Arbitrability of Data Protection Disputes: Personal Data, Personalized Justice?

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Abstract

This article explores the interplay between international arbitration and data subject compensation claims under the General Data Protection Regulation (GDPR). The analysis focuses on the validity and enforcement of arbitration agreements and the resulting awards. The article argues that despite potential skepticism, arbitration can offer significant benefits to data subjects, and that compensation claims under the GDPR should be considered arbitrable under the New York Convention and CJEU case law. The article further argues that EU courts have a duty to refer disputes to arbitration, and that the mandatory provisions of EU law have limited means of interfering with this duty. Furthermore, it establishes that the misapplication of GDPR provisions does not automatically justify the denial of arbitral award recognition. The article argues that this is a natural extension of trust traditionally shown to arbitrators, and that such trust should not be easily cast aside.

I. Introduction

Imagine a situation in which a person – let's call her Alice – downloads a popular fitness app. This app is developed and maintained by ACME, an American company with no establishment in the EU. One day, ACME experiences a catastrophic data breach. Many user details, including information on cardio fitness, are made publicly available. Alice works as a personal trainer and suffers a great deal of anxiety about losing her job and clients.

One day, Alice decides to file a lawsuit in front of a court of Norway, where she lives. As soon as the dispute is filed, ACME raises a jurisdictional objection. It points to its terms of service, which include the following clause:

> "Any dispute, controversy, or claim arising under, out of, or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the AAA Arbitration Rules. The seat of arbitration shall be Los Angeles, California, regardless of where the hearings take place. The dispute, controversy, or claim shall be decided in accordance with the law of California, without giving regard to its conflict of law provisions."

ACME asks the court to decline to hear the case and refer the parties to arbitration. The first question of this article is whether the court should grant such a motion, holding that the arbitral tribunal should be the one to rule on the GDPR[1] compensation claim.

Let us assume, next, that the proceedings are indeed brought before an arbitral tribunal, and that this tribunal issues an award, ruling that Alice is not entitled to

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[1] 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)

receive any compensation. Alice is dissatisfied with this outcome and turns to the court again. ACME claims the matter is settled under a binding arbitral award, which gives the court no right to re-open the case, even assuming the arbitrators misinterpreted some of the provisions under the GDPR. The second question of this article is whether the court should recognize and enforce the arbitral award.

The intuitive answer might appear to be negative: the GDPR makes it clear that data subjects have a right to file compensation claims in front of the courts of their country. The EU consumer protection laws contain broad provisions against unfair contractual terms. The court should naturally assume jurisdiction, regardless of whether there is an arbitration agreement in place, or if there is an arbitral award settling the dispute.

However, the situation is more intricate. There is a complex web of legal sources at play; the ways in which they interact can lead to complex, unexpected outcomes – calling for careful and nuanced analysis.

In this paper, I will argue that arbitration, when carried out in a fair manner, can offer significant benefits to data subjects, when compared with traditional litigation. I will then establish that under the New York Convention and CJEU case law, data protection disputes must be considered arbitrable – that is, capable of being resolved through arbitration. I will then establish that arbitration agreements, such as the one above, must be enforced by the courts, and that the parties must be referred to arbitration; showing the limits of applicability of mandatory EU law to arbitration *agreements* governed by the New York Convention. I will show how the EU law might, under public policy grounds, be used to decline recognition and enforcement of the resulting *award*s, but that it cannot be considered that misapplication of any GDPR mandatory provision will give rise to such recognition denial. Lastly, I will present a few ways in which Member State Courts can attempt to apply EU law to decline enforcing arbitration agreements, if skeptical of arbitration; but will conclude that the only way to do so under the New York Convention is to deem data subject compensation claims non-arbitrable in their entirety. I will conclude that this extreme step should not be taken, due to the lack of any compelling evidence of systemic abuse of arbitration, and that the courts, in line with the New York Convention, should

extend arbitrators their trust, even when ruling on compensation for a breach of a right as fundamental as data protection.

There are a few important limitations of scope to mention here. Firstly, I will only be discussing *private law* disputes between data subjects and data controllers (or processors) – that is to say, *compensation claims* arising under the GDPR, without examining the arbitrability of administrative fines imposed by the Member State authorities. Secondly, I will assume that controllers or processors are established outside of the EU. Thirdly, I will be focusing on the effects of arbitration agreements and awards; I will not be performing an in-depth analysis of the substantive aspects of consumer protection legislation. Lastly, I will be focusing on exclusively on arbitral decisions falling within the scope of the New York Convention – that is, leaving aside specialized consumer dispute settlement mechanisms, such as those focusing on mediation or non-binding awards.

