SPECIAL PROBLEMS IN THE RESOLUTION OF INTERNATIONAL COMMERCIAL DISPUTES IN BRICS: REFLECTIONS FROM THE EUROPEAN UNION

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1. Course Description

BRICS is an economic bloc of five major emerging economies: Brazil, Russia, India, China and South Africa. Although Argentina, Nigeria and Saudi Arabia have expressed their interest in joining the group, their inclusion is subject to the consent of the existing members of the bloc. The BRICS countries cover around 42% of the world's population and are among the most dynamic emerging economies - constituting approximately 23% of global G.D.P. Moreover, cross-border interactions - not merely among the BRICS jurisdictions – and outside the bloc have escalated in the recent decade. Nonetheless, the diversity in terms of political, legal, economic, and social structure coupled with the lack of geographical proximity and historical connections have been highlighted as pointers that have hindered successful cooperation and the ability of BRICS to play an active part in global governance. The exponential growth of international business across the globe has significantly increased the number of commercial disputes between parties from different jurisdictions. This has, in turn, given rise to an increased requirement for the creation of fast and efficient dispute resolution systems specifically designed to handle high-value commercial claims, keeping in mind the diverse cultural backgrounds between the parties to foster international trade in the country.

This need has been met in several legal systems by creating specialised dispute resolution forums dedicated to adjudicating commercial matters with a foreign element. China, Dubai, France, Germany, and, more recently, Cyprus are prominent jurisdictions that have constituted commercial courts to exclusively adjudicate international matters according to procedural rules designed for complex commercial claims. The focus of these forums was to address the unique challenges involved in resolving international commercial disputes through litigation – a mechanism that is otherwise regarded as the least preferable – particularly in the context of commercial disputes of an international nature. The increased risk of multiple forums adjudicating the same matter, sovereign immunities and, most prominently, the lack of enforceability of such decisions in another country have been among the notable reasons for the lack of popularity of transnational litigation compared to international commercial arbitration. The desire to increase faith in litigation by reducing unnecessary complexities and hurdles, thus, provided a significant impetus to the constitution of special forums to resolve such disputes when they contain a foreign element.

The rise of multinationals, the involvement of several stakeholders spread across many countries in supply chain management, and the increased movement of people across borders have contributed to the complexities involved in the adjudication of commercial disputes of an international nature. Where must the parties initiate the dispute? How should the liability of the parties be determined? What happens when they have agreed to confer the matter to international commercial arbitration – does that exclude the jurisdiction of the competent court – and if so, to what extent? What happens when a commercial dispute arises in relation to goods purchased from or services rendered by State-owned business entities in non-market economies such as China? Does the notion of sovereign immunity preclude the initiation of such claims – and if so, to what extent? These questions illustrate the complexities involved in the adjudication of international commercial disputes – to which cogent answers must be available and, if not, they must be formulated to effect any Government-led initiatives that foster transnational trade.

In general, each country in BRICS has consistently attempted to develop rules for the challenges mentioned above encountered in international trade. In general, the Europeanisation of the international private law principles has urged other civil law systems, such as China and Russia and, to a lesser extent, Brazil, to undertake legislative reforms and prescribe clear, predictable rules to identify the applicable law in such claims. Moreover, the ongoing Russia-Ukraine crisis has further heightened the need to understand how the members would identify situations where the applicable law would or should give way to the overriding mandatory norms and the forum's public policy. The current political climate concerning the crisis is likely to similarly entail questions on whether the courts of the (other) members of the bloc would be willing to displace the applicable law on the ground that it contradicts the overriding mandatory norms and the public policy of another country whose law is closely connected to the contract out of which the dispute arose.

That said, it is well known that in matters involving a foreign element, decisions of an adjudicating authority – be it a court or an arbitral tribunal – cannot have any effect outside its territorial limits unless they are recognised and enforced by an appropriate court in whose jurisdiction the debtor (i.e. the person against whom the decision is made) has assets. In the case of foreign judgments, the legal principles on which courts may give effect to such choices are universally predicated on some theoretical justification. BRICS is no exception to this rule.

