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# Arbitration as a Shield: Examining the Use of Private Redressal Mechanisms in Evading Criminal Liability for White Collar Crimes

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*International arbitration has been largely hailed as an impartial and speedy means for settling commercial and civil disputes. Yet, its increasing blurring with claims of white-collar crimes such as fraud, corruption and regulatory evasion has sparked debates on its potential abuse. This paper investigates how arbitration procedures could be used as a means for protecting economic offenders from being held criminally liable. The research evaluates crucial structural aspects of arbitration in terms of aspects like confidentiality, lack of transparency and parallel proceedings, which might be used for delays during investigations or for translating criminal activities into civil or treaty-based disputes. Based on doctrinal analysis and some judicial precedents at the international and Indian levels, the research discusses the conflict between the civil nature of arbitration and its criminal aspects. This paper, analysing the existing legal framework, discusses structural issues with the arbitration process and how it is being exploited. Finally, recommendations are provided for reform to promote transparency and tighter regulations to avoid abuse of arbitration as a shield from criminal liability that arises out of white-collar crimes.*

**Keywords:** *arbitration, white-collar crimes, corporate veil, fraud.*

## WHITE COLLAR CRIMES AND THEIR EVOLUTION IN INDIA

Edwin H. Sutherland coined the term 'white collar crime' in 1939, defining it as financially motivated, nonviolent offences committed by individuals in positions of power or trust, or by persons of high social status and respectability during their occupation.[1] This concept gained recognition, leading to a comprehensive classification system for these offences. Sutherland's work built upon earlier ideas, notably E.A. Ross's 'criminaloid concept' from 1907.[2] Ross used this term to describe businessmen who engaged in harmful acts while maintaining an image of respectability, considering them a significant societal danger due to the substantial losses they caused while appearing virtuous.

The earliest known instance of white-collar crime dates to England's 15th century with the Carrier's Case of 1473.[3] In this case, an agent entrusted with transporting wool dishonestly appropriated a portion for personal gain. The court found the agent liable, marking a crucial legal recognition of fraudulent conduct committed through a position of trust. This decision led to the development of the 'breaking bulk' doctrine, allowing prosecution of bailees who misused lawfully possessed goods. The Carrier's Case was significant as it departed from earlier principles that often protected the bailee. It laid the foundation for understanding white-collar crime as offences involving deception, breach of trust, and misuse of authority, highlighting the need for legal safeguards in commercial transactions.[4]

Ancient and medieval Indian literature, particularly from the Vedic period, references fraud, dishonesty, and wrongful gain. This aligns with Manu's perspective that moral decline (adharma) eventually supplanted an era of ethical conduct (dharma).[5] Over time, offences like cheating, breach of trust, and corruption became more organised and prevalent. India's colonial era saw the Indian Penal Code 1860 codify offences like bribery, forgery,

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[1] Edwin Hardin Sutherland, *White Collar Crime* (Dryden Press 1949)
[2] 'White-Collar Crime Survey' *INBA View Point* (November 2019) <https://www.indianbarassociation.org/wp-content/uploads/2020/01/White-Collar-Crime-Survey-2019.pdf> accessed 07 December 2025
[3] Michelle Penn, 'History of White Collar Crime: Developments & Examples' (*Study*) <https://study.com/academy/lesson/history-of-white-collar-crime-developments-examples.html> accessed 07 December 2025
[4] Richa Tiwari, 'An Analysis upon Concept and Legal Theory of White-Collar Crimes: A Review' (2019) 16(4) Journal of Advances and Scholarly Researches in Allied Education <https://ignited.in/index.php/jasrae/article/download/10587/20978/52408?inline=1> accessed 07 December 2025
[5] Tejaswi Netam, 'WHITE COLLAR CRIMES IN INDIA' (*LeDroit India*, 17 March 2025) <https://ledroitindia.in/white-collar-crimes-in-india/> accessed 07 December 2025

counterfeiting, criminal breach of trust, and cheating, which are closely linked to white-collar crime, even without explicitly using the term.[6]

Post-independence, rapid industrialisation and economic growth spurred an increase in corporate and financial crimes. Reports like the Santhanam Committee[7] and the Vivin Bose Commission of Inquiry highlighted white-collar crimes committed by individuals of high social status, including businessmen, industrialists, and corrupt officials, involving fraud, forgery, and tax evasion. Technological advancements have significantly expanded the scope of white-collar crimes, particularly cyber fraud and corruption, posing a major contemporary concern in India.