II. Why arbitrate?

The scenario painted in the introduction is intentionally bleak. It is quite easy to conceive of arbitration with a weaker party as an abusive, manifestly unfair process, used to deprive people of their fundamental rights. The costs can be prohibitive, the tribunals located in far-off places, and the arbitrators might be biased in favor of companies – the "repeat players" before them.

The empirical research surrounding the topic does not, however, support such blanket conclusions. An American study from 2022 found that during 2014-2021, consumers initiated and prevailed in 41,7% of arbitrations that terminated with awards, compared to 29,3% of litigations that terminated with awards.[2] The study further claims that consumer claimants tended to recover a higher amount in damages in arbitration ($20.356 compared to $6.669, in median), as well as that the

[2] N. Pham and M. Donovan, Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration [2022] *SSRN Electronic Journal* 3 (https://www.ssrn.com/abstract=4077421) accessed 6 June 2023.

arbitration was speedier (265 days compared to 315, in median).[3] The study, therefore, claims that arbitration is faster, cheaper and more fair.[4] An older study, however, claims that employment disputes resolved in arbitration are less likely to be resolved in favor of the claimants (21.4% in arbitration compared to 36.4% in litigation); it is, though, worth noting that this study employed a significantly smaller sample size (5.592 compared to 67.119 arbitral cases), and examined fewer state jurisdictions.[5]

Other empirical studies are similarly divided, their conclusions widely open to interpretation. American Bureau of Consumer Financial Protection (CFBP) released a report in 2015,[6] stating that "in 341 of those arbitrations filed in 2010 and 2011, the arbitrator awarded relief to consumers in 32 cases and consumers obtained debt forbearance in 46 cases."[7] The report was, however, interpreted in two extremely inconsistent ways: both consumer groups and companies using mandatory arbitration celebrated it as a win. Following its release, 58 Members of Congress urged the CFPB to adopt a regulation eliminating consumer arbitration clauses, while more than 80 Representatives and Senators urged for re-opening of the study, as it "failed to provide even the most basic of comparisons needed to evaluate the use of arbitration agreements"; as it did not "estimate the transaction costs associated with pursuing a claim in federal court as compared to arbitration".[8] The industry groups pointed to the fact that the report still found arbitration to be faster and less expensive than litigation, noting that AAA rules limit cap consumer's legal fees to 200 USD; they also argued that the amounts recovered by the consumers are greater than those awarded in litigation, and that many disputes are solved through pre-award

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[3] *Ibid 2.*
[4] *Ibid 4.* See also the 2020 report: 'Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration' (*ILR*, 16 November 2020) (https://instituteforlegalreform.com/research/fairer-faster-better-ii-an-empirical-assessment-of-consumer-arbitration/) accessed 6 June 2023;.
[5] C. Drahozal and S. Zyontz, An Empirical Study of AAA Consumer Arbitrations (2009) 25 *Ohio State Journal on Dispute Resolution*.
[6] 'Arbitration Study: Report to Congress 2015' (*Consumer Financial Protection Bureau*, 26 April 2023) (https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/) accessed 6 June 2023;.
[7] *Ibid* 3.
[8] A.S. Kaplinsky, M.J. Levin and M.C. Bryce, The CFPB's Consumer Arbitration Study Takes Center Stage (2016) 71 *The Business Lawyer* 731, 737.

settlements.[9] Consumer groups retorted that such interpretation is "empirically bankrupt", calling for an outright ban of standardized arbitration clauses in consumer credit agreements.[10]

It is important to note that numerous other studies exist, but that their methodological differences, such as defining what a "win" is, make them prone equally to wide interpretation.[11] It is hard, however, to conclude that any of the studies show unequivocal signs of systemic abuse.

The courts have, against such backdrop, consistently held that standardized arbitration agreements are not unfair *as such*.