Against this backdrop, this course aims to understand the unique complexities of adjudicating international commercial disputes in India through litigation and arbitration and identify how legal representatives and adjudicating authorities may successfully prepare for and address these challenges. In doing so, the course focuses on:

- Identifying the procedural problems involved in adjudging commercial disputes of an international nature through judicial processes (litigation). This aspect would highlight the circumstances in which parties are likely to encounter multiple proceedings involving the same subject matter and the predicaments that these could give rise to during the enforcement of such decisions before foreign courts.
- Understand the various obligations that may arise from international commercial contracts and the laws that will govern each. This aspect would involve an examination of a) the parties' right in international law to pre-decide the applicable law, b) the extent to which this right prevails in determining the law in these jurisdictions, c) the applicable law in the absence of such an agreement and, d) an in-depth examination of the rules for the application of the CISG. In doing so, the students would also be able to understand the factors that must be considered while drafting (or agreeing upon) the choice of law clauses in international commercial contracts – depending on whether the dispute resolution system is litigation or arbitration.
- Understand the role of banks and commercial credits in commercial contracts and the unique challenges involved in adjudicating disputes involving such payment mechanism; and
- Examining the circumstances that call for the termination of the contract and/or the re-negotiation of the terms of the agreements and the remedies available for non-performance (such as the failure to perform or defective performance).

Total: 12 hours

MODULE1: INTRODUCTION (2 hours)

Unlike purely domestic contracts, agreements with a foreign element involve an in-depth analysis of certain crucial questions at the time of their formation. A contract may contain a foreign element for a variety of reasons. For instance, the parties may belong to different nationalities, or the contract may be performed overseas. Such contracts are synonymously referred to as cross-border, transnational or

international agreements. In contrast, domestic contracts do not involve parties from different nationalities living in different countries. Neither do such contracts require to be performed overseas. Instead, all the elements of the contract are located in one country, for instance, Italy.

Unlike purely domestic contracts, every contract with a foreign element involves the analysis of three fundamental questions: a) which court (in which country) is competent to adjudicate the matter? b) how should the court identify the applicable law? Which country's law would determine the rights and liabilities of the parties? and c) to what extent are the decisions of the court capable of recognition and enforcement in another country – particularly if the opposite (losing party) has assets/property overseas?

This module provides an overview of the various private law implications that arise in international disputes in contracts for the sale of goods – insofar as these constitute a major component of foreign trade. In particular, it discusses the circumstances in which a contract becomes 'international'. How does one differentiate between a contract for the sale of goods and the sale of services? What is the relevance and the need for harmonisation and unification of the law on the subject? What are the existing Conventions, and when do they apply? These are some questions that will be discussed in this module.

MODULE 2: DOING BUSINESS ABROAD: WHAT ASPECTS SHOULD YOUR CLIENT KEEP IN MIND WHILE PURSUING BUSINESS OPPORTUNITIES IN INDIA? CRUCIAL POINTERS WHILE NEGOTIATING AND DRAFTING CONTRACTS (2 hours)

Moving past the introductory class, this module involves an examination of the important pointers that lawyers must consider while negotiating and drafting contracts for businessmen and traders interested in pursuing business opportunities in their country. What mode of dispute resolution would be best suited to protect their interests? Should they include a jurisdiction clause or an arbitration clause? What factors should they keep in mind while choosing a law to govern any disputes that could plausibly arise? Is the decision of the court or arbitral tribunal capable of being recognised or enforced in another part of the world (outside India)? These are some aspects that will be discussed in this module.

MODULE 3: THE ROLE OF THE EUROPEAN UNION [EU] IN THE EUROPEANISATION OF INTERNATIONAL PRIVATE LAW (3 hours)

Internationally, the formulation of the principles of international private law has been the brainchild of academics and scholars. The EU is a prominent example and has provided an impetus to global developments in this area in several other major economies – including those in BRICS – an economic bloc comprising Brazil, Russia, India, China and South Africa. Unlike the EU, academic research and scholarly writings in the field of the BRICS international private law have, in general, been limited. This module, consequently, discusses the unification of the legal principles concerning the three chief pillars of any international dispute on the sale of goods: a) the determination of the court's jurisdiction; b) the identification of the law that the court will apply; and c) the recognition of foreign judgments in the EU. Consequently, this module will provide an in-depth analysis of the role of the Brussels Ibis recast and the Rome I and II Regulations in developing the international private laws of some major BRICS jurisdictions – such as Brazil, Russia and China. International private law in the EU has particularly played an instrumental role in shaping the judicial interpretations of the highest courts in Russia and China. In India, EU's international private law – particularly in determining the law that will govern an international dispute- has similarly been valuable in shaping some of the Supreme Court's decisions.

