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VICE-CHANCELLOR'S MESSAGE

It gives me immense pleasure to present the Second Issue of First Volume of the Journal on Arbitration and Allied Fields (JALAF). I am thrilled to see the level of scholarship and critical analysis on display in this edition. The articles featured in JALAF offer valuable analysis, with a particular emphasis on transparency, accountability, and party autonomy, aiming to deepen the reader's comprehension of arbitration law and its practical application.

This journal marks yet another significant milestone in our university's ongoing commitment to advancing scholarship and fostering meaningful academic and professional discourse in the ever-evolving field of arbitration. I would like to take this opportunity to congratulate the writers, editors and management of the journal on successfully bringing this publication. My special appreciation to the Editorial Board for their able leadership. I wish them all the very best for the future and hope that this journal will be useful edition to the existing literature on the subject and also serves the needs of the scholars and practitioners in the field of law. I look forward to all future editions of the Journal.

Prof. Dr. Surya Prakasa Rao,
Chairperson, Centre for Alternate Dispute Resolution (CADR) Vice Chancellor,
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Dr. Kabir Duggal is an attorney at Akin Gump Strauss Hauer & Feld LLP, New York, specializing in international arbitration and public international law. He is recognized as a "Chartered Arbitrator" by both CIArb and AIADR. He has been listed as a Global Leader and Thought Leader in International Arbitration by Who's Who Legal since 2021. He holds an S.J.D. in Law from Harvard Law School, where he was a Note Award recipient, won the 2024 Albert S. Pergam International Law Writing Competition, and was actively involved with the

Harvard International Law Journal. He teaches at Columbia Law School and serves as Managing Editor of The American Review of International Arbitration. He has co-authored several books on investment arbitration and has received the Burton "Law360 Distinguish Legal Writing Award" for his scholarly writings.

Mr. Harshad Pathak works as a Consultant (International Arbitration) with Mayer Brown, Paris. He acted as counsel in arbitral proceedings pursuant to the ICSID Convention, UNCITRAL Arbitration Rules, SIAC Rules, ICC Arbitration Rules, VIAC Rules of Arbitration and Mediation, among others. He has authored several articles published in platforms including Manchester Journal of International Economic Law, IISD ITN Quarterly, among others.

Mr. Rahul Donde is the founder of Rahul Donde Dispute Resolution and specializes in international commercial and investment arbitration, serving as arbitrator, counsel, tribunal secretary, and assistant. He got recognised by Who's Who Legal, Legal 500, and Expert Guides and was ranked among the "most highly regarded" non-partners in EMEA (WWL Arbitration 2023). He has authored works for several international publications, including Routledge (UK).

Ms. Manini Brar has acted as counsel, advisor to the Government of India on matters of international investment law. She founded Arbridge Chambers & Solicitors at New Delhi. She has authored the book 'The Figure in the Fog'. Currently, Manini is a Board Member of the Indian Women in International Arbitration practitioner's group, Global Steering Committee member of the Young Arbitral Women Practitioners Group, an empanelled arbitrator with the Singapore International Arbitration Centre (SIAC reserve panel), and the Thailand Arbitration Centre (THAC).

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EDITORIAL NOTE

Every dispute raises unique legal issues that warrant careful deliberation and the arbitration fraternity has valuable insights to offer on each of such issues. Academic discussions have played a vital role in shaping legal developments throughout history – from identifying loopholes in existing frameworks to recommending solutions to emerging questions of law. The academic engagements become further indispensable in context of arbitration as trade and commerce confronts novel legal, technological and geopolitical challenges. To further the intellectual dialogue, the Centre for Alternative Dispute Resolution devised the Journal on Arbitration Law and Allied Fields as a medium for scholars, practitioners and students to present their viewpoints. The Journal furthers academic research at the intersection of arbitration law and specialised fields like Investment Law, Insolvency Law, Intellectual Property Law, Maritime Law and more. Such interdisciplinary exploration informs the legal community about the relevance and scope of arbitration practice.

Through this issue, authors have voiced their concerns about the impact of geopolitical tensions on arbitration, highlighted the importance of virtual hearings, evaluated the principles of consent and party autonomy in the context of digital disputes, explored public interest angle in technological disputes and analysed judicial precedents to clarify the scope of curial law. These thought-provoking pieces have been meticulously written and carefully selected through a rigorous review process. A brief overview of each article is provided below.

Tamanna Jindal in "Arbitration in Turbulence: Sanctions, Aviation Leasing, and the Future of Cross-Border Enforcement" examines the unprecedented wave of aviation leasing disputes arising from the Russia-Ukraine conflict and the sanctions imposed thereafter. The article highlights how the seizure and re-registration of foreign-leased aircraft in Russia disrupted the foundations of the global aviation leasing industry and exposed arbitration to geopolitical pressures beyond its traditional commercial framework. It discusses the jurisdictional and enforcement challenges faced by arbitral tribunals when sanctions render contractual performance impossible and when enforcement of awards encounters public policy objections under the New York Convention. The author further analyses the parallel role played by domestic courts, particularly in the United Kingdom and Ireland, in shaping outcomes alongside arbitral proceedings. The article ultimately underscores the need for arbitration to adapt to an increasingly fragmented enforcement landscape where geopolitical considerations significantly influence commercial dispute resolution.

Krithik Vikas T M in "Post-Pandemic Virtual Hearings in Maritime Commercial Arbitration: Due-Process Paranoia or Procedural Efficiency?" highlights the structural efficiencies of arbitration institutions. The maritime arbitration was not hindered by the Covid-19 pandemic as switching to virtual hearings was without bottlenecks. Institutions created guidance notes supporting virtual proceedings without the trouble of amending the rules in entirety. Online arbitration turned out to be cost-efficient method. In situations where cargo needs to be inspected, a hybrid-proceedings may be welcome. Infrastructure further enables hearings and examination of witnesses in a secured manner. It has also given validity to digital evidence.

Nandani Agarwal and Palak Lamba in "Psychological and Temporal Arbitrability: Reformulating the Doctrine for Digital Asset Disputes" propose a novel rethinking of the doctrine of arbitrability in the context of cryptocurrency and digital asset disputes. The authors argue that traditional tests based on the distinction between rights in rem and rights in personam are inadequate to address the unique challenges posed by decentralized digital ecosystems. The paper introduces the concepts of "Psychological Arbitrability" and "Temporal Arbitrability", highlighting concerns regarding informed consent in click-wrap agreements and the impact of rapidly evolving regulatory frameworks on the arbitrability of disputes. Further, the authors suggest that arbitrability should be examined not only at the commencement of proceedings but also at the enforcement stage, given the fluid nature of cryptocurrency regulation across jurisdictions. By proposing a three-dimensional framework combining subject-matter legitimacy, psychological consent, and temporal compliance, the article contributes a fresh doctrinal perspective to contemporary arbitration jurisprudence in the digital economy.

Soumya Jha, Elnaaz Sayeed and Aparna Dwivedi in "The Sanctions-Arbitration Paradox: India's Quest for a Neutral and Enforceable Forum" shed light upon one of the most important issues in the arbitration world in Indian context. Geopolitics and sanctions pose challenges to legitimacy of arbitration agreements and threaten sanctioned parties' right to access justice and enforcement of arbitral awards. As the New York Convention remains silent on sanctions, different jurisdictions have their own way of dealing with this issue. Institutions perform screening and obtain licenses to deal with such entities. What assumes importance is identifying a neutral seat and India potentially may offer such neutrality. So, without becoming a haven, India may bring some reforms such as mandating disclosure of sanctions, building a dual compliance framework and regulating grant of licenses. Further, the strategic sectors like defence, energy or high-end technology may be excluded to prevent any conflict with the sanction-undertaking countries.

Dipti in "Importance of Arbitration in FRAND Disputes in Standard Essential Patents" explores the growing relevance of arbitration in resolving disputes concerning Standard Essential Patents (SEPs) and Fair, Reasonable, and Non-Discriminatory (FRAND) licensing obligations. The article examines the tension between the private contractual nature of licensing arrangements and the broader public interest concerns arising from competition law and access to standardized technologies. It analyses the arbitrability of FRAND disputes across jurisdictions, with particular focus on India's rights in rem versus rights in personam framework and the evolving international acceptance of arbitration in SEP-related conflicts. It further discusses concerns relating to competition law, transparency, and public policy, which continue to shape the scope of arbitral intervention in this field. The author concludes that arbitration offers a viable mechanism to balance innovation incentives and market access, provided that appropriate safeguards are adopted to accommodate the public interest dimensions inherent in FRAND disputes.

Adv. Hitesh Ramchandani in "The Commencement of Arbitral Proceedings under Indian Law" discuss the Supreme Court judgment in Regenta Hotels Private Limited v M/s Hotel Grand Centre Point & Ors., 2026 INSC 32. The Apex Court has reinforced the statutory mandate given under Section 21 of the Arbitration & Conciliation Act 1996 regarding commencement of arbitral proceedings. Section 11 application for appointment of arbitrator cannot be treated as the date of commencement when Section 21 clearly specifies that arbitration commences when a notice invoking arbitration is received by the respondent. In view of the same, non-appointment of arbitrator within 90 days would not take away interim relief granted.

Adv. Kritika Gakhar and Adv. Ishaan Sharma in "Digital Justice or Digital Risk? Rethinking Data Protection and Neutrality in SEBI's ODR Regime" critically examine the evolution of Online Dispute Resolution within India's securities market through SEBI's SMART-ODR framework. While acknowledging the efficiency, accessibility, and cost-effectiveness promised by technology-driven dispute resolution, the authors draw attention to significant concerns regarding data protection, confidentiality, and procedural neutrality. The article analyses the regulatory, contractual, and statutory foundations of the ODR ecosystem and identifies structural vulnerabilities relating to data governance, redaction practices, allocation of responsibility, cross-border data transfers, and algorithmic transparency. It argues that the legitimacy of digital dispute resolution depends not merely on technological adoption but on the existence of robust safeguards capable of protecting investor trust and procedural fairness.

Shraddha Tiwari in "The Achmea Judgment: A Watershed Moment for Intra-EU Investment Arbitration and Its Global Reverberations" has critically analysed the positioning of European Union's law over and above intra-EU bilateral investment treaties (BITs) as decided by Court of Justice of the European Union (CJEU) in 2018 and upheld by the Bundesverfassungsgericht in 2024. Achmea BV, A Dutch investor brought a claim against Slovakian government's ban on distribution of profits from private health insurance activities between 2007 and 2011. The arbitral tribunal found breach of Fair and Equitable Treatment under the Netherlands-Slovakia BIT and ordered Slovak Republic to pay EUR 22.1 million. This was followed by the elimination of intra-EU BITs. The Bundesverfassungsgericht decision of 23 July 2024 upheld the FCJ's decision. The Achmea judgment has indirect implications outside EU and India which have been discussed by the author.

We hope these 8 articles proves to be engaging and a prolific read and improves the quality of literature on arbitration available to the student community and legal fraternity. We look forward to receiving feedback from our readers.

Katyayni Singh, Editor-in-Chief & Kaushik Sharma, Student Editor

For

Editorial Board, Journal on Arbitration Law and Allied Fields

LONG ARTICLES

ARBITRATION IN TURBULENCE: SANCTIONS, AVIATION LEASING, AND THE FUTURE OF CROSS-BORDER ENFORCEMENT

- *TAMANNA JINDAL*[1]

"Inter arma enim silent leges"[2]

- Cicero, Pro Milone

ABSTRACT

The seizure of more than 400 foreign-leased aircraft in Russia after the imposition of sanctions in 2022, has generated one of the largest and the most complex waves of aviation disputes in modern history. Lessors, insurers, and state-linked carriers are now entangled in arbitration claims worth billions of dollars. These disputes have exposed arbitration to the pressures it was not designed to manage, the sanctions that override contractual performance, conflicting national approaches to enforcement, and questions of legitimacy when private tribunals adjudicate matters that have geopolitical and systemic implications. The Russia-Ukraine crisis has effectively transformed aviation arbitration from merely a tool of commercial efficiency into a forum where private rights collide with public international law. Recent court rulings, such as the United Kingdom High Court's 2025 decision awarding damages to AerCap for aircraft and engines stranded in Russia, show that domestic courts are beginning to shape outcomes in parallel with arbitration. This article is structured around three points of analysis. Firstly, the sanctions disrupt the assumptions underneath the leasing model, ultimately rendering contracts undermined in practice, though sometimes enforceable through damages claims and shifting the burden onto arbitration and insurance. Secondly, arbitration proceedings face jurisdictional and enforcement challenges, especially under the public policy exception of the New York Convention, and the conflicting approaches across various jurisdictions. Thirdly, the disputes raise concerns regarding confidentiality, fragmentation across fora, and the perception of politicisation.

[1] Associate, CMS IndusLaw, Email: tamannajindalwork@gmail.com.
[2] *"Inter arma enim silent leges" ("In times of war, the law falls silent").* Cicero, *Pro Milone* (52 BC), ch 11.

Keywords: *Aviation Arbitration, Aircraft Leasing Disputes, International Sanctions, New York Convention, Cross-Border Enforcement.*

I. INTRODUCTION

The infrastructure that sustains aviation, such as the lease agreements, the maintenance contracts, insurance frameworks, and regulatory approvals, is deeply entangled with national legal systems and international regimes. Aviation relies heavily on cross-border financial arrangements, which has made it predominantly dependent on arbitration.[3] The parties that are involved in leasing and financing agreements have always favoured arbitration because it provides neutrality, enforceability, and procedural flexibility.[4] Unlike domestic courts, arbitral tribunals can, at least in theory, accommodate the complexities of disputes arising from contracts that cover multiple jurisdictions and involve several layers of regulation.[5]

This reliance on arbitration was put to the test in 2022, after Russia invaded Ukraine. The European Union ("**EU**"), the United States ("**US**"), the United Kingdom ("**UK**"), and other jurisdictions responded by imposing sanctions on Russia, which included restrictions on the leasing, financing, and insurance of aircraft.[6] Russia blocked the repossession of western-leased aircraft, which were then effectively stranded in Russia.[7] Russian legislation allowed the unilateral re-registration of these aircraft under the Russian flag.[8] The lessors, mostly based in Ireland and Singapore, tried to recover their assets, only to find that their aircraft were

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[3] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, Oxford Law Pro 2009 <https://doi.org/10.1093/law:iic/9780199557189.001.1> accessed 20 September 2025.

[4] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) vol I.

[5] UNCITRAL, *Model Law on International Commercial Arbitration* (1985, with 2006 amendments) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 20 September 2025.

[6] Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L66/1; Export Administration Regulations, 'Expansion of Sanctions Against Russia and Belarus' (US Bureau of Industry and Security, Final Rule, 14 April 2022) 87 Fed Reg 22130; Sanctions and Anti-Money Laundering Act 2018 (UK).

[7] Reuters, 'Aircraft Lessors Cool on Risky Markets after $10 Billion Russia Blow' (20 January 2023) <https://www.reuters.com/business/aerospace-defense/aircraft-lessors-cool-risky-markets-after-10-billion-russia-blow-2023-01-20/> accessed 20 September 2025.

[8] Order of the Government of the Russian Federation of 19 March 2022 No 411 'On Amending Certain Acts of the Government of the Russian Federation on Issues of State Registration of Aircraft' (CIS Legislation, 2022) <https://cis-legislation.com/document.fwx?rgn=140952> accessed 20 September 2025.

detained and their contractual rights were obstructed by a combination of sanctions and domestic decrees.[9]

The result was a huge wave of arbitration claims.[10] Leasing companies such as AerCap, SMBC Aviation Capital, and Avolon initiated proceedings against insurers and their counterparties, trying to recover billions of dollars.[11] These claims have been filed primarily in established arbitration hubs such as London, Dublin, and Singapore. At the same time, insurers such as Lloyd’s of London and AIG are contesting their liability by raising arguments about the scope of coverage under war-risk and political-risk insurance.[12] There is also a parallel litigation in Dublin, where Irish courts are hearing claims over aircraft stranded in Russia worth more than USD 2.5 billion.[13] In June 2025, the UK High Court ruled in favour of AerCap and awarded compensation for the aircraft and engines stranded in Russia.[14] This development shows that even though arbitration is essential, national courts are also shaping the enforcement landscape in high-value disputes.

These disputes highlighted multiple challenges in aviation arbitration. The first and most obvious challenge being jurisdictional. Arbitral tribunals must decide whether they have competence to adjudicate disputes when performance of the underlying contract has been rendered illegal due to sanctions. If EU or UK sanctions prohibit the leasing or insurance of aircraft to Russian entities, can a tribunal still issue an award that requires performance or compensation? The second challenge is the enforcement. Even if a tribunal issues an award in favour of a lessor, the enforcement of that award in national courts may be resisted due to the

[9] Reuters, ‘Lessor AerCap Lodges $3.5 bln Claim for Seized Russian Aircraft’ (30 March 2022) <https://www.reuters.com/business/aerospace-defense/aircraft-leasing-company-aercap-says-potential-russian-losses-manageable-2022-03-30/> accessed 20 September 2025.

[10] Reuters (n 6).

[11] Reuters, ‘Aviation lessor settlements with Russia over trapped planes’ (31 January 2024) <https://www.reuters.com/business/aerospace-defense/aviation-lessor-settlements-with-russia-over-trapped-planes-2024-01-31/> accessed 22 September 2025.

[12] *Lost in the War Judgment in the Russian Aircraft Claims: AerCap v AIG* (LexisNexis UK) <https://www.lexisnexis.co.uk/legal/news/lost-in-the-war-judgment-in-the-russian-aircraft-claims-aercap-v-aig#:~:text=Article%20summary,contrast%2C%20DAE%20succeeded...> accessed 22 September 2025.

[13] Reuters, 'What Are the Battle Lines in Ireland’s Multi-Billion Euro Russian Jet Trial?' (27 June 2024) https://www.reuters.com/business/aerospace-defense/what-are-battle-lines-irelands-multi-billion-euro-russian-jet-trial-2024-06-27/ accessed 22 September 2025.

[14] Reuters, 'UK court rules in favour of lessors in case over jets 'lost' in Russia' (11 June 2025) <https://www.reuters.com/business/finance/uk-court-rules-favour-lessors-court-case-over-jets-lost-russia-2025-06-11/> accessed 22 September 2025.

public policy exception in Article V of the New York Convention.[15] National courts have historically been reluctant to enforce awards that violate their sanctions or broader public policies.[16] There is a huge risk of fragmentation. An award may be enforceable in one jurisdiction but could be refused in another. This will undermine the predictability that arbitration is designed to provide.[17]

These challenges highlight the complicated intersection of arbitration and geopolitics. Arbitration has traditionally been represented as a neutral and apolitical forum for resolving commercial disputes, but the aviation leasing disputes have revealed that this neutrality is fragile. Sanctions are not just regulatory measures, they are also instruments of foreign policy and economic coercion.[18] When arbitral tribunals are asked to resolve disputes that are inseparable from such measures, they get involved into questions that go beyond private law. This raises concerns regarding legitimacy. Should private arbitrators decide disputes that affect the implementation of sanctions adopted in response to war and violations of international law? Or should such disputes be left to state courts and public institutions, that are more directly accountable to democratic and international legal processes?

For India, these issues are not too remote. Indian aviation is a fast-growing sector, and Indian airlines are heavily dependent on aircraft leased from foreign lessors, especially the ones that are based in Ireland and Singapore. If geopolitical conflicts and sanctions can destabilise the leasing model so drastically, Indian carriers are indirectly exposed. Also, India is a party to the New York Convention, and Indian courts may be asked to enforce arbitral awards arising out of these disputes. How Indian courts would interpret the public policy exception in the context of sanctions could determine whether India is seen as a reliable jurisdiction for enforcement. But India lacks a comprehensive domestic framework on sanctions, and relies mostly on United Nations Security Council measures.[19]

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[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art V(2)(b).

[16] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740 (CA); *Soleimany v Soleimany* [1999] QB 785 (CA).

[17] Maxi Scherer, 'Effects of EU Sanctions on International Arbitration' (2022) 40(2) ASA Bulletin 257, 259.

[18] Thomas Biersteker and Sue Eckert (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2021) 14–15.

[19] Ministry of External Affairs, Government of India, 'Implementation of UNSC Sanctions (DPRK)' <https://www.mea.gov.in/Implementation-of-UNSC-Sanctions-DPRK.htm> accessed 23 September 2025.

The argument advanced here is not that arbitration is incapable of managing aviation disputes, but that the current crisis has exposed arbitration's limitations when disputes blur the boundary between private contracts and public international law. Aviation leasing arbitrations affected by the sanctions are a just a small part of a larger challenge, that whether international arbitration can adapt to a world where geopolitical conflicts increasingly shape commercial relationships. The first judicial outcomes, such as the 2025 ruling of the English High Court in favour of the lessors, indicate that arbitration will not operate in isolation. Domestic courts are also beginning to set precedents that assess risk and enforcement in this sector. But pending appeals in London and unresolved proceedings in Ireland emphasize that the enforcement landscape is still unsettled.

II. THE AVIATION LEASING MODEL AND THE DISRUPTIVE FORCE OF SANCTIONS

Aircraft leasing is a globalised and financially complex industry. Majority of the world's commercial aircraft are leased and not owned by the airlines.[20] This model became popular because leasing provides the carriers with flexibility in their fleet management, reduces the upfront capital costs, and allows the airlines to adjust their capacity as per fluctuations in the demand. On the other hand, lessors benefit from economies of scale and diversified portfolios by placing aircraft in multiple jurisdictions.[21]

The industry is more concentrated in some jurisdictions. One such jurisdiction is Ireland, which has become the leading centre for aircraft leasing and hosts companies such as AerCap, Avolon, and SMBC Aviation Capital.[22] Singapore is another major hub due to support from favourable tax structures and regulatory frameworks.[23] London has played a key role as a forum for dispute

[20] IATA, *More aircraft are leased than owned by airlines globally* (Chart of the Week, 12 April 2024) <https://www.iata.org/en/iata-repository/publications/economic-reports/more-aircraft-are-leased-than-owned-by-airlines-globally/> accessed 23 September 2025.
[21] Aviation Working Group, *Practitioners' Guide to the Cape Town Convention and Aircraft Protocol* (October 2020) 12 <https://awg.aero/wp-content/uploads/2020/10/Practitioners-Guide-to-the-Cape-Town-Convention-and-Aircraft-Protocol-October-2020.pdf> accessed 23 September 2025.
[22] PwC Ireland, *Taking Flight 2023: An Economic and Employment Analysis of the Aviation Leasing Industry in Ireland* (2023) <https://www.pwc.ie/publications/2023/taking-flight-2023.pdf> accessed 23 September 2025; Central Statistics Office (Ireland), *Aircraft Leasing in Ireland 2024: Key Findings* (2024) <https://www.cso.ie/en/releasesandpublications/ep/p-ali/aircraftleasinginireland2024/keyfindings/> accessed 23 September 2025.
[23] Corporate Tax Incentives and Deduction Schemes, *Singapore Budget 2024: Concessionary tax-rate tier for Aircraft Leasing Scheme* (PwC Singapore, 17 February 2024)

resolution as English law is a popular choice for governing law in leasing contracts. These hubs are the backbone of a globalised leasing market that is dependent on cross-border financing, insurance, and regulatory recognition.

Arbitration has become the preferred dispute resolution mechanism in this sector.[24] Standard leasing agreements increasingly include arbitration clauses, with designated institutions such as the London Court of International Arbitration ("**LCIA**"), the International Chamber of Commerce ("**ICC**"), or the Singapore International Arbitration Centre ("**SIAC**"). Arbitration offers three advantages that are very attractive to the lessors.[25] First, neutrality, by avoiding the home courts of the lessee airline. Second, enforceability, through the New York Convention. And third, confidentiality, by protecting sensitive financial information. But this model is inherently vulnerable to systemic complications. Aircraft are mobile assets that are often operated in jurisdictions where lessors do not have much practical control. Lease agreements depend on stable international regulation, most important of which is the recognition of ownership rights and registration under the Cape Town Convention.[26] When states begin to interfere with these arrangements through nationalisation, regulatory changes, or emergency legislation, the contractual framework that sustains the leasing model can unravel very quickly.[27]

The invasion of Ukraine by Russia in February 2022 led to one of the most comprehensive sanctions regimes in modern history. The EU, US, UK, and several other jurisdictions, imposed restrictions targeting Russian state entities, banks, and strategic industries. The aviation sector was particularly affected. The EU passed a regulation which prohibited the sale, supply, leasing, or transfer of aircraft and aircraft parts to Russia.[28] It also banned the provision of services like insurance, reinsurance, and maintenance. The UK and the US issued similar measures.[29]

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https://www.pwc.com/sg/en/publications/singapore-budget/commentary/corporate-tax-incentives-and-deduction-schemes.html accessed 23 September 2025.