A 2016 Business Insider report titled 'The Evolving Dynamics of White-Collar Crime in India' revealed the Central Bureau of Investigation (CBI) identified 6,533 corruption cases over a decade, with 517 cases in the two years prior.[8] It also highlighted ₹4,000 crore in fraudulent trade transactions using fake PAN cards, indicating India's significant white-collar crime challenge. The Law Commission of India, in its 47th report,[9] building on Edwin H. Sutherland's work, defined white-collar crime as offences committed by upper-strata individuals during their occupation. The Commission in its 29th report highlighted its severe impact, noting that these crimes are dangerous not only due to high financial stakes but also because of the lasting harm they inflict on public morality.[10] Prominent forms of white-collar crime include tax evasion, corporate and stock-market fraud, monopolistic abuse, hoarding, profiteering, under or over-invoicing, bribery, corruption, election malpractices, and violations of economic laws.

[6] Aayushi Swaroop and Jyotika Saroha, 'White Collar Crimes in India' (*iPleaders*, 08 April 2025) <https://blog.ipleaders.in/white-collar-crimes-in-india/> accessed 07 December 2025
[7] Santhanam Committee, *Report of the Committee on Prevention of Corruption* (1964)
[8] Moin Aftab and Irshad Ali, 'Understanding The Underbelly: The Evolution And Impact Of White Collar Crime In India' (2024) 29(3) IOSR Journal of Humanities And Social Science <https://www.iosrjournals.org/iosr-jhss/papers/Vol.29-Issue3/Ser-5/A2903050127.pdf> accessed 07 December 2025
[9] Law Commission, *Report on Trial and Punishment of Social and Economic Offences* (Law Com No 47, 1972)
[10] Law Commission, *Proposal to Include Certain Social and Economic Offences in the Indian Penal Code* (Law Com No 29, 1966)

## RISE, DOMINANCE AND EXPANDING SCOPE OF ARBITRATION

As white-collar crimes increasingly stem from complex commercial and corporate transactions, arbitration has become the preferred dispute resolution method, especially for cross-border and high-value cases. This highlights the need to examine its scope, dominance, and implications for economic offences.

Arbitration is a formal, private dispute resolution method where parties agree to submit their conflict to neutral arbitrators. The arbitrators' decision, known as an arbitral award, is legally binding on the parties, serving as an alternative to traditional court litigation. This mechanism allows for a chosen resolution process outside of the public court system. Arbitration is fundamentally consensual, requiring prior agreement through a contract clause or separate submission. Once initiated, it cannot be unilaterally withdrawn, unlike mediation. A key feature is party autonomy, allowing parties to select arbitrators, applicable law, language, and seat. This flexibility ensures arbitration acts as a neutral forum, preventing any party from gaining an advantage based on familiarity with a specific territory or institution.[11]

Arbitration is characterised by party autonomy, allowing participants to select arbitrators, governing law, language, and the arbitration's location. This flexibility ensures a neutral forum, preventing any party from gaining an advantage due to territorial or institutional familiarity. Additionally, arbitration proceedings maintain a high degree of confidentiality, with rules protecting the privacy of proceedings, disclosures, and the final award, which is especially valuable for sensitive commercial disputes.[12] Arbitral awards are final and enforceable, with limited judicial review. International awards benefit from enforceability under the New York Convention, 1959,[13] across over 165 jurisdictions, significantly contributing to arbitration's widespread adoption in global commercial and investment disputes.

[11] 'What Is Arbitration?' (*World Intellectual Property Organization*) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 07 December 2025
[12] *Ibid*
[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959

Due to the complexity of modern commercial transactions, traditional litigation's rigidity and delays are often inadequate. Arbitration has thus emerged as a dominant and effective mechanism for dispute resolution in both domestic and international contexts.

## GLOBAL RISE OF ARBITRATION

International arbitration has experienced significant growth over the last decade, particularly for high-value and cross-border commercial disputes. Its appeal stems from key advantages, including flexibility, enforceability, neutrality, and procedural efficiency. Empirical data, such as the 2025 International Arbitration Survey, show that 87% of respondents prefer international arbitration, either alone or combined with other ADR methods, solidifying its status as the leading global dispute resolution forum. Arbitration's rise has been accelerated by external disruptions like the COVID-19 pandemic and geopolitical uncertainties, showcasing its adaptability through virtual and paper-based procedures. Its enforceability under the New York Convention offers commercial parties cross-jurisdictional certainty, a significant advantage over traditional litigation.