To the contrary, the ECtHR held that arbitration clauses have "undeniable advantages both for the individuals who enter them, as well as for the "administration of justice", even when discussing a standardized clause found in an employment agreement of two professional athletes.[12] It held that the parties can, by a virtue of an arbitration agreement, waive their right to trial, without infringing the European Convention on Human Rights – as long as the waiver is established in a "free, lawful and unequivocal manner".[13] It went as far as to hold such waiver was

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[9] *Ibid* 737.
[10] *Ibid 738.*
[11] See, for instance: C Drahozal and S Zyontz (n 4); A. Chakraborty, R. Shankar and J.R. Marsden, An empirical analysis of consumer-unfriendly E-commerce terms of service agreements: Implications for customer satisfaction and business survival (2022) 53 *Electronic Commerce Research and Applications* 101151; J. Prince and S. Wallsten, Empirical Evidence of the Value of Privacy (2021) 12 *Journal of European Competition Law & Practice* 648; P. Kesan and C.M. Hayes, A Comprehensive Empirical Study of Data Privacy, Trust, and Consumer Autonomy 91 *INDIANA LA WJOURNAL*; F. Weber, Is ADR the Superior Mechanism for Consumer Contractual Disputes?—an Assessment of the Incentivizing Effects of the ADR Directive (2015) 38 *Journal of Consumer Policy* 265; J.R. Sternlight and E.J. Jensen, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse? (2004) 67 *Law and Contemporary Problems* 75; I.S. Szalai, The Failure of Legal Ethics to Address the Abuses of Forced Arbitration (2018) 24 *Harvard Negotiation Law Review* 127; J. Valenti, The Case Against Mandatory Consumer Arbitration Clauses; C.R. Drahozal and S. Zyontz, 'Creditor Claims in Arbitration and in Court' (https://papers.ssrn.com/abstract=1508545) accessed 6 June 2023;; T. Wilson, Setting Boundaries Rather than Imposing Bans: Is it Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness for Consumers? (2016) 39 *Journal of Consumer Policy*; R. Miller, Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed after Concepcion and American Express 32 *THE GEORGETOWN JOURNAL OF LEGAL ETHICS*.
[12] *Mutu and Pechstein v Switzerland* [2018] ECtHR 40575/10, 67474/10 [94].
[13] *Mutu and Pechstein v. Switzerland* (n 11) para 96.

freely given, even though contained in an employment contract: other athletes had negotiated contracts without such clauses; other clubs, although offering financially less desirable terms, offered contracts with no arbitration clauses.[14] Similarly, the CJEU has repeatedly held arbitration to be unproblematic – provided that sufficient safeguards are in place.[15]

We will examine such safeguards (and their limitations) in parts III and IV of this paper. For now, let us assume a hypothetical scenario where arbitration's fairness is beyond doubt: the agreement is valid, the arbitrators are unbiased, the costs are covered, the proceedings are convenient, and so forth. How can data subjects benefit from such arbitration?

First, a fair arbitral proceeding might result in *lower costs and faster dispute resolution*.[16] Most institutions specializing in consumer arbitration have developed rules under which there are hard limits on the amounts of legal fees which the consumers need to pay, regardless of the outcome of the case.[17] Procedural flexibility, a hallmark of arbitration, allows the hearings to be scheduled according to the desire of the parties: in person or digitally, in any desired language or locale.[18] There are no requirements to appoint legal counsel, nor overly formal evidentiary rules – if the parties desire so. Most of such choices would not be available in litigation – even in small claim cases.

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[14] *Ibid,* para. 119: "The Court is able to accept that a major football club with considerable financial resources may have a greater negotiating strength than an individual player, even a famous one. That being said, not only has the first applicant failed to adduce evidence that all Chelsea players were obliged to give their consent to the arbitration clause, he has also failed to show that other professional football clubs, which perhaps have more modest financial means, would have refused to hire him on the basis of a contract providing for dispute settlement in the ordinary courts."

[15] For an in-depth discussion of CJEU case law on arbitration, see section IV of this paper.

[16] The studies mentioned above seem to agree on this aspect, although some consumer groups claim that any studies analyzing AAA cases are flawed, due to "data manipulation" resulting from deletion of records from AAA database. A. a. J. Research, 'The Truth About Forced Arbitration' (Social Science Research Network 2019) SSRN Scholarly Paper 3451316 3 (https://papers.ssrn.com/abstract=3451316) accessed 6 June 2023;.

[17] 'AAA Rules, Forms & Fees | ADR.Org' (https://www.adr.org/Rules) accessed 2 June 2023.