[24] Born (n 3) vol I, 86–87.

[25] Blackaby and others (n 2).

[26] Convention on International Interests in Mobile Equipment (signed 16 November 2001, entered into force 1 March 2006) 2307 UNTS 285 (Cape Town Convention); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (signed 16 November 2001, entered into force 1 March 2006) 2367 UNTS 410 (Aircraft Protocol).

[27] Scherer (n 16) 263–265.

[28] Ibid (n 5).

[29] US Bureau of Industry and Security, *Expansion of Sanctions Against Russia and Belarus under the EAR* (14 April 2022) 87 Fed Reg 22130; The Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, as amended.

The immediate impact was dramatic. Western lessors were required to terminate their contracts with Russian airlines within a period of 30 days, which, in theory, meant repossessing more than 400 aircraft that were valued at over USD 10 billion.[30] But in practice, repossession was proved to be impossible. Russian authorities closed their airspace to foreign lessors and adopted a legislation that permitted Russian airlines to re-register foreign-owned aircraft in the Russian registry.[31] This effectively nationalised the aircraft and stripped the lessors of their contractual rights and undermined the Cape Town Convention's framework for recognition of international interests in the aircraft. Lessors disclosed that they had aircraft and engines worth billions trapped in Russia. For example, SMBC Aviation Capital, an Irish lessor, reported that 34 aircraft were stranded in Russia, which were valued at approximately USD 1.7 billion.[32]

It is important to understand that the sanctions and Russia's countermeasures did not merely cause economic losses, but also disrupted the fundamental assumptions of the leasing model. Contracts that were carefully negotiated under the English or Irish law became unenforceable in practice. Lessors were unable to regain possession of their aircraft, lessees could not make payments due to banking restrictions, and insurers disputed their liability on the grounds of sanctions exclusions and force majeure clauses.[33] The standard contractual mechanisms for managing risk, such as force majeure, frustration, and insurance coverage, were proved to be highly inadequate. Force majeure clauses typically exclude liability for events that are beyond the control of the parties, but their applicability to sanctions and state expropriation is unclear.[34] Insurers argued that the losses were not covered because policies excluded confiscation or were voided by sanctions, and lessors argued that insurers must compensate for what amounted to unlawful expropriation.

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[30] Reuters (n 9).
[31] Ibid (n 7).
[32] Padraic Halpin and Tim Hepher, 'SMBC proceeds from Russian jet insurance settlements hit $1.4 billion' *Reuters* (22 May 2025) <https://www.reuters.com/business/finance/smbc-proceeds-russian-jet-insurance-settlements-hit-14-billion-2025-05-22/> accessed 23 September 2025.
[33] *Lloyd's, AIG, Chubb, Swiss Re hit by Russian jet decision in UK court* (Insurance Business Magazine, 11 June 2025) <https://www.insurancebusinessmag.com/us/news/breaking-news/lloyds-aig-chubb-swiss-re-hit-by-russian-jet-decision-in-uk-court-538709.aspx> accessed 23 September 2025.
[34] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL); Scherer (n 16).

III. ARBITRATION IN THE SHADOW OF SANCTIONS: THE CHALLENGES

Why has arbitration emerged as the primary forum for these disputes? The answer can be found in the structure of the industry. Leasing agreements and insurance contracts are mostly governed by English law and provide for arbitration seated in London, Dublin, or Singapore. The parties to these contracts are often multinational corporations that are reluctant to litigate in national courts where neutrality might be questioned. Arbitration promises a forum where technical expertise can be combined with procedural flexibility. But the very features that make arbitration attractive, are the same reasons that also raise questions when it comes to issues created by sanctions.

The emergence of these proceedings has highlighted many challenges, most importantly regarding jurisdiction and enforcement. A central jurisdictional issue is whether arbitral tribunals have the jurisdiction to hear disputes where performance of the underlying contract has become illegal due to imposition of sanctions. For example, if EU regulations prohibit the leasing of aircraft to Russian entities, can a tribunal still pass an award granting damages for breach of such a lease? Lessors argue that sanctions render performance impossible but do not extinguish their contractual rights to compensation. Whereas, the insurers argue that sanctions render the contracts void or exclude coverage.

The principle of separability usually protects arbitration agreements from the invalidity of the underlying contract, but it is not clear whether this principle would apply the same when the invalidity is due to sanctions.[35] Tribunals must consider whether the arbitration agreement itself is affected by the sanctions, that whether the party is prohibited from engaging in arbitration. Most sanctions regimes do not explicitly prohibit arbitration, but they may restrict payments of arbitral costs or enforcement of awards, which would raise practical barriers.

In the AerCap litigation in London, the High Court treated the arbitration clauses and insurance contracts as enforceable despite sanctions, and emphasised that prohibitions on leasing did not extinguish the lessors' rights to damages. This decision suggested that courts may take a pragmatic approach by distinguishing between prohibited performance and permissible

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[35] Oxford Academic, 'Separability in International Commercial Arbitration' (2017) <https://academic.oup.com/arbitration/article/34/3/355/5098414> accessed 23 September 2025.

compensation. Justice Butcher observed that loss occurred when Russian legislation banned export of aircraft on 10th March 2022, and not when physical repossession failed.[36] This anchored the liability to legislative expropriation instead of factual detention.

Another major challenge is that even if tribunals assume jurisdiction and issue awards, enforcement is still problematic. Article V of the New York Convention permits the refusal of enforcement if an award violates the public policy of the enforcing state.[37] Sanctions are treated as part of international public policy. Courts have a history of refusing enforcement of contracts and awards that are in conflict with sanctions. In *Westacre Investments v. Jugoimport*, the English Court of Appeal observed that enforcement cannot be in contravention of public policy, including international sanctions.[38] In the UK Court of Appeal's decision in *Celestial Aviation v UniCredit*, the court overturned a High Court ruling and allowed a bank to refuse payment under letters of credit, and held that compliance with sanctions takes precedence.[39] This highlighted that retrospective and prospective sanctions are still contentious. US courts have denied enforcement of contracts that breach Office of Foreign Assets Control ("**OFAC**") sanctions.[40] These precedents suggest that awards where the performance is inconsistent with sanctions may be unenforceable.

The uncertainty primarily lies in the question whether the awards ordering compensation, rather than performance, are also affected. Lessors argue that awards containing damages only compensate for losses and do not violate the sanctions, but insurers argue that paying damages to sanctioned entities indirectly undermines the sanctions. This uncertainty is partially reduced by the English courts' stance in the AerCap ruling where the High Court confirmed that damages awarded under war-risk insurance policies did not undermine sanctions compliance.

There is also a high risk of fragmentation across fora.[41] UK courts are likely to interpret sanctions broadly, in a way that is consistent with their statutory obligations. EU courts may

[36] *Russian Aircraft Lessor Policy Claims* [2025] EWHC 1430 (Comm) (Butcher J).
[37] Ibid (n 14).
[38] *Westacre Investments Inc v The Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia and Udruzena Beogradska Banka* [1999] 1 WLR 1534 (CA).
[39] *Celestial Aviation Services Ltd v UniCredit Bank GmbH, London Branch* [2024] EWCA Civ 628.
[40] *Transatlantic Shiffahrtskontor GmbH v Shanghai Foreign Trade Corp* 204 F 3d 384 (2d Cir 2000); *Dean Witter Reynolds Inc v Fernandez* 741 F 2d 355 (11th Cir 1984); *Holy Land Foundation for Relief and Development v Ashcroft* 333 F 3d 156 (DC Cir 2003).
[41] Rebecca Perkins, 'High Court ruling brings clarity but not closure for aviation (re)insurers' *Insurance Insider* (16 June 2025) <https://www.insuranceinsider.com/article/2exhn9dj7atjsz3ullyps/all-topics/claims-and-losses/high-court-ruling-brings-clarity-but-not-closure-for-aviation-reinsurers> accessed 23 September 2025.

adopt a similar approach under EU regulations. Singaporean courts may take a more contract-focused approach, given their pro-arbitration stance. Russian courts, meanwhile, have amended their legislation to prevent enforcement of foreign awards in sanction-related disputes. [42] This divergence is already visible. The pro-lessor outcome in London contrasts with the more restrictive interpretations likely to emerge in EU jurisdictions, while Singaporean and Indian positions remain unsettled. Irish proceedings may add another layer to this, as Dublin courts are dealing with claims exceeding USD 2.5 billion.[43] Whether they will follow London's pro-lessor approach or adopt a stricter interpretation of sanctions is yet to be seen. What appears as judicial clarity in one forum might lead to fragmentation globally.

Insurance disputes add another layer to these challenges. Many policies contain explicit exclusions for confiscation, nationalisation, or requisition by a government.[44] Insurers argue that the Russian re-registration law falls within these exclusions. Lessors contend that insurers must cover losses under war-risk provisions. Awards in such disputes will have to interpret not only contractual clauses but also the interplay with sanctions law. Enforcement of such awards will determine whether courts are willing to separate private risk allocation from public sanctions policy.

One of arbitration's core features, confidentiality, presents another challenge in this context. Aviation disputes involve billions of dollars, state-owned airlines, and globally significant sanctions. But most proceedings are confidential. This leaves the regulators, policymakers, and the public blind to how key legal issues are being resolved. This lack of transparency affects the broader accountability. If an arbitral tribunal interprets sanctions narrowly and awards damages against an insurer, the decision may have implications for the effectiveness of sanctions. But such an award may never be publicly disclosed. The English High Court's AerCap ruling in 2025, which was delivered openly, has provided a benchmark for future disputes.

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[42] Mayer Brown, 'Jurisdictional Battleground in Disputes with Sanctioned Russian Persons' <https://www.mayerbrown.com/en/insights/publications/2024/07/jurisdictional-battleground-in-disputes-with-sanctioned-russian-persons> accessed 23 September 2025.

[43] Reuters (n 12).

[44] Hogan Lovells, 'Briefing Sheet on EU Sanctions and Aviation Insurance Prohibition' <https://www.hklaw.com/en/insights/publications/2022/02/briefing-sheet-on-eu-sanctions-and-aviation-insurance-prohibition> accessed 23 September 2025.

The UK has always positioned itself as a pro-arbitration jurisdiction, but its courts are equally committed to enforcing sanctions.[45] In the case of *Mamancochet Mining v. Aegis,* the High Court held that sanctions could suspend obligations under insurance contracts, even if the contract itself was otherwise enforceable.[46] This suggests that UK courts may refuse to enforce awards that are inconsistent with sanctions, even if the tribunal awarded damages instead of performance. EU courts are bound by the EU sanctions regime, which is directly applicable in member states. Awards that are in conflict with sanctions are likely to be refused enforcement. The Court of Justice of the EU has emphasised on the primacy of EU sanctions in multiple contexts, which makes it unlikely that national courts would be able to enforce awards inconsistent with sanctions.[47]

Singapore's judiciary has consistently adopted a pro-enforcement stance. It is possible that Singaporean courts would enforce awards if they interpret damages to be compensatory rather than violative of sanctions. But Singapore also recognises international comity and may be cautious about undermining sanctions to which its trading partners are committed.[48] In India, there is no autonomous sanctions regime. Indian courts would need to interpret "public policy" under the Arbitration and Conciliation Act.[49] The Supreme Court narrowed the scope of public policy review in cases like *Renusagar v. General Electric* and *ONGC v. Saw Pipes*, but it is still unclear as to how sanctions might be treated.[50] Enforcement in India may end up depending on broader diplomatic and policy considerations rather than a settled legal doctrine.

[45] Arbitration Act 1996 (UK) s 1(a); *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.
[46] *Mamancochet Mining Ltd v Aegis Managing Agency Ltd* [2018] EWHC 2643 (Comm).
[47] European Court of Justice, 'Two Russian oligarchs win court ruling over EU sanctions' *The Guardian* (10 April 2024) <https://www.theguardian.com/world/2024/apr/10/russian-oligarchs-petr-aven-mikhail-fridman-court-ruling-eu-sanctions> accessed 24 September 2025; Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* EU:C:2021:943.
[48] Brown (n 41).
[49] *Arbitration and Conciliation Act 1996 (India) s 34(2)(b).*
[50] *Renusagar Power Co Ltd v General Electric Co* [1994] 2 SCC 644 (India); *ONGC Ltd v Saw Pipes Ltd* [2003] 5 SCC 705 (India).

IV. REIMAGINING AVIATION ARBITRATION IN A WORLD OF SANCTIONS

The disputes arising from the seizure of foreign-leased aircraft in Russia have highlighted both the indispensability of arbitration as well as its limitations.[51] There are doctrinal issues such as jurisdiction and enforcement, and structural tensions such as confidentiality and fragmentation. These interlinked issues point to a deeper question: How should arbitration adapt to remain a credible dispute resolution mechanism in a world full of sanctions?

One way to adapt would be institutional reform. Arbitral institutions have taken modest steps to address sanctions by focusing primarily on administrative issues such as the payment of fees and appointment of arbitrators. But this is insufficient. Institutions could develop model sanctions clauses that could clarify the effect of sanctions on contractual performance and dispute resolution. This would reduce the uncertainty that is currently present in leasing contracts. They could also adopt protocols that require tribunals to give due consideration to overriding mandatory laws, including sanctions. Such measures would not replace tribunal discretion, but would provide consistent frameworks across cases. The adoption of best practices, similar to the International Bar Association ("**IBA**") Guidelines on Conflicts of Interest, could provide guidance to the arbitrators about disclosure, evidence, and reasoning in sanctions disputes.[52] This would enhance the predictability and help in changing the perception that tribunals act different in politically sensitive disputes.

Transparency is another area where reform is needed. There is no doubt that confidentiality is valuable in many commercial disputes. The aviation leasing arbitrations involve billions of dollars, and affects the stability of insurance markets as well as the credibility of sanctions as a tool of foreign policy. Resolving such disputes entirely behind closed doors has the risk of affecting the legitimacy of arbitration. Therefore, a calibrated approach to transparency is best suited. Tribunals could publish awards or at least redacted versions that address the questions regarding sanctions law. These measures would not affect the confidentiality of commercial

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[51] *Impact of international sanctions on arbitral proceedings* (Norton Rose Fulbright, 2021) <https://www.nortonrosefulbright.com/en-id/knowledge/publications/92ca5faf/impact-of-international-sanctions-on-arbitral-proceedings> accessed 24 September 2025.

[52] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (adopted 23 October 2014) <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 24 September 2025.

details, and would allow the public, regulators, and the courts to access the reasoning on issues of wider consequence. Investment arbitration has shown that transparency is compatible with arbitral practice, and commercial arbitration should not be immune where disputes are linked with public policy.

Another aspect that needs consideration is specialisation. Aviation disputes have complex regulatory and technical dimensions. Arbitrators have to understand the leasing structures, insurance policies, aviation safety requirements, and sanctions regimes. Arbitrators, in general, may lack the expertise to navigate such disputes effectively. In this scenario, maritime arbitration provides a useful example.[53] Institutions such as the London Maritime Arbitrators Association, have developed specialist expertise and tailored procedures. Aviation could benefit from a similar approach. It could be through a dedicated aviation arbitration body, a specialist panel within the existing institutions, or a collaboration with aviation regulators. Specialisation would strengthen both the quality and the consistency of the awards.

These reforms matter beyond Western leasing hubs. India's airlines are heavily reliant on leased aircraft, and the country's aviation market is one of the fastest-growing in the world. If sanctions or geopolitical crises were to disrupt these arrangements, Indian carriers would be directly affected. Contractual clarity, robust insurance, and predictable dispute resolution are extremely vital to the stability of India's aviation sector. India lacks a comprehensive autonomous sanctions regime, and relies on United Nations Security Council measures.[54] This creates an uncertainty for Indian courts if they are asked to enforce awards that implicate unilateral sanctions imposed by the EU or US. Indian jurisprudence on the public policy exception under the New York Convention has narrowed in recent years, but its application to sanctions is still not settled.[55] If Indian courts broadly enforce awards inconsistent with Western sanctions, India may be perceived as a jurisdiction of opportunity, while a restrictive stance could weaken its arbitration-friendly image. Developing a principled framework for sanctions

[53] *Key Arbitration Centres for Trade and Maritime Disputes* (Marlin Blue, 2023) <https://marlinblue.com/arbitration-centres-for-maritime-and-trade/> accessed 25 September 2025.

[54] *Aviation Disputes 2025 - India* (Chambers and Partners, 2025) <https://practiceguides.chambers.com/practice-guides/aviation-disputes-2025/india> accessed 24 September 2025.

[55] *Assessing the Public Policy Exception and Comparative Perspectives in Enforcing Arbitral Awards: Where Does India Stand?* (Columbia Law School, 2023) <https://aria.law.columbia.edu/assessing-the-public-policy-exception-and-comparative-perspectives-in-enforcing-arbitral-awards-where-does-india-stand/> accessed 24 September 2025.

in arbitration would allow India to avoid this uncertainty and strengthen its role as an emerging arbitration hub.

These reforms are not just technical in nature. They are also about the legitimacy of arbitration in an era where private contracts are becoming more and more entangled with public policy. Without reforms, arbitration is at a risk of being perceived as a mechanism that privileges private parties and ignores broader public consequences. A perception like that could severely weaken confidence in arbitration across industries and jurisdictions. The objective behind reimagining aviation arbitration in a sanctions-heavy world, is not to abandon arbitration's traditional principles of efficiency, neutrality, and party autonomy. Rather, it is to recognise that these features alone are insufficient when private disputes have public consequences. By integrating the compliance of sanctions into the arbitral practice, by improving transparency in cases of public importance, and by creating specialised expertise, arbitration can evolve to meet the present challenges.

V. CONCLUSION

The seizure of hundreds of foreign-leased aircraft in Russia after the imposition of sanctions in 2022 has generated a complex wave of aviation disputes. These disputes have put arbitration into an unfamiliar situation where it is no longer merely a neutral and efficient forum for private dispute resolution, but a mechanism at the intersection of contract law, sanctions regimes, and international politics. The resulting cases have become a test for whether arbitration has the capacity to handle disputes where private rights collide with public policy.

This article has argued that the aviation leasing crisis highlights the need to rethink arbitration in three respects. Firstly, sanctions destabilise the contractual assumptions under the leasing model as leases, insurance coverage, and repossession rights became unworkable because of overriding state measures. Secondly, the enforcement of arbitral awards is uncertain and fragmented as national courts have differing views on how to reconcile the New York Convention with sanctions obligations. The UK and EU have adopted a sanctions-compliant approach while jurisdictions such as Singapore and India remain less clearly positioned.[56] Enforcement has therefore become patchy. But the 2025 AerCap judgment in favour of lessors

[56] Ibid (n 35-42).

demonstrates that, at least in London, courts are willing to sustain claims despite the surrounding sanctions environment.[57] And thirdly, the disputes expose broader legitimacy concerns. Confidentiality, fragmentation across fora, and perceptions of politicisation, all challenge the neutrality and credibility of arbitration in the eyes of states, markets, and the public.

The reforms proposed in this article aim to address these challenges without discarding arbitration's core values. Arbitral institutions should move beyond narrow administrative guidance and provide substantive protocols on sanctions, including model clauses and best practices. Transparency should be introduced, at least in disputes with public consequences, to ensure that decisions on issues such as sanctions law and insurance coverage are not hidden from regulators and the public. Specialisation should be developed, either through new aviation arbitration bodies or dedicated panels within existing institutions, to ensure that arbitrators possess the expertise needed to handle disputes that involve aviation regulation, insurance, and public international law. The precedents set by national courts also make it clear that arbitration cannot be seen as operating in a vacuum. As the AerCap decision shows, judicial oversight can legitimise and clarify outcomes in ways arbitration alone cannot.

The significance of these disputes extends beyond aviation. Sanctions are increasingly used as tools of foreign policy, and their intersection with global industries is likely to generate further arbitration cases. Aviation is therefore not an isolated episode but a preview of the future of arbitration in a world riddled with sanctions. How arbitration chooses to respond to this crisis, will shape its credibility across industries and jurisdictions. The answer will determine not just the outcome of the current aviation disputes but also the future of international arbitration as a global system of dispute resolution.

[57] Ibid (n 13).

POST PANDEMIC VIRTUAL HEARINGS IN MARITIME COMMERCIAL ARBITRATION: DUE-PROCESS PARANOIA OR PROCEDURAL EFFICIENCY?

- KRITHIK VIKAS T M[1]

ABSTRACT

The COVID-19 pandemic changed how international maritime arbitration handles disputes, pushing many hearings online. This change has caused discussion about keeping things quick and fair. Some people are worried about the "Due Process Paranoia" that virtual hearings might lead to unfair outcomes, which makes them hesitant to use this method. This article looks at how virtual hearings have changed since the pandemic by looking at changes in the rules, court cases, and practical issues. By examining what's happening at major maritime arbitration centres like the LMAA (London Maritime Arbitrators Association), SCMA (Singapore Chamber of Maritime Arbitration), and HKIAC (Hong Kong International Arbitration Centre), this study shows that virtual hearings can speed things up without being unfair, if handled correctly. The study finds that while there are valid worries about things like questioning witnesses, keeping data safe, and making sure everyone can participate equally, these problems can usually be fixed with clear rules. It concludes that the initial resistance to virtual hearings was more about unfounded worries about fairness than real problems with the process. The article suggests keeping a mix of virtual and in-person hearings to get the best of both worlds: the speed of virtual hearings and the reliability of traditional arbitration.

Keywords: Maritime Arbitration, Due Process Paranoia, Virtual hearings, Reliability

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I. INTRODUCTION

The COVID-19 pandemic sped up tech changes in the legal field, and global shipping arbitration saw maybe the biggest change. Before 2020, online hearings for shipping cases were rare, usually just for witnesses who couldn't be there in person. Travel bans and distancing rules during the pandemic meant everyone had to switch to fully online meetings. This really challenged the shipping arbitration world, which usually liked to meet in person.

This change has caused a lot of talk about how to balance getting things done quickly with making sure everyone gets a fair shake. Shipping arbitration, with its tricky technical arguments and big money at stake, has always used in-person meetings to make sure cross-examining and talks are done right. Because everyone had to switch to online platforms, people are wondering if online hearings can still be fair and protect the validity of arbitration decisions. The overcautious, often unwarranted and decisive act of "Due process Paranoia" is that tribunals being unwilling to act because they fear the arbitral award being challenged on the basis of a party not having had the chance to present its case fully has become a key topic since the pandemic.[2] This worry shows deeper questions about whether decisions made in online meetings can be enforced and if they might be challenged.

II. INSTITUTIONAL ADAPTATION AND RULE DEVELOPMENT

A. LMAA's Pioneering Approach

The London Maritime Arbitrators Association (LMAA) deals with about 1,700 new cases each year and publishes around 500 awards. During the pandemic, the LMAA showed it could adapt quickly. Ian Gaunt, a past president of the LMAA, said that they ran virtual hearings successfully, ensuring that all parties could present their cases and question witnesses properly.[3] Since the LMAA Terms and Procedures already allowed virtual hearings, no rule changes were needed, which gave them an edge during the crisis.

[2] Columbia Law School, 'The Age of Confidentiality Concerns and Due Process Paranoia' (2022).
[3] Ian Gaunt, Virtual Hearings: adapting to the new reality (2020) https://www.maritimelondon.com/news/virtual-hearings-adapting-to-the-new-reality accessed 15 September 2025.

This approach worked well because about 80% of LMAA cases are settled with documents alone, meaning no oral hearings are needed.[4] This made it easier to expand virtual proceedings. The association even created guidelines for arbitrators running remote hearings. The LMAA's experience shows that being prepared and having flexible procedures are key to making virtual hearings work.

B. SCMA's Hybrid Model Innovation

Under the leadership of Executive Director Punit Oza, the Singapore Chamber of Maritime Arbitration (SCMA) has become a frontrunner in using virtual hearings. Because Maxwell Chambers already had good tech in place, SCMA was able to keep running smoothly during the pandemic. Interestingly, no one asked to delay their arbitration cases.