Arbitration's growing dominance is due to its structural advantages over litigation, offering confidentiality to avoid public scrutiny and protect reputation. It also allows parties to select arbitrators with specific expertise and tailor procedures, enhancing party autonomy. Institutional arbitration has significantly bolstered arbitration's appeal by providing procedural discipline, administrative support, and enforceability safeguards. Global arbitral institutions, like the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), and Hong Kong International Arbitration Centre (HKIAC), offer refined expedited procedures and cost-effective models, transforming arbitration into a mainstream dispute resolution system.[14]

## EXPANDING SCOPE OF ARBITRATION IN INDIA

India's arbitration landscape mirrors global trends, actively moving towards a pro-arbitration system. The Arbitration and Conciliation Act 1996,[15] based on the UNCITRAL

[14] Richard Power, 'The rise and rise of international arbitration' (*LawCareers.Net*, 23 November 2021 <https://www.lawcareers.net/Explore/CommercialQuestion/Clyde-Co-LLP-The-rise-and-rise-of-international-arbitration> accessed 07 December 2025

[15] Arbitration and Conciliation Act 1996

Model Law, established this foundation. Subsequent judicial rulings and legislative changes have consistently minimised court interference and bolstered party autonomy, strengthening the regime. Indian courts consistently uphold arbitration agreements, stressing that parties must honour their commitment to this dispute resolution method. This judicial stance reflects a preference for arbitration to ensure commercial certainty and alleviate court backlogs. Notably, the scope of arbitration in India is expanding beyond large commercial disputes. Supreme Court Justice P.S. Narasimha advocated extending arbitration to smaller civil and property matters, highlighting its potential to tackle systemic court congestion and provide timely justice at a grassroots level.[16] This vision signifies a more comprehensive integration of arbitration into India's civil justice framework.

Additionally, India has transitioned from ad-hoc to institutional arbitration, prompted by issues of delay and inefficiency. Legislative amendments in 2015, 2019, and 2021 have bolstered institutional mechanisms, improving transparency, timeliness, and enforceability, thereby expanding arbitration's functional scope.[17]

## LAWS RELATED TO ARBITRATION

The principal law that governs arbitration in India is the Arbitration and Conciliation Act, 1996,[18] with subsequent amendments in 2015, 2019 and 2021.[19] It sets out to implement and regulate the arbitration practices in accordance with international standards. Arbitration is a mechanism that was propagated in India to reduce the overburdened judicial system. Arbitration is used to resolve commercial and contractual disputes, thereby addressing disputes of a civil nature. Although the Act does not explicitly state that arbitration is a civil

[16] Sonali Ahuja, '"Without complete integrity of both arbitrators and lawyers, the institutional integrity is nowhere near": Justice P.S. Narsimha at launch of IIAC's magazine "The Equilibrium"' (*SCC Online*, 12 December 2025) <https://www.scconline.com/blog/post/2025/12/12/justice-ps-narsimha-speaks-at-launch-of-iiac-magazine-the-equilibrium/> accessed 13 December 2025

[17] Shubham Rawat, 'The Rise of Institutional Arbitration vs Ad-hoc Arbitration in India: Advantages and Challenges' (*LawCurb*, 25 October 2025) <https://www.lawcurb.in/post/the-rise-of-institutional-arbitration-vs-ad-hoc-arbitration-in-india-advantages-and-challenges> accessed 07 December 2025

[18] Arbitration and Conciliation Act 1996

[19] Prateek Jain, 'Recent Amendments in Indian Arbitration and Conciliation Act: The Winds Have Begun to Blow for the Resolution of Complex Construction Disputes' *Daily Jus* (28 April 2024) <https://dailyjus.com/world/2024/04/recent-amendments-in-indian-arbitration-and-conciliation-act-the-winds-have-begun-to-blow-for-the-resolution-of-complex-construction-disputes#:~:text=Therefore%2C%20in%20an%20attempt%20to,2019%20and%20March%2010%2C%202021.> accessed 07 December 2025

process, its provisions, when read together with judicial interpretation, indicate that arbitration is a civil recourse rather than a criminal process.

