability ex ante and shaping review ex post, France gives both guidance and discipline.

In Germany, arbitrability turns on function. When the State or a SOE acts commercially, the dispute may be arbitrated; when it exercises sovereign authority, it may not. Nevertheless, within arbitrable space, mandatory regimes operate as public policy, and competition law is the clearest example. Where an award would challenge the effective enforcement of antitrust norms, the Federal Court of Justice has held that courts must undertake a full factual and legal review at the set-aside stage. The message to tribunals, therefore, is direct: build a proper competition-law record, such as market definition, dominance, effects, and justifications, or risk annulment. This approach aims to protect core constitutional and EU-law commitments while leaving the remainder of commercial disputes to arbitral autonomy.

English law is the model of common law systems and strongly developed within a private-law paradigm, which does not maintain a separate system of administrative courts. It therefore tends to assimilate public entities to private actors in arbitration, irrespectively if domestic or international. Even so, the courts calibrate public-interest control through two gates at review and enforcement. First, consent and jurisdiction are tested de novo where a State denies being bound, e.g., public funds should not be exposed unless there was real agreement to arbitrate. Second, integrity and legality are controlled through serious irregularity and public policy, under which fraud and corruption can justify setting aside or refusing enforcement where recognition would offend the rule of law. Neither gate imports a general administrative-law review into commercial arbitration; both are tied to the New York Convention and the Arbitration Act 1996. In this way, English courts preserve arbitral autonomy over the merits while guarding core public values at the points that matter most.

Finally, Brazil affords comparatively broad access to arbitration for public entities over "disposable economic rights," while ring-fencing non-disposable public interests through constitutional principles and sectoral rules. In practice, claims tied to the Administration's secondary interests, such as economic-financial rebalancing, compensation, technical performance, and pecuniary penalties, are generally amenable to arbitration on the law. By contrast, matters that implicate primary public interest (constitutional duties and core prerogatives) remain outside party's disposal and authority consent, the reach of applicable law, and the menu of remedies. Brazil's framework reinforces this balance by expecting

reasoned awards, promoting arbitration "on the law," and standardizing parameters in public-contract sectors, so arbitral efficiency does not cover non-waivable duties.

Taken together, these different designs answer the first research question. Each jurisdiction protects a hard core of public interest through its own filters: France by narrowing arbitrability and focusing review; Germany by respecting arbitral space but enforcing mandatory regimes through public policy; England by testing consent and integrity rigorously; and Brazil by opening access but tying the merits and the remedy to constitutional and statutory controls. For arbitrators operating transnationally, the practical takeaway is similar across these contexts: identify the non-waivable norms that may bind the dispute, explain how they interact with the parties' allocation of risk, and calibrate relief so it respects public functions and enforcement realities. While the doctrinal routes vary, courts in all four settings tend to reward awards that make those limits visible and justify outcomes within them. Arbitrators can therefore plan around a small, knowable set of expectations and write reasons that that are intelligible across legal orders.

The second research question asked what kinds of broader public consequences arise from awards involving States and SOEs, and whether the presence of a public party changes the private character of arbitration in a way that calls for greater sensitivity to non-party interests. The record shows that such awards can carry consequences that reach beyond the signatories. Monetary relief may affect public budgets, debt profiles, and spending priorities; remedies can influence the continuity, pricing, or quality of essential services such as energy, water, transport, or health. Outcomes also touch regulatory authority and market structure, for example by validating or constraining procurement choices, competition policy, sanctions compliance, or administrative legality. Because proceedings are often confidential, weak reason-giving may erode public trust, while clear engagement with mandatory norms can support accountability and predictability. Cross-border enforcement adds another layer, since *ordre public*, mandatory rules, and execution immunity shape what relief is practically realizable.

Nevertheless, the participation of a public party does not change the private legal basis of arbitration, yet it does introduce non-party interests that tribunals can hardly ignore. A cautious and workable response is to make public norms visible, explain how they interact with the contract's allocation of risk, and assess state measures for legality, necessity,

proportionality, and non-discrimination. Remedies can be tailored to preserve service continuity and fiscal integrity, for example through adaptation, staged performance, calibrated interest, or declaratory relief, while recording execution realities. Handled in this way, tribunals respect party autonomy but write reasons that are intelligible across legal orders and more likely to withstand review.

