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ROLE OF ARBITRATION IN CROSS-BORDER MERGERS AND ACQUISITIONS: LEGAL LANDSCAPE AND ENFORCEMENT CHALLENGES

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I. ABSTRACT

Cross-border mergers and acquisitions sit at the intersection of corporate law, private international law, and commercial risk allocation, and disputes arising from them rarely fit neatly inside the courts of a single jurisdiction. Arbitration has become the dispute resolution mechanism of choice for such transactions because it offers a neutral forum, confidentiality, party autonomy in selecting decision-makers, and most importantly a relatively reliable path to cross-border enforcement under the New York Convention. This paper examines the legal architecture that supports arbitration in cross-border M&A and tests that architecture against the practical reality of enforcement. Rather than retelling the familiar doctrinal story of arbitration's rise, the paper concentrates on three friction points that recur in M&A arbitration practice: first, the arbitrability of disputes that straddle private contract and public corporate-law remedies, particularly shareholder oppression and minority-protection claims; second, the interpretation of risk-allocation devices such as Material Adverse Change ("MAC") clauses when tested through arbitration rather than litigation; and third, the structural gap between an arbitral award on paper and an arbitral award actually collected, given the discretionary refusal grounds under Article V of the New York Convention. Drawing on current institutional data from the ICC and SIAC, recent case law including the NSW Supreme Court's decision in Cosette Pharmaceuticals Inc v Mayne Pharma Group Limited on MAC-based termination, the English Commercial Court's decision in BM

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Brazil v Sibanye, and the evolving Indian arbitrability jurisprudence culminating in Vidya Drolia and the Anupam Mittal litigation, the paper argues that the legal landscape is converging toward arbitration-friendliness in principle while remaining fragmented in enforcement practice. The paper closes with a set of practical drafting and policy recommendations directed at transactional lawyers, arbitral institutions, and legislators, aimed at narrowing the gap between the promise of arbitral finality and the reality of cross-border collection.

II. KEYWORDS

Cross-Border Mergers and Acquisitions; International Commercial Arbitration; New York Convention; Arbitrability; Enforcement of Arbitral Awards.

III. INTRODUCTION

Mergers and acquisitions that cross national borders are, by their nature, exercises in managed uncertainty. A buyer in one country agrees to acquire a target in another, often relying on warranties, valuations, and closing conditions that were negotiated months before signing and that must still hold true months later at closing. When something goes wrong in that interval a warranty turns out to be false, an earnings figure is revised downward, a regulatory approval is delayed, or one side simply tries to walk away the parties need a forum capable of resolving the dispute fairly, predictably, and across borders.

Litigation in either party's home courts is rarely attractive to the other side, because it raises the spectre of "home-court advantage," unfamiliar procedure, and language barriers. Arbitration emerged as the structural answer to this problem, and it is now the dominant dispute resolution mechanism written into international M&A contracts.[3]

The scale of this shift is visible in the caseload of the major arbitral institutions. The International Chamber of Commerce ("ICC") registered 841 new arbitration cases in 2024,

[3] Titilayo A. Olowu, ESQ.; *"Enforcement of Arbitral Awards under New York Convention"*; RUHM AND ASSOCIATES (June 2, 2025) https://www.ruhmandassociates.com/enforcement-of-arbitral-awards-under-the-new-york-convention

with the aggregate amount in dispute for new cases reaching US$102 billion and the total pending caseload value reaching a record US$354 billion; mergers, share purchase, and shareholder-agreement disputes were among the most frequent claim types after the traditionally dominant construction and energy sectors.[4] Preliminary 2025 figures show the ICC registering 894 new cases, with the pending caseload reaching a record 1,869 matters and an aggregate value of US$299 billion, confirming that this is not a one-year spike but a sustained trend.[5]

Beyond the ICC, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and the China International Economic and Trade Arbitration Commission collectively pushed the total new caseload across major institutions to a record 10,067 cases in 2024, with the HKIAC alone recording its highest-ever caseload, reflecting the institution's growing attractiveness for complex cross-border commercial matters including M&A-related claims. These figures matter because they show that arbitration's role in cross-border M&A is no longer theoretical or marginal; it is the default forum that transactional lawyers draft toward, and its enforcement mechanics therefore carry real commercial weight for billions of dollars in deal value.[6]

The legal foundation that makes this system workable is the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, universally known as the New York Convention. The Convention requires courts in over 170 contracting states to recognise written arbitration agreements and to enforce foreign arbitral awards, subject only to a closed, exhaustive list of refusal grounds set out in Article V. It is this

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[4] Pamela McDonald, Sylvia Tonova; "*ICC reports record-breaking arbitration caseload value in 2024*"; PINSENT MASONS (July 24, 2025) https://www.pinsentmasons.com/out-law/news/icc-record-arbitration-caseload-2024

[5] Dispute Resolution Service; "*ICC releases preliminary 2025 dispute resolution statistics*"; INTERNATIONAL CHAMBER OF COMMERCE (Feb 12, 2026) https://iccwbo.org/news-publications/news/icc-releases-preliminary-2025-dispute-resolution-statistics/