Section 2(3)[20] states that it will not affect the operation of any existing law that prohibits certain disputes from being submitted to arbitration. Criminal laws within the country are elaborate, having various procedures to ensure fairness and justice. This section duly recognises this difference. Section 8[21] also gives judges the authority to decide whether the subject matter of the dispute is arbitrable or not. Where a dispute involves elements of criminality, courts refrain from referring such matters to arbitration. This is further cemented in various judgments. In Booz Allen & Hamilton Inc. v SBI Home Finance Ltd. & Ors.[22] it was held that disputes arising out of criminal offences could not be arbitrated. The Supreme Court, in Vidya Drolia and Ors. v Durga Trading Corporation,[23] used the rationale given in the Booz Allen case to lay down a four-fold test to establish whether a matter is arbitrable or not. Issues at hand are not arbitrable if it violates/ affects a right in rem (thereby ruling out crimes as an arbitrable issue), if it affects the rights of a third party, where the issue relates to sovereign functions of the government or where an existing law expressly or impliedly bars the process of arbitration. In A Ayyasamy v A Paramasivam & Ors.,[24] it was held that though fraud has a criminal element, if the fraud is not severe, it can be arbitrated on. However, if the fraud is severe, it has to be adjudicated by an ordinary court, as it affects the public at large, and the burden of proof is significantly higher.

Section 34(b) of the Act also allows courts to set aside arbitral awards if the issue is not arbitrable under existing law[25] or if it goes against public policy.[26] This further strengthens judicial control over public concerns like white-collar crimes.

## LAWS RELATED TO WHITE-COLLAR CRIMES

There are various criminal statutes that are used to govern white-collar crimes; India does not have a singular consolidated statute for white-collar crimes. The principal criminal code

[20] Arbitration and Conciliation Act 1996, s 2(3)
[21] *Ibid* s 8
[22] *Booz Allen & Hamilton Inc v SBI Home Finance Ltd & Ors* (2011) 5 SCC 532
[23] *Vidya Drolia and Ors v Durga Trading Corporation* (2020) AIRONLINE 2020 SC 929
[24] *A Ayyasamy v A Paramasivam & Ors* (2016) 10 SCC 386
[25] Arbitration and Conciliation Act 1996, s 34(2)(b)(i)
[26] Arbitration and Conciliation Act 1996, s 34(2)(b)(ii)

in India currently is the Bharatiya Nyaya Sanhita[27] (hereinafter referred to as BNS), which replaced the colonial criminal code- the Indian Penal Code.[28] These codes address certain commercial crimes as they affect the public at large. These statutes, when interpreted with the Companies Act,[29] Prevention of Money Laundering Act[30] (hereinafter referred to as PMLA) and the Information Technology Act[31] (hereinafter referred to as IT Act), along with their subsequent amendments/ rules formed under these legislations, are used to curb white-collar crimes.

The term 'fraudulently'[32] and 'dishonestly'[33] are defined within section 2 of BNS. These definitions reinforce the role of mens rea in criminal law, particularly emphasising the intent underlying economic offences. Economic offences also include crimes like criminal breach of trust, forgery, counterfeiting notes, bank notes and Government stamps, hawala transactions, mass-marketing fraud or running any scheme to defraud several persons, banks or financial institutions.[34] Furthermore, section 314[35] also criminalises the misappropriation of movable properties. These sections create criminal liability for the various forms of white-collar crimes, imposing responsibility on corporate structures to regulate their actions in accordance with the prevailing laws and impose stricter restrictions on commercial transactions.

The Companies Act of 2013 is the main law governing corporate fraud and misconduct. Acts involving deception, concealment, or abuse of position carried out with the intention of gaining an unfair advantage or causing loss to the company or its stakeholders are defined as 'fraud' in Section 447,[36] which also stipulates harsh penalties. While Sections 241 and 242[37] offer remedies against oppression and mismanagement resulting from fraudulent conduct

[27] Bharatiya Nyaya Sanhita 2023
[28] Indian Penal Code 1860
[29] Companies Act 2013
[30] Prevention of Money Laundering Act 2002
[31] Information Technology Act 2000
[32] Bharatiya Nyaya Sanhita 2023, s 2(9)
[33] Bharatiya Nyaya Sanhita 2023, s 2(7)
[34] Bharatiya Nyaya Sanhita 2023, s 111(1)(iii)
[35] Bharatiya Nyaya Sanhita 2023, s 314
[36] Companies Act 2013, s 447
[37] Companies Act 2013, ss 241, 242

within companies, Sections 210 and 212[38] give the Central Government and the Serious Fraud Investigation Office the authority to look into serious corporate frauds.

Offences involving the laundering of proceeds derived from economic crimes are regulated under the PMLA, 2002. Section 3[39] defines the offence of money laundering, while Section 4 prescribes punishment. The Act further enables provisional attachment of property under Section 5[40] and confiscation upon conviction under Section 8,[41] reinforcing the State's power to deprive offenders of illicit gains arising from scheduled white-collar offences.