[18] G. Born, The Principle of Judicial Non-Interference in International Arbitral Proceedings (2008) 30 *University of Pennsylvania Journal of International Law* 999; W. Mattli, Private Justice in a Global Economy: From Litigation to Arbitration (2001) 55 *International Organization* 919; J. Faris, The Procedural Flexibility of Arbitration as an Adjudicative Alternative Dispute Resolution Process (2008) 41 *De Jure* 504; W Mattli; J Faris.

These benefits have been acknowledged within the EU, where several attempts have been made to create alternative dispute settlement mechanisms for consumer disputes, including online dispute resolution platforms.[19] These sources do not regulate arbitration in its "classic" sense, and as such, are not within the scope of this article; however, they indicate a broad agreement on the potential benefits of seeking alternative dispute resolution fora.[20] As we will see, the GDPR itself envisions use of alternative dispute mechanisms and out-of-court settlements.

Closely linked with the issues of time and cost is the concept of *finality of arbitral awards* under the New York Convention.[21] As it will be discussed further, arbitral awards are subject to a minimal judicial review – which does not extend to a review of the merits of the dispute. Once they are assured that the award is not in breach of public policy – which it is exceedingly unlikely to be if the data subject prevails – the courts will enforce it; making it impossible to use aggressive litigation strategies and prolonged appeals to deprive data subjects of timely compensation.

Another factor to consider in the third-country context is the *cross-border recognition* of arbitral awards under the New York Convention.[22] If an EU Member State court were to rule against a data controller *solely* established in a third country, it would, in

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[19] 'Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)' 2013; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) 2013 (OJ L).

[20] For the advantages of online dispute resolution, see e.g.: A. Datla, Enforceability, Advantages, and Disadvantages of Online Arbitration (2021) 2 *Jus Corpus Law Journal* 237; A. Swaroop and S. Singh, Online Dispute Resolution and Consumer Disputes International Arbitration (2007) 9 *Asian Dispute Review* 38; N. Ebner and E.E. Greenberg, Strengthening Online Dispute Resolution Justice New Directions in Domestic and International Dispute Resolution (2020) 63 *Washington University Journal of Law & Policy* 65; J. Van Den Herik and D. Dimov, Towards Crowdsourced Online Dispute Resolution (2012) 7 *Journal of International Commercial Law and Technology* 99. *See also* M. Durovic and J. Stuyck, 'The External Dimension of EU Consumer Law' in Marise Cremona and Hans-W Micklitz (eds), *Private Law in the External Relations of the EU* (Oxford Scholarship Online 2016); M. Durovic and P. Markova, 'Online Dispute Resolution of Consumer Disputes, Vulnerable Consumers and New Technologies', *Vulnerable Consumers and the Law* (Taylor and Francis 2020).

[21] 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' 1958 art V.

[22] Ibid

most scenarios, lack any an effective and predictable enforcement mechanisms.[23] International treaties regarding recognition and enforcement of foreign judgements are few and far between, lacking both in details and the number of signatories. Arbitral proceedings, to the contrary, enjoy an (essentially) worldwide enforcement mechanism, making it far easier for data subjects to seek enforcement before foreign courts. An arbitral award against a US defendant would, in no uncertain terms, be easier to enforce than a comparable court judgement.[24]

Furthermore, arbitrators can be chosen based on their *level of expertise* in data protection laws. An arbitrator well-versed in this field could have significantly more expertise than a generalist judge randomly assigned from the pool – especially in a field as complex and fast-developing as data protection law is. The ECtHR made this point in a case involving a standardized arbitration clause in professional sports: "the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialized body which is able to give a ruling swiftly and inexpensively. […] Recourse to a single and specialized international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty".[25] This echoes the international stance that "adaptability and access to *expertise* are hallmarks of arbitration."[26]

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[23] For more issues in the context of extraterritorial enforcement of the GDPR, see I. Revolidis, Judicial Jurisdiction over Internet Privacy Violations and the GDPR: a Case of '"Privacy Tourism"'? (2017) 11 *Masaryk University Journal of Law and Technology* 7; C. Ryngaert and M. Taylor, The GDPR as Global Data Protection Regulation? (2020) 114 5; O.J. Gstrein and A. Zwitter, 'Extraterritorial Application of the GDPR: Promoting European Values or Power?' (https://papers.ssrn.com/abstract=3940596) accessed 6 June 2023; A. Azzi, The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation (2018) 9 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 126.