SCMA's biggest achievement was creating a blended world method, which mixes virtual and real-world parts depending on what the case needs. This lets people handle early steps online but keeps complex hearings with lots of proof for face-to-face or mixed setups. In October 2020, SCMA put out sample rules for virtual hearings, which gave clear instructions on how to make sure these hearings are fair and work well.[5]

III. INTERNATIONAL INSTITUTIONAL RESPONSES

A. Due Process Analysis and Legal Framework

On April 9, 2020, the International Chamber of Commerce (ICC) put out a Guidance Note on steps to lessen how the COVID-19 Pandemic was impacting things. It made clear that arbitration courts could decide to hold virtual hearings even if the parties did not agree. The guidance stressed that the court must think about how enforceable any decision would be under Article 42 of the ICC Rules and explain why they chose to have a virtual hearing.[6]

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[4] Ian Gaunt, 'LMAA Arbitration: Present and Future Challenges' (International Institute of Marine Surveying, 2020

[5] Marcus Hand, 'Virtual hearings and a blended future for maritime arbitration: SCMA' (2020) https://www.seatrade-maritime.com/shipping-finance/virtual-hearings-and-a-blended-future-for-maritime-arbitration-scma

[6] Aline Tanielian Fadel, 'Virtual Arbitration Hearings and Due Process: Two Sides of the Same Coin' (2024) https://eptalex.com/publications/virtual-arbitration-hearings-and-due-process-two-sides-of-the-same-coin

The London Court of International Arbitration (LCIA) also added rules for virtual hearings in its 2020 update. Article 19.2 says hearings can happen virtually by conference call, video conference, or other tech with people in different places.[7] This got rid of any doubt that the court could order virtual proceedings.

The Singapore International Arbitration Centre (SIAC) took a practical approach because it starts from what the existing rules already allow and then simply clarifies and operationalises that flexibility, instead of creating rigid new procedures or conditions for virtual hearings They issued guidance saying that the SIAC Rules 2016 don't stop virtual hearings. Hearings can be done in whatever way the court thinks is best, after talking to the parties.[8]

SIAC treats virtual hearings as a normal exercise of existing case-management powers, that is- there is no need for party consent beyond the usual consultation, no extra-legal test and no special protocol that might later be argued to limit or condition their use. The unique practicality is that SIAC minimises doctrinal controversy where parties cannot argue that the tribunal lacked power, because the tribunal is merely applying explicit discretion already granted by the rules. Moreover, it avoids procedural clutter, where instead of adding another layer of mandatory steps, SIAC offers a short, user-friendly guide on "taking your arbitration remote" that focuses on implementation (how to do it) rather than legal pre-conditions (when you are allowed to do it).

B. Fundamental Due Process Requirements

Due process worries mainly stem from the need for arbitration to allow each side a fair chance to state their case. This idea, found in the New York Convention Article V(1)(b) and the UNCITRAL Model Law Article 34(2)(a)(ii), can cause challenges to awards.[9]

The European Court of Human Rights offers helpful advice on how virtual meetings meet due process rules. In cases where Italian courts used video calls for mafia trials, the Court decided

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[7] Two Birds, 'New 2021 Rules at the ICC, after the LCIA, and before the SIAC' (2020) https://www.twobirds.com/en/insights/2020/global/new-2021-rules-at-the-icc-after-the-lcia-and-before-the-siac

[8] Singapore Supreme Court, 'SAL-SCMA Mock Arbitration 2021 Opening Address' (2021).

[9] New York Convention, Art V(1)(b); UNCITRAL Model Law, Art 34(2)(a)(ii).

that virtual hearings usually follow Article 6 ECHR's due process rights, if the video conferencing setup makes sure due process is followed.[10]

IV. PROCEDURAL SAFEGUARDS IN VIRTUAL SETTINGS

Top arbitration groups have created detailed rules to handle fairness issues in online hearings. The International Bar Association's updated Evidence Rules (2020) talks about online witness questioning, telling courts to work with the sides to set up rules making sure witnesses giving spoken testimony are not wrongly swayed or bothered.[11]

Important procedural protections include:

I. Witness Rules: HKIAC rules suggest having hearing watchers in witness rooms and using 360-degree cameras to make sure rooms are secure.[12] SIAC guides say witnesses must testify from behind clear tables and stay on camera during the hearing.

II. Tech and Security Steps: ICC advice gives cybersecurity rules covering platform choice, access control, and data safety.[13] These steps address worries about privacy leaks and unwanted access to hearings.

III. Fair Involvement Needs: Courts must confirm everyone has good tech access and internet to join properly. Time zone issues and translation services need careful handling to avoid bias against anyone.

A. Annulment Risk Assessment

Evidence shows that worries about fairness in virtual hearings might not be a big deal. Studies suggest that no award has been challenged because a virtual hearing supposedly violated someone's rights.[14] Courts in Australia have turned down complaints about time zone issues

[10] DLA Piper, 'Online Arbitration Hearings' (2020) https://www.dlapiper.com/-/media/files/other/2020/virtual-hearings-report--september-20-updatev6.pdf

[11] Arbitration Blog, 'Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective' (2020) https://arbitrationblog.kluwerarbitration.com/2020/11/17/due-process-concerns-in-virtual-witness-testimonies-an-indian-perspective/

[12] HKIAC, 'Virtual Hearings at HKIAC: Services and Success Stories' https://www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories

[13] Bartolomé Óscar Giupponi, 'Chapter 3 "Virtual" Dispute Resolution in International Arbitration: The COVID-19 Pandemic and Beyond' (2022).

[14] Benjamin Arp, 'Chapter 8 The Practice of Virtual Hearings during COVID-19: ICSID Investment Arbitration Experience' (2022).

and concerns about witnesses being influenced, and UK courts have rejected arguments that lawyers weren't comfortable with video conferencing.[15]

The UAE's arbitration law allows tribunals to hold hearings and examine witnesses remotely. This legal support lowers the chances of awards being overturned in a key region for enforcing decisions.

B. Procedural Efficiency Considerations

I. Time and Cost Savings

Virtual hearings are more efficient than traditional in-person ones. Studies show that virtual arbitrations finish 40% quicker than court cases, plus you save money on travel and lodging.[16] SCMA data shows a rise in awards after hearings, with 77 in 2021 compared to 53 in 2020, meaning hearings are getting done faster.[17]

Being able to do things in shorter sessions is a real plus. Punit Oza from SCMA says virtual hearings let groups break down an arbitration into issues in bite-sized chunks, instead of trying to handle everything at once in one long hearing.

II. Easier Scheduling

Virtual hearings give you way more freedom when it comes to scheduling, which is great for maritime arbitration since everyone involved might be in different time zones. No travel means more case management meetings and hearing schedules that work for people all over the world.

HKIAC said that mostly everyone asked about virtual hearing help, showing that people really want to use remote hearings.[18] The centre handled hard cases with people in North America, Europe, and Asia.

III. Good for the Environment and Easier to Get To

[15] IBA, 'Due process challenges to virtual hearings? Good luck if you're in the UAE' (2018) https://www.ibanet.org/Article/NewDetail?ArticleUid=3aeebdf8-d607-4366-ab04-014170488dec
[16] RSIS, 'The Art of Maritime Arbitration in Resolving High-Stakes Disputes in Africa's Blue Economy' (2025) https://rsisinternational.org/journals/ijrsi/digital-library/volume-12-issue-7/2155-2167.pdf accessed 15 September 2025.
[17] Daily Jus, 'Maritime Arbitration Report' (2022) https://dailyjus.com/wp-content/uploads/2022/05/Maritime-Arbitration-Report-Industry-Insights-Issue-4.pdf
[18] HKIAC (n 28).

Switching to virtual hearings is helping the environment by cutting down on international travel.[19] HKIAC Chairman Neil Kaplan CBE QC SBS said virtual hearings show how tech and support can the negative environmental impact of our work. This push for sustainability is becoming a big deal as the maritime industry is being pressured to cut its carbon output.

Virtual hearings also make it easier for people with mobility issues or visa problems to take part. Getting rid of geographical limits opens access to top arbitration groups and maritime arbitrators.[20]

V. CASE STUDIES AND PRACTICAL IMPLEMENTATION

A. Successes with Virtual Hearings

The story of the Ever-Given ship in March 2021 proves that online arbitration can be really helpful when tricky operational disagreements pop up.[21] When that massive container ship got stuck in the Suez Canal for almost a week, it stopped billions of dollars-worth of trade from moving each day. Online arbitration played a key role in getting things sorted out quickly. The involved parties were able to come to agreements about late payments and other financial settlements. This process really helped to reduce the overall delays caused by the incident. This prevented more supply chain issues worldwide.

Another example, the Icon Stella cargo[22] claim, shows that virtual hearings can also be very useful in contract disagreements. In this case, an experienced arbitrator was able to resolve a claim about damage that happened because of how cargo was stored. The whole thing was settled in less than a year. That's way faster than if they'd gone through the regular court system. The speed and of the resolution ended up saving each party involved a lot of money.

Even though virtual hearings can be a game-changer, it's important to remember that there are some catches. In some situations, a mix of online and in-person methods might be the best way

[19] Daniella Horton, 'Maritime arbitration: the dispute resolution cornerstone of the global shipping sector' (2023).
[20] Giupponi (n 31).
[21] Wang, Cindy; Park, Kyunghee; Lee, Annie (23 March 2021). "Suez Canal Snarled with Giant Ship Stuck in Top Trade Artery"
[22] STELLA (IMO: 9434785).

to go.[23] For instance, if there are complicated technical details that require inspections of ships or cargo being there to see things up close can be a huge plus. Also, questioning witnesses online can be harder, especially if they're not being cooperative or answering questions correctly. It can be hard to see facial expressions and body language that would normally assist in determining the of the witness. So, attorneys need to be very prepared.

Technology can be a problem in certain regions. Data indicates just a small percentage of arbitration centres are currently using upcoming technologies like artificial intelligence to handle their cases. There have been reports that some are still relying on paper files. This can create substantial slowdowns in the arbitration. Access to stable internet and training in using these news technologies could be helpful so that more places can participate in online arbitrations.

B. Hybrid Model Development

A good way to handle hearings seems to be a mix of virtual and in-person methods, depending on what the case needs. This way, early steps, meetings about how the case is going, and showing documents can be done online. But more involved witness questioning and presentations that are very technical should be done in person.

Big maritime arbitration places have started using this mixed approach. The LMAA made virtual hearings official in its 2021 rules, and the SCMA keeps pushing its blended world idea, which aims to be both efficient and fair.[24]

VI. COMPARATIVE INTERNATIONAL PERSPECTIVES

A. How Different Regions Handle Virtual Arbitration Hearings

Generally, European arbitration groups have accepted virtual hearings and offer detailed instructions. The Vienna International Arbitral Centre (VIAC) says that if a remote hearing lets both sides present their case verbally, it meets the requirement for an oral hearing, unless both

[23] Ling Chen, 'Will Virtual Hearings Remain in Post-pandemic International Arbitration' (2023) https://durham-repository.worktribe.com/output/1758319/will-virtual-hearings-remain-in-post-pandemic-international-arbitration

[24] Paul Daly, 'Even More on Virtual Hearings' (2024).

parties agree otherwise. This gives courts a lot of freedom to use technology during proceedings.[25]

Asian arbitration centres are leaders when it comes to using virtual hearings in new ways. For example, the SIAC works with Maxwell Chambers to offer advanced virtual hearing spaces. HKIAC provides complete remote hearing services, such as virtual breakout rooms and ways to present electronic evidence.[26] The creation of special maritime arbitration groups in Asia suggests a rising comfort level with virtual proceedings. SCMA's success with its flexible arbitration shows that virtual hearings can be useful for the maritime industry's specific needs.

In North America, institutions have been more careful about virtual hearings, likely due to a stronger preference for traditional court methods. Still, recent cases suggest that virtual proceedings can meet legal requirements in the U.S. and Canada if conducted properly.

VII. REGULATORY AND LEGISLATIVE DEVELOPMENTS

A. UNCITRAL Model Law Implications

Article 19(2) of the UNCITRAL Model Law gives tribunals the ability to set their own procedural rules, which can be interpreted as allowing virtual hearings.[27] Some, lawyers think that future revisions of the Model Law should include specific rules for virtual hearings to remove any lingering doubts.[28]

Article 24 says that tribunals must give parties a full chance to present their case. This can be done through well-run virtual proceedings.[29] What matters most is that the procedure is fair, not whether everyone is in the same room.

B. How National Laws Are Changing

[25] HFW, 'The Maritime Arbitration Universe in Numbers' (2024) https://www.hfw.com/app/uploads/2024/04/005239-HFW-Maritime-Arbitration-Universe-in-Numbers-Sep-23.pdf
[26] Azmi & Associates, 'Maritime Disputes & Arbitration: Navigating Disputes – Views from Established Practitioners' (2021) https://www.azmilaw.com/insights/maritime-disputes-arbitration-navigating-disputes-views-from-established-practitioners/
[27] UNCITRAL Model Law, Art 19(2).
[28] UNCITRAL, 'Virtual Hearing' (2022) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2-6_seokchun_yun.pdf accessed 15 September 2025.
[29] UNCITRAL Model Law, Art 24.

Some countries have changed their arbitration laws to specifically allow virtual proceedings. The UAE Federal Arbitration Law No. 6 of 2018 allows remote hearings and digitally signed awards,[30] and Singapore's International Arbitration Act has rules that support virtual proceedings.[31]

Courts in England have generally accepted virtual hearings. They have rejected challenges to due process based on technical problems or a lawyer's lack of experience with the platforms. This backing from the courts lowers the chance that awards made through virtual proceedings will be challenged.

VIII. TECHNOLOGICAL INFRASTRUCTURE AND SECURITY

A. Platform Selection and Security

One of the biggest problems with doing hearings online is cybersecurity. The ICC's Cyber-Protocol Checklist gives advice on picking platforms, controlling who has access, and keeping things confidential.[32] Also, guidelines from organizations stress using encryption and safe ways to share files. Now many top platforms have special features for arbitration, like private rooms, ways to keep witnesses separate, and tools for showing documents. These changes fix a lot of the first security worries and make these platforms better than simple video calls.

B. Using Digital Evidence

Hearings online have made people switch to using electronic files and ways to show digital proof faster. These have perks over paper, like being able to make notes as things happen, letting many people view at once, and having search built in. Going paperless has made things faster. Lawyers say they spend less time getting ready and can find files easier. But, to make sure everyone can use these new systems well, you need to spend money on training and tech help.[33]

IX. FUTURE IMPLICATIONS AND RECOMMENDATIONS

[30] IBA (n 36).
[31] Singapore International Arbitration Centre, Singapore International Arbitration Act.
[32] DLA Piper (n 19).
[33] Ana Nikolic, 'Virtual Hearings in International Arbitration – Armageddon or New Normal?' (2023).

A. Permanent Integration of Virtual Elements

Virtual hearings look like they should stick around in maritime arbitration, not just be a temporary thing from the pandemic. Ian Gaunt from LMAA said it would be a complete shame if everyone forgot what they learned and went back to how things were before. The best idea is to make hybrid models the standard. This way, people involved can pick what kind of hearing works best for their case. This keeps things flexible but still lets everyone meet in person if they need to.

B. How to Make Things Better

Arbitration groups should keep working on detailed guides for virtual hearings. Make sure these guides cover tech stuff, how things should be done, and security. They should also keep updating these guides as tech gets better and as they learn more. It's also key to train arbitrators, lawyers, and parties so they know how to handle virtual hearings well. Training should include tech skills, tips for arguing cases online, and how to handle the process.

C. Making the Rules Clearer

Laws and regulations should be changed to clearly allow virtual hearings and give directions on what's fair. This will make things less confusing and lower the chance of problems with enforcing decisions. Groups like UNCITRAL could help countries work together on rules for virtual hearings. This would keep things consistent across different places.

X. CONCLUSION

Virtual hearings in maritime arbitration after the pandemic show that well-run remote sessions can make things more efficient without sacrificing basic rights. The early worry about fairness was mostly unnecessary, stemming more from not being used to virtual platforms than actual issues. Data shows that virtual hearings have cut resolution times by up to 40%, lowered costs, and made things more accessible while still being fair. Big maritime arbitration groups have changed their rules and created protocols that deal with worries about examining witnesses, cyber safety, and equal involvement. Going forward, the best move is to keep hybrid hearing models that mix the good parts of virtual sessions with the usual benefits of in-person arbitration. This way, things stay flexible, fair, and parties get to choose how they proceed.

The maritime arbitration world quickly got used to virtual hearings when the pandemic hit, which shows how adaptable the field is when it needs to change. Instead of seeing virtual sessions as just a temporary fix, professionals should see them as helpful tools that add to the ways maritime disputes can be resolved. COVID-19 has made maritime arbitration stronger by pushing it to adopt approaches that are more efficient, accessible, and eco-friendly. The task now is to make these changes permanent while keeping the high standards of fairness and skills that have made maritime arbitration the top method for settling disputes in the shipping business.

As the maritime world keeps changing because of tech, environmental concerns, and new business methods, the arbitration ways need to keep up. Successfully adding virtual hearings isn’t just a reaction to a crisis, but a step toward fixing disputes better in today's maritime economy.

PSYCHOLOGICAL AND TEMPORAL ARBITRABILITY: REFORMULATING THE DOCTRINE FOR DIGITAL ASSET DISPUTES

- *NANDINI AGARWAL,*[1] *PALAK LAMBA*[2]

ABSTRACT

The rapid expansion of cryptocurrency markets has exposed structural limitations within the traditional doctrine of arbitrability. While digital asset disputes frequently arise from private contractual relationships, their regulatory, cross-border, and public policy implications challenge the classical understanding of arbitration as a purely inter partes mechanism. This paper argues that the conventional subject-matter test, rooted in the distinction between rights in rem and rights in personam as articulated in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., is no longer sufficient to address disputes emerging from decentralized digital ecosystems.

The study identifies two under-examined doctrinal gaps. First, it introduces the concept of Psychological Arbitrability, which questions whether consent to arbitration in digital environments often secured through non-negotiated click-wrap agreements truly reflects informed and voluntary party autonomy. Second, it advances the notion of Temporal Arbitrability, proposing that arbitrability must be evaluated not only at the initiation of proceedings but also at the enforcement stage, particularly in light of rapidly evolving regulatory frameworks.

Building upon these insights, the paper proposes a structured three-dimensional arbitrability framework integrating subject-matter legitimacy, substantive consent review, and temporal compliance analysis. By reconceptualizing arbitrability as a dynamic and context-sensitive doctrine, this research contributes to contemporary arbitration jurisprudence and offers a principled approach for resolving digital asset disputes in a decentralized economy.

Keywords: *Cryptocurrency Arbitration, Arbitrability, Party Autonomy, Digital Asset Disputes*

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I. INTRODUCTION

The doctrine of arbitrability has traditionally been viewed as a static rule a binary gatekeeper that decides whether disputes belong in the private sphere of arbitration or in the public forum of courts. Rooted in the classical distinction between rights in rem and rights in personam, courts across jurisdictions have consistently excluded matters such as criminal offences, insolvency, or family disputes from the reach of arbitration. Yet, this framework was built in an era of predictable disputes and relatively stable regulatory environments. Today, in a world reshaped by digital assets, cryptocurrencies, and cross-border technologies, the old boundaries of arbitrability appear increasingly porous and insufficient. Cryptocurrency disputes, in particular, expose the fragility of the traditional doctrine. On the one hand, they resemble private commercial disputes over property or contractual rights. On the other hand, regulators view them through the lens of financial stability, public policy, and systemic risk. What looks like a private quarrel over a Bitcoin wallet may simultaneously implicate anti-money laundering obligations or cross-border tax concerns. The question is no longer whether such disputes are arbitrable in principle, but whether the very idea of arbitrability can adapt to fast-changing legal, technological, and psychological realities. This article advances two fresh conceptual lenses that challenge the static understanding of arbitrability. The first is Psychological Arbitrability, which questions whether consent to arbitration the very foundation of the process is genuine in digital markets where contracts are embedded in unread "click-wrap" agreements. Arbitration, without authentic and informed consent, risks becoming an instrument of imbalance rather than autonomy. The second is Temporal Arbitrability, which emphasizes that arbitrability must be tested not just at the initiation of the dispute but also at the enforcement stage, given that regulatory frameworks for digital assets evolve rapidly across time and jurisdictions. Together, these ideas reveal arbitrability as a moving target, shaped by human understanding and regulatory timing, rather than a fixed doctrinal line. The doctrinal gaps exposed by cryptocurrency disputes invite a rethinking of arbitrability not as a rigid exclusionary rule but as a dynamic, multi-dimensional doctrine. This paper seeks to contribute to that rethinking by proposing a framework where arbitrability is tested across three dimensions: subject-matter legitimacy, psychological consent, and temporal alignment. In doing so, it hopes to extend the debate beyond settled case law and into the uncharted territory where law, technology, and human choice intersect.

II. UNDERSTANDING THE DOCTRINE OF ARBITRABILITY

The Doctrine of Arbitrability is a legal test that decides whether a dispute can be resolved through arbitration or whether it must remain in the control of national courts. Traditionally, courts in India and elsewhere have drawn boundaries around arbitration by holding that certain disputes, usually involving public rights or issues of state concern, cannot be arbitrated. For example, criminal offences, insolvency proceedings, matrimonial disputes, and matters affecting third-party rights have consistently been declared non-arbitrable.

Three-Dimensional Arbitrability Framework

In light of the doctrinal gaps identified above, this paper proposes a three-dimensional test for arbitrability in cryptocurrency disputes:

First, Subject-Matter Legitimacy – Courts must determine whether the dispute concerns private rights capable of resolution through arbitration, consistent with the principles laid down in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. In that case, the Supreme Court of India drew a fundamental distinction between rights in personam (private rights between parties) and rights in rem (rights enforceable against the world at large). The Court held that disputes involving rights in personam are generally arbitrable, whereas disputes involving rights in rem fall outside the domain of private adjudication because they implicate public interest

Second, Psychological Consent Review – Courts must assess whether the arbitration agreement reflects genuine and informed consent, particularly in digital environments characterized by non-negotiated click-wrap contracts.

Third, Temporal Compliance Review – Arbitrability must be examined both at the initiation stage and at enforcement, ensuring alignment with evolving statutory frameworks and public policy considerations.

III. UNDERSTANDING ARBITRABILITY THROUGH A PSYCHOLOGICAL ARBITRABILITY

Normally, the Doctrine of Arbitrability looks at whether a certain type of dispute can be decided by arbitration or not. For example, criminal cases, family matters like divorce, or insolvency issues are usually kept out of arbitration because they belong only to courts. In the case of cryptocurrencies, the usual debate is whether crypto is "property," "security," or "commodity," and whether such disputes can legally go to arbitration.

The classical doctrine of arbitrability presumes that party consent to arbitration is free, informed, and deliberate. However, this assumption collapses in the digital economy. Cryptocurrency exchanges and blockchain platforms rely heavily on click-wrap and browse-wrap agreements, where arbitration clauses are embedded within lengthy and technical terms of service. Users typically accept these clauses without negotiation and often without comprehension.

While the Supreme Court in **Vidya Drolia v. Durga**[3] Trading Corporation reaffirmed that arbitration is founded upon party autonomy, autonomy cannot be reduced to a mechanical act of clicking "I Agree." Genuine consent requires awareness of rights being waived, including access to national courts.

The concept of Psychological Arbitrability therefore introduces a subjective dimension into the doctrine. It proposes that before enforcing an arbitration agreement in digital asset disputes, courts must assess whether consent was substantively informed and meaningful. This does not invalidate arbitration clauses per se, but demands heightened scrutiny where power asymmetry and informational imbalance are evident.

In this sense, arbitrability is no longer merely a question of subject matter; it becomes a question of authentic consent. The concept of Psychological Arbitrability seeks to fill this gap. It suggests that arbitration should only be valid if the parties truly understood what they were agreeing to. Without this safeguard, arbitration risks becoming a tool of inequality, where weaker parties are trapped in processes they never consciously chose. Cases like **Uber v. Heller (Canada, 2020)[4] and AT&T Mobility v. Concepcion (U.S., 2011)[5]** already show courts questioning the fairness of consumer arbitration. Extending this concern into the crypto space offers a new doctrinal lens: arbitrability must be tested not only against subject matter, but also against the authenticity of consent.

Psychological Arbitrability extends the doctrine by asking:

[3] Vidya Drolia v Durga Trading Corporation (2020) 20 SCC 406
[4] Uber Technologies Inc v Heller [2020] SCC 16 (Supreme Court of Canada).
[5] AT&T Mobility LLC v Concepcion 563 US 333 (2011).

Not only "Is this subject-matter arbitrable?" but also "Was the party's consent to arbitration genuinely informed?"
It injects a subjective dimension into the doctrine of arbitrability ensuring that party autonomy is substantive, not illusory.