[6] Dr. Markus Alternkirch, Maria Clara Von Rundstedt, Franziska Reese; "*Arbitration Statistics 2024: Arbitration is the preferred method of dispute resolution for large disputes*", GLOBAL ARBITRATION NEWS (Sept 25, 2025) https://www.globalarbitrationnews.com/2025/09/25/arbitration-statistics-2024-arbitration-is-the-preferred-method-of-dispute-resolution-for-large-disputes/

enforcement promise not the arbitration clause itself that gives M&A parties the confidence to agree to arbitrate in the first place, because a contract is only as valuable as the remedy that backs it up. Yet the Convention's apparent simplicity conceals significant complexity in application: each contracting state interprets "public policy" and "arbitrability" through its own domestic lens, and an award that is perfectly enforceable in one jurisdiction may be resisted, delayed, or even refused in another. This is the central research problem this paper investigates.[7]

Three specific friction points illustrate the problem in the M&A context. The first concerns arbitrability the threshold question of whether a dispute is even capable of being resolved by a private arbitral tribunal, or whether it must instead go before a public court or specialised tribunal. M&A disputes frequently involve shareholder agreements that sit alongside a company's constitutional documents and statutory minority-protection regimes; when a dispute is framed as "oppression" or "mismanagement" rather than simple breach of contract, courts in some jurisdictions India being the clearest example have had to decide whether the arbitration clause survives that re-characterisation.[8]

The second concerns the substantive risk-allocation clauses that are unique to M&A contracts, most notably Material Adverse Change clauses, which determine whether a buyer can walk away from a signed deal before closing. These clauses are notoriously difficult to construe, and when the construction exercise happens inside arbitration rather than open court, the absence of a public appellate record makes it harder for the market to learn from outcomes, even as the underlying legal tests harden through parallel court litigation such as the English Commercial Court's 2024 decision in BM Brazil v Sibanye. The third, and most consequential, friction point is enforcement itself: an arbitral

[7] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); art. 5

[8] Gawry Cootiah, Dushyanth Narayanan, Yash Khanna; *"Enforcing Arbitration Clauses: Overcoming Oppression and Mismanagement Claims"*; LEGAL ERA (Oct 24, 2025) https://www.legaleraonline.com/alternate-dispute-resolution/enforcing-arbitration-clauses-overcoming-oppression-and-mismanagement-claims-935199

tribunal's award is only the beginning of the story, not the end, because a losing party can resist recognition in the jurisdiction where assets are located by invoking Article V grounds such as public policy, due process violations, or the award having been set aside at the seat.[9]

This paper's research problem can therefore be stated narrowly: does the current legal landscape comprising the New York Convention, national arbitration statutes, and institutional rules provide M&A parties with a reasonably predictable path from arbitration agreement to collected award, or does the combination of arbitrability uncertainty and discretionary enforcement refusal grounds leave a structural gap that undermines arbitration's core value proposition for cross-border M&A transactions? The paper argues that the gap is real but narrowing, and that it is narrowing unevenly across jurisdictions, sectors of dispute, and types of M&A clause. Understanding precisely where the gap remains widest is of direct practical value to deal lawyers drafting dispute resolution clauses, to arbitral institutions designing procedural rules, and to policymakers considering arbitration law reform.

A. Research Objectives

The objectives of this paper are practical rather than purely theoretical. The paper aims:

1. To map the current doctrinal position on M&A arbitrability across a comparative set of jurisdictions, namely India, Singapore, England, and Brazil;
2. To analyse how recent MAC-related disputes have been resolved or are being litigated;
3. To synthesise current ICC and SIAC institutional data in order to evidence the scale and practical significance of M&A-related arbitration; and

[9] Harkiran Hothi, Rajinder Bassi, Noah Stewart Ornstein; *"Commercial Court Gives Important Guidance on Material Adverse Change Clauses"*; KIRKLAND AND ELLIS (Oct 23, 2024) https://www.kirkland.com/publications/kirkland-alert/2024/10/commercial-court-gives-important-guidance-on-material-adverse-change-clauses

4. To translate the doctrinal and comparative findings into actionable recommendations for transactional drafters and policymakers.

B. Research Questions

This paper is guided by the following research questions:

1. How do courts distinguish arbitrable contractual claims from non-arbitrable corporate-law claims in the specific context of M&A-related shareholder disputes, and has this distinction stabilised or remained contested across jurisdictions?
2. How are MAC clauses and other M&A-specific risk-allocation devices construed when the dispute is resolved by arbitration, and what does recent comparative case law suggest about convergence or divergence in interpretive approach?
3. What do the Article V refusal grounds of the New York Convention mean in practice for M&A awards specifically, given that M&A disputes often carry public-interest overtones including competition concerns, state-owned enterprise involvement, and minority shareholder protection that may make public policy objections more plausible than in a typical commercial sale-of-goods dispute?
4. What concrete legal and drafting reforms would reduce the residual enforcement risk that current arbitration law leaves unresolved?

C. Research Methodology

This paper adopts a doctrinal and comparative legal research method. It analyses primary legal sources, including the New York Convention, the UNCITRAL Model Law, and leading judicial decisions such as Vidya Drolia v. Durga Trading Corporation and BM Brazil v. Sibanye, alongside secondary commentary from arbitral institutions, law firm analyses, and academic publications. It further supplements the doctrinal analysis with current empirical data drawn from ICC and SIAC statistical reports, treating institutional caseload and dispute-value data as evidence of the practical significance of the doctrinal questions examined. The comparative method is deliberately cross-jurisdictional rather than single-country, because cross-border M&A arbitration ordinarily engages multiple legal systems simultaneously, including the law of the underlying contract, the law of the arbitral seat, and the law of the jurisdiction where enforcement is ultimately sought.