[24] A possible way of overcoming such problems is presented by the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, which, at the time of writing of this article, only has 5 signatories.

[25] *Mutu and Pechstein v. Switzerland* (n 11) para 98.

[26] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 105 3346 (SCt).

Lastly, one of arbitration's biggest advantages to data subjects is its (largely intact) *confidentiality*.[27] Compensation claims for misuse of personal data are based on the harm that a plaintiff has consequently suffered; a harm difficult to prove and establish.[28] The very nature of such claims induces litigation chill: a plaintiff who was harmed due to lack of control over their personal information can certainly be hesitant to discuss such information in an open court, as a matter of public record. As the US Supreme Court remarked in an abortion-related case, "the woman's assertion of her own rights [...] may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit."[29] Sensitive personal information, such as that about one's health, religion or sexuality, is far more easily discussed behind the closed doors, which is an advantage (largely) distinct to arbitration.

Furthermore, the intrinsic value of arbitration's confidentiality extends beyond merely providing a private forum for redressal. It also fosters candor and openness during the proceedings, thereby enhancing the effectiveness of the dispute resolution process. The confidence of discussing sensitive matters in a private setting can promote a more open dialogue and a fuller presentation of the issues at stake, facilitating a resolution that truly accounts for the unique circumstances of the data subject; something certainly desirable under the GDPR.

However, it is critical to reiterate that these benefits hinge on arbitration proceedings being truly consensual and fair. The integrity and value of arbitration cannot be

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[27] It is important to note that confidentiality in arbitration is not, much like in court proceedings, an absolute: a public interest, or specific legal grounds established in national laws, may call for public disclosure of materials submitted to arbitration. See M. Collins QC, Privacy and Confidentiality in Arbitration Proceedings (1995) 11 *Arbitration International* 321; A.C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration (2000) 16 *American University International Law Review* 969; R.C. Reuben, Confidentiality in Arbitration: Beyond the Myth (2005) 54 *University of Kansas Law Review* 1255.

[28] B. van der Sloot, Where Is the Harm in a Privacy Violation (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 322; J. Hariharan, Damages for reputational harm: can privacy actions tread on defamation's turf? (2021) 13 *Journal of Media Law* 186; D.K. Citron and D.J. Solove, Privacy Harms (2022) 102 *Boston University Law Review* 793; S. Romanosky and A. Acquisti, Privacy Costs and Personal Data Protection: Economic and Legal Perspectives (2009) 24 *Berkeley Technology Law Journal* 1061.

[29] Singleton v. Wulff, 96 S.Ct. 2868, 2875, 428 U.S. 106, 117 (U.S.Mo.,1976)

separated from these fundamental conditions. The ideal scenario sketched out here – where the agreement is valid, the arbitrators unbiased, the costs manageable, and the proceedings convenient – is admittedly an aspirational one. Much like the unfairness of arbitration should not be presumed, *neither should its fairness*. Instead, both call for a nuanced, case-by-case analysis.

III. The legal framework

The interaction between the GDPR, international arbitration, EU law, jurisdictional rules, local arbitration laws, and arbitral agreements and awards is complex. I believe that it merits a short overview; with the details being explored in latter parts of the article.

The starting point is the GDPR, which establishes *substantive* grounds for a compensation claim, by stating that "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 for the damage suffered".[30] The GDPR is rather short in detail: it briefly establishes a few provisions on the reversed burden of proof in such cases – and the joint liability of controllers and processors involved[31] – but elaborates on no other specifics. In a recent *UI v Österreichische Post AG* case, the CJEU has clarified that "the mere infringement" of the GDPR, such as simple nuisance, is not sufficient to confer a right to compensation.[32] It left it to the Member States to use the principles of their national tort law to rule on the amount of damages, as long as they can demonstrate compliance with the principle of equivalence and effectiveness.[33]

However, the GDPR does not address the question of whether such disputes can be solved before arbitral tribunals. Its jurisdictional rule, stating that data controllers and processors may be sued in the country of their establishment, or the country where a

[30] GDPR Art. 82
[31] *Ibid.*
[32] *UI v Österreichische Post AG* [2023] CJEU Case C-300/21 [43–48].
[33] *Ibid.* paras 53–58.

data subject has their residence, pertains exclusively to court jurisdiction.[34] While this rule is not literal and exhaustive, it *is,* as detailed in part IV, supplanted by the Brussels I (Recast) Regulation[35] – which regulates general jurisdictional questions and explicitly excludes arbitration from its scope.[36] Specifically, in its Recital 12, the Regulation clarifies that it neither pertains to arbitral agreements nor awards: the court decisions to hold an agreement invalid, annul an award, or decline its recognition, is not subject to its enforcement regime.[37]

Instead, the primary legal source dealing with the recognition and enforcement of international arbitration agreements and awards is the New York United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The Convention was adopted in 1958 and has 172 signatory states, including all of the EU Member States.