IV. TEMPORAL ARBITRABILITY

The second overlooked gap is time. Arbitrability is usually seen as a static question either the dispute is arbitrable, or it is not. But with digital assets, this certainty collapses. In India, crypto trading was banned by RBI (2018),[6] later revived by the Supreme Court in **Internet and Mobile Association v. RBI (2020),**[7] and then subjected to heavy taxation in 2022.[8] This shows that a dispute arbitrable in 2019 could become non-arbitrable by 2021, depending on changing regulation.
traditional arbitrability doctrine treats arbitrability as a one-time inquiry conducted at the initiation of proceedings. However, cryptocurrency regulation is fluid and rapidly evolving. A transaction considered lawful at the time of contract formation may later fall under regulatory prohibition or heightened public policy scrutiny.
The Indian experience illustrates this instability. The Reserve Bank's 2018 circular restricting crypto-related banking services was set aside in Internet and Mobile Association of India v. Reserve Bank of India, only for subsequent taxation measures to reintroduce regulatory control. Such volatility demonstrates that arbitrability cannot remain temporally static.
Temporal Arbitrability therefore proposes a dual-stage inquiry:

1. At the commencement of arbitration whether the subject matter is arbitrable.
2. At the enforcement stage whether the award remains consistent with prevailing public policy and statutory regulation.

V. CHALLENGES AND DOCTRINAL GAPS

The idea of arbitrability means deciding what kind of disputes can be settled through arbitration and what kind must go to courts. In India, this rule has been shaped by cases like **Booz Allen**

[6] Reserve Bank of India, Circular on Prohibition on dealing in Virtual Currencies (6 April 2018).
[7] Internet and Mobile Association of India v Reserve Bank of India (2020) 10 SCC 274 (SC).
[8] Finance Act 2022 (India), ch 13 (Virtual Digital Asset Taxation).

& Hamilton Inc. v. SBI Home Finance Ltd. (2011), [9]which said disputes about rights that affect the public (rights in rem) are not fit for arbitration, and **Vidya Drolia v. Durga** [10]Trading Corporation (2020), which added that matters involving weaker parties or public policy cannot be left to private arbitration. These cases imagined arbitrability as a stable, black-and-white rule. But when we apply the doctrine to cryptocurrency disputes, this stable idea starts to break down and shows new gaps. The first problem is with consent. Arbitration is supposed to be based on party agreement, but in practice, most people in the crypto world agree to arbitration without even knowing it. They simply click "I Agree" to the terms of online exchanges, not realizing that they are committing to a complex process in a foreign country with high costs. In Vidya Drolia, the court said arbitration depends on free consent, but here, the consent is more formal than real. This gives rise to what can be called psychological arbitrability whether parties truly understand and consent to arbitration. For millions of small investors, the answer is often no. This means arbitration in crypto disputes risks being unfair, because the foundation of real consent is missing. The second problem is with time. In normal commercial disputes, arbitrability is checked only once when the case begins. But with crypto, the law itself keeps changing. In India, the Reserve Bank banned banks from dealing with crypto in 2018, the Supreme Court struck this down in **Internet and Mobile Association of India v. RBI (2020),**[11] and by 2022, the government started taxing crypto heavily. This shows that a dispute may be arbitrable at one time but not at another. This gives rise to a new idea temporal arbitrability which means arbitrability should not be checked just once but at two stages: when the arbitration begins and again when the award is enforced. Otherwise, an award that was valid when made may become useless later if the law changes. The third problem is global inconsistency. Arbitration is supposed to provide a system where awards are respected across borders. But crypto is treated differently in different countries. The U.S. sometimes treats it as property, sometimes as securities. The U.K. recognized it as property in **AA v. Persons Unknown (2019)**[12]. India avoids full recognition but taxes it, while China bans it completely. This means an arbitral award that is valid in one country may be rejected in another, simply

[9] Booz Allen & Hamilton Inc v SBI Home Finance Ltd (2011) 5 SCC 532 (SC)
[10] Vidya Drolia v Durga Trading Corporation (2020) 20 SCC 406 (SC)
[11] Internet and Mobile Association of India v Reserve Bank of India (2020) 10 SCC 274 (SC).
[12] AA v Persons Unknown [2019] EWHC 3556 (Comm).

because the subject matter (crypto) is not legally recognized there. This creates a recognition gap that makes arbitration uncertain for crypto disputes.

All these problems show that arbitrability is not just a simple yes-or-no rule anymore. It is changing and flexible. The consent gap leads to the idea of psychological arbitrability, the time gap leads to the idea of temporal arbitrability, and the recognition gap shows the weakness of arbitration in a fragmented global system. None of these ideas have been clearly discussed by courts or scholars yet, which makes them important for new research. Unless arbitrability is rethought in this way, arbitration may lose its relevance in one of the most important areas of the modern economy digital assets.

VI. LEGAL STATUS OF CRYPTOCURRENCIES

The legal status of cryptocurrencies remains fragmented across jurisdictions. While some countries recognize digital assets as property or regulate them under financial law, others impose strict limitations or regulatory uncertainty. This lack of uniform classification creates significant unpredictability in dispute resolution, particularly in cross-border arbitration. An arbitral award involving cryptocurrency may be valid in one jurisdiction yet face resistance in another due to differing public policy or regulatory approaches. Such inconsistency directly impacts enforcement under international arbitration frameworks. Consequently, the fragmented regulatory landscape reinforces the need to reconsider arbitrability in technologically evolving markets.

VII. CRYPTOASSETS

Public blockchains such as Bitcoin and Ethereum operate on decentralised networks without a central governing authority. This structural feature complicates traditional dispute resolution mechanisms, as there is no single entity against whom claims can easily be enforced. While blockchain communities sometimes respond to large-scale disputes through technical solutions such as network forks, such mechanisms are collective governance tools rather than individualized legal remedies. They are unsuitable for resolving private contractual disputes between specific parties. Consequently, most crypto-related conflicts ultimately rely on conventional arbitration agreements embedded in exchange terms or token sale contracts. This structural decentralisation therefore intensifies the importance of clearly defining arbitrability in digital asset disputes However, enforcing these arbitration agreements is not always simple. One problem is that many crypto businesses operate online and across borders. Often, the user agreements are not clearly shown to users or require little to no action to agree to them. These are sometimes called **"browse wrap agreements,"** where just visiting or using a website is treated as agreement to the terms. Courts have disagreed on whether such agreements are legally binding. For example, a U.S. court in ***Ventoso v. Shihara***[13] said that the arbitration agreement was valid, but another court in ***In re Tezos Securities Litigation***[14] said that the user had not clearly agreed to the terms, so the clause didn't apply. Another issue is **inconsistent or unclear user agreements.** Crypto platforms often update their terms, remove old versions, or have multiple sets of terms. In some U.S. cases, courts have said that if the terms are confusing, it's up to an arbitrator to decide whether they apply. In other cases, courts ruled that no valid agreement existed at all. For instance, in ***Rensel v. Centra tech*** [15], a user bought crypto by sending funds directly to a smart contract, bypassing the website where the terms (including arbitration) were posted. The court decided that the arbitration clause didn't apply. Outside the U.S., different countries take different views. In the UK, the High Court ruled in ***Chechetkin v. Payward Ltd*** [16]that a consumer could sue a crypto exchange in the UK, even though an arbitrator in California had already ruled on the case. The UK court said the U.S. arbitrator had ignored important UK laws that protect consumers, and enforcing the arbitration award would go against public policy. This shows that courts may refuse to enforce arbitration outcomes if they believe the process was unfair or didn't respect local laws.

VIII. CROSS-BORDER JURISDICTIONAL COMPLEXITIES IN BLOCKCHAIN INSOLVENCY

Blockchain-related insolvency exposes the structural tension between decentralised digital assets and territorially bound legal systems. Crypto assets are not located within a single

[13] Ventoso v Shihara (US District Court, SDNY, 2019).
[14] In re Tezos Securities Litigation (US District Court, ND Cal, 2018).
[15]Rensel v Centra Tech Inc (US District Court, SD Florida, 2018).
[16] Chechetkin v Payward Ltd [2022] EWHC 3057 (Comm)

jurisdiction and may be controlled through anonymous wallet addresses, making it difficult to determine the applicable law or competent forum. In cross-border insolvency proceedings, courts often struggle to assert control over assets recorded on distributed ledgers that operate beyond national boundaries. Even where an arbitral award or judicial order is obtained, enforcement remains uncertain due to the mobility and pseudonymous nature of digital tokens. These challenges highlight that disputes involving crypto insolvency are not merely contractual in nature but raise complex questions of jurisdiction, enforcement, and public policy, thereby directly affecting the arbitrability analysis.

IX. LEGAL REFORM AND SUGGESTION

The regulation of digital assets and cryptocurrency requires a clear, forward-looking legal framework that balances innovation with security. The first step is to properly define and classify digital assets in law so that confusion over whether they are currencies, commodities, or securities can be removed, and separate categories such as payment tokens, utility tokens, security tokens, and stablecoins can be recognized. Once definitions are in place, a licensing system for all crypto service providers, including exchanges, custodians, and wallet operators, should be made mandatory, with tiered requirements so that small players face lighter compliance while large platforms and stablecoin issuers are subject to stronger prudential rules. To address the serious risks of money laundering and terror financing,[17] crypto businesses must follow strict KYC norms, maintain records, and implement the "travel rule," which ensures information about the sender and receiver travels with each transaction. Special rules are also required for stablecoins, since they directly affect the financial system: issuers should hold liquid reserves, allow smooth redemption, and publish regular audits to protect consumers. Alongside this, there must be clear provisions on the coexistence of central bank digital currencies (CBDCs) with private tokens, so that both can operate in harmony without causing market fragmentation. Custodians should be placed under a legal duty to keep client funds separate from company assets, as exchange collapses in the past have shown how mixing funds leads to consumer losses; independent audits can strengthen this safeguard. To build trust in

[17] Financial Action Task Force (FATF), Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (2019).

the market, strict rules against insider trading, pump-and-dump schemes, and false advertising are needed, with regulators empowered to suspend trading and penalize manipulators. Consumer protection should also be at the heart of reforms: every token issuer and exchange must provide a short and clear disclosure document explaining risks, fees, custody arrangements, and redress mechanisms, and a national ombudsman can be set up to resolve investor grievances quickly. Finally, taxation rules must be made simple and transparent, ensuring there is no double taxation on the same transaction and that both profits and losses are fairly recognized; automated reporting between exchanges and tax authorities can reduce evasion and disputes. Together, these reforms can build a trustworthy, transparent, and innovation-friendly digital asset ecosystem that protects consumers while supporting the growth of the financial sector.

X. CONCLUSION

The evolution of cryptocurrency markets has revealed the structural inadequacies of a static understanding of arbitrability. While traditional doctrine, particularly the distinction between rights in rem and rights in personam articulated in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., continues to provide the foundational test for subject-matter arbitrability, digital asset disputes expose dimensions that classical jurisprudence did not anticipate. The decentralized architecture of blockchain networks, the widespread use of non-negotiated digital contracts, and the volatility of regulatory frameworks collectively challenge the assumption that arbitrability can be determined through a singular, time-bound inquiry.

This paper has argued that arbitrability must be reconceptualized as a dynamic doctrine. The introduction of Psychological Arbitrability ensures that arbitration remains anchored in genuine and informed consent, rather than mechanical acceptance of standard-form digital agreements. The concept of Temporal Arbitrability further recognizes that the legitimacy of arbitration cannot be divorced from evolving statutory and public policy considerations. By proposing a structured three-dimensional framework integrating subject-matter legitimacy, substantive consent review, and temporal compliance the study offers a principled method for adapting arbitration law to decentralized financial ecosystems.

Ultimately, the future relevance of arbitration in digital asset disputes depends not on abandoning established doctrine, but on refining it. Arbitrability must evolve from a rigid gatekeeping device into a context-sensitive jurisprudential principle capable of preserving party autonomy while safeguarding systemic and regulatory interests. Only through such doctrinal recalibration can arbitration continue to function as an effective and credible mechanism of dispute resolution in the digital economy.

THE SANCTIONS-ARBITRATION PARADOX: INDIA'S QUEST FOR A NEUTRAL AND ENFORCEABLE FORUM

- SOUMYA JHA,[1] ELNAAZ SAYEED,[2] APARNA DWIVEDI[3]

ABSTRACT

As sanctions reconfigure the rules of the global economic game, international arbitration is confronted with its quintessential conundrum: how to remain neutral and effective when a party is politically or financially disadvantaged? This paper examines the growing tension between sanctions regimes and arbitration, focusing on key issues such as enforceability, procedural fairness, institutional integrity, and emerging models of jurisdiction.

The main research questions inquired about are:

(1) Will arbitration clauses about prohibited entities be valid and enforceable?

(2) Can sanctions compromise party equality and access to justice?

(3) Navigating compliance risk: How should arbitral institutions do it without enabling regulatory capture?

(4) Can India develop a coherent model that balances neutrality with legal integrity?

The paper explores how sanctions impact the arbitration process at every stage through doctrinal examination, comparative case studies, and institutional evolution. Significant legal gaps and recommended innovations such as "sanction-shield" clauses, dual-compliance systems, and institutional codes to mitigate risk and maintain the legitimacy of the procedure are proposed.

The final section of the paper builds a principled Indian model for sanctions-sensitive arbitration. It draws on India's sovereign neutrality, pro-enforcement jurisprudence, and legislative reforms to propose a practical yet responsible arbitration regime. Disclosure

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obligations, escrow safeguards, judicial specialisation, and formal neutrality declarations are recommended to prevent misuse without compromising access.

This paper presents original insights into how arbitration can adapt to a fragmented sanctions landscape, and offers India as a case study for balancing autonomy, enforceability, and global cooperation in a legally complex world.

Keywords: International Arbitration, Sanctioned Parties, Enforcement of Foreign Awards, India as Neutral Arbitral Forum, Sanctions and Public Policy Exception

I. INTRODUCTION: THE SANCTIONS-ARBITRATION PARADOX

Arbitration has been lauded for a long time as the last bastion of neutrality in international legal order. But today's world of sanctions regimes may soon undermine this belief. For India to position itself as a neutral hub for sanction related disputes, it must grapple with the deeper normative crisis that sanctions pose for international arbitration.

Arbitration's legitimacy rests heavily on the ideal of neutrality, a forum removed from the political machinations of states, where parties freely agree to refer their dispute to an impartial tribunal.[4] In classical doctrine, neutrality means that the seat, the arbitrators, and the applicable procedural rules all remain uncontested by external pressures. Arbitration flourished in part because it promised a zone of autonomy insulated from state interference.

However, sanctions pose a radical challenge to that conception. Sanctions are not neutral tools rather they are instruments of foreign policy which are forcefully imposed and deeply political. Once one party becomes subject to a sanctions' regime, the arbitration apparatus can no longer pretend to exist in a political vacuum. The institution, the tribunal, and the enforcement courts must grapple with whether participation or execution violates sanction laws or public order.[5]

[4] Jacques Dumas, 'Sanctions of International Arbitration' (1911) 5(4) American Journal of International Law 934 <https://www.jstor.org/stable/2186530> accessed 27 September 2025.
[5] Artem Lavrov, 'Impact of Sanctions on International Arbitration: International Sanctions and Unilateral Restrictive Measures' (22 May 2024) *SSRN* <http://dx.doi.org/10.2139/ssrn.5026604> accessed 27 September 2025.

Take, for instance, the Yukos arbitration 2014,[6] the attempt by former Yukos shareholders to enforce awards against Russia triggered arguments over whether compliance with certain European enforcement orders might conflict with Russian counter-measures or sanctions. Similarly, in *OJSC Ukrnafta*,[7] the sanctions context gave rise to questions not purely commercial but political; which parties may be legitimate claimants, whether certain assets were subject to freezing, and how a tribunal should treat actions taken under economic warfare.

Scholars have warned that arbitration becomes hollow if state policy seeps into every step. If arbitrators monitor or enforce compliance with sanctions, they become regulators rather than neutral decision-makers.[8] Emmanuel Gaillard critiques the myth of neutrality, he elucidates even when tribunals strive to distance themselves from states, they remain embedded in a network of enforcement courts and institutional regimes that are politicized.[9] Hence, we face a philosophical crisis: is arbitration as traditionally conceived compatible with a world in which parties may be barred, institutions may risk sanction exposure, and awards may be refused or attacked on public order grounds? The classical consensus that arbitration is apolitical is no longer sustainable. Instead, arbitration must be rethought as a hybrid mechanism that must manage the interface between private contract rights and public international order.

In this reimagining, neutrality does not mean absence of politics, but resilience in the face of political constraints. A tribunal need not pretend that sanctions do not exist; rather, it must operate with transparency about them, adopt procedures to accommodate sanction-risks, and ensure that all parties retain meaningful access, even under pressure. Only by accepting the political dimension as part of its environment can arbitration preserve its legitimacy.

II. ARBITRATION UNDER SANCTIONS: LEGAL CHALLENGES AND NORMATIVE SOLUTIONS

The overlap between sanctions law and international arbitration has created multiple doctrinal fault lines, which remain largely unaddressed in both scholarship and practice. These issues

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6 *Hulley Enterprises Ltd v Russian Federation* (Yukos Arbitration, Permanent Court of Arbitration, 18 July 2014).
7 *OJSC Ukrnafta v Russian Federation* (Permanent Court of Arbitration, final award, 12 April 2019).
8 Jan Paulsson, *The Idea of Arbitration* (OUP 2013).
9 Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010).

touch upon the enforceability of arbitration clauses, the principles of party equality and procedural access, institutional legitimacy, and the very independence of the arbitral process.

(a) Enforceability of Arbitration Clauses in the Face of Sanctions

A central question in sanction sensitive arbitration is whether the mere existence of sanctions can render an arbitration clause unenforceable. When one party is subject to sanctions, certain jurisdictions may treat the clause as void or invalid on the grounds of illegality or public policy. Under such an interpretation, the contractual commitment with a proscribed party could be seen as breaching the laws of the sanctioning state, thereby invalidating the agreement to arbitrate.

Conversely, other jurisdictions adopt a more restrained approach: they uphold the arbitration clause but refuse performance or enforcement of the award to the extent that it conflicts with sanctions. For example, in the United Kingdom (hereinafter, "UK"), courts interpreting London Court of International Arbitration (hereinafter, "LCIA") rules have occasionally upheld the validity of the arbitration clause while restricting payments that could contravene applicable sanctions, provided that tribunals take measures to remain compliant with sanction regimes.[10]

In the United States (hereinafter, "US"), the approach is notably stricter. The Office of Foreign Assets Control often requires specific licenses for any form of legal advice, representation, or arbitration involving a sanctioned party.[11] As a result, the global framework remains fragmented, there is no coherent doctrine which unites these approaches, and the New York Convention itself remains silent on sanctions,[12] leaving tribunals and courts to navigate a patchwork of national rules.

(b) Sanctions and the Principles of Party Equality and Procedural Access

Sanctions can also have profound procedural implications. Their restrictions typically involve significant constraints on the sanctioned party, for example freezing assets, freezing payments,

[10] '*Sanctions Are Not a 'Get Out of Arbitration Free' Card!'* (Orrick, 23 May 2024) <www.orrick.com/en/Insights/2024/05/Sanctions-Are-Not-a-Get-Out-Of-Arbitration-Free-Card> accessed 27 September 2025.

[11] Steven L. Schwarcz, 'Sanctions and International Arbitration: Navigating U.S. OFAC Regulations' (2021) 37 *Journal of International Arbitration* 1.

[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 UNTS 38.

restricting bank transactions, or restricting access to representation. These restrictions may affect a party's ability to fund deposits for the arbitrators, fund institutional fees, or representation in connection to the arbitration, leading to concerns regarding the equality of arms principle. These constraints can compromise a party’s ability to fund arbitrator deposits, pay institutional fees, or secure representation, raising questions about the principle of equality of arms. Denial of the opportunity to effectively present one’s case may constitute a violation of Article V(1)(b) of the New York Convention.[13]

(c) Institutional limits and concerns

The role of arbitral institutions has evolved in response to sanctions, often taking on quasi-regulatory functions. International Chamber of Commerce, LCIA, and Singapore International Arbitration Centre, among others, conduct extensive screening of whether they can accept funds from sanctioned parties, seek licenses where required, and perform due diligence to ensure compliance.[14] In practice, this may lead institutions to decline mandates, delay appointments, or impose additional conditions, effectively controlling access to arbitration.

Such filtering raises significant legitimacy concerns. Arbitration has traditionally been a private and autonomous process, yet institutional pre-screening and compliance oversight risk transforming tribunals into extensions of state regulatory authority. The tension calls into question whether arbitration can maintain its independence in a sanction-sensitive context.

(d) Sanctions as rules or constraints

Courts are divided regarding the application of sanctions and the arbitration clauses. Some courts regard sanctions as non-derogable mandatory norms that invalidate any contract clause attempting to evade the sanctions. Under this view, a contract with an arbitration agreement that engages a party who is under sanctions is contrary to public policy rendered invalid.

Other courts adopt a more nuanced perspective, treating sanctions as a source of relative incapacity, while the arbitration clause remains valid, performance may be excused under doctrines such as force majeure or impossibility of performance. These divergent approaches

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[13] ibid, Art V(1)(b).

[14] Artem Lavrov, ‘Impact of Sanctions on International Arbitration: International Sanctions and Unilateral Restrictive Measures’ (22 May 2024) *SSRN* <https://ssrn.com/abstract=5026604> accessed 27 September 2025.

create uncertainty for drafters of arbitration agreements, particularly when negotiating with parties that may become subject to sanctions.

To address the challenges posed by sanctions, parties may consider incorporating a "sanction-shield" clause into their arbitration agreements. Such a clause would pre-emptively define procedures, fallback mechanisms, and remedies in the event that one party becomes subject to sanctions, ensuring continuity of the arbitral process while remaining compliant with applicable law. Key features may include alternative payment channels (e.g., escrow accounts in neutral jurisdictions), permission for tribunals to request governmental licenses where necessary, and explicit authorization for the arbitrators and institution to adopt measures that preserve access without violating sanctions.[15] By embedding these safeguards, the parties reduce uncertainty regarding enforceability, access, and due process, while maintaining neutrality and efficiency in proceedings.

An additional innovation is the concept of "dual compliance" at the arbitral seat. Here, obligations under the New York Convention to enforce arbitral awards would be appropriately balanced with applicable sanctions law in the place of the seat. For example, tribunals would be required to assess compliance risks beforehand and to adopt proportionate measures, legitimizing the ability of parties to perform through licensed mechanisms or awaiting the segregation of sets of funds before enforcing sanctions, thereby permitting actions by parties' private interests without filing action under a neutral forum.

Collectively, these innovations offer a pragmatic and normative approach, they preserve the neutrality and private autonomy of arbitration, mitigate the procedural disadvantages of sanctioned parties, and provide institutional guidance for managing sanction-sensitive disputes. Such frameworks could position jurisdictions like India as reliable, neutral hubs for arbitration involving high-risk, sanction-affected parties, offering predictability, access, and legitimacy in a complex international environment.

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15 Chambers, 'Drafting Arbitration Agreements in Light of International Sanctions' (2023) <www.chambers.com/article/arbitration-sanctions> accessed 27 September 2025.

III. INDIA'S GEOPOLITICAL NEUTRALITY AND POLITICAL READINESS

India's foreign policy of strategic autonomy and selective abstention on politically fraught United Nations votes has created a posture that aligns well with the neutrality that arbitrators and disputing parties prize.[16] India's reluctance to join blanket Western sanctions regimes, such as in the Russia-Ukraine context, and its continued commercial engagement with states that face Western measures, notably trade and project activity with Russia and Iran's Chabahar port, create a perception that India can act as an impartial forum for disputes where one party is subject to third-country sanctions. This is an asset for parties seeking a seat not visibly aligned with sanctioning jurisdictions. India offers lower political friction for enforcement or interim relief than seats tied to the European Union (hereinafter, "EU"), UK, or US regulatory constraints.

But perception alone does not form an arbitration hub. Institutional capacity and procedural credibility are the hard requirements. India's institutional architecture has expanded rapidly. The Mumbai Centre for International Arbitration updated its rules in 2025 to add stronger emergency arbitrator, joinder, consolidation, summary dismissal, and third-party funding provisions, features that make it functionally comparable to established centers.[17] These are directly relevant where quick, enforceable interim measures are needed in sanction-tied disputes. India has been building other nodes as well. The New Delhi International Arbitration Centre, as a statutory institution, GIFT City's arbitral initiatives, and new proposals for a Vizag international center, signal state and sub-national commitment to infrastructure. These developments allow parties to pick seats on procedural grounds of speed, emergency measures, confidentiality as much as geopolitical ones.[18]

Nevertheless, gaps remain that an incoming "sanctions-sensitive" arbitration market will test. First, Indian institutions currently lack explicit procedural protocols tailored to sanctions risks, for example, mandatory compliance checks, clear guidance on counsel obligations when interacting with sanctioned counterparties, or published rules on how tribunals should handle blocked funds and licensing dependencies. Second, reputational risk is real. If India is seen as

[16] Col KC Monnappa, 'India's Pursuit of Strategic Autonomy: An Ontological Security Perspective Rooted in Civilizational Legacy' (2025) 1(1) CNSS Journal of Security Studies.
[17] Mumbai Centre for International Arbitration Rules 2025.
[18] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2210-15.

a jurisdiction that routinely facilitates the evasion of sanctions, actual or perceived, that perception may trigger countermeasures, court non-recognition of awards in key enforcement jurisdictions, or political pressure that undermines neutrality.