MODULE 4: CONSEQUENCES OF NON- PERFORMANCE OF A CONTRACT (3 hours)

The parties' inability to perform a contract may be attributed to several circumstances. In some situations, it may be due to an impeding eventuality. In others, non-performance may occur due to sheer recklessness or the inability to perform on a timely basis. This module discusses the nuances of the non-performance of a contract. In particular, it discusses the differences between *force majeure*, frustration of contract, hardship and breach – these being the chief types of non-performance. The implications of

non-performance could vary drastically depending on whether one is adjudicating the dispute in a civil or common law system. What are the rights and liabilities of the parties when one party fails to perform? How is the seriousness of the breach determined? What is the notion of 'fundamental breach', and how does its interpretation vary depending on the court before whom the parties are adjudicating their disputes?

MODULE 5: PRODUCT LIABILITY (1 hour)

In some situations, using a defective or dangerous product can result in injuries. This is known as 'product liability'. The expression refers to the civil liability of manufacturers for the injury caused to the user or a third person or damage to their property from using a product that fails to meet the standards claimed explicitly or impliedly. This module discusses the determination of the rights and liabilities of the aggrieved party in claiming damages for such injuries. In a product liability claim, the chain of events that constituted the harmful behaviour is likely to be spread due to the escalation of the international distribution of goods combined with the purchaser's ability to consume the product in a country that differs from the place of its acquisition. Consider, for example, a customer who suffers injuries from the use of a dishwasher in his country of residence, X, but the product has been that is manufactured in country Y and designed in country Z. Further, in some situations, the place where the damage from the use of the defective product occurs may differ from the customer's place of residence, the place of manufacture or designing. This may be the position when the defective product has caused harm in a country where the consumer has travelled for a vacation or work. The identification of the law that will govern the dispute becomes indispensable to determine the manufacturer's liability. The EU, the UK, and India's BRICS partners – Russia and China – are examples of legal systems that have developed a special conflict of law rules on the applicable law in product liability claims. This module, consequently, highlights the problems in extending the uniform rule to product liability claims and demonstrates how it debilitates access to justice and is not suitable for disputes that arise from accidents caused by products such as autonomous vehicles, which incorporate new technology.

MODULE 6: THE ROLE OF LETTERS OF CREDIT IN THE INTERNATIONAL SALE OF GOODS (1 hour)

Considered 'the lifeblood of international commerce', letters of credit remain one of the most favoured mechanisms to effect payments in commercial contracts - particularly in scenarios where they concern the international sale of goods where the parties belong to different jurisdictions. Traders and businessmen are heavily reliant on such payment mechanisms, especially while purchasing or selling products from or in a foreign country, for the security that they provide concerning the credibility of the other party. Accordingly, they enable a buyer to pay the seller through the involvement of a bank once the latter has confirmed that the goods contracted for have been duly transported. The seller is simultaneously ensured that it will be paid on time if the documents tendered correspond to the terms of the credit. Despite their popularity, the resolution of disputes on letters of credit is often tricky – especially when they contain a foreign element – insofar as they necessitate the identification of the applicable law to enable courts and arbitrators to adjudicate the matter. Unlike most other conventional cross-border civil and commercial matters, transactions involving letters of credit consist of three and sometimes four to five autonomous yet interdependent contractual relationships between the buyer, the seller and the bank(s) that has undertaken to finance the sale. Moving past the discussion in previous parts, this module examines the peculiar predicaments that litigants are likely to encounter while resolving unconventional transnational disputes before courts and arbitral tribunals – such as those concerning letters of credit.