The paper's addition to existing literature is threefold. First, it offers an enforcement-stage analysis of M&A arbitration that most doctrinal arbitration scholarship omits, by following the dispute through from arbitrability at the outset to collection at the end. Second, it uses 2024–2026 case law and data that postdates much of the existing academic commentary on this subject, including the Mayne Pharma–Cosette dispute, the BM Brazil decision, and the ICC's most recent statistical reports, ensuring the analysis reflects the current state of the law rather than a static historical snapshot. Third, it deliberately avoids treating any single jurisdiction's arbitration law as the universal benchmark, instead triangulating across India, England, Singapore, Brazil, and the ICC's transnational caseload to produce recommendations that are jurisdiction-agnostic and therefore more broadly useful to international transactional practice.

D. Literature Review

Existing scholarship on arbitration and M&A tends to fall into two separate streams that rarely intersect. The first stream is doctrinal commentary on the New York Convention itself exemplified by the foundational work of jurists such as Albert Jan van den Berg, whose overview of the Convention's grounds for refusal remains a standard reference point for practitioners analysing Article V.[10] This stream is rich on the mechanics of enforcement but rarely engages with the specific transactional features of M&A disputes, such as MAC clauses or shareholder-agreement arbitrability, treating "commercial

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[10] Albert Jan van den Berg; *"The New York Convention of 1958: Overview"*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (ICCA) https://cdn.arbitrationicca.org/s3fspublic/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf

arbitration" as a single undifferentiated category. The second stream is corporate-law scholarship on shareholder remedies and minority protection, exemplified by Indian commentary on the arbitrability of oppression and mismanagement claims under the Companies Act, 2013, which engages deeply with corporate-law doctrine but rarely connects back to the enforcement consequences under the New York Convention once an award is actually rendered[11]. This paper's first contribution is to bridge these two streams by treating arbitrability and enforcement as two stages of a single continuous problem rather than as separate fields of inquiry.

IV. WHY CROSS-BORDER M&A PARTIES CHOOSE ARBITRATION?

The preference for arbitration in cross-border M&A is not accidental; it follows directly from the structural weaknesses of litigation in this context. When an Indian acquirer buys a Brazilian target, neither side wants to litigate in the other's home courts, and a neutral third-country court may lack jurisdiction altogether absent a forum-selection clause that the other side would resist litigating under foreign procedural rules. Arbitration solves this through party autonomy: the parties can select a neutral seat, a tribunal with relevant sectoral or legal expertise, and procedural rules (such as those of the ICC, SIAC, or HKIAC) that are designed for international commercial disputes rather than domestic litigation.

Recent ICC data illustrates this neutrality preference directly: in 2024, ICC arbitrations were seated in 107 cities across 62 countries, with the United Kingdom, France, and Switzerland the most frequently selected seats, and English law remained the most frequently chosen governing law, applied in 15% of new cases. This pattern of seat and law selection shows parties consistently choosing jurisdictions associated with

[11] Diksha Rao; "*Role of Arbitration in Shareholder Disputes*"; 4 IJLR L. 315 (2024)

predictable, arbitration-friendly judicial review rather than their counterparty's home jurisdiction.[12]

Confidentiality is a second driver specific to M&A. Litigation is, in most jurisdictions, a matter of public record; arbitration proceedings and (frequently) the resulting awards are confidential under most institutional rules. For M&A parties, this matters enormously, because the underlying dispute often concerns sensitive matters valuation methodology, the target's true financial condition, or the reasons a deal collapsed that neither side wants exposed to competitors, regulators, or the financial markets. The growing share of ICC cases falling under purchase-and-sale, share-purchase, and shareholder-agreement categories (alongside the traditionally dominant construction and energy sectors) reflects this confidentiality-driven preference among corporate and private equity parties[13].

V. THE ARBITRABILITY FAULT LINE: CONTRACT CLAIMS VERSUS CORPORATE-LAW REMEDIES

The clearest doctrinal fault line in M&A arbitration concerns arbitrability — whether a dispute can be resolved by a private tribunal at all. The fault line is sharpest in jurisdictions with a dedicated statutory forum for shareholder grievances. In India, Section 241 of the Companies Act, 2013 is the substantive provision under which a member may apply to the National Company Law Tribunal for relief in cases of oppression or mismanagement, while Section 244 separately prescribes the eligibility threshold for members entitled to bring such an application and empowers the Tribunal to waive those requirements. These provisions therefore operate together but serve distinct functions, and the NCLT remains a specialised public forum with powers

[12] Pamela McDonald, Sylvia Tonova; *"ICC reports record-breaking arbitration caseload value in 2024"*; PINSENT MASONS (July 24, 2025) https://www.pinsentmasons.com/out-law/news/icc-record-arbitration-caseload-2024

[13] *Id*

including the power to restructure a company's affairs on equitable grounds that an arbitral tribunal does not possess.[14]