To handle sensitive disputes without appearing to serve as a channel for avoiding sanctions, Indian arbitration institutions should consider adopting some targeted reforms. These might include: (i) putting in place a screening process at the filing stage to identify sanctions-related issues; (ii) requiring parties to disclose any applicable sanctions or licences; (iii) issuing clear and easily available guidance on questions of enforceability; and (iv) maintaining neutrality while at the same time ensuring compliance with domestic legal obligations.[19] These are actionable, institutional level innovations that build trust without isolating India from sensitive matters.

In short, India's geopolitical position provides a strategic marketing advantage for arbitration involving sanctioned parties. However, transforming this advantage into a sustainable, high-quality arbitration seat requires comprehensive procedural reforms at the institutional level. These reforms should align with international best practices such as the UNCITRAL Model Law[20], while also relying on India's statutory framework, particularly the NDIAC Act 2019, which provides a legal foundation for institutional arbitration.[21]

IV. INDIAN JUDICIARY AND THE PATH TO REFORM

The Indian judiciary determines whether institutional promise can translate into enforceable outcomes. Recent Supreme Court jurisprudence has moved India toward a pro-arbitration posture: the *PASL Wind Solutions Pvt. Ltd. v GE conversion India Pvt. Ltd*.[22] decision affirmed that Indian commercial parties may validly choose a foreign seat and seek interim relief in Indian courts, reinforcing party autonomy. *Vijay Karia v Prysmian Cavi e Sistemi SRL*[23] narrowed the public-policy escape, strengthening enforcement prospects for foreign awards.

[19] Lawrence Boo and Alvin Yeo, *Arbitration in Asia* (3rd edn, JurisNet 2019) ch 8.
[20] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* (1985, as amended 2006).
[21] New Delhi International Arbitration Centre Act 2019.
[22] *PASL Wind Solutions Pvt Ltd v GE Power Conversion India Pvt Ltd* [2021] 7 SCC 1.
[23] *Vijay Karia v Prysmian Cavi E Sistemi* [2020] 11 SCC 519.

Those decisions show courts increasingly prioritize arbitration finality and enforcement as an encouraging baseline for any seat that seeks global disputes.

At the same time, the Supreme Court's rulings protecting arbitral procedure, *Perkins Eastman Architects Dpc & Another v. HSCC (India) Ltd.*[24] on unilateral appointments, and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*[25] on arbitrator's ineligibility signal that Indian courts will police fairness and party equality. That dual trend, favoring enforcement while policing procedural fairness, can be a selling point: it reassures parties that India will not be a "black-box" venue where powerful parties can stack tribunals or evade due process. However, this judicial posture also creates potential friction in sanctions cases: tribunals and courts may face hard choices where compliance with an external sanctions regime would make performance or enforcement illegal, or where the exercise of judicial power might indirectly frustrate sanctions policy.

A concrete, recent development to monitor is the *Gayatri Balasamy* litigation, which the Supreme Court has used to clarify courts' remedial reach under Sections 34 and 37 of the Arbitration and Conciliation Act.[26] That line of authority is crucial as when sanctions create cross-border enforcement risk, parties will test the boundaries of vacatur and enforcement in Indian courts. Clear, consistent high court and Supreme Court pronouncements that limit discretionary interference while preserving mandatory public-interest considerations will be essential to ensure foreign parties and home-state enforcement courts.

Given the twin institutional and judicial realities, India should pursue three pragmatic reforms to claim a responsible leadership role rather than simply an alternative forum. First, create a Judicial Sanctions Bench or a specialist docket either within commercial divisions or as an appellate stream to handle cases where sanctions law and arbitration intersect. Specialization will reduce inconsistent ad hoc holdings and speed up the development of reliable precedent. Second, Indian arbitration institutions should publish a short Declaration of Arbitral Neutrality, a formal statement of institutional impartiality, accompanied by a protocol that requires parties to disclose applicable sanctions and any necessary licensing. Third, codify a modest set of "dual

[24] *Perkins Eastman Architects DPC & Another v HSCC (India) Ltd* [2019] 20 SCC 760.
[25] *Bharat Broadband Network Ltd v United Telecoms Ltd* [2019] 5 SCC 755
[26] *Gayatri Balasamy v ISG Novasoft Techonolgies Ltd* [2025] 7 SCC 1; Arbitration and Conciliation Act 1996, s 34 & 37.

compliance" rules: guidance that tribunals seated in India should follow applicable Indian mandatory laws including any sanctions enacted domestically, while also providing a procedure for addressing conflicts with foreign sanctions including referral to Indian regulators where licenses may be needed. These measures would position India as a legitimacy builder, a seat that offers neutrality and institutional safeguards, not a loophole for circumvention.

If India wants to be more than a stopgap option, it must pair diplomatic posture with institutional discipline: neutrality marketed without procedural and judicial clarity will invite both enforcement headaches and ethical criticism; neutrality coupled with transparency, specialization, and predictable judicial review can make India an attractive, credible hub for the arbitration problems sanctions create.

V. ENFORCEMENT OF SANCTIONED AWARDS IN INDIA AND ABROAD

The strength of arbitration is in the global enforceability of awards.[27] If that fails through politics, sanctions or procedural impasse, arbitration risks turning into a beautiful but empty shell. As cross-border trade never halts despite adversity of geopolitics, trade conflicts with the sanctioned parties are natural and inescapable. Arbitration has emerged as the default mode of dispute resolution in this context, but sanctions challenge its enforceability procedurally and substantively.

A foundational question is whether disputes involving sanctioned entities are even arbitrable. Most courts and tribunals have answered this affirmatively, preserving the autonomy of the arbitral process.[28] In *Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v ATF,* the arbitral tribunal held that the mere risk of unenforceability in other jurisdictions was insufficient to render the dispute non-arbitrable under Swiss law.[29] The court may refuse the

[27] Dhruv Malik and others, 'Pro-enforcement regime for foreign arbitral awards: Is India really headed towards it?' (*International Bar Association*) <www.ibanet.org/article/7CC3CF19-09D7-474C-A2CE-8B8227CD92DE> accessed 27 September, 2025.
[28] *La Compagnie Nationale Air France v. Libyan Arab Airlines* [2000] R.J.Q. 717, J.Q. No. 410.
[29] *Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v ATF* [1992] ICC Case No. 6719.

award's enforcement as being contrary to public policy rather than questioning its jurisdiction or arbitrability.[30]

In case of procedural challenges such as transferring registration fees or paying arbitrators in sanctioned jurisdictions, due diligence by institutions and arbitrators is crucial. [31]

Recent developments in Russia show an increasingly adversarial approach to foreign arbitration. In 2020, the Russian Parliament enacted Federal Law No. 171-FZ,[32] granting exclusive jurisdiction to Russian commercial courts over disputes involving sanctions. While arbitral tribunals may still hear such disputes, Russian courts may issue injunctions to block participation in proceedings. They may even award the entire claim amount to the 'injured' party in case of non-compliance.

The shift became more aggressive in *JSC Uraltransmash v. PESA*, where the Russian Supreme Court held that the imposition of sanctions alone invalidated arbitration agreements.[33] This rulings effectively carve out a domestic veto over international arbitration whenever sanctions are involved. However, courts in other jurisdictions have refused to endorse this view. In *Linde*, Hong Kong's Court of First Instance upheld the arbitration clause and stayed Russian proceedings.[34] Similarly, in *UniCredit*, the UK Court of Appeal, affirmed by the Supreme Court, issued an anti-suit injunction requiring the Russian party to discontinue parallel proceedings.[35] Non-compliance with such injunctions, however, results in heavy legal and financial costs.

Sanctions also interfere with performance and payment. What can be done when contracts stipulate that they should be paid in dollars but the embargo prohibits us to use them? In *RTI*

[30] A Kotelnikov, 'Economic sanctions, arbitrability and public policy' (2020) 23(1) International arbitration law review [online] <https://rgu-repository.worktribe.com/output/830000/economic-sanctions-arbitrability-and-public-policy> accessed 9 September, 2025.

[31] Beth Michoma, 'Cross Border Enforcement of Foreign Arbitral Awards in the Context of Economic Sanctions' (2023) 3(3) NCIA Alternative Dispute Resolution Journal <https://jusmundi.com/en/document/pdf/publication/en-ncia-alternative-dispute-resolution-journal-vol-3-no-3> accessed on 25 September, 2025.

[32] On amendments to the Arbitration Procedure Code of the Russian Federation in order to protect the rights of individuals and legal entities in connection with restrictive measures introduced by a foreign state, state association and (or) union and (or) state (interstate) institution of a foreign state or state association, and (or) union 2020, Federal Law of 08.06.2020 No. 171-ФЗ.

[33] *JSC Uraltransmash v. Pojazdy Szynowe PESA Bydgoszcz SA* [2020] A60-36897/2020.

[34] *Linde PLC v. RusChemAlliance LLC* [2023] HKIAC Case No. A23039.

[35] *UniCredit Bank AG, London Branch v Constitution Aircraft Leasing 3 Limited and another* [2024] UKSC/2024/0102.

Ltd. v. MUR Shipping BV, the UK Supreme Court found that as dollars had been blocked, the buyer could not be forced to accept payment in euros.[36] Despite alternatives, the principle of strict contractual compliance prevailed. Similarly, in *Gasum v. Gazprom*, the arbitral tribunal accepted that a Russian decree requiring payment in rubles was a force majeure event.[37] Though the claimant had no obligation to comply, the tribunal allowed the respondent to suspend performance. There is growing uncertainty not just in resolving disputes, but in executing arbitral awards. Enforcement can be paralysed even when the tribunal has spoken clearly.

India is a signatory to the New York Convention[38] and enforces foreign awards under Part II, Chapter I of the Arbitration and Conciliation Act, 1996.[39] Section 47 outlines the documentation required for enforcement.[40] Section 48 provides the limited grounds on which enforcement may be refused, including a violation of Indian public policy.[41] Indian courts do not have the power to set aside a foreign award; that power lies solely with the courts at the seat of arbitration.[42]

Indian courts have developed a nuanced approach to the "public policy" exception. In *Renusagar Power Co. Ltd. v. General Electric Co.*, the Supreme Court defined a violation of fundamental policy as one that offends the country's most basic legal, moral, and ethical standards.[43] This includes awards that fail to decide material issues or shock the conscience of the court. Mere contravention of a statute is not enough. The violation must strike at the very foundations of Indian legal philosophy. This restrictive view of public policy has contributed to India's recent reputation as a pro-enforcement jurisdiction.

Neither the New York Convention nor the UNCITRAL Model Law defines "public policy". Article V(2)(b) of the Convention refers to "the public policy of that country".[44] Model Law

[36] *RTI Ltd. v. MUR Shipping BV* [2024] UKSC 18.
[37] *Gasum Oy v. Gazprom Export LLC* [2022] T 540-23.
[38] ibid n 9.
[39] Arbitration and Conciliation Act 1996, Part II Chapter I.
[40] ibid, s 47.
[41] ibid, s 48.
[42] *Union of India v. Vedanta Ltd.* [2020] 10 SCC 1 ¶83.11; *Mercator Ltd. v. Dredging Corpn. of India Ltd.* [2024] SCC OnLine Del 3075.
[43] *Renusagar Power Co Ltd v General Electric Company & anr* [1993] 1994 AIR 860.
[44] ibid n 9, article V(2)(b).

provisions follow the same formulation.[45] International legal scholarship distinguishes between three levels of public policy:[46]

1. Domestic public policy is grounded in a state's own laws.

2. International public policy is a subset invoked in cross-border matters but still shaped by domestic courts.

3. Transnational public policy aspires to a universalist standard, though its boundaries remain undefined.

The Indian Supreme Court has consistently rejected the use of transnational public policy as a test, citing its unworkability.[47] This clarity offers a vital legal advantage. Because India does not automatically adopt US, EU, or other third-party sanctions into its domestic law, those sanctions cannot form the basis of a public policy objection unless independently reflected in Indian policy.

India's independence from third-party sanctions becomes a strategic asset as the global enforcement landscape fractures under geopolitical pressure. By upholding its narrow, domestic conception of public policy and refusing to internalise foreign sanctions, Indian courts preserve a degree of arbitral neutrality that is vanishing elsewhere.

Yet, challenges remain. What happens when the award can be enforced, but the funds are frozen by international banks? Can courts compel enforcement through non-dollar channels? Should India create an executive clearance mechanism to navigate sanctioned payments? These are questions of practice as much as principle and they demand institutional clarity.

VI. RISK, CRITIQUE, AND ETHICAL NAVIGATION

India's strategic neutrality positions it as a potential haven for the enforcement of foreign arbitral awards, even those involving sanctioned entities. This neutrality has commercial

[45] ibid n 18, Articles 34(2)(b)(ii) and 36(1)(b)(ii)
[46] Margaret L Moses, 'Public Policy under the New York Convention: National, International, and Transnational' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019).
[47] Ibid n 41.

benefits as well as ethical and legal dilemmas. The question is can India maintain an arbitration-friendly attitude without unwittingly abetting sanctions evasion or trampling upon international legal principles?

Implementing awards against sanctioned parties would potentially test India's relationships with countries undertaking the sanctions, like the US or EU members. Such tensions could in turn result in diplomatic and even economic consequences such as trade embargoes or fines. If she is seen as a tool to circumvent international sanctions, then the neutral arbitral center status of India stands to be damaged. This may deter legitimate international business and arbitral work. Indian financial institutions may face challenges in making payments involving sanctioned individuals, exposing the institutions to unintentional violation of international sanctions laws and secondary sanctions exposures such as by the US.[48]

While sanctioned entities have a right to seek justice, enforcing arbitral awards in their favor can sit uncomfortably with broader international efforts to uphold sanctions regimes. This creates a real dilemma: arbitration is meant to be neutral and depoliticized, yet the enforcement of awards involving sanctioned parties can be seen as undermining the very system of legal pressure intended to influence state behavior. India's refusal to adopt third-party sanctions is consistent with its sovereign foreign policy. Yet this neutrality can be misread as indifference or worse, quiet facilitation, especially when global powers are unified in their sanctions approach. The challenge, then, is to hold space for India's independent position while avoiding reputational harm or unintended complicity.

To walk this line, India could adopt a set of clear, focused measures such as setting boundaries on arbitrable sectors by excluding defense, energy, or high-end technology where national security is at play. An independent body or committee to assess whether the enforcement of a particular award aligns with India's public interest and legal obligations. Arbitration institutions should be encouraged to build internal compliance checks that flag sanctions risks early and ensure parties are operating in a bona fide manner. Limited reporting requirements like

[48] Sakshi Sharma and others, 'The Impact of Sanctions on ADR in International Commercial Disputes: Legal Frameworks and Challenges' (2025) 6(2) International Journal of Research Publication and Reviews 1124.

anonymised disclosures where sanctioned parties are involved can also build transparency without compromising confidentiality.

None of these steps suggest hostility to sanctioned parties. Instead, they are moral guide rails that uphold India's credential as a value-based, neutral forum. Neutrality, naturally, should never be mistaken with being passive. Through a lean, transparent, and value-based regime, India can remain arbitration-friendly but show an understanding of the differences in sanctions. In doing so, it offers something rare in today's fragmented legal landscape: a forum that is both open and responsible.

VII. THE INDIAN MODEL

India stands at a rare intersection of political neutrality and rising institutional credibility in the global arbitration landscape. Recent legislative reforms such as the Arbitration and Conciliation (Amendment) Act, 2015,[49] DIAC (Arbitration Proceedings) Rules, 2023[50] and the Commercial Courts Act, 2016,[51] reflect a legislative and judicial shift toward minimal interference and speedy enforcement. Landmark ruling has affirmed party autonomy.[52] Decisions like *Vedanta* and *Vijay Karia* reflect a judiciary willing to enforce foreign awards unless they offend a narrow understanding of public policy.[53] In other words, the legal and institutional groundwork is already present for India to become a legitimate forum for complex disputes, including those involving sanctioned parties.

However, structural readiness is not enough. India lacks a clear procedural framework tailored to the challenges that sanctions pose, especially in enforcement, licensing, and fund transfers. Without guidelines on how tribunals should handle blocked payments, how to deal with conflicting foreign sanctions regimes, or when enforcement must be conditioned on licensing or escrow, India risks uncertainty and reputational damage.

[49] Arbitration and Conciliation Act 1996.
[50] DIAC (Arbitration Proceedings) Rules 2023.
[51] Commercial Courts Act 2016.
[52] ibid n 20.
[53] ibid n 40; n 21.

A lean principled model is proposed:

(1) requiring disclosure of applicable sanctions at the time of filing of arbitration;

(2) conditioning enforcement on local compliance safeguards, such as escrow or local banking channels;

(3) designating a judicial or institutional body with special expertise to handle sanctions-sensitive enforcement; and

(4) issuing a formal institutional declaration of neutrality, aligned with India's sovereign stance of not adopting unilateral sanctions.

These interventions are modest but meaningful. They protect against abuse, foster predictability, and signal that India seeks legitimacy, not circumvention.

This does not turn India into a "safe haven" for sanctioned entities. Instead, it carefully positions India as a compliant, neutral, and procedurally credible jurisdiction, a bridge between sanctioned parties and enforceable justice. In doing so, it addresses a critical gap in the global arbitration system and offers a novel seat that is not politically constrained, yet legally robust.

VIII. CONCLUSION: BETWEEN GEOPOLITICS AND JUSTICE

The arbitral promise of neutrality stretches. As more and more sanctions influence cross-border trade and diplomatic architecture, domestic courts and arbitral institutions must confront their never-meant regulatory complexity. This paper has argued that sanctions are not an external disruption to arbitration; they are now part of its legal and ethical environment.

With its independent autonomy and sensitive sanctions policy, India fills a special niche. It is neither part of the sanction groups nor openly hostile to them. This intermediate stance opens an unprecedented possibility: an accountable forum of sensitive controversies regarding legal access and circumspect regulation.

However, neutrality must be structured, not just asserted. India's procedural and judicial frameworks must evolve to meet the practical demands of enforcing awards involving sanctioned entities. Through modest but clear institutional reforms, judicial specialisation, and principled compliance mechanisms, India can strike a balance: preserving arbitration's autonomy while ensuring it does not become a shield for impunity.

The future of arbitration under sanctions will not be defined by rigidity, but by jurisdictions that offer credible, adaptable solutions. India can lead this reimagining not by rejecting the political realities of sanctions, but by embedding them into a fair, transparent, and enforceable model of arbitral justice.

IMPORTANCE OF ARBITRATION IN FRAND DISPUTES IN STANDARD ESSENTIAL PATENTS

- *DIPTI*[1]

ABSTRACT

The growing significance of Standard Essential Patents (SEPs) and Fair, Reasonable, and Non-Discriminatory (FRAND) obligations has sparked intense debate over the role of arbitration in resolving licensing disputes. While arbitration offers neutrality, expertise, and enforceability under the New York Convention, the public interest dimensions of SEPs complicate their arbitrability. This paper critically examines the arbitrability of FRAND disputes across jurisdictions, focusing on India, the United States, and the European Union. It highlights how Indian jurisprudence, rooted in the rights in rem versus rights in personam distinction, creates uncertainty in SEP arbitration, while global practices reveal cautious but increasing acceptance of arbitration in FRAND contexts. The analysis further explores the role of institutional frameworks such as WIPO, ICC, and UNCITRAL in promoting consistency, confidentiality, and technical expertise. Public policy concerns, particularly competition law implications and access to standardised technologies, pose unique challenges, necessitating careful calibration of arbitral mechanisms. Case studies, including Ericsson v. Micromax and Unwired Planet v. Huawei, underscore both the promise and the limitations of arbitration in this domain. The article concludes by advocating hybrid approaches that balance private party autonomy with broader market regulation, positioning arbitration as a potential bridge between innovation incentives and public access.

Keywords: *Standard Essential Patents (SEPs), FRAND, Arbitrability, Arbitration, Competition Law, Intellectual Property, WIPO, ICC, India, Global Licensing*

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I. INTRODUCTION

Arbitration has long been celebrated for its efficiency, flexibility, and global enforceability under the New York Convention, 1958. Traditionally associated with commercial disputes, its scope has expanded into specialised fields such as investment law, sports law, and intellectual property law. In intellectual property, the confidentiality and expertise-driven nature of arbitration make it an attractive alternative to litigation. However, the interface between arbitration and IPR is not seamless.

The most striking manifestation of this overlap is in disputes concerning Standard Essential Patents (SEPs). SEPs, which are patents essential to the implementation of a technical standard, form the backbone of modern industries such as telecommunications (e.g., 5G), semiconductors, and consumer electronics. Licensing these patents on FRAND terms is critical for balancing innovation incentives with market access. Yet, FRAND disputes are increasingly marked by cross-border litigation, forum shopping, and anti-suit injunctions.[2]

Against this backdrop, arbitration is proposed as a neutral, efficient, and global dispute resolution mechanism. But critical questions remain unresolved: Are SEP/FRAND disputes arbitrable, especially given their competition law dimensions? How do arbitral tribunals address public interest issues when operating within private contracts? What lessons can be drawn from global practice for India? This paper seeks to answer these questions through a comparative and doctrinal analysis.

II. CONCEPTUAL CONTEXT

Standard Essential Patents (SEPs) and FRAND Obligations

Standard Essential Patents (SEPs) occupy a unique and indispensable position particularly in technology-driven markets. These are patents without which it is technically impossible to implement an industry standard such as 4G LTE, Wi-Fi, or MPEG video compression. Their indispensability ensures that the owners of SEPs wield considerable market power, often

[2] Picht, P.G. & Loderer, P. (2019), *Arbitration in SEP/FRAND Disputes: The Case for Case-by-Case Arbitrability,* Journal of International Arbitration, 36(5), pp. 575–594 https://www.ius.uzh.ch/dam/jcr:32d2c1e3-21ca-4e0b-a175-dad6bdd10272/Picht_Loderer__Arbitration%20in%20SEP-FRAND%20Disputes__JOIA%202019_575-594.pdf accessed 3 September 2025.

translating into a potential monopolistic leverage to dictate licensing terms.[3] In recognition of this, Standard-Setting Organisations (SSOs) such as the European Telecommunications Standards Institute (ETSI) require patent holders to commit to licensing their SEPs on Fair, Reasonable, and Non-Discriminatory (FRAND) terms.

The purpose of FRAND obligations is twofold: first, to curb the possibility of patent hold-up, where SEP holders exploit their monopolistic position to demand unreasonably high royalties; and second, to prevent patent hold-out, where implementers of a standard refuse to negotiate or delay royalty payments. Thus, the FRAND framework attempts to strike a balance between protecting the legitimate interests of patent holders and ensuring wide public access to standardised technologies.[4]

Yet, the interpretation and enforcement of FRAND obligations remain contentious. Key questions, such as what constitutes a "reasonable" royalty rate or whether global portfolio licenses should be considered compliant with FRAND commitments, have triggered disputes across multiple jurisdictions. Courts in the EU, US, China, and India have grappled with these issues, yet no universally accepted definition of FRAND has emerged. This lack of consistency makes arbitration a potentially attractive mechanism for resolving SEP disputes, offering neutral expertise and transnational enforceability.

Arbitrability in Intellectual Property Disputes

The question of whether disputes involving SEPs and FRAND obligations are arbitrable is both legally complex and normatively significant. Arbitrability refers to the legal capacity of a subject matter to be resolved through arbitration rather than through judicial or administrative forums.[5]

In general, disputes that are commercial in nature, such as royalty determinations, contractual breaches, or licensing disagreements, are widely recognised across jurisdictions as arbitrable. However, intellectual property disputes often straddle the divide between rights *in personam*

[3] Wolters Kluwer Arbitration Blog (2019), *Are We FRAND Now? Arbitration and Standard-Essential Patents* https://legalblogs.wolterskluwer.com/arbitration-blog/are-we-frand-now/ accessed 11 September 2025.
[4] ICC (2017), *Report of the ICC Commission on Arbitration and ADR: IP Disputes and Arbitration*. International Chamber of Commerce https://iccwbo.org/publication/icc-arbitration-ip-disputes/ accessed 13 September 2025.
[5] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006* (United Nations 2008).