The third research question asked how tribunals can respond to public-interest concerns, both procedurally and substantively, without undermining party autonomy, efficiency, and finality, and how they might structure reasons to support enforcement and legitimacy where a public entity is involved. The answer is methodological rather than structural. Tribunals already possess the tools they need, and the task is to use them in a way that is explicit, disciplined, and review resistant.

On procedure, incremental adaptations may help. The idea is to make small, practical adjusts to procedure so awards in State or SOE cases are easier to defend. Institutions can help the quality of reasons by promoting anonymized publication of awards after a cooling-off period with redactions, by requiring disclosure of third-party funding so conflicts checks are credible, and by permitting narrow non-party input when a regulator or a clear public-interest issue is at stake. These steps create a modest public record, improve independence screening, and let tribunals hear targeted expertise without turning the case into open litigation. Tribunals can order focused production of procurement files, audit reports, and budget documents under protective measures to build an adequate record without compromising confidentiality.

On substance, what matters is the award's reasons. The thesis proposed a three-step matrix: identification, justification, and proportionality. Identification requires the tribunal to specify which public interests are engaged, such as fiscal integrity, continuity of essential services, competition, or anti-corruption; and to map the binding norms that give them legal force. This includes the applicable law, any *lois de police*, relevant EU law, procurement or constitutional constraints, and likely enforcement *fora*. Justification asks whether any sovereign measure or omission meets legality and necessity standards, taking into account statutory authority, legitimate aim, evidence, non-discrimination, and the contract's allocation of regulatory risk. Proportionality then calibrates relief so that the remedy fits both the contract and the non-waivable duties of the State. In practice, this may favor adaptation, phased performance, declaratory relief, or carefully framed monetary relief rather than intrusive specific

performance, with attention to immunity from execution and to avoiding windfall interest against taxpayers. None of these steps change the nature of commercial arbitration. They make explicit what careful tribunals and courts already do.

The case law surveyed in this thesis shows how this method aligns with review practice. In France, the administrative courts protect non-waivable public-law norms and expect awards to address them expressly. In Germany, the courts will annul an award that under-engages with competition-law *ordre public*. In England, courts test consent *de novo* and set aside awards infected by fraud or serious irregularity. In Brazil, constitutional principles and the category of "disposable economic rights" frame the space for arbitration and the forms of relief. Across these systems, superficial engagement with public-law constraints is the principal failure mode and a reliable predictor of set-aside or refusal of recognition.

These findings have implications for arbitral legitimacy and for State participation. Legitimacy here is not a theoretical label, but a practical condition that affects whether a court will enforce the award and whether the public will accept it. When public money or essential services are on the line, the arbitral proceedings should be accessible for the relevant interested subjects, and courts will continue to police consent, integrity, and public policy. It is our conclusion that, if tribunals "show their work" on the mandatory rules and explain how those rules shaped the result, courts can review more lightly, which keeps arbitration fast and final while still safeguarding public values.

The incentives for all sides are aligned. For States and SOEs, better record-building reduce review risk, facilitate settlement, and improve public perception. For private counterparties, the same steps increase certainty and reduce the danger of post-award surprises.

This study, however, has its limits. It focuses on four jurisdictions and on published awards and judgments. Confidentiality hides much practice from view. Practitioner surveys offer partial insight and may lag behind rapid developments, especially on transparency and third-party funding. Therefore, there is a selection effect: controversial awards are more likely to be litigated and published. The thesis responds to these limits by advancing a method rather than a fixed substantive test. The method can be applied across sectors and *fora* and can be refined as more material becomes available.

Future research should build a stronger empirical base. Citation analysis could track how often tribunals engage with competition law, procurement legality, or proportionality, and how those references correlate with enforcement outcomes. Institutional studies could test whether anonymized publication or disclosure policies change tribunal behavior or court reasoning. Interviews with arbitrators and counsel could show whether panels that include public-law expertise reason differently and whether that affects results.

The overall conclusion is modest and practical. International commercial arbitration can accommodate public interest without losing its private-law strengths, but only if tribunals write reasons that public law can recognize and courts can sustain. Public interest is not a license to reopen the merits; it is a reminder that some values are not up for trade. When a public entity is involved, the award should show how those values were identified, why they applied, and how they were balanced against the contract. If tribunals make that analysis explicit, parties can plan, courts can review with restraint, and public confidence can grow. The method proposed here fits existing statutes and conventions, works with different national balances, and turns public interest from a source of uncertainty into a framework for better reasons.

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