Because of this, Indian courts have spent over a decade refining the test for distinguishing genuine oppression claims (non-arbitrable) from disputes that are contractual in substance but "dressed up" as oppression claims purely to escape an arbitration clause in a shareholders' agreement (arbitrable in substance, regardless of label). The Supreme Court of India's decision in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. first drew the foundational distinction between rights in rem (binding on the world, generally non-arbitrable) and rights in personam (binding only between the contracting parties, generally arbitrable).[15]

The Court refined this further in Vidya Drolia v. Durga Trading Corporation, laying down a four-pronged test under which a dispute is non-arbitrable if it concerns rights in rem, affects third-party rights with an Erga Omnes effect, relates to the State's sovereign functions, or is expressly or impliedly barred from arbitration by statute while cautioning that the test does not offer a watertight, mechanical answer in every case. Applying this test, Indian company-law adjudicatory bodies have, on occasion, referred ostensible oppression claims to arbitration where the underlying grievance was, in substance, a contractual dispute over share valuation or equity dilution under a shareholders' agreement. In Sidharth Gupta v. Getit Infoservices Private Limited, decided by the Company Law Board the statutory predecessor to the NCLT for this line of company-law jurisprudence the CLB held that the allegations were essentially contractual in nature and referred the parties to arbitration, notwithstanding the petitioners' attempt to frame the

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[14] Gawry Cootiah, Dushyanth Narayanan, Yash Khanna; *"Enforcing Arbitration Clauses: Overcoming Oppression and Mismanagement Claims"*; LEGAL ERA (Oct 24, 2025) https://www.legaleraonline.com/alternate-dispute-resolution/enforcing-arbitration-clauses-overcoming-oppression-and-mismanagement-claims-935199

[15] Vikash Kumar Jha, Ena Kapur; *"Arbitrability of Disputes: Indian Jurisprudence Part 1"*; DISPUTE RESOLUTION BLOG; CYRIL AMARCHAND MANGALDAS https://disputeresolution.cyrilamarchandblogs.com/2024/06/arbitrability-of-disputes-indian-jurisprudence-part-i/

dispute as one of oppression and mismanagement under Sections 397 and 398 of the Companies Act, 1956.[16]

This tension has played out in real time in one of India's most closely watched recent corporate disputes. When BYJU'S investors brought oppression and mismanagement proceedings before the NCLT Bengaluru, the tribunal had to confront directly whether an arbitral tribunal could have jurisdiction over allegations that were framed as statutory oppression claims rather than contract claims, underscoring that this is not a settled historical question but a live, recurring issue in major Indian M&A and investment disputes.[17]

The comparative dimension sharpens the picture further: in Anupam Mittal v. Westbridge Ventures II Investment Holdings, the Singapore Court of Appeal held that, as a matter of Singapore law, oppression claims are arbitrable, even though the same category of claim would, under Indian law, fall within the NCLT's exclusive jurisdiction meaning that the same substantive shareholder grievance can be arbitrable or non-arbitrable purely depending on which jurisdiction's law applies to the question. For drafters of cross-border shareholders' agreements, this divergence is not an academic curiosity; it determines whether an arbitration clause will actually be given effect when a dispute eventually arises.[18]

VI. MATERIAL ADVERSE CHANGE CLAUSES: RISK ALLOCATION TESTED THROUGH ARBITRATION AND PARALLEL LITIGATION

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[16] Anuj Berry, Ashish Bhan, Mohit Rangi; *"Arbitrability of shareholder disputes in India: Complexities and Issues"*; GLOBAL ARBITRATION REVIEW (May 26, 2023) https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review-archived/2024/article/arbitrability-of-shareholder-disputes-in-india-complexities-and-issues

[17] Prakhar Khandal, Jitesh Lakra; *"Arbitrability of Shareholder Disputes in India: Addressing "Dressed-Up" Corporate Oppression Claims"*; THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (IRCCL) https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims

[18] *Id*

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A second distinctive feature of M&A disputes is the Material Adverse Change clause, a contractual mechanism allowing a buyer to walk away from, or renegotiate, a signed deal if a sufficiently serious adverse event affects the target between signing and closing. MAC clauses are heavily negotiated and rarely litigated successfully by buyers, because courts and tribunals alike have historically set a high threshold for what counts as "material." The English Commercial Court's 2024 decision in BM Brazil I Fundo De Investimento Em Participações Multistrategia v Sibanye BM Brazil illustrates this rigour: the case concerned a US$1.2 billion acquisition of two Brazilian mines, where the buyer sought to terminate after a geotechnical event at one mine, but the court held that the event was not material because it was "insignificant" relative to the transaction and could be remedied at a cost equivalent to only about 5% of the purchase price.[19] The same judgment offered detailed guidance on materiality thresholds, finding that a reduction in equity value of between 15–20% "might be" material and a 20% reduction "is" material, while also clarifying that MAC clauses generally do not apply to events that merely reveal pre-existing problems rather than causing new ones.[20]