(private, contractual rights enforceable against specific parties) and rights *in rem* (public rights enforceable against the world at large). This distinction was firmly articulated by the Supreme Court of India in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.* (2011),[6] where the Court held that while rights in personam are arbitrable, rights *in rem* are not.

When applied to SEPs, this doctrinal boundary creates a conceptual and practical tension. On one hand, disputes regarding FRAND commitments are contractual in nature, involving the SEP holder's obligations to license implementers on fair terms. These disputes could be framed as rights in personam and thus arbitrable.[7] On the other hand, SEPs are tied to industry standards that affect market access on a global scale, invoking elements of public policy and competition law. Such issues raise concerns of non-arbitrability, as they implicate the public interest and extend beyond the contracting parties.

The Conceptual Tension in FRAND Arbitration

This dual character of SEPs, as both private licensing arrangements and public access renders their arbitrability a highly contested question. Arbitration, by design, is confidential and consensual. Yet, FRAND disputes often involve broader policy considerations, such as ensuring non-discriminatory access to standardised technologies, preventing monopolistic practices, and safeguarding competition. If left exclusively to private arbitration, there is a risk that these broader policy goals may be subordinated to private bargaining outcomes.

At the same time, reliance solely on national courts creates problems of jurisdictional fragmentation and inconsistency. Different jurisdictions may arrive at divergent interpretations of FRAND, producing uncertainty for patent holders and implementers in global markets. Arbitration, particularly if conducted under institutional frameworks with subject-matter expertise, offers a solution by providing consistency, neutrality, and enforceability under the New York Convention.

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[6] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

[7] SpicyIP (2020), *Synthesising Arbitrability of Standard Essential Patents Disputes in India,* https://spicyip.com/2020/02/synthesising-arbitrability-of-standard-essential-patents-disputes-in-india.html accessed 13 September 2025.

This tension lies at the heart of the ongoing debate: whether arbitration can reconcile the private contractual dimensions of FRAND disputes with their public-policy implications for global technology markets.

III. LEGAL ANALYSIS

Arbitrability of FRAND Disputes

One of the central questions in the intersection of arbitration and Intellectual Property Rights (IPR) is the arbitrability of disputes concerning Standard Essential Patents (SEPs) and their licensing obligations under Fair, Reasonable, and Non-Discriminatory (FRAND) terms. In India, the Supreme Court in *A. Ayyasamy v. A. Paramasivam* (2016)[8] acknowledged that allegations of fraud do not automatically bar arbitration unless they implicate public rights or statutory prohibitions. This reasoning provides a useful analogy: while disputes involving purely private rights, such as royalty calculations, are generally arbitrable, disputes implicating public interest, such as competition law or market access, may face judicial scrutiny. The earlier ruling in *Booz Allen & Hamilton v. SBI Home Finance* (2011)[9] drew a fundamental distinction between rights in rem, which are non-arbitrable, and rights in personam, which may be arbitrated. SEP disputes complicate this distinction because they straddle both categories; they are private licensing contracts between parties, yet they affect market access for entire industries and, by extension, the public at large.

In the United States, the *Microsoft v. Motorola* (2013)[10] litigation brought FRAND commitments to the forefront. The U.S. courts leaned toward judicial oversight but simultaneously recognised arbitration as a useful mechanism to resolve royalty-setting disputes. This trend is reinforced by institutional encouragement: the American Arbitration Association (AAA) and JAMS have promoted arbitration for SEP and FRAND matters, highlighting its neutrality and flexibility. Similarly, in the European Union, the Court of Justice of the European Union (CJEU) in *Huawei v. ZTE* (2015)[11] outlined a negotiation framework

[8] *A. Ayyasamy v. A. Paramasivam,* (2016) 10 SCC 386.
[9] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[10] Microsoft Corp. v. Motorola, Inc. 795 F.3d 1024 (9th Cir. 2015) (United States Court of Appeals).
[11] Huawei Technologies Co. Ltd. v. ZTE Corp., C-170/13 [2015] ECLI:EU:C:2015:477.

for SEP licensing under competition law but did not explicitly rule on the role of arbitration.[12] Nevertheless, several European jurisdictions, including Germany and the UK, have welcomed arbitration under institutional frameworks such as ICC and WIPO, particularly for cross-border global licensing disputes arise. This comparative perspective demonstrates that while courts worldwide recognise arbitration's efficiency, they remain cautious about relinquishing oversight over issues with broader market implications.

Role of Institutional Arbitration

The rise of institutional arbitration has been particularly significant in the field of IPR disputes, including SEPs. The WIPO Arbitration and Mediation Center, a globally recognised authority in the field of intellectual property dispute resolution, has been a pioneer in this respect, offering specialised rules tailored to the complexities of intellectual property disputes. These rules emphasise expert appointments, technical competence, and confidentiality, which makes them particularly well-suitable for FRAND licensing disputes that involve highly technical subject matter. Similarly, the International Chamber of Commerce (ICC) has emerged as a leading forum for global FRAND disputes. Its 2017 Task Force Report explicitly recognised arbitration as a valuable tool for resolving SEP licensing disputes, especially in light of the inefficiency and fragmentation of national litigation.[13]

The UNCITRAL Arbitration Rules[14] further strengthen the case for arbitration by ensuring neutrality and enforceability through the New York Convention[15]. Given the cross-border nature of FRAND obligations, institutional arbitration offers an effective solution to the problem of fragmented cross-border litigation. By providing specialised forums and procedural guarantees, institutions like WIPO and ICC not only address expertise concerns but also mitigate arbitrability challenges under domestic law.

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[12] Dhar, R. (2022), *Arbitrability of Standard Essential Patent Disputes in India: A Critical Analysis,* SSRN Electronic Journal https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136840 accessed 3 September 2025.

[13] WIPO Arbitration and Mediation Center (2020), *WIPO ADR for FRAND Disputes Relating to Standard Essential Patents (SEPs)*, World Intellectual Property Organization https://www.wipo.int/amc/en/center/specific-sectors/sep-frand/ accessed 3 September 2025.

[14] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006* (United Nations 2008).

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

Public Policy and Competition Law Concerns

Despite its advantages, arbitration in FRAND disputes raises persistent questions concerning the intersection public policy and competition law. Arbitration traditionally respects party autonomy and confidentiality, but FRAND disputes extend beyond bilateral interests to implicate broader market regulation and consumer access to technology. In India, Section 34 of the Arbitration and Conciliation Act[16] allows courts to set aside awards that are contrary to public policy.[17] This raises an important question: if an arbitral tribunal fixes a royalty rate that is deemed anti-competitive, could the award be invalidated by Indian courts on public policy grounds?

Comparative jurisdictions shed light on this tension. In the European Union, the *Huawei v. ZTE*[18] framework situates FRAND obligations within abuse of dominance under Article 102 TFEU[19], making competition law oversight a crucial element. Arbitration may therefore attract judicial or regulatory scepticism. In the United States, antitrust law similarly interacts with FRAND disputes, particularly in cases of "patent hold-up" where SEP holders exploit monopolistic leverage to demand excessive royalties.[20] The interplay between arbitration and competition oversight thus becomes a delicate balance: arbitration offers efficiency and expertise, but without judicial or regulatory oversight, it risks undermining public policy objectives.

Third-Party Participation and Transparency in FRAND Arbitration

A relatively unexplored dimension of FRAND arbitration is the role of third parties—both competitors and consumers, who are indirectly but significantly affected by the outcomes of such disputes. Unlike conventional commercial arbitration, where confidentiality and bilateral settlement are central features, FRAND disputes concern technology standards that affect entire industries, from smartphone manufacturers to automobile companies and, ultimately,

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[16] Arbitration and Conciliation Act 1996, s 34.
[17] Carrier, M.A. & Minniti, C. (2020), *FRAND and Antitrust: Reexamining the Antitrust–IP Interface*, Cornell Law Review, 105(6) https://publications.lawschool.cornell.edu/lawreview/2020/09/15/frand-and-antitrust/ accessed 3 September 2025.
[18] Court of Justice of the European Union (Fifth Chamber) [2015]: Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, Case No. C-170/13
[19] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 102.
[20] A Douglas Melamed and Carl Shapiro, 'How Antitrust Law Can Make FRAND Commitments More Effective' (2018) 127 *Yale Law Journal* 2110, 2116–19.

consumers. The traditional model of closed-door arbitration thus raises questions of legitimacy: can an arbitral tribunal, constituted by private parties, set royalty rates that shape global access to technology without broader participation?

Some scholars argue that arbitral tribunals in FRAND disputes should allow a limited form of amicus curiae participation or regulatory observation, particularly by competition authorities or Standard-Setting Organisations (SSOs)[21]. This approach would strike a balance between the confidentiality sought by the disputing parties and the transparency needed to protect public interest. The concept finds resonance in investment arbitration, where transparency reforms under the UNCITRAL Transparency Rules[22] and ICSID practice have opened arbitral proceedings to non-disputing parties in recognition of public interest stakes. By analogy, FRAND arbitrations could incorporate similar mechanisms, ensuring that royalty determinations are not entirely insulated from public scrutiny.

Another important dimension is selective publication of arbitral awards. While commercial arbitration favours confidentiality, selective publication of redacted FRAND awards could serve two functions: (1) enhancing consistency by providing reference points for future tribunals, and (2) reinforcing the legitimacy of arbitration in disputes with broader economic implications.[23] The ICC and WIPO have experimented with limited publication of awards, and extending this to FRAND disputes would create a quasi-precedential body of arbitral jurisprudence, reducing the risk of inconsistent determinations.

The inclusion of third-party perspectives and controlled transparency in FRAND arbitration reflects a growing recognition that arbitration is no longer confined to private rights alone. Where disputes intersect with public interest and competition law, arbitration must evolve to ensure that legitimacy is not sacrificed for efficiency. This evolution may well determine whether arbitration becomes the preferred global mechanism for resolving FRAND disputes or remains a secondary alternative to litigation.

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[21] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation* (2011) 29 Berkeley Journal of International Law 200.

[22] United Nations Commission on International Trade Law, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (adopted 11 July 2013, effective 1 April 2014).

[23] Global Arbitration Review (2023), *Issues of Arbitrability in Telecoms Arbitrations*, The Guide to Telecoms Arbitrations, 3rd ed https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/third-edition/article/issues-of-arbitrability-in-telecoms-arbitrations accessed 3 September 2025.

Artificial Intelligence and Data-Driven Arbitration in FRAND Disputes

Another emerging dimension in the arbitration of FRAND disputes is the growing use of artificial intelligence (AI) and data-driven models to determine royalty rates. One of the most persistent challenges in FRAND determinations is the calculation of what constitutes a “fair” and “reasonable” royalty. Traditional litigation and arbitration rely on expert witnesses, economic models, and comparative licensing agreements. However, this process is time-consuming, prone to bias, and often results in divergent outcomes across different forums.

With the rapid advancement of AI and big data analytics, arbitral tribunals now have the potential to rely on algorithmic valuation models that analyse large datasets of comparable licensing agreements, market adoption rates, and technology diffusion. Such models could help standardise royalty calculations, reduce subjectivity, and provide tribunals with empirically grounded benchmarks. For instance, AI could assist in identifying royalty stacking risks, where multiple SEP holders cumulatively demand excessive royalties, or in simulating the economic impact of different royalty structures across markets.

Yet, reliance on AI in arbitration raises its own legal and ethical challenges. Issues of transparency in algorithms, potential bias in training data, and the non-reviewability of AI-driven decisions may conflict with due process rights under arbitration law. Moreover, introducing AI into FRAND arbitration could exacerbate the confidentiality, transparency tension: while parties may prefer to keep sensitive licensing data private, effective AI models require access to large datasets, potentially necessitating greater disclosure.

Importantly, Indian arbitration law has not yet engaged with the implications of AI-assisted decision-making, though global arbitral institutions like the ICC and WIPO are beginning to explore the integration of technology into arbitral processes. FRAND disputes, given their reliance on complex economic modelling, may become a testing ground for such innovations. The success, or failure, of AI-assisted FRAND arbitration could shape the future of technologically complex arbitrations more broadly.

Case Studies of Arbitration in FRAND Disputes

A closer look at actual disputes reveals the judiciary's ambivalence toward arbitration in FRAND contexts. In *Ericsson v. Micromax* (Delhi High Court, 2016)[24], the dispute over SEP royalties was initially litigated but eventually resolved through mediation and arbitration, highlighting the potential for hybrid mechanisms in India. The protracted litigation between *Apple and Samsung*[25] in multiple jurisdictions during the 2010s demonstrated the inefficiency of fragmented national proceedings and prompted calls for arbitration as a global solution. Likewise, in *Unwired Planet v. Huawei*[26] (UK Supreme Court, 2020), the court set global FRAND rates for SEP licensing. However, the judgment sparked debate over whether such determinations should instead be left to specialised arbitral tribunals, given their technical expertise and international enforceability.

These cases collectively illustrate that while arbitration has been considered, courts often retain a controlling role, particularly where broader market or public interest considerations are implicated. Arbitration is therefore not a complete substitute for judicial oversight but functions as a complementary mechanism.

Advantages and Pitfalls of Arbitration in FRAND Disputes

Arbitration offers several compelling procedural and substantive advantages in FRAND disputes. It ensures neutrality in cross-border contexts, preventing "home court advantage" in jurisdictions where parties may have greater influence. Confidentiality is another significant benefit, as FRAND negotiations often involve sensitive licensing strategies and proprietary technical data. Moreover, arbitration allows the appointment of arbitrators with specialised expertise in intellectual property and technology law, which is often lacking in generalist courts. Finally, arbitral awards are enforceable under the New York Convention in over 160 jurisdictions, providing predictability and global reach.[27]

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[24] *Telefonaktiebolaget LM Ericsson (Publ) v Competition Commission of India and Another* (W.P.(C) 464/2014 & W.P.(C) 1006/2014.

[25] *Samsung Electronics Co Ltd v Apple Inc* 580 US 53 (2016).

[26] Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd., [2020] UKSC 37.

[27] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

However, arbitration is not without its pitfalls. The confidentiality of arbitral proceedings, while beneficial for parties, may conflict with the public interest in transparent access to essential technologies. Arbitrability challenges in jurisdictions like India further complicate the landscape, particularly where disputes intersect with competition law. Additionally, the risk of inconsistent awards in different arbitrations undermines predictability and may encourage strategic forum shopping. The absence of systemic oversight by competition authorities in private arbitration also raises concerns that party autonomy could override broader regulatory objectives.[28]

IV. LEGAL AND PRACTICAL OUTPUTS

The critical analysis of arbitration in FRAND disputes suggests that arbitration is a viable but not fully sufficient mechanism. To enhance its effectiveness, institutional and procedural safeguards must be introduced. Institutional arbitration rules could incorporate public interest safeguards, such as partial transparency of awards or structured involvement of competition regulators. In India, legislative or judicial clarification is needed to explicitly recognise the arbitrability of SEP licensing disputes, even where they overlap with competition law. Hybrid mechanisms such as mediation-arbitration (med-arb) or expert-determined arbitration could balance efficiency with regulatory oversight; for instance, WIPO's expert determination rules have been used in practice in Singapore's IPOS patent proceedings, illustrating the model's real-world applicability in IP disputes.. Finally, global coordination through institutions such as WIPO or UNCITRAL may promote consistency in arbitral outcomes, preventing fragmentation and ensuring fairness in SEP licensing across jurisdictions.

V. CONCLUSION

The intersection of arbitration and intellectual property rights, particularly in the context of Standard Essential Patents (SEPs) and FRAND obligations, illustrates both the promise and the perils of private dispute resolution in a highly public domain. Arbitration, with its neutrality, flexibility, and enforceability under the New York Convention, presents itself as a natural solution to the inefficiencies of fragmented national litigation. The technical expertise of

[28] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).

arbitrators and the confidentiality of proceedings further strengthen its appeal in disputes involving complex licensing strategies and sensitive commercial data.

Yet, the very features that make arbitration attractive also create tensions when applied to FRAND disputes. The confidential and bilateral nature of arbitration must contend with the fact that SEP licensing terms potentially affect entire industries and consumers worldwide. Arbitrability challenges, especially in jurisdictions like India, highlight the difficulty of reconciling rights in personam with rights in rem in disputes that implicate competition law and public interest. Comparative practice shows a cautious judicial approach: while the U.S. and EU recognise arbitration's value, courts remain reluctant to abdicate oversight of issues with systemic market implications.

The way forward lies not in choosing between arbitration and judicial regulation but in designing hybrid and adaptive mechanisms. Institutional rules by WIPO, ICC, and UNCITRAL can be strengthened to accommodate partial transparency, limited third-party participation, and regulatory involvement where necessary. Incorporating technology, such as AI-driven royalty assessments, may improve accuracy and consistency, but it must be tempered with safeguards for due process and fairness. For India, legislative or judicial clarification of arbitrability in SEP/FRAND disputes would provide much-needed certainty, aligning domestic arbitration with global best practices.

Ultimately, the effectiveness of arbitration in FRAND disputes depends on its ability to evolve from a purely private dispute resolution tool to a mechanism that accommodates broader market realities. If properly structured, arbitration can bridge the gap between innovation incentives and public access, ensuring that the governance of SEPs upholds both fairness to patent holders and the public interest in standardised technologies. In this sense, FRAND arbitration is not merely a technical question of arbitrability, but a test case for arbitration's adaptability in an era where private rights and public goods increasingly intersect.

SHORT ARTICLES

THE COMMENCEMENT OF ARBITRAL PROCEEDINGS UNDER INDIAN LAW

- *HITESH RAMCHANDANI*[1]

ABSTRACT

Arbitration in India has steadily evolved through legislative refinement and judicial interpretation, with a consistent objective of ensuring speed, fairness, and minimal court intervention.[2] *At the heart of this framework lies the principle governing the commencement of Arbitral proceedings, a concept that directly impacts limitation, jurisdiction, interim protection, and the procedural legitimacy of arbitration.*[3]

Despite the statutory clarity embedded in Section 21 of the Arbitration and Conciliation Act, 1996 ("the Act"), conflicting judicial approaches had led to procedural confusion, particularly in cases involving pre-arbitration interim relief under Section 9. Courts often differed on whether arbitration commences upon service of a notice invoking arbitration or only upon the appointment or constitution of the Arbitral tribunal.[4] *This divergence created uncertainty, avoidable litigation, and procedural rigidity.*

The Hon'ble Supreme Court of India judgment in Regenta Hotels Private Limited v. M/s Hotel Grand Centre Point & Ors. (2026) decisively settles this controversy.[5] *The ruling reasserts statutory discipline, strengthens party autonomy, and restores procedural clarity by holding that Arbitral proceedings commence upon receipt of the notice invoking arbitration under Section 21, and not from the appointment of the Arbitrator.*

I. STATUTORY FOUNDATIONS AND LEGISLATIVE INTENT

The Arbitration and Conciliation Act, 1996 was enacted to modernize India's arbitration regime, promote Alternative Dispute Resolution, and reduce excessive judicial intervention.

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[2] Arbitration and Conciliation Act 1996; UNCITRAL Model Law on International Commercial Arbitration 1985
[3] Arbitration and Conciliation Act 1996 Section 21
[4] Sundaram Finance Ltd v NEPC India Ltd (1999) 2 SCC 479
[5] *Regenta Hotels (P) Ltd. v. Hotel Grand Centre Point & Ors*, (2026 INSC 32)

Central to this framework is Section 21, which stipulates that Arbitral proceedings commence on the date when the respondent receives a request for reference of disputes to arbitration, unless otherwise agreed by the parties.[6]

This provision performs a vital function. It establishes a clear and predictable starting point for arbitration, governs the computation of limitation, and ensures procedural certainty. The legislature deliberately avoided linking commencement with judicial proceedings, thereby preserving the autonomy and flexibility of arbitration.

Judicial interpretation has consistently reinforced that Section 21 must be accorded full statutory effect.[7] The Supreme Court of India has repeatedly emphasized that arbitration is fundamentally a party driven mechanism, and courts must respect the statutory architecture governing its initiation.

II. FACTUAL MATRIX AND CORE LEGAL ISSUE

The dispute in *Regenta Hotels* arose from a franchise arrangement relating to hotel operations. Internal disputes among the partners of the hotel owning firm resulted in alleged obstruction of business operations, compelling the franchise operator to seek urgent interim protection under Section 9 of the Act.[8]

The Civil court granted ad-interim injunction. Within the stipulated period, the appellant served a notice invoking arbitration. However, due to resistance from the respondents regarding the appointment of an arbitrator, a petition under Section 11 was filed subsequently. The civil court, and later the Karnataka High Court, held that arbitration had not commenced within ninety days since the Arbitrator had not yet been appointed, leading to the vacation of interim protection.

This approach raised a critical legal question: Does arbitration commence upon receipt of the notice invoking arbitration, or only upon appointment of the Arbitrator? The Supreme Court of India resolution of this question forms the crux of the judgment.

[6] Arbitration and Conciliation Act 1996 Section 21
[7] Milkfood Ltd v. GMC Ice Cream Pvt Ltd (2004) 7 SCC 288
[8] *Regenta Hotels (P) Ltd. v. Hotel Grand Centre Point & Ors*, (2026 INSC 32)

III. JUDICIAL REINFORCEMENT OF SECTION 21

The Hon'ble Supreme Court of India, while examining the issue, placed strong reliance on settled legal principles governing the commencement of Arbitral Proceedings. The Court held:

> *"The settled position as emerged is that the commencement of arbitral proceedings is a statutory event defined exclusively under Section 21 of the Act, wherein the respondent's receipt of a request to refer the dispute to arbitration sets the arbitral proceedings in motion and no judicial application i.e. whether under Section 9 or Section 11 petition, constitutes commencement."*[9]

This leaves no room for ambiguity and reinforces that the trigger for arbitration lies in party action through notice, and not in court intervention.

IV. SUPREME COURT'S REASONING AND DOCTRINAL CLARITY

The Hon'ble Supreme Court of India undertook a meticulous examination of the statutory framework and reaffirmed that Section 21 is the sole determinative provision governing the commencement of Arbitral proceedings. The Court relied upon a consistent line of precedents, including *Sundaram Finance Ltd.*, *Milkfood Ltd.*, *Geo Miller*, and *Arif Azim*, all of which unequivocally hold that arbitration commences upon receipt of a valid notice invoking arbitration.[10]

The Hon'ble Supreme Court of India, further clarified that the statutory scheme of the Act is designed to ensure that arbitration remains independent of procedural delays that may arise in court proceedings. By anchoring commencement to the receipt of notice, the law avoids uncertainty and ensures that the arbitral process is not dependent on external procedural developments such as appointment proceedings.

The Hon'ble Supreme Court of India clarified that the statutory scheme consciously separates the commencement of arbitration from court-driven procedures. arbitration is legally set in

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[9] *Regenta Hotels (P) Ltd. v. Hotel Grand Centre Point & Ors*, (2026 INSC 32)

[10] Sundaram Finance Ltd v NEPC India Ltd (1999) 2 SCC 479
Milkfood Ltd v GMC Ice Cream Pvt Ltd (2004) 7 SCC 288
Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd (2020) 14 SCC 643
Arif Azim Co Ltd v Aptech Ltd (2024) SCC OnLine SC

motion the moment a valid notice invoking arbitration is received by the respondent, and not when the Arbitrator is appointed. Judicial proceedings cannot postpone, substitute, or redefine this statutory trigger.

By rejecting the Hon'ble Karnataka High Court's approach, the Hon'ble Supreme Court of India restored doctrinal coherence and reaffirmed the primacy of legislative intent. The judgment ensures that statutory timelines are respected while preserving the autonomy, flexibility, and efficiency that form the backbone of the Arbitral process.

The Hon'ble Supreme Court of India, further cautioned against treating the filing of a Section 11 petition as the point of commencement of arbitration. The Court observed:

> *"If the date of filing of the Section 11 petition is to be treated as the date of commencement of Arbitral Proceedings, as has been observed by the High Court in the Impugned Judgment, that would result into the displacement of commencement of arbitral proceedings as provided under Section 21 and would be contrary to the text and purpose of the Act."*[11]

This clarification is significant as it prevents distortion of the statutory scheme and ensures that arbitration remains anchored to its legislative foundation.

V. PRACTICAL AND JURISPRUDENTIAL SIGNIFICANCE

The Judgment carries substantial implications for arbitration practice in India. It eliminates long-standing ambiguity, simplifies procedural compliance, and ensures predictability in Arbitral proceedings.

From a practitioner's standpoint, the ruling provides much-needed clarity that timely service of a notice invoking arbitration suffices to preserve interim protection. Parties are no longer compelled to prematurely initiate Section 11 proceedings merely to prevent automatic vacation of interim relief.