It is important to note that the Convention does not regulate any *substantive* legal aspects of arbitral proceedings or agreement validity: instead, it establishes the framework for recognition and enforcement of arbitration agreements and awards and provides *conflict rules* for identifying the applicable law. These conflict rules operate independently and autonomously, excluding the application of national (and EU) rules to questions of identifying the applicable law. To that extent, the Rome I Regulation, in the same vein as Brussels I Regulation, explicitly excludes arbitration from its scope.[38]

Another thing to note is that under the Convention, both contractual and non-contractual disputes can be arbitrated.[39] Although a claim might be classified as a tort

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[34] See GDPR Art. 79
[35] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012 (OJ L).
[36] See e.g. M. Brkan, Data protection and European private international law: observing a bull in a China shop (2015) 5 *International Data Privacy Law* 257; I Revolidis (n 22); L. Lunstedt, International Jurisdiction over Cross-Border Private Enforcement Actions under the GDPR Data Protection (2018) 65 *Scandinavian Studies in Law* 213.
[37] Brussels I Regulation (n 34)
[38] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) 2008 (OJ L) art 1) Art. 1.e.
[39] NYC Art. II.

– which, although possibly connected with a contract, a data protection compensation claim is likely to be – it will fall under the scope of the Convention, assuming the existence of a valid arbitration agreement.[40]

There are two key duties that the Convention imposes on its signatory states.

The first obligation under the Convention is to require the states to give full effect to arbitration *agreements* by denying parties access to courts in contravention of their agreement to arbitrate. As outlined in Art. II(1) of the Convention, each contracting state *must* recognize an arbitration agreement encompassing existing or potential disputes, *whether contractual or not*, as long as the "subject matter [is] capable of settlement by arbitration". In addition to this, the court must *refer the parties to arbitration*, unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed".[41]

As for the second obligation, the Convention requires the signatory states to recognize and enforce arbitral *awards*, unless very narrow exclusion criteria are met. As per its Art. V, in addition to the criteria for refusing enforcement of arbitration agreements (lack of arbitrability and/or lack of a valid agreement), final awards may be declined enforcement only if there are significant procedural irregularities (parties being under legal incapacity or unable to present their case, arbitral tribunals being improperly constituted or exceeding their power), or if the award was either set aside in the country where it was made. Absent this, the enforcement may be denied only if the recognition or enforcement of the award would be "contrary to the public policy" of the forum.[42]

Consequently, following the structure of Art. II and V, the law of the forum which is seized – in our introductory hypothetical, EU law and Norwegian law – is an obstacle to enforcement only when it entirely precludes arbitration, purports to interfere with the arbitration agreement, or imposes public policy limitations on award

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[40] However, see the discussion on the *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* [2015] CJEU Case C-352/13.
[41] See NYC Art. II(2).
[42] See NYV Art. V.

enforcement. In the context of data protection disputes, these elements must be examined individually.

IV. Data protection disputes are arbitrable

It is apparent that certain questions should not be resolved through arbitration. Issues such as criminal liability, validity of patents, and dissolution of marriage cannot be resolved through a private decision-making process: the courts will retain their jurisdiction, in the name of safeguarding the fundamental interests of the society.[43]

Non-arbitrability is the most drastic anti-arbitration measure that a state can use under the New York Convention. As such, it must be distinguished from other grounds for denying recognition and enforcement.

Unlike the *public policy* exception – which calls for a case-by-case analysis of the potential infringing effects of enforcement of awards – lack of arbitrability[44] constitutes an *absolute prohibition* against arbitration: even properly formed arbitration agreements, resulting in final (and otherwise valid) awards will be denied enforcement in the countries where the subject matter is not arbitrable. Additionally, public policy exception applies, as we will see, only to the matter of enforcing arbitral awards; while the lack of arbitrability can be used to decline enforcement