The Securities Exchange Board of India (SEBI) also lays down certain rules and regulations that require companies that are publicly traded to have a high-level of transparency and accountability. It can also take suo moto cognisance of cases that come under its jurisdiction for white-collar crimes like market manipulation and insider trading. Section 27 of the SEBI Act also allows the corporate veil to be pierced, thereby allowing the persons behind executive decisions of the company to be held criminally liable for any crime committed under the guise of business transactions.[42]

When taken as a whole, these statutory provisions show that the legislature intended to treat white-collar crimes as offences involving harm to society and the public interest. Therefore, the fundamental criminal liability and regulatory enforcement arising under these statutes remain non-arbitrable, even though civil consequences arising from such conduct may occasionally be addressed through arbitration.

## CASE STUDIES

**Devas–Antrix Arbitration:** The Devas–Antrix dispute highlights how multinational investors can strategically use international arbitration to protect commercial claims from domestic fraud and criminal liability findings. In this case, Devas Multimedia Pvt Ltd entered a 2005 agreement with Antrix Corporation Ltd. for S-band satellite spectrum. After the 2011 termination, Devas initiated ICC arbitration, securing a USD 562.5 million award in 2015.[43]

[38] Companies Act 2013, ss 210, 212
[39] Prevention of Money Laundering Act 2002, s 3
[40] Prevention of Money Laundering Act 2002, s 5
[41] Prevention of Money Laundering Act 2002, s 8
[42] Securities and Exchange Board of India Act 1992, s 27
[43] Vasanth Rajasekharan, 'Winding-up in Pendency of Arbitration and Criminal Proceedings: NCLT Orders for Winding Up of Devas Multimedia for Operating Fraudulently Since Incorporation' (*Mondaq*, 02 June 2021)

Indian authorities launched criminal investigations into the Devas–Antrix agreement, citing allegations of cheating, corruption, criminal conspiracy, and money laundering. These investigations led to findings by the National Company Law Tribunal (NCLT), upheld by the Supreme Court of India, that Devas was formed with fraudulent intent and lacked technical capability.[44] Consequently, the entire commercial relationship was deemed a 'product of fraud,' with the Supreme Court asserting that fraud at inception invalidates all subsequent transactions, including arbitration proceedings and awards.

Scholarly analysis indicates that relying on arbitration can strategically impede white-collar crime enforcement.[45] This occurs by fragmenting legal proceedings across jurisdictions, restricting access to crucial evidence, and pressuring states that face significant arbitral liabilities. The Devas–Antrix case exemplifies how multinational actors can leverage arbitration, despite its formal neutrality, to protect monetary claims even when substantial fraud is proven. This reveals a fundamental tension between investor protection mechanisms and a sovereign's ability to enforce laws against economic crimes.

**Delhi Airport Metro Express Pvt. Ltd. (DAMEPL) (Reliance Infra) v Delhi Metro Rail Corporation (DMRC):** DAMEPL and DMRC entered into a Public-Private Partnership to build the Airport Metro Express Line in Delhi. DMRC was required to get all the government clearances done, whereas DAMEPL had to complete the technical and operational tasks of the project. The project experienced delays and structural issues like deformities and cracks. DMRC failed to resolve these issues, causing DAMEPL to terminate the contract. DMRC initiated arbitration proceedings against DAMEPL.[46]

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<https://www.mondaq.com/india/contracts-and-commercial-law/1075408/winding-up-in-pendency-of-arbitration-and-criminal-proceedings-nclt-orders-for-winding-up-of-devas-multimedia-for-operating-fraudulently-since-incorporation> accessed 07 December 2025

[44] Kapil Arora and Pravar Misra, 'Devas v Antrix: fraud as a ground for setting aside an arbitral award: unique outlier or a sign of things to come?' (*Cyril Amarchand Mangaldas*, 04 December 2023) <https://disputeresolution.cyrilamarchandblogs.com/2023/12/devas-v-antrix-fraud-as-a-ground-for-setting-aside-an-arbitral-award-unique-outlier-or-a-sign-of-things-to-come/.> accessed 07 December 2025

[45] Thendralarasu Subramanian, 'From Fraud to Fairness: Devas v Antrix as Catalyst for Enhanced Judicial Scrutiny in Enforcement of Arbitral Awards' (*Kluwer Arbitration Blog,* 16 September 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/from-fraud-to-fairness-devas-v-antrix-as-catalyst-for-enhanced-judicial-scrutiny-in-enforcement-of-arbitral-awards/> accessed 07 December 2025

[46] Vasanth Rajasekaran and Harshvardhan Korada, 'Deciphering the Supreme Court's Verdict on DMRC v DAMEPL- The "Cure" to Longstanding Legal Battle' (*SCC Online,* 06 May 2024) <https://www.scconline.com/blog/post/2024/05/06/deciphering-supreme-court-verdict-dmrc-damepl-cure-to-longstanding-legal-battle/> accessed 07 December 2025