The Mayne Pharma–Cosette Pharmaceuticals dispute now provides a significant example of public judicial guidance on MAC construction in an arbitration-adjacent, cross-border M&A context. In that matter, the US-based acquirer issued notices in May and June 2025 purporting to terminate a Scheme Implementation Deed on the basis of an alleged 'Material Adverse Change' in the Australian target's financial performance, including weaker sales performance and related developments. On 15 October 2025, however, the Supreme Court of New South Wales, in *Cosette Pharmaceuticals Inc v Mayne Pharma Group Limited* [2025] NSWSC 1204, rejected Cosette's MAC-based termination and

[19] Benny Sham, Peter Williams, Irfaan Rashid; *"Your guide to material adverse change clauses amidst current economic headwinds"*; LEXOLOGY (June 5, 2026) https://www.lexology.com/library/detail.aspx?g=41e8887c-b662-4297-a0e2-2eb8db7eeb78

[20] Harkiran Hothi, Rajinder Bassi, Noah Stewart Ornstein; *"Commercial Court Gives Important Guidance on Material Adverse Change Clauses"*; KIRKLAND AND ELLIS (Oct 23, 2024) https://www.kirkland.com/publications/kirkland-alert/2024/10/commercial-court-gives-important-guidance-on-material-adverse-change-clauses

held that the relevant quantitative threshold under the Scheme Implementation Deed had not been satisfied.[21]

The decision is instructive for cross-border M&A practice generally and for arbitration in particular because it demonstrates the evidentiary rigour required to establish a contractually defined MAC. The Court's reasoning engaged directly with the quantitative EBITDA-based threshold in the Scheme Implementation Deed and confirmed that a buyer seeking to invoke such a clause must prove, through objective financial evidence, that the agreed threshold has in fact been met. This strengthens the comparative point made in this paper: public court judgments such as Mayne Pharma–Cosette and BM Brazil v Sibanye contribute to a developing body of guidance on MAC construction, whereas confidential arbitral awards may resolve similar disputes without generating equivalent public precedent.[22]

The subsequent trajectory of the transaction also illustrates that MAC adjudication may not be the final determinant of deal completion. After the NSW Supreme Court rejected Cosette's termination position, Australia's Treasurer blocked the proposed acquisition on national-interest grounds in November 2025, citing risks to critical medical supply chains, local jobs, and the local community. Both Cosette and Mayne Pharma thereafter served termination notices in December 2025, while Cosette pursued an appeal from the adverse NSW Supreme Court judgment in January 2026.

The broader policy environment makes MAC clauses even more consequential for cross-border deals specifically. Tariff measures, trade-agreement renegotiations, and geopolitical instability are increasingly cited as potential MAC triggers in cross-border

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[21] Rory Moriarity, Kimberley Bruce, Victoria Hu; *"Material Adverse Change clauses: how much protection do buyers really have?"*; CLAYTON UNZ (July 3; 2025) https://www.claytonutz.com/insights/2025/july/material-adverse-change-clauses-how-much-protection-do-buyers-really-have

[22] Alberto Córdoba, Eugenio Chinchillas; *"Material adverse change clauses in M&A: The risks of USMCA renegotiation and tariff uncertainty"*; INTERNATIONAL BAR ASSCOIATION (May 23; 2025) https://www.ibanet.org/material-adverse-change-clauses-m-and-a-risks-of-USMCA-renegotiation-and-tariff-uncertainty

transactions, because such macroeconomic shocks can fall outside a seller's control while still depressing the target's value, raising difficult questions about whether broadly drafted MAC clauses were intended to capture systemic, market-wide risk of this kind. Because international arbitration is now the default forum for resolving exactly this category of high-value, cross-border M&A dispute, tribunals are likely to be the primary decision-makers interpreting MAC clauses against this backdrop of trade and tariff volatility in the years ahead, even though unlike the English courts in BM Brazil their reasoning will typically remain outside the public record.[23]

VII. THE NEW YORK CONVENTION'S ENFORCEMENT ARCHITECTURE AND THE ARTICLE V REFUSAL GROUNDS

The New York Convention's central commitment is straightforward: each contracting state must recognise a written arbitration agreement and must enforce a resulting award, subject only to the exhaustive list of refusal grounds in Article V.[24]

Article V (1) sets out party-invoked grounds incapacity or invalidity of the arbitration agreement, lack of proper notice or an inability to present one's case, the tribunal exceeding the scope of the submission to arbitration, improper composition of the tribunal, or the award having been set aside or suspended at the seat.[25] Article V (2) adds two grounds that a court may raise on its own motion regardless of whether the resisting party pleads them: non-arbitrability of the subject matter under the law of the enforcing state, and inconsistency with that state's public policy.

It is this second category arbitrability and public policy assessed by the enforcing court itself that creates the most uncertainty for M&A awards specifically, because M&A

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[23] *Id*

[24] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); art. 5

[25] Sebastien Fries, Martin Molina, Annemarie Streuli, Denise Wohlwend, *"Grounds to Refuse Enforcement"*; GLOBAL ARBIYTRATION REVIEW (GAR) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards-archived/3rd-edition/article/grounds-refuse-enforcement

disputes (unlike, say, a straightforward sale-of-goods dispute) often touch areas, such as minority shareholder protection or competition concerns, where states are more inclined to treat their domestic rules as mandatory public policy.[26]