Equally significant is the reinforcement of contractual appointment mechanisms and institutional Arbitration procedures. By discouraging unnecessary court intervention, the

[11] *Regenta Hotels (P) Ltd. v. Hotel Grand Centre Point & Ors*, (2026 INSC 32)

judgment strengthens the efficiency and credibility of arbitration as a commercially viable dispute resolution mechanism.

The judgment also reduces unnecessary procedural complications. By clearly defining the point of commencement, it minimizes disputes on technical grounds and allows parties to focus on the substantive resolution of disputes. It also ensures that interim protection granted by courts serves its intended purpose without being defeated by procedural misunderstandings.

Further, the ruling strengthens confidence in arbitration by promoting certainty and predictability—two essential elements for any effective dispute resolution system, particularly in commercial matters.

VI. CONTEXTUAL POSITIONING OF INDIAN ARBITRATION LAW

Indian arbitration jurisprudence, though inspired by international best practices, has evolved through indigenous legislative design and judicial craftsmanship. It reflects domestic commercial realities, constitutional principles, and procedural pragmatism.

The Hon'ble Supreme Court of India approach in *Regenta Hotels* exemplifies this calibrated evolution. The ruling is grounded firmly in statutory interpretation and legislative intent rather than mechanical reliance on foreign models. It reinforces a distinct Indian arbitration identity that balances expedition with fairness, party autonomy with judicial supervision, and procedural flexibility with legal certainty.

VII. CONCLUSION

Viewed from a broader perspective, the decision in *Regenta Hotels* marks an important step in streamlining arbitration procedure in India. By clarifying the law at the threshold stage itself, the Supreme Court of India has reduced the scope for conflicting interpretations and strengthened the efficiency of the arbitral framework.

The Hon'ble Supreme Court of India decision in *Regenta Hotels Private Limited v. M/s Hotel Grand Centre Point & Ors.* provides clear guidance on an important procedural issue in arbitration law. The Supreme Court of India has made it clear that arbitration begins when the notice invoking arbitration is received, and not when the Arbitrator is appointed.

This clarity will help parties, lawyers, Arbitrators, and courts follow a consistent and predictable process. It prevents unnecessary court proceedings, saves time and cost, and strengthens confidence in arbitration as a fast and effective method of resolving disputes.

Most importantly, the judgment reinforces that arbitration should remain simple, efficient, and party-driven, with courts playing only a supportive role.

This balanced approach will greatly contribute to the growth and reliability of arbitration in India.

DIGITAL JUSTICE OR DIGITAL RISK? RETHINKING DATA PROTECTION AND NEUTRALITY IN SEBI'S ODR REGIME

- *KRITIKA GAKHAR,*[1] *ISHAAN SHARMA*[2]

ABSTRACT

The expansion of Online Dispute Resolution (ODR) in India's capital markets represents a significant shift in the resolution of investor disputes, particularly following SEBI's introduction of the SMART-ODR portal through its Master Circular. While the platform promises accessibility, efficiency, and cost-effectiveness, its long-term legitimacy raises critical concerns relating to data protection and procedural fairness. The central thesis of this paper revolves around whether SMART-ODR can deliver a neutral dispute resolution in the absence of a robust data governance architecture. The authors pose a core question: How can India reform SEBI's SMART-ODR framework to resolve inherent vulnerabilities in data protection and algorithmic fairness while aligning with global standards? Through a doctrinal and comparative analysis of the existing regulatory framework, the article identifies structural gaps that risk undermining user trust and proposes solutions to the same. This article is divided into four parts. Part I introduces the background and raises the core research question. Part II examines SEBI's current ODR framework across regulatory, contractual, and statutory bases. Part III analyses critical issues of data protection and neutrality through five sub-themes: redaction risk, ambiguity in role obligations, data retention, cross-border transfers, and algorithmic transparency. Part IV concludes with an assessment of SMART-ODR's potential in India's capital markets.

Keywords: *Online Dispute Resolution, SMART-ODR, SEBI, Data Protection, Capital Market, Cross-Border Transfer*

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I. INTRODUCTION

The interception of privileged legal communications in ***Libananco Holdings v. Turkey*** (ICSID, 2011[3]), exposes the vulnerabilities inherent in digital dispute resolution. Far from being a mere procedural lapse, the state's monitoring of the investor's emails undermined the integrity of the arbitral process itself. As noted by Morel de Westgaver, such interception amounts to unauthorized data processing, a concern that is also prevalent within India's rapidly digitising landscape[4]. With capital market disputes increasingly channelled through centralised platforms such as the Securities and Exchange Board of India ("SEBI")'s Online Dispute Resolution ("ODR") portal, the risks of unauthorised access and systemic breaches to confidential information are significantly amplified. Therefore, it raises a pressing question as to how can digital dispute resolution platforms in India safeguard sensitive data in a manner that preserves procedural integrity and neutrality for both investors and institutions? Over the years, arbitration and ODR have emerged as some of the most promising methods of resolving disputes by offering parties an efficient alternative to traditional litigation in India. In the field of Capital market, disputes are heavily complex and involve stakeholders of every range, from small investors to large institutions. The introduction of ODR in this context is considered as one of the landmark moves taken by SEBI. On 31 July 2023, SEBI issued a circular, 'Online Resolution of Disputes in the Indian Securities Market',[5] which was subsequently amended on 4 August 2023[6]. This was followed by the issuance of the "Master Circular for Online Dispute Resolution" on 20 December 2023.[7] The circular emphasized the use of technology driven dispute resolution through SEBI's SMART-ODR Portal,[8] a digital platform established by

[3] *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) para 570.
[4] Claire Morel de Westgaver, *'Cybersecurity in International Courts and Tribunals'*, para 7 <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3763.013.3763/law-mpeipro-e3763?p=emailAw0dwy9b1vxOg&d=/10.1093/law-mpeipro/e3763.013.3763/law-mpeipro-e3763&print> accessed 14 August 2025.
[5] Securities and Exchange Board of India, 'Online Resolution of Disputes in the Indian Securities Market' (31 July 2023) https://www.sebi.gov.in/legal/circulars/jul-2023/online-resolution-of-disputes-in-the-indian-securities-market_74794.html accessed 14 August 2025.
[6] Securities and Exchange Board of India, 'Corrigendum cum Amendment to Circular dated July 31 2023 on Online Resolution of Disputes in the Indian Securities Market' (4 August 2023) https://www.sebi.gov.in/legal/master-circulars/aug-2023/online-resolution-of-disputes-in-the-indian-securities-market_75220.html accessed 14 August 2025.
[7] Securities and Exchange Board of India, 'Master Circular for Online Resolution of Disputes in the Indian Securities Market' (20 December 2023) (SEBI Master Circular for ODR) https://www.sebi.gov.in/legal/master-circulars/dec-2023/master-circular-for-online-resolution-of-disputes-in-the-indian-securities-market_80236.html accessed 14 August 2025.
[8] Securities and Exchange Board of India, 'SMART ODR' https://smartodr.in/login accessed 25 September 2025.

Market Infrastructure Institutions (MIIs) such as stock exchanges and clearing corporations. The portal enables investors, listed companies and institutions to settle disputes among themselves using online conciliation and arbitration. The framework seeks to ease jurisdictional barriers, cross-border disputes and reduce costs whilst also ensuring that the dispute is settled within the timeline as prescribed in the circular.

While this platform makes it easier for parties to resolve disputes, it raises some important concerns. Does the platform ensure data privacy for investors while uploading confidential information? Is there neutrality in the way arbitrators are appointed through the automated system? And lastly, does the ODR process guarantee fairness so that small investors feel equally protected when facing such large institutions? These questions remain at the core of SEBI's ODR framework and lead us to ask: Does this shift to digital justice protect investor trust, or does it risk compromising privacy and impartiality in the pursuit of efficiency?

II. MAPPING SEBI'S EXISTING FRAMEWORK ON DATA PROTECTION

The ODR framework under SEBI rests on three pillars:

i. Regulatory obligations under SEBI's 'Master Circular for Online Resolution of Disputes in the Indian Securities Market'[9],
ii. Contractual obligations through SMART-ODR's Terms and Conditions[10], and
iii. Baseline statutory obligations under Sensitive Personal Data ("SPDI") Rules, 2011[11], issued under subsection (2) of Section 87, read with Section 43A of the Information Technology Act, 2000.

[9] SEBI Master Circular for ODR (n 6).
[10] SMART ODR, 'Terms and Conditions of Usage of Online Dispute Resolution Portal' (4 August 2023) https://smartodr.in/terms-and-conditions accessed 16 August 2025.
[11] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (SPDI Rules') (11 April 2011) https://upload.indiacode.nic.in/showfile?actid=AC_CEN_45_76_00001_200021_1517807324077&type=rule&filename=GSR313E_10511(1)_0.pdf accessed 25 September 2025.

SEBI's Master Circular provides the primary regulatory architecture governing data protection and confidentiality within this ecosystem. Under this Circular[12], Schedule C[13] and E[14] are of prime importance for our discussion. Schedule C, Clause 5[15] imposes a duty on MIIs to ensure due secrecy, confidentiality of proceedings, and secure data transmission for the dataflow between the ODR Portal and its platforms. By extending confidentiality duties to conciliators and arbitrators, Clause 6[16] of the same schedule recognises data protection as a shared responsibility rather than a purely technical concern. Clause 10 (b)[17] of the same schedule further attempts to balance transparency with anonymity by mandating publication of awards in a de-identified form. Schedule E (Code of Conduct for Conciliators and Arbitrators), item (xi)[18] reinforces this approach, squarely addressing privacy of records and recordings, limiting disclosure to legal or judicial requirements.

While Part VII – Intellectual Property[19] of the SMART-ODR Portal's 'Terms and Conditions' restricts data mining (the practice of searching through large amounts of computerized data to find useful patterns or trends) and protects the integrity of data uploaded on the portal, several clauses simultaneously dilute accountability. Part VIII 'Eligibility, Restrictions and Undertakings', Clause xxv [20] limits collection to dispute-related data and reserves rights over user content modification. However, the same clause expressly disclaims responsibility for unsolicited sensitive information uploaded by users, thereby shifting the burden of precaution onto the participants. More significantly, Part X 'No Liability for Lost Data'[21] attempts to exclude liability for data loss by placing the burden on users to maintain backups. This limitation is further strengthened under Part XI 'Disclaimer of warranties and limitation of liability[22] which significantly limits the platforms liability for data breaches, losses, or misuse effectively trying to shield SMART-ODR from damages. This creates a tension between

[12] SEBI, Master Circular for ODR (n 6).
[13] SEBI, Master Circular for ODR (n 6) sch C.
[14] SEBI, Master Circular for ODR (n 6) sch E.
[15] SEBI, Master Circular for ODR (n 6) sch C cl 5.
[16] SEBI, Master Circular for ODR (n 6) sch C cl 6.
[17] SEBI, Master Circular for ODR (n 6) sch C cl 10 (b).
[18] SEBI, Master Circular for ODR (n 6) sch E cl xi.
[19] SMART ODR, 'Terms and Conditions of Usage of Online Dispute Resolution Portal'2023, pt VII https://smartodr.in/terms-and-conditions accessed 16 August 2025.
[20] ibid pt VIII.
[21] ibid pt X.
[22] ibid pt XI.

SEBI's regulatory safeguards articulated in the Master Circular and the risk allocation framework embedded in the portal's contractual obligations.

It is in furtherance of this gap between regulatory intent and contractual terms that the law assumes greater significance. SEBI's framework specifically refers to compliance with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("SPDI Rules"[23]), issued under the Information Technology Act, 2000. Section 43A of the Information Technology Act 2000 imposes compensatory liability on any body corporate negligent in implementing 'reasonable security practices and procedures' (according to the SDPI Rules) in handling sensitive personal data. Here, compensatory liability specifically refers to liability aimed at restoring a claimant to the position they would have been in had the wrong not occurred Unlike the contractual framework of SMART-ODR, this statutory regime does not permit broad disclaimers of responsibility. Instead, it functions as a liability backstop, restoring accountability where regulatory obligations are weakened in practice. The interaction between SEBI's ODR framework, the portal's contractual limitations, and the SDPI Rules thus reveals a fragmented approach to data protection, one in which statutory liability becomes crucial to preserving procedural integrity in digital dispute resolution.

The framework thus reflects a layered but uneven model of oversight: regulatory safeguards promise confidentiality, yet contractual disclaimers absolve the liability of the portal and shift the liability on to the users. Though statutory protections for negligence exist, the platform prioritizes legal immunity over effective enforcement.

III. ANALYSIS: STRUCTURAL VULNERABILITIES IN DATA GOVERNANCE

Having outlined the regulatory, contractual, and statutory architecture governing SMART-ODR, this section critically evaluates whether these layered safeguards adequately protect confidentiality and personal data in practice. The analysis proceeds across five structural fault lines: redaction risks, ambiguity in role-based accountability, data retention practices, cross-border data transfers, and algorithmic opacity in case allocation. Examined comparatively against global standards, the analysis demonstrates how these gaps risk compromising investor

[23] SPDI Rules' 2011 (n 10).

privacy and procedural neutrality. To mitigate these risks, the author suggests aligning with international best practices and adopting advanced technological solutions.

III.A. Redaction risk - SEBI, through the ODR Master Circular, requires ODR institutions to *'publish decisions of the arbitrators, redacted or masked to ensure identity of the parties is not ascertainable…'*.[24] Redaction, generally, as a tool for data protection has repeatedly been shown to be ineffective for high-dimensional datasets. In the Netflix Prize case, anonymised user ratings were successfully de-anonymised by correlating them with public IMDb data. metadata or cross-referenced patterns can re-identify parties[25]. ODR platforms like the SEBI SMART-ODR platform must therefore employ data-minimisation, encryption, and access-control, not just text redaction. The SMART-ODR Portal's redaction of arbitral awards therefore, may not by itself guarantee protection of personal or commercially sensitive data. In a separate study, author Latanya Sweeney showed 87% of U.S. citizens can be uniquely identified with a postal code, gender, and birthdate.[26] The European Union (EU's) General Data Protection Regulation (GDPR) Recital 26[27] in the EU makes it clear that anonymisation if done must be irreversible: *'The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable.'* Publishing full data or even redacted, can still reveal identities through details like dates, transaction amounts, or instruments.[28] The judgment of the Supreme Court of India in ***Justice K S Puttaswamy (Retd) v Union of India*** underscores that any restriction on privacy must satisfy the proportionality test.[29]

Applied in the context of capital market dispute resolution, SEBI should examine whether publishing full arbitral awards is indeed the least intrusive method of ensuring transparency.

[24] SEBI, Master Circular for ODR (n 6) cl 10(b).
[25] A. Narayanan and V. Shmatikov, 'Robust De-anonymization of Large Sparse Datasets', (IEEE Symposium on Security and Privacy, Oakland, CA, USA, 18-22 May, 2008) <https://ieeexplore.ieee.org/document/4531148> accessed 22 August 2025.
[26] Latanya Sweeney, Simple Demographics Often Identify People Uniquely (2018) Carnegie Mellon University Journal contribution <https://doi.org/10.1184/R1/6625769.v1> accessed 22 August 2025.
[27] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (EU GDPR), r 26.
[28] John X. Morris, Justin T. Chiu, Ramin Zabih and Alexander M. Rush, 'Unsupervised Text Deidentification' (2022) Findings of the Association for Computational Linguistics: EMNLP 2022 <https://aclanthology.org/2022.findings-emnlp.352/> accessed 25 August 2025.
[29] (2017) 10 SCC 1.

Alternatives such as summaries or statistical reports may achieve the same regulatory objectives with lower privacy risks. Where such less intrusive measures suffice, SEBI ought to prefer them over disclosure of the complete award. Along similar lines, the GDPR Article 5(1)(c) says '*Personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')'*[30]. This is very similar to the proportionality idea from the ***Puttaswamy*** judgement of the Hon'ble Supreme Court of India.

III.B. Ambiguity in role obligations- The SEBI Master Circular[31] doesn't assign roles among Market Infrastructure Institutions (MIIs), ODR institutions, and neutrals. The GDPR Article 24(1) imposes responsibility directly on entities like the "controller": *'The controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation.'* [32]

The SMART-ODR platform's terms (specifically Part X[33] and XI[34]) say that the portal is not responsible if your data is lost or deleted, and it also blocks users from claiming damages. This means that even if your personal data is mishandled, you may not get any compensation. Section 43A of the Information Technology Act 2000 only lets you claim something if you can prove negligence, which is already a task under the said act. What we can learn again from the EU is that the GDPR Article 82(1)[35] gives every person a direct right to compensation: *'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor.'* SEBI could explicitly designate MIIs as controllers and ODR institutions as processors, aligning with the GDPR Articles on processor and controller obligations.

III.C. Data Retention - SEBI's Master Circular on ODR[36] says that records must be kept "as per extant law" (para 35) without ODR-specific timelines. Even the SPDI Rule 5(4)[37] merely requires data not to be retained *longer than is required for the purposes for which the information*

[30] EU GDPR (n 26) art 5(1)(c).
[31] SEBI, Master Circular for ODR (n 6).
[32] EU GDPR (n 26) art 24(1).
[33] SMART ODR, 'Terms and Conditions of Usage of Online Dispute Resolution Portal' (4 August 2023), pt X https://smartodr.in/terms-and-conditions, accessed 25 August 2025.
[34] ibid pt XI.
[35] EU GDPR (n 26) art 82(1).
[36] SEBI, Master Circular for ODR (n 6).
[37] SPDI Rules' 2011 (n 10) r 5(4).

may lawfully be used or is otherwise required under any other law for the time being in force. In contrast, the EU GDPR Article 5(1)(e) sets clear conditions under which : *'Personal data maybe stored for longer periods (for example-public interest, scientific or historical research or statistical purposes* . *'*[38] Therefore extended retention is expressly conditioned upon strict compliance with GDPR law (Article 89(1)[39] in particular) and its laid down conditions and is not broader, vague and structurally undefined like Rule 5 (4) of the SDPI Rules. The SDPI Rule 5(4) contains no equivalent recognition of archival, historical or scientific exceptions and nor does it prescribe safeguards where data is retained beyond immediate purpose.

SEBI could therefore adopt fixed retention horizons and ban the use of data for analytics without the express consent of the user. A case in point to this argument could be The Financial Ombudsman Service in the United Kingdom. It specifies exact retention schedules for various categories and also has procedures in place to deal with any suspected personal data breach and taking its legal recourse thereafter. For example, for a compliant that is fully investigated, the length of time for which the data is stored in the system is 6 years from the date closed[40]. SEBI's ODR framework also lacks explicit rights to access, rectification, or erasure. The EU -GDPR Articles 15 to 17[41] on the other hand guarantee these rights. South Africa's Protection of Personal Information (POPI) Act similarly grants access and correction rights.[42]

III.D. Cross Border Transfers- SPDI Rule 7[43] says that data can be sent outside India only if the foreign company promises to give the "same level of data protection." But the law does not explain what this 'same level' actually means. There is no official list of safe countries and no standard contract to use. This makes cross-border transfers vague and very riskyIn contrast, under the EU's GDPR, Article 46(2)(c)[44] allows transfers if both sides sign Standard Contractual Clauses (SCCs), which are detailed, legally binding templates approved by the EU. These contracts clearly spell out responsibilities for protecting the data.

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[38] EU GDPR (n 26) art 5(1)(e).

[39] EU GDPR (n 26) art 89(1).

[40]Financial Ombudsman Service, 'Consumer privacy notice' (Financial Ombudsman Service, August 2025) <https://www.financial-ombudsman.org.uk/privacy-policy/consumer-privacy-notice> accessed 3 March 2026

[41] EU GDPR (n 26) art 15-17.

[42] Protection of Personal Information Act 4 of 2013, (Access to Personal Information) s 23 https://popia.co.za/section-23-access-to-personal-information/ accessed 27 August 2025.

[43]SPDI Rules' 2011 (n 10) r 7.

[44] EU GDPR (n 26) art 46(2)(c).

SEBI could potentially prepare sector-specific model contractual clauses (like those of the EU SCCs) and requireODR platforms to make their incorporation mandatory whenever data is stored or processed outside India. It could also make a list of countries that have ‘adequate’ protection, so parties know where data can be safely hosted.

III.E. Algorithmic Transparency- SEBI’s Master Circular says that arbitrators must be fair and independent, but they do not talk about how these cases are assigned on the digital platform. Practically, what happens is that software or algorithms might be used to distribute cases, and if those systems are not checked, they could be biased - for example, giving more cases to certain arbitrators or moving things faster for some of the repeat players. In Canada, the government requires an Algorithmic Impact Assessment (AIA) before using such systems to check their risks.[45] Using AI to select arbitrators in ODR may turn out to be problematic. Confidentiality limits training data, and published sources often provide only partial records. Many awards lack reasoning, while available data is skewed toward non-diverse appointments. With résumés missing diversity details, AI risks reinforcing biases like favouring older white males[46]. Incomplete and opaque data ultimately weakens both fairness and effectiveness in arbitrator selection.

SEBI could think of directing its partner ODR platforms to test their case-allocation software for bias, audit trails, and make the process transparent to all parties. Critics further argue that by mandating a full deposit of the disputed amount before appeal, SEBI’s framework risks compromising procedural fairness, particularly for individual and small investors with limited financial capacity.[47]

IV. CONCLUSION

[45] Government of Canada, ‘Algorithmic Impact Assessment tool’ <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html> accessed 27 August 2025.

[46] J Brian Johns, ‘Artificial Intelligence in the Selection of Arbitrators: Whether to Trust the Machine’ (2024) *International Trade & Arbitration Review* vol 6, issue 3 <https://www.itainreview.org/articles/2024/vol6/Issue3/artificial-intelligence-in-the-selection-of-arbitrators-whether-to-trust-the-machine.html> accessed 28 August 2025.

[47] Neha Joshi, ‘Experts flag gaps in SEBI’s speedy dispute resolution plan’ (*LiveMint*, 23 April 2025) <https://www.livemint.com/market/stock-market-news/sebi-consultation-paper-online-dispute-resolution-in-securities-market-direct-arbitration-odr-framework-miis-investors-11745388595707.html> accessed 5 September 2025.

In addition to the reforms listed above, further guidance can be drawn by having a look at how existing ODR platforms are navigating data privacy concerns through various methods. One such approach could be employing smart contracts to strengthen data protection in dispute resolution by automating secure transactions and ensuring the immutability of records.[48] According to *Nick Szabo*, who first proposed the idea in 1994, a smart contract is:

> "a set of promises, specified in digital form, including protocols within which the parties perform on these promises."[49]

Smart contracts offer promise for facilitating and streamlining transactions in many areas of business and government.[50] Blockchain-based alternate dispute resolution platforms further demonstrate many advantages.[51] Kleros[52], is a blockchain-based ODR system, where randomly assigned jurors settle disputes and enforce outcomes automatically via smart contracts[53]. Kleros protects privacy by using pseudonyms (Ethereum addresses instead of real names) and by keeping records tamper-proof on the blockchain. It also plans to keep detailed dispute files off-chain or encrypted, putting only a digital fingerprint (hash) on the blockchain so that sensitive information is not exposed publicly.[54]

Similarly, CADRE ODR Portal[55], navigates data protection by using cryptographic tools like hashing, public anchoring, and Merkle Trees (sometimes called a hash tree, it is a data structure used in blockchain technology that allows efficient and secure verification of large data

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[48] United Nations Conference on Trade and Development, 'Technology and the Future of Online Dispute Resolution (ODR) Platforms for Consumer Protection Agencies' (*UNCTAD* 2023) <https://unctad.org/system/files/official-document/tcsditcinf2023d5_en.pdf> accessed 05 September 2025.

[49]Nick Szabo, 'Smart Contracts' (1994) <https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html> accessed 05 September 2025.

[50] Rohit Jain and Anirudh Rastogi, 'Online Dispute Resolution: The Future of Dispute Resolution in India' (2021) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3977477> accessed 5 September 2025.

[51] Anirudh Rastogi and Rishabh Kaul, 'Online Dispute Resolution and the Evolution of the Legal System in India' (2024) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4748761> accessed 5 September 2025.

[52] Kleros, 'Kleros: Homepage' <https://kleros.io> accessed 05 September 2025.

[53] Vidhilegalpolicy, 'Kleros Is Crypto-Based Dispute Resolution: The Future' (21 October 2021) https://vidhilegalpolicy.in/blog/kleros-is-crypto-based-dispute-resolution-the-future/ accessed 06 September 2025.

[54] Varda Saxena and Harshitha Swarna, 'The Conundrum of Enforceability of Blockchain Arbitration: Learnings from Kleros' (17 April 2024) https://jgu.edu.in/mappingADR/the-conundrum-of-enforceability-of-blockchain-arbitration-learnings-from-kleros/ accessed 06 September 2025.