The arbitral tribunal ruled in favour of DAMEPL, citing that DMRC had breached its contractual obligations, awarding DAMEPL 2782.33 Crores. DMRC, under section 34 of the Arbitration and Conciliation Act,[47] approached the Delhi High Court, which upheld the arbitral amount. This was overruled by the Division Bench of the Delhi High Court, which found the award was 'afflicted by perversity, irrationality and patent illegality'. This was further overturned by the Supreme Court, which again upheld the award given by the arbitral tribunal. DMRC filed a review petition, arguing that the Supreme Court had overlooked critical facts and misinterpreted the agreement. They filed a curative petition, which allowed the Supreme Court to annul the arbitral award on grounds of patent illegality, holding that DMRC had not breached the contract. Although this was not a case of criminal liability, it highlights the glaring concerns that arise when corporations use arbitration as a mode for dispute resolution.

## KEY CONCERNS WITH ARBITRATION

**Structural Risks Inherent in Arbitration:** The increasing use of arbitration raises significant concerns for white-collar crime enforcement. Multinational corporations can exploit their inherent confidentiality, limited transparency, and restricted public oversight to conceal fraudulent conduct, corruption, and money laundering from regulatory scrutiny. Scholarly research indicates that arbitration may be misused to legitimise illicit fund transfers through fabricated disputes and enforceable awards.[48] Furthermore, the doctrine of separate legal personality[49] allows corporate entities to disperse liability across intricate structures, creating an opacity that hinders the effective detection, deterrence, and prosecution of economic offences.

**Enforcement Gaps and Institutional Consequences:** The convergence of arbitration with white-collar disputes creates significant enforcement gaps. International arbitration surveys reveal that disputes involving fraud or economic misconduct often result in settlements rather than reasoned awards, thereby limiting factual findings crucial for regulators and

[47] Arbitration and Conciliation Act 1996, s 34
[48] Fabian Teichmann et al., 'The risk of abuse of arbitration proceedings in jurisdictions where corruption is pervasive' (2023) 2 Journal of Economic Criminology <https://doi.org/10.1016/j.jeconc.2023.100032> accessed 07 December 2025
[49] John Vithayathil, 'Power to Lift the Corporate Veil During Execution of Arbitral Awards' (*SCC Online*, 23 June 2025) <https://www.scconline.com/blog/post/2025/06/23/power-to-lift-the-corporate-veil-during-execution-of-arbitral-awards/.> accessed 07 December 2025

prosecutors. This issue is exacerbated in India by enforcement delays, restricted judicial review, and narrow grounds for setting aside awards, which prioritise finality over substantive scrutiny.[50] Simultaneously, fragmented enforcement, discretionary inertia, and institutional opacity already hinder the prosecution of economic offences.[51] When such disputes are directed to private arbitration, these systemic weaknesses are compounded, potentially allowing corporate misconduct to be resolved without parallel criminal accountability.

The practical implication of these concerns becomes clear when arbitration intersects with fraud and economic offence. The Devas-Antrix dispute exemplifies how arbitral processes can operate alongside, and sometimes conflict with, domestic white-collar crime investigations, highlighting the challenges in enforcement and accountability.

## WHY INDIA IS SUSCEPTIBLE

The convergence of India's arbitration-friendly jurisprudence with systemic enforcement limitations makes it especially susceptible to the strategic use of arbitration in white-collar disputes.

**Pro- Arbitration Judiciary and High Judicial Deference:** India's arbitration jurisprudence, particularly since 1996, has become increasingly arbitration-friendly, extending even to disputes involving fraud or regulatory violations. Decisions like BALCO[52] and Vidya Drolia v Durga Trading Corporation[53] have affirmed a strong presumption in favour of arbitrability. Indian courts now generally hold that civil aspects of fraud are arbitrable, unless the fraud directly undermines the arbitration agreement itself. While strengthening India's arbitration landscape, this stance also introduces potential regulatory blind spots limiting judicial scrutiny during both the referral and enforcement phases of arbitration. Indian jurisprudence

[50] Tushar and Dr Divya Sharma, 'Historical Evolution and Modern Landscape of Arbitration: An Indian and International Perspective' (2025) 15(2) European Economic Letters <https://doi.org/10.52783/eel.v15i2.3315> accessed 07 December 2025