In practice, courts apply the public policy exception narrowly, and a mere violation of an enforcing state's domestic law is generally insufficient on its own to justify refusal; many jurisdictions have moved toward an "international" or "transnational" conception of public policy that is interpreted more restrictively than purely domestic public policy would be.[27] Brazilian case law offers a useful illustration of where the line is actually drawn: Brazilian courts have identified categories of rules considered to be genuinely of a public-policy nature including constitutional, criminal, and family-law matters while treating ordinary commercial disputes as falling outside this narrow band, and have refused enforcement on public policy grounds chiefly where there was a fundamental defect such as a party's lack of consent to arbitrate in the first place. The practical takeaway for M&A practice is that the public policy exception, while real, functions as a narrow safety valve rather than a general re-examination of the merits but the existence of that valve, however narrow, still means an M&A award cannot be treated as automatically collectible the moment it is rendered.[28]

A further enforcement complication specific to multi-jurisdictional M&A disputes arises from Article V(1)(e), which allows refusal where the award has been set aside by a court at the arbitral seat an effect with extraterritorial consequences precisely because it precludes enforcement everywhere else, unlike a simple refusal of enforcement, which only binds the jurisdiction in which that refusal occurs.[29]

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[26] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); art. 5

[27] Dr, Willocks Andrews, Jansen Denise; *"New York Convention: Public Policy Exception"*; JUS MUNDI (Sept 23, 2025) https://jusmundi.com/en/document/publication/en-new-york-convention-public-policy-exception

[28] *Id*

[29] Albert Jan van den Berg; *"The New York Convention of 1958: Overview"*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (ICCA)

For M&A parties, this creates an important strategic incentive in seat selection: choosing a seat with a supervisory court known for being deferential to arbitral awards (rather than interventionist) materially reduces the risk that a single set-aside application could destroy the award's global enforceability, which helps explain the continued dominance of seats such as London, Paris, Singapore, and Switzerland in cross-border M&A arbitration clauses.[30]

Institutional data confirms that enforcement-stage friction, while real, has not deterred the underlying preference for arbitration; on the contrary, ICC tribunals approved 607 awards in 2025 the second-highest annual total on record and the ICC Court has now registered more than 30,000 cases under its Arbitration Rules since the Convention-era system took shape, with arbitrations spanning 70 countries in 2025 alone.[31] The sheer global reach evidenced by this caseload, set against the comparatively rare reported instances of enforcement refusal, supports the broader proposition that the New York Convention's "pro-enforcement" design is functioning largely as intended at a systemic level, even though refusal risk remains concentrated and significant in particular categories of dispute such as those touching shareholder and minority-protection rights.[32]

VIII. COMPARATIVE SNAPSHOT: SINGAPORE, ENGLAND, BRAZIL, AND INDIA

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https://cdn.arbitrationicca.org/s3fspublic/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf

[30] Pamela McDonald, Sylvia Tonova; "*ICC reports record-breaking arbitration caseload value in 2024*"; PINSENT MASONS (July 24, 2025) https://www.pinsentmasons.com/out-law/news/icc-record-arbitration-caseload-2024

[31] Dispute Resolution Service; "*ICC releases preliminary 2025 dispute resolution statistics*"; INTERNATIONAL CHAMBER OF COMMERCE (Feb 12, 2026) https://iccwbo.org/news-publications/news/icc-releases-preliminary-2025-dispute-resolution-statistics/

[32] Titilayo A. Olowu, ESQ.; "*Enforcement of Arbitral Awards under New York Convention*"; RUHM AND ASSOCIATES (June 2, 2025) https://www.ruhmandassociates.com/enforcement-of-arbitral-awards-under-the-new-york-convention

Singapore has positioned itself as the jurisdiction most willing to expand arbitrability in the shareholder-dispute context, as the Anupam Mittal decision demonstrates, treating oppression-type claims as arbitrable rights in personam between the parties to a shareholders' agreement.[33]

England, through decisions like BM Brazil v Sibanye, has instead focused its M&A-related judicial energy on the substantive construction of risk-allocation clauses, offering detailed, reasoned, and crucially public guidance on MAC thresholds that arbitral tribunals (whose own reasoning remains confidential) can draw upon as persuasive, if non-binding, authority.[34]

Brazil's courts have adopted a narrow, carefully enumerated conception of public policy under the New York Convention, providing relatively predictable guardrails for enforcement even though Brazil remains a jurisdiction where a substantial share of ICC cases involve purely domestic Brazilian parties rather than cross-border disputes.[35]

India presents the most dynamic and unsettled picture: its courts have repeatedly refined the arbitrability test through Booz Allen and Vidya Drolia, its tribunals continue to grapple with "dressed-up" oppression claims in live, high-value disputes such as the BYJU'S matter, and its overall judicial posture has shifted toward a "when in doubt, do refer [to the arbitral tribunal]" presumption favouring arbitration, reflecting a deliberate policy choice to support India's ambitions as an international arbitration hub.[36]

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[33] Prakhar Khandal, Jitesh Lakra; *"Arbitrability of Shareholder Disputes in India: Addressing "Dressed-Up" Corporate Oppression Claims"*; THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (IRCCL) https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims

[34] Harkiran Hothi, Rajinder Bassi, Noah Stewart Ornstein; *"Commercial Court Gives Important Guidance on Material Adverse Change Clauses"*; KIRKLAND AND ELLIS (Oct 23, 2024) https://www.kirkland.com/publications/kirkland-alert/2024/10/commercial-court-gives-important-guidance-on-material-adverse-change-clauses