[55] CADRE ODR, 'India's Simplest Online Dispute Resolution Platform' https://cadreodr.com accessed 06 September 2025.

structures)[56] to secure every step of a case. Once claims or evidence are filed, they can't be altered without detection, allowing parties and courts to verify authenticity and ensuring fairness in digital records.[57]

With respect to ODR in general as well, risks like hacking, leaks, and unauthorized access threaten the confidentiality of evidence and awards.[58] Similar risks can be attributed to the SEBI's SMART-ODR portal as well, if not mitigated. Without strong security safeguards and standards, the SMART-ODR Portal's credibility and effectiveness could be undermined

Hence, the authors propose that the takeaway is not necessarily adoption of the blockchain technology as a whole but the incorporation of stronger and robust technological mechanisms to further strengthen SEBI's regulatory framework. While moving to digital platforms brings the risk of data breaches and vulnerabilities, their effectiveness ultimately depends on operability by ensuring that their utmost priority is to protect both investors and large institutions. Also, until the overarching framework of the upcoming Digital Personal Data Protection (DPDP) Act 2023,[59] is brought into force by the Government of India, the clauses of the Act remain good on paper, but can invoke a sense of doubt amongst the platform users. Until then, SMART-ODR is resting on a slippery slope as parts of SEBI's ODR policy are still uncertain, which raises serious difficulties for both domestic and foreign investors. Having said that, in today's world, where technological advancements are no longer optional but necessary, initiatives like SEBI's ODR framework mark an important step forward in driving innovation in the capital market. In all honesty, SEBI has come a long way from its first arbitration mechanism published in 2010.[60] To sum it up, SMART-ODR remains a revolutionary idea for a swift and efficient way to resolve disputes, and SEBI, having taken the

[56] Arvind Narayanan, Joseph Bonneau, Edward Felten, Andrew Miller and Steven Goldfeder, 'Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction' (*Princeton University Press* 2016) 63.
[57] Saurabh Nambiar and Subbaiah KG, 'Secured Logs: Furthering Tech-Enabled Fairness' (*CADRE ODR Blog*, 9 June 2025) <https://cadreodr.com/blog/adr-alternate-dispute-resolution/secured-logs-furthering-tech-enabled-fairness> accessed 06 September 2025.
[58] Sourav Mandal, 'Data Protection in Online Dispute Resolution (ODR): Issues and Challenges' (*SSRN*, 2023) <https://ssrn.com/abstract=4541971.> accessed 06 September 2025.
[59] Digital Personal Data Protection Act 2023 (No 22 of 2023).
[60] Securities and Exchange Board of India, *Arbitration Mechanism in Stock Exchanges* (Circular No CIR/MRD/DSA/24/2010, 11 August 2010) <https://www.sebi.gov.in/legal/circulars/aug-2010/arbitration-mechanism-in-stock-exchanges_386.html.> accessed 5 September 2025.

first step in implementing this ODR platform, promises to pave a new path for dispute resolution in India for the capital markets.[61]

[61] Rajendra Barot and Priyanka Shetty, 'India's Securities and Exchange Board Provides a Gateway into the Future of Dispute Resolution' *Business Law Today* (15 August 2024) https://businesslawtoday.org/2024/08/indias-securities-and-exchange-board-provides-a-gateway-into-the-future-of-dispute-resolution/ accessed 5 September 2025.

CASE COMMENT

THE ACHMEA JUDGMENT: A WATERSHED MOMENT FOR INTRA-EU INVESTMENT ARBITRATION AND ITS GLOBAL REVERBERATIONS

- *SHRADDHA TIWARI*[1]

ABSTRACT

The decision of the Court of Justice of the European Union in Slovak Republic v. Achmea BV fundamentally reshaped the landscape of international investment arbitration within the European Union by declaring investor-state arbitration clauses in intra-EU bilateral investment treaties incompatible with EU law. This paper examines the legal reasoning of the 2018 Achmea judgment alongside the 2024 decisions of the German Federal Constitutional Court, which effectively brought the dispute to a close. It analyses the constitutional principles of EU law autonomy and mutual trust that underpin the Court's approach while critically evaluating the distinction drawn between treaty-based investment arbitration and commercial arbitration. The paper also explores the broader implications of the judgment for investment protection, the termination of intra-EU BITs, enforcement outside the European Union, and ongoing reforms in international investment law. It argues that Achmea represents not merely a regional constitutional decision but a development with lasting consequences for the future of investor-state dispute settlement across jurisdictions.

I. Introduction

The Court of Justice of the European Union's (CJEU) landmark decision in *Slovak Republic v. Achmea BV*[2] embodies a paradigmatic shift in the landscape of international investment arbitration within the European Union. The 6 March 2018 judgment fundamentally challenged the compatibility of investor-state dispute settlement mechanisms in bilateral investment

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[2] *Slovak Republic v Achmea BV* (CJEU, Case C-284/16, 6 March 2018) EU: C:2018:158.

treaties **(BITs)** between EU Member States with EU law. Six years later in July 2024, the German Federal Constitutional Court rejected Achmea's complaints and upheld the CJEU's position and its far-reaching implications for international investment law and finally closed this chapter.[3]

The significance of this case extends beyond the confines of intra-EU relations, creating ripple effects that have reshaped global investment arbitration practices and influenced policy decisions worldwide. This case comment examines both the 2018 CJEU judgment and the 2024 German Constitutional Court decisions, analysing their legal reasoning, implications for investment protection regimes, and broader consequences for the international legal order.

II. Factual Background

The Achmea saga originated from a commercial dispute involving the liberalisation and subsequent re-regulation of Slovakia's health insurance market. Achmea BV (formerly Eureko BV), a Dutch insurance company, had established significant operations in Slovakia following the country's 2004 decision to open its health insurance sector to private operators.[4] After a change of government in 2006, Slovakia partially reversed this liberalisation, prompting Achmea to initiate arbitration proceedings in October 2008 under Article 8 of the Netherlands-Slovakia BIT.[5]

The arbitral tribunal, seated in Frankfurt and operating under UNCITRAL Arbitration Rules, ruled in favour of Achmea in December 2012, ordering Slovakia to pay €22.1 million in damages for breaching fair and equitable treatment standards.[6] Slovakia's subsequent attempts to set aside the award before German courts ultimately led to the Bundesgerichtshof's (BGH)

[3] German Federal Constitutional Court, 2 BvR 557/19 and 2 BvR 141/22 (23 July 2024).
[4] *Achmea* (n 1) [4]-[5].
[5] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (adopted 29 April 1991, entered into force 1 October 1992).
[6] *Achmea BV v Slovak Republic* (UNCITRAL PCA Case No 2008-13, Final Award, 7 December 2012).

preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the EU (TFEU), questioning the compatibility of intra-EU investment arbitration with EU law.[7]

III. The 2018 CJEU Judgment

A. The Court's Central Findings

The CJEU's judgment established three fundamental propositions that have become cornerstones of EU investment policy. *First*, the Court held that Articles 267 and 344 TFEU preclude arbitration provisions in intra-EU BITs that enable investors from one Member State to bring proceedings against another Member State before arbitral tribunals.[8] *Second*, the Court found such provisions incompatible with the autonomy of EU law and the principle of mutual trust between Member States.[9] *Third,* the judgment distinguished between investment arbitration and commercial arbitration, preserving the latter's compatibility with EU law.[10]

The Court's reasoning centered on the exclusivity of its jurisdiction to interpret EU law through the preliminary reference procedure under Article 267 TFEU. Investment arbitral tribunals, whilst potentially required to interpret EU law, cannot refer questions to the CJEU, thereby undermining the uniform application of EU law.[11] This can lead to the sidestepping of EU courts by arbitral tribunals and creating what the Court characterised as an impermissible circumvention of the EU's judicial architecture.

B. The Distinction between Investment and Commercial Arbitration

Perhaps the most analytically complex aspect of the judgment concerns the Court's differentiation between investment and commercial arbitration.[12] The CJEU identified two key distinguishing criteria: (i) the Court distinguished the two by noting that investment arbitration originates from treaty provisions between States, whereas commercial arbitration arises from

[7] *Achmea* (n 1) [14]-[18].
[8] Ibid [58].
[9] Ibid [34], [58].
[10] Ibid [54]-[55].
[11] Ibid [54]-[55].
[12] Ibid [54]-[55].

contractual agreements between private parties; (ii) the intensity of judicial review to which decisions are subject. Commercial arbitration arises from voluntarily agreed contracts between private parties and is thus subject to the courts of the relevant member states and, importantly, to the CJEU through preliminary references when EU law questions arise. Conversely, investment arbitration under intra-EU BITs stems from standing treaty offers to arbitrate and tends to bypass national courts, limiting judicial scrutiny.[13]

This distinction has been subject to scholarly critique. As Konstantinidis observes, the Court's classification appears "insufficiently nuanced", particularly regarding the jurisdictional effects of both forms of arbitration.[14] Both commercial and investment arbitration can potentially remove disputes involving EU law interpretation from national courts. However, the Court's emphasis on the treaty basis of investment arbitration, as distinguished from the contractual foundation of commercial arbitration, provides a more coherent analytical framework when viewed through the lens of mutual trust obligations between member states.[15]

C. Constitutional Foundations: Autonomy and Mutual Trust

The judgment's constitutional underpinnings rest on two fundamental EU law principles. The autonomy of EU law requires that the uniform interpretation and application of EU law be preserved through the preliminary reference procedure.[16] The principle of mutual trust, articulated in Articles 2 and 4(3) of The Treaty on European Union (TEU), mandates that member states ensure respect for EU law in their territories and refrain from actions that could undermine this obligation.[17]

The Court found that intra-EU BITs violated both principles by creating arbitral mechanisms outside EU judicial control that could nonetheless determine questions of EU law. This reasoning reflects a deeply territorial understanding of legal sovereignty, where the EU's constitutional order must remain hermetically sealed from external judicial interference.[18]

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[13] M Konstantinidis, 'Intra-EU Investment Arbitration Post-Achmea' (2025) 74 ICLQ 225, 231.
[14] Ibid 225,232.
[15] Ibid232-233.
[16] *Achmea* (n 1) [32]-[37].
[17] Ibid [34], [58].
[18] Christina Eckes, 'The Achmea Case Between International Law and European Union Law' (2019) 5 European Papers 283, 295-297.

IV. The 2024 German Constitutional Court Decisions

A. Procedural Disposition and Fundamental Rights Analysis

The German Federal Constitutional Court's (Bundesverfassungsgericht or BVerfG **)** decisions of 23 July 2024 definitively closed the domestic German chapter of the Achmea controversy by dismissing both of Achmea's constitutional complaints.[19] The Court's analysis addressed two separate challenges: Achmea's complaint against the BGH's decision to set aside the arbitral award, and its challenge to Germany's ratification of the Agreement for the Termination of BITs between EU Member States.[20]

The BVerfG dismissed the first complaint on procedural grounds, finding that Achmea lacked a protected legal interest in a merits judgment given the subsequent entry into force of the Termination Agreement, which retroactively eliminated the Netherlands-Slovakia BIT.[21] This procedural disposition reflects the Court's recognition that even a successful constitutional challenge would not alter the ultimate outcome, as the BGH would still be required to set aside the award under the changed legal circumstances.

B. Constitutional Review of CJEU Decisions

The BVerfG's substantive analysis reaffirmed Germany's commitment to EU law primacy whilst maintaining constitutional safeguards. The Court applied its established "ultra vires" and fundamental rights standards, requiring that CJEU decisions neither exceed delegated competences nor fall below German constitutional protection standards.[22] Applying these criteria, the Court found no violation of either standard, emphasising that the CJEU's interpretation was based on "the overarching objective of ensuring the uniform application of EU law" and was neither arbitrary nor contrary to accepted legal methodology.[23]

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[19] German Federal Constitutional Court (n 2).
[20] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.
[21] German Federal Constitutional Court (n 2).
[22] Ibid [35]-[40].
[23] Ibid [42].

The Court's analysis of Achmea's fundamental rights claims proved equally unavailing. Regarding property rights, the BVerfG noted that whilst arbitral awards constitute "property", their recognition may legitimately be subjected to limitations under mandatory EU law.[24] The Court rejected arguments concerning legitimate expectations, noting the European Commission's position that intra-EU BITs are contrary to EU law had been clear since 2006. This strengthened the validity of the CJEU's approach and justified the Termination Agreement. [25]

V. Critical Analysis

A. Strengths of the Court's Reasoning

The CJEU's judgment demonstrates several analytical strengths that support its conclusions. The emphasis on preserving the preliminary reference procedure as the "keystone" of the EU judicial system reflects a coherent vision of constitutional hierarchy.[26] The Court's concern about ensuring uniform EU law application addresses genuine practical problems that could arise from fragmented arbitral interpretations of EU legal principles.

Treaty-based arbitration encompasses standing consent embedded in multilateral or bilateral treaties, often bypassing substantive national procedural safeguards. Contract-based arbitration involves direct agreements between investor and State and typically allows for more judicial oversight and control, making it less intrusive to the EU legal order.[27] The distinction between treaty-based and contract-based arbitration, whilst imperfect, provides a workable framework for preserving commercial arbitration whilst addressing the specific constitutional concerns raised by intra-EU BITs. This approach recognises that mutual trust obligations operate differently in Member State-to-Member State contexts compared to private contractual relationships.[28]

[24] Ibid [55]-[60].
[25] Ibid [62].
[26] *Opinion* 2/13 (CJEU, 18 December 2014) EU: C:2014:2454 [176].
[27] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (n 19).
[28] Konstantinidis (n 13) 232-233.

B. Weaknesses and Analytical Limitations

However, the judgment suffers from several significant analytical limitations. The Court's treatment of judicial review intensity appears fundamentally flawed, as both commercial and investment arbitral awards are typically subject to the same limited grounds for annulment and enforcement challenges.[29] Even in Achmea, German courts exerted significant judicial oversight, including the ability to refer questions to the CJEU. The Court's blanket statement undervalues existing overlapping oversight mechanisms outside the **International Centre for Settlement of Investment Disputes** (ICSID) system.[30]

The judgment's brevity regarding complex constitutional questions has attracted widespread criticism. As noted in academic commentary, the Court's "elliptical" reasoning is "highly problematic given that the validity of nearly 180 intra-EU BITs was at stake".[31] The absence of detailed analysis regarding alternative solutions or transitional arrangements has created significant legal uncertainty for pending disputes and existing investments.

C. The ICSID Distinction Problem

A particularly troubling aspect of the Court's analysis concerns its failure to distinguish between different arbitral regimes. The CJEU's reasoning suggests that all investment arbitration excludes adequate judicial oversight, when in fact this exclusion applies primarily to ICSID Convention proceedings.[32] Awards under UNCITRAL Arbitration Rules and most institutional rules remain subject to national court supervision, as demonstrated by the Achmea case itself. This analytical oversight undermines the coherence of the Court's jurisdictional concerns.

VI. Implications for Investment Protection and Dispute Resolution

[29] ibid 235-237.
[30] *Achmea* (n1); see also *Eco Swiss China Time Ltd v. Benetton International NV* (Case C-126/97) EU:C:1999:269.
[31] Ségoléne Barbou des Places and others, 'Achmea between the Orthodoxy of the Court of Justice and Its Multi-faceted Implications' (2019) 5 European Papers 297, 309.
[32] Konstantinidis (n 13) 236-237.

A. The Termination of Intra-EU BITs

The immediate consequence of Achmea has been the systematic dismantling of the intra-EU investment protection architecture. The Agreement for the Termination of BITs between EU Member States, signed in May 2020, terminated most intra-EU BITs with retroactive effect.[33] This unprecedented collective denunciation represents a radical restructuring of investment protection within the EU.

The Commission's subsequent Declaration regarding the Energy Charter Treaty (ECT) extends Achmea's logic to multilateral investment instruments, effectively eliminating intra-EU ECT arbitration.[34] These developments reflect the EU's commitment to implementing Achmea's constitutional vision, regardless of the economic consequences for foreign investors.

B. Alternative Dispute Resolution Mechanisms

The elimination of treaty-based investment arbitration has highlighted the continued viability of contract-based arbitration as an investment protection mechanism. As Konstantinidis persuasively argues, arbitration under investment contracts between Member States and foreign investors remains compatible with EU law, provided adequate judicial review mechanisms are preserved.[35] This contractual route offers investors a potential alternative to treaty-based protection, albeit with more limited scope and application.

The European Court of Human Rights has emerged as another potential avenue for investment protection, though its applicability remains limited and its procedures are less investor-friendly than traditional arbitration.[36] The EU's promotion of its Investment Court System represents a longer-term institutional response, though its effectiveness and acceptance remain untested.

Hence, it is important to recognise that the Achmea judgment affirms the primacy of EU law over intra-EU BITs, demonstrating a strong commitment to EU legal order rather than a

[33]Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (n 19).
[34]European Commission, 'Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty' [2024] OJ L2024/2121.
[35] Konstantinidis (n 13) 237-244.
[36]'Investors' Fundamental Rights Post-Achmea: Insights from the German Constitutional Court Decisions in Achmea' (Kluwer Arbitration Blog, 7 January 2025).

rejection of investor protection. The ruling is fundamentally pro-EU law, not anti-investor rights or anti-BITs in principle.

VII. Global Reverberations and the Indian Context

A. Enforcement outside the EU

The international response to Achmea has demonstrated the limited extraterritorial effect of the CJEU's reasoning. Courts outside the EU have consistently rejected Achmea-based challenges to intra-EU awards, maintaining that international law governs investment arbitration independently of EU constitutional concerns.[37] The U.S. Court of Appeal for the District of Columbia Circuit and the Swiss Federal Tribunal have both confirmed the enforceability of intra-EU awards, emphasising the primacy of international arbitration law over EU constitutional principles in their jurisdictions.[38]

B. Indirect Effects on India

Whilst Achmea directly addresses only intra-EU disputes, its indirect effects on India's investment arbitration landscape warrant examination. India's experience with investment treaty arbitration, including high-profile cases such as *Vodafone v. India* and *Deutsche Telekom v India*, has occurred against the backdrop of global investment treaty reform partly inspired by EU developments.[39]

India's 2017 termination of 58 bilateral investment treaties reflects broader concerns about investor-state arbitration that align with, though predated, the Achmea judgment.[40] The country's adoption of a restrictive model BIT in 2015 and its subsequent negotiation of state-

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[37] *NextEra Energy Global Holdings BV v Kingdom of Spain* (DC Cir, No 22-7000, 2024).
[38] 4A_273/2023 (Swiss Federal Tribunal, 3 April 2024).
[39] *Vodafone International Holdings BV v Republic of India* (UNCITRAL PCA Case No 2016-35, Award on Jurisdiction and Merits, 25 September 2020).
[40] UNCTAD, 'India's Experience with BITs and the 2015 Model Text' (2017) UNCTAD/DIAE/PCB/2017/2.

to-state arbitration mechanisms in the India-Brazil BIT demonstrate policy preferences that resonate with EU skepticism about investor-state dispute settlement.[41]

The enforcement challenges faced by investment awards in India, exemplified by the ongoing *Vodafone* and *Deutsche Telekom* enforcement proceedings, illustrate broader systemic issues that the Achmea judgment has highlighted regarding the relationship between international arbitration and domestic constitutional orders.[42] Indian courts' restrictive interpretation of their enforcement obligations under the New York Convention reflects similar concerns about sovereignty and judicial hierarchy that animated the CJEU's reasoning in Achmea.[43]

C. Sunset Clause Implications

The operation of sunset clauses in terminated BITs has gained particular significance in the post-Achmea environment. These provisions, which typically extend treaty protection for 10-15 years after termination, create ongoing obligations that may conflict with Achmea's constitutional requirements.[44] In the wake of Achmea, these clauses play a crucial role by preserving claims during transition periods but generate legal uncertainties about the lasting reach of invalidated treaty provisions. India's experience with sunset clause disputes, including cases under terminated BITs with Australia, the UK, and Mauritius, demonstrates the practical complexities that arise when constitutional requirements conflict with international law obligations.[45]

VIII. Policy and Social Implications

A. Investment Climate and Economic Consequences

[41] Bilateral Investment Treaty between the Federative Republic of Brazil and the Republic of India (25 January 2020, not yet in force).
[42] *Deutsche Telekom AG v Republic of India*, PCA Case No 2014-10, Final Award (13 December 2017).
[43] Nishith Desai Associates, 'Vodafone Holdings BV versus Republic of India: Case Analysis & Implications' (2021) 45-52.
[44] ‘Operation and Termination of Sunset Clauses in Bilateral Investment Treaties’ (2023) 10 *National Law School Business Law Review* 1.
[45] *Tethyan Copper Company v Islamic Republic of Pakistan* (ICSID Case No ARB/12/1, Award, 12 July 2019) [1650]–[1670].

The elimination of intra-EU investment arbitration has created significant uncertainty about the EU's commitment to international investment protection. Foreign direct investment (FDI) flows between EU Member States, which constitute a substantial portion of global FDI, now lack the procedural safeguards that investment treaties traditionally provided.[46] This policy shift occurs at a time when global investment governance faces increasing scrutiny and reform pressure.

The absence of effective alternative dispute resolution mechanisms within the EU creates what Norton Rose Fulbright has characterised as an "investment protection vacuum".[47] This situation may particularly disadvantage smaller investors who lack the resources to pursue complex contract-based protections or ECHR proceedings.

B. Constitutional Pluralism and International Law

Achmea exemplifies broader tensions between regional constitutional orders and international law systems. The judgment reflects an increasingly assertive approach to constitutional autonomy that parallels developments in other jurisdictions, including India's experience with international arbitration enforcement.[48]

The CJEU's prioritisation of constitutional coherence over international law obligations raises fundamental questions about the relationship between regional integration projects and global governance mechanisms. This tension becomes particularly acute in areas such as investment protection, where international law has traditionally provided the primary regulatory framework.[49]

C. Impact on Developing Countries

The Achmea judgment's effects extend beyond the EU to influence global investment governance debates. As noted by the Center for International Environmental Law, the decision has created asymmetrical effects that may disadvantage investors from developing countries,

[46] Norton Rose Fulbright, 'Investment protection post-Achmea' (4 August 2019).
[47] Ibid.
[48] Prabhash Ranjan, ‘India and Bilateral Investment Treaties – A Changing Landscape’ (2014) *ICSID Rev* 419.
[49] S. W. Schill, ‘International Investment Law and Comparative Public Law – an Introduction’ in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3–37.

who have historically been less frequent users of investment arbitration.[50] The ruling thus exacerbates existing imbalances in the international investment system.

IX. Conclusions and Future Prospects

The Achmea judgment represents a watershed moment in the evolution of international investment law, establishing constitutional limits on the operation of investor-state arbitration within regional integration contexts. The CJEU's reasoning, whilst problematic in several respects, articulates a coherent vision of constitutional hierarchy that prioritises legal uniformity and judicial control over international arbitral autonomy.

The 2024 German Constitutional Court decisions provide definitive closure to the domestic constitutional challenges whilst reaffirming the supremacy of EU law within the German legal order. The BVerfG's analysis demonstrates the limited scope for national constitutional resistance to CJEU interpretations, even in cases involving significant economic interests and fundamental rights concerns.

Looking forward, several key developments merit attention. *First*, the effectiveness of alternative dispute resolution mechanisms, particularly contract-based arbitration and the nascent Investment Court System, will determine whether the EU can maintain adequate investment protection standards.

Second, the global response to Achmea continues to evolve, with implications for the enforcement of intra-EU awards and the broader legitimacy of investment arbitration.

Third, the judgment's influence on investment treaty reform processes worldwide, including in India and other developing countries, suggests that Achmea's impact extends far beyond its immediate constitutional context. The decision has provided intellectual ammunition for critics of investor-state arbitration whilst demonstrating the potential for regional constitutional orders to constrain international arbitral mechanisms.

[50] Center for International Environmental Law, 'How the Achmea Judgment Impacts Investment Agreements with Non-EU Countries' (April 2018) 1-8.

The Achmea judgment ultimately reflects deeper questions about sovereignty, democracy, and the role of international law in domestic constitutional systems. Whilst its immediate effects have been largely confined to intra-EU relations, its analytical framework and constitutional vision continue to influence global debates about the future of international investment arbitration. The judgment thus represents not merely a European constitutional decision, but a contribution to evolving global discussions about the proper balance between international economic governance and domestic constitutional autonomy.

For practitioners and policy-makers, Achmea serves as both a cautionary tale about the fragility of international arbitral arrangements and a demonstration of the power of constitutional reasoning to reshape established international law frameworks. Its legacy will likely be felt for decades to come, as the international investment law system continues to grapple with questions of legitimacy, effectiveness, and democratic accountability that the judgment so starkly posed.