[51] Dr Neena Hamid, 'Arbitrariness in Discretionary Power: Legal Implications in White-Collar Crime Enforcement in India' (2025) 7(4) Indian Journal of Law and Legal Research <https://www.ijllr.com/post/arbitrariness-in-discretionary-power-legal-implications-in-white-collar-crime-enforcement-in-india> accessed 07 December 2025

[52] *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc* (2012) 9 SCC 552

[53] *Vidya Drolia and Ors v Durga Trading Corporation* (2020) AIRONLINE 2020 SC 929

has shifted from viewing fraud primarily as a public-law concern to increasingly framing it as a private contractual dispute suitable for arbitration.[54]

**Enforcement-First Approach Despite Regulatory Violations:** India's legal framework prioritises the finality of arbitral awards, even when regulatory compliance is questioned, further increasing its susceptibility to certain issues. Indian courts have consistently ruled that breaches of regulations such as FEMA or RBI do not suffice as grounds to deny the enforcement of foreign arbitral awards,[55] as demonstrated in cases such as Cruz City v Unitech, [56] Vijay Karia v Prysmian,[57] and NTT Docomo v Tata Sons.[58] Even when statutory approvals are necessary, courts allow enforcement contingent on subsequent regulatory clearance, effectively decoupling contractual enforcement from regulatory accountability. This enforcement-focused approach creates a systemic opportunity for multinational corporations to secure and execute awards despite unresolved statutory concerns.

**Expansion of Arbitrability into Traditionally Public Domains:** Indian courts have broadened the scope of arbitrable matters, now including intellectual property, statutory rights, and complex commercial disputes, previously deemed non-arbitrable as rights in rem, by re-characterising them as rights in personam.[59] This expansion dilutes safeguards originally articulated in Booz Allen,[60] allowing arbitration to encompass disputes with significant public interest and economic implications, even those connected to white-collar misconduct. This trend enables private adjudication of cases that might otherwise warrant public scrutiny.

**Institutional Weaknesses:** Finally, India's legal landscape is hampered by overburdened enforcement agencies like the ED, CBI, and SFIO, alongside fragmented prosecutorial mechanisms. This leads to delays, jurisdictional overlaps, and selective enforcement,

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[54] Harsha Roy and Sainaz Parveen, 'Arbitrability of Fraud in India – A Need for Finality' (*SCC Online*, 21 April 2025) <https://www.scconline.com/blog/post/2025/04/21/arbitrability-of-fraud-in-india-a-need-for-finality/> accessed 07 December 2025

[55] Kamla Shankar and Pradyumna Sharma, 'Enforcement of Foreign Arbitral Awards in the Context of FEMA Violations | India' (*AZB & Partners*, 21 January 2025) <https://www.azbpartners.com/bank/enforcement-of-foreign-arbitral-awards-in-the-context-of-fema-violations-india/.> accessed 07 December 2025

[56] *Cruz City 1 Mauritius Holdings v Unitech Ltd* (2017) SCC Online Del 7810

[57] *Vijay Karia & Ors v Prysmian Cavi E Sistemi SRL & Ors* AIR 2020 SC 1807

[58] *NTT Docomo Inc v Tata Sons Ltd* (2017) SCC Online Del 8078

[59] Manasa S Venkatachalam, 'Arbitrability of IPR in India: Have Courts Put a Snooze on Booz Allen?' (*IndiaCorpLaw,* 24 February 2021) <https://indiacorplaw.in/2021/02/24/arbitrability-of-ipr-in-india-have-courts-put-a-snooze-on-booz-allen/> accessed 07 December 2025

[60] *Booz Allen & Hamilton Inc v SBI Home Finance Ltd & Ors* (2011) 5 SCC 532

undermining effective prosecution. When economic offence disputes are diverted to arbitration, these institutional weaknesses are exacerbated, allowing private settlements or awards to conclude cases without ensuring criminal accountability.

**India's Need for Bilateral Treaties:** Bilateral Investment Treaties between any two countries aim to promote and protect the investments made in each other's countries by individuals and institutions. It allows free movement of foreign direct investment between the two countries, thereby promoting each other's economy. However, investors are apprehensive due to the absence of an effective redressal mechanism. They favour direct arbitral proceedings as they are a private and easily accessible alternative to a country's public courts, which are often procedure-heavy and time-consuming.[61] Arbitration processes are now becoming central to an evolving international market, allowing investors to effectively enforce their rights in foreign countries as these tribunals work independently. However, there are concerns that these tribunals favour investors rather than upholding the public good, especially when a large amount of assets is under consideration.[62] This could lead to investors misusing this mechanism to cover white-collar crimes, creating tension between protecting investors and preserving India's regulatory autonomy. Another problem that arises with transnational arbitration is the difficulty in tracing assets and the requirement of intergovernmental co-operation.[63]

## PROPOSED SOLUTIONS

**Codifying Certain Non-Arbitrable Disputes:** They should clearly exclude disputes involving fraud, corruption, money-laundering, bribery or other serious economic offences. It should be designed specifically for private disputes, while we do have judicial precedents that do not allow arbitration of criminal offences, due to the confidentiality of arbitration proceedings, it is imperative that it is codified, curbing its misuse.