[35] Dr. Markus Alternkirch, Maria Clara Von Rundstedt, Franziska Reese; *"Arbitration Statistics 2024: Arbitration is the preferred method of dispute resolution for large disputes"*, GLOBAL ARBITRATION NEWS (Sept 25, 2025)

[36] Prakhar Khandal, Jitesh Lakra; *"Arbitrability of Shareholder Disputes in India: Addressing "Dressed-Up" Corporate Oppression Claims"*; THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS

In Conclusion, these four jurisdictions show a discernible convergence toward arbitration-friendliness at the level of stated principle, but real, continuing divergence in how that principle is actually applied to M&A-specific fact patterns.

IX. SUGGESTIONS AND RECOMMENDATIONS

A. For Transactional Drafters Negotiating Shareholders' Agreements and Share Purchase Agreements

1. Draft arbitration clauses to expressly capture statutory minority-protection-style claims (oppression, unfair prejudice, mismanagement) as falling within the scope of the arbitration agreement, to reduce the room for a "dressed-up claim" argument later, drawing on the reasoning in Sidharth Gupta v Getit Info services.[37]

2. Where the target or a key party is incorporated in a jurisdiction with a strong statutory minority-shareholder forum (such as India's NCLT), consider layering the shareholders' agreement's governing law and seat selection toward a jurisdiction, such as Singapore, that has affirmatively recognised the arbitrability of oppression-type claims, as in Anupam Mittal.[38]

3. Draft MAC clauses with explicit, quantified materiality thresholds (for example, a defined percentage decline in EBITDA, revenue, or equity value over a defined measurement period) rather than open-textured "material

(IRCCL) https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims

[37] Anuj Berry, Ashish Bhan, Mohit Rangi; *"Arbitrability of shareholder disputes in India: Complexities and Issues"*; GLOBAL ARBITRATION REVIEW (May 26, 2023) https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review-archived/2024/article/arbitrability-of-shareholder-disputes-in-india-complexities-and-issues

[38] Prakhar Khandal, Jitesh Lakra; *"Arbitrability of Shareholder Disputes in India: Addressing "Dressed-Up" Corporate Oppression Claims"*; THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (IRCCL) https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims

adverse effect" language, to reduce reliance on after-the-fact judicial or arbitral gap-filling of the kind seen in BM Brazil v Sibanye.[39]

4. Expressly address whether macroeconomic and geopolitical shocks tariffs, sanctions, and trade-agreement renegotiations fall inside or outside the MAC definition, rather than leaving this to be litigated under general language, in light of the uncertainty highlighted by ongoing USMCA renegotiation risk.[40]
5. Select an arbitral seat with a judiciary known for minimal, deferential post-award review; to reduce the risk that a single domestic set-aside action could destroy the award's enforceability everywhere else under Article V(1)(e).[41]
6. Include tiered dispute resolution clauses (negotiation, then mediation, then arbitration) for MAC-type disputes specifically, since the fact-intensive, valuation-driven nature of these disputes often benefits from an initial expert-led or mediated phase before formal adjudication.

B. For Arbitral Institutions

1. Continue and expand efforts, of the kind reflected in the ICC's growing transparency around award statistics and procedural data, to publish more granular, anonymised guidance on how tribunals have approached recurring

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[39] Harkiran Hothi, Rajinder Bassi, Noah Stewart Ornstein; "*Commercial Court Gives Important Guidance on Material Adverse Change Clauses*"; KIRKLAND AND ELLIS (Oct 23, 2024) https://www.kirkland.com/publications/kirkland-alert/2024/10/commercial-court-gives-important-guidance-on-material-adverse-change-clauses

[40] Alberto Cordoba, Eugenio Chinchillas; "*Material Adverse Change Clauses in M&A: The Risks of United States-Mexico-Canada Agreement Renegotiation and Tariff Uncertainty*"; AMERICAN BAR ASSOCIATION (May 30, 2025) https://www.americanbar.org/groups/business_law/resources/newsletters/2025-spring-ma/material-adverse-change-clauses-m-a/

[41] Albert Jan van den Berg; "*The New York Convention of 1958: Overview*", INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (ICCA) https://cdn.arbitrationicca.org/s3fspublic/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf

M&A issues such as MAC thresholds, without compromising the confidentiality of individual awards.[42]

2. Expand the use of expedited and emergency procedures specifically tailored to M&A disputes, where time pressure (an unwinding deal, a looming closing date) is often more acute than in standard commercial disputes, building on existing expedited procedure frameworks that already show strong uptake.[43]

C. For Legislators and Policymakers

1. Jurisdictions still developing their arbitrability jurisprudence should consider the Vidya Drolia four-pronged framework as an analytically useful though not universally binding starting point for distinguishing arbitrable contractual claims from non-arbitrable statutory remedies, given its now well-tested application across multiple Indian decisions.[44]

2. States that have not yet ratified the New York Convention, or that maintain reservations limiting its scope, should be encouraged to do so without limiting reservations, since the absence of Convention coverage continues to impose a meaningful cross-border enforcement risk premium on transactions touching those jurisdictions.[45]

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[42] Flore Poloni, Kimberley Bazelais; "*Flore Poloni and Kimberley Bazelais analyse the ICC Court's 2024 Statistics in Law.com International*", SINATURE (Aug 4, 2025) https://signaturelitigation.com/flore-poloni-and-kimberley-bazelais-analyse-the-icc-courts-2024-statistics-in-law-com-international/

[43] Dispute Resolution Service; "*ICC releases preliminary 2025 dispute resolution statistics*"; INTERNATIONAL CHAMBER OF COMMERCE (Feb 12, 2026) https://iccwbo.org/news-publications/news/icc-releases-preliminary-2025-dispute-resolution-statistics/

[44] Anuj Berry, Ashish Bhan, Mohit Rangi; "*Arbitrability of shareholder disputes in India: Complexities and Issues*"; GLOBAL ARBITRATION REVIEW (May 26, 2023) https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review-archived/2024/article/arbitrability-of-shareholder-disputes-in-india-complexities-and-issues

[45] United Nations, "*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*" (June 10, 1996) https://www.newyorkconvention.org/media/uploads/pdf/6/6/66_nyc-experience-prospects.pdf

3. Domestic courts applying the Article V(2)(b) public policy exception should continue to articulate clear, narrow, enumerated categories of what counts as public policy following the Brazilian approach of listing specific protected categories rather than open-ended balancing tests, to give M&A parties greater enforcement predictability.[46]

X. CONCLUSION

Cross-border mergers and acquisitions will continue to generate disputes that no single national court is well placed to resolve alone, and arbitration's combination of neutrality, confidentiality, and critically New York Convention-backed enforceability explains why it remains the dispute resolution mechanism of choice for these transactions, as confirmed by the ICC's record caseload value and the sustained, multi-institution growth in cross-border case filings through 2024 and 2025.[47] Yet this paper has shown that the legal landscape supporting that choice is not uniform. At the arbitrability stage, jurisdictions such as India continue to refine, case by case, the boundary between contractual disputes that belong in arbitration and statutory corporate-law remedies that belong before specialised public tribunals, while Singapore has moved further and faster toward treating shareholder-oppression-type claims as arbitrable, creating real divergence for parties structuring cross-border shareholder arrangements.[48]

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[46] Dr, Willocks Andrews, Jansen Denise; *"New York Convention: Public Policy Exception"*; JUS MUNDI (Sept 23, 2025) https://jusmundi.com/en/document/publication/en-new-york-convention-public-policy-exception

[47] Dr. Markus Alternkirch, Maria Clara Von Rundstedt, Franziska Reese; "Arbitration Statistics 2024: Arbitration is the preferred method of dispute resolution for large disputes", GLOBAL ARBITRATION NEWS (Sept 25, 2025) https://www.globalarbitrationnews.com/2025/09/25/arbitration-statistics-2024-arbitration-is-the-preferred-method-of-dispute-resolution-for-large-disputes/

[48] Prakhar Khandal, Jitesh Lakra; "Arbitrability of Shareholder Disputes in India: Addressing "Dressed-Up" Corporate Oppression Claims"; THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (IRCCL) https://www.irccl.in/post/arbitrability-of-shareholder-disputes-in-india-addressing-dressed-up-corporate-oppression-claims

At the substantive interpretation stage, MAC clauses remain fact-intensive and resistant to bright-line rules, as the English Commercial Court's careful, threshold-setting judgment in BM Brazil v Sibanye and the NSW Supreme Court's decision in Cosette Pharmaceuticals Inc v Mayne Pharma Group Limited both illustrate. The Mayne Pharma–Cosette judgment is particularly important because it directly addressed a quantified MAC threshold and rejected the buyer's attempted termination, thereby strengthening the body of public judicial guidance that arbitral tribunals may find persuasive but that confidential arbitration itself often does not generate.[49] And at the enforcement stage, the New York Convention's pro-enforcement design functions well at a systemic level, but the discretionary public policy and arbitrability grounds in Article V (2) remain a genuine, if narrow, source of residual risk precisely in the categories of dispute shareholder protection, public-interest-adjacent corporate disputes that are common in M&A.[50]

The overall picture, then, is one of convergence at the level of principle, with arbitration-friendly doctrine spreading across jurisdictions, but continued fragmentation at the level of practical application. Closing that gap is a shared task: transactional lawyers must draft with these specific fault lines in mind rather than relying on generic dispute resolution boilerplate, arbitral institutions must continue building procedural tools suited to the time pressure and factual complexity of M&A disputes, and legislators and courts must continue narrowing and clarifying the public policy and arbitrability exceptions that, left too broad, would otherwise erode the very enforceability that makes arbitration valuable to cross-border M&A in the first place.

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[49] Rory Moriarity, Kimberley Bruce, Victoria Hu; "Material Adverse Change clauses: how much protection do buyers really have?"; CLAYTON UNZ (July 3; 2025) https://www.claytonutz.com/insights/2025/july/material-adverse-change-clauses-how-much-protection-do-buyers-really-have

[50] Dr, Willocks Andrews, Jansen Denise; "New York Convention: Public Policy Exception"; JUS MUNDI (Sept 23, 2025) https://jusmundi.com/en/document/publication/en-new-york-convention-public-policy-exception

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