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[61] Prateek Bagaria and Vyapak Desai, 'BILATERAL INVESTMENT TREATIES AND INDIA' (*Nishith Desai Associates*) <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf> accessed 07 December 2025

[62] Davy Karkason, 'How are Bilateral Investment Treaties a Safeguard with Arbitration' (*Transnational Matters,* 12 June 2024) <https://www.transnationalmatters.com/bilateral-investment-treaties-and-arbitration-as-a-safeguard/> accessed 07 December 2025

[63] Vyshnavi Epari, 'Shell Companies and Corporate Frauds: Legal Loopholes and Regulatory Response in India.' (2025) 27(7) IOSR Journal of Business and Management <https://www.iosrjournals.org/iosr-jbm/papers/Vol27-issue7/Ser-2/E2707024249.pdf> accessed 07 December 2025

**Mandatory Disclosure:** Arbitrators should have a statutory duty to report any evidence that is brought forward during the arbitration proceedings that might incriminate any of the parties of criminal wrongdoing. Confidentiality of proceedings should be subordinate to public interest when criminal conduct is discovered.

**Public Interest Exception:** Confidentiality is a key to arbitration processes as it preserves proprietary secrets and the reputation of a business. This is important when the dispute is of a civil/ personal character. However, this confidentiality should be forgone when public funds or public assets are involved. Disclosure becomes important for accountability and protecting public confidence in governance.

**Clean Hands Doctrine:** He who comes into equity must come with clean hands. This maxim should be given statutory authority. Arbitrators must refuse jurisdiction where the underlying contract/ business transaction is fraudulent or illegal. These contracts should be considered void ab initio, thereby making the arbitration clause unenforceable.

**Institutional Reforms:** Arbitral tribunals should issue robust anti-corruption guidelines, train arbitrators in detecting financial crimes and incentivise them to come forward when they discover fraudulent activities. There must be a proactive shift towards responsible adjudication.

**Exceptions in Bilateral Investment Treaties:** Bilateral treaties should explicitly exclude protections of investments that are tainted by illegal activities. Investors shouldn't be allowed to use arbitration as a default dispute resolution mechanism to shield themselves from criminal liability.

**Include Override Clauses in Arbitration Clauses:** Promotion to include that criminal law overrides clauses within arbitration agreements, that is, the arbitration clause cannot be enforced when a criminal element is discovered.

**Forensic Audit Mechanism:** A statutory rule should be introduced stating that whenever the dispute relates to unusually serious damages or is in reference to public assets, there should be a complete forensic audit that should be conducted to aid the arbitration process. If fraud is discovered, the information that is uncovered must be reported to the corresponding regulatory authority.

**Criminalise Strategic Initiation of Arbitration:** When a party strategically uses arbitration to delay/ obstruct investigations, threaten stakeholders or coerce settlements, criminal liability should be imposed.

## CONCLUSION

Arbitration is an excellent mechanism that reduces the burden on the traditional judicial system. It gives speedy resolutions to civil and commercial disputes. However, due to deep pockets that corporations have, they are misusing arbitration to shield themselves from criminal liability. The private nature of arbitration, confidentiality of the proceedings, limited procedures in comparison to traditional courts and limited fact-finding requirements make it a perfect ecosystem for deflecting criminal liability.

While we do have legislation to deal with various facets of white-collar crimes, we need a robust reform to deal with the practical problems that are arising from the current legal frameworks. It will help improve public confidence in the market and induce further foreign investment as well.

The solution doesn't lie in rejecting arbitration as a whole but rather in re-emphasising its original purpose by introducing statutory safeguards. It must remain subordinate to criminal law, and therefore, there should exist a system that ensures proactive reform. It should be able to balance the growing nature of commercial disputes and curb the use of arbitration as a shield, improving public confidence.

It cannot run parallel to the traditional judicial system, but rather act as an agent of justice and equity. Ensuring this balance is essential not only to combat white-collar crimes but also to maintain the credibility of arbitration as a fair and responsible mechanism of dispute resolution in a rule-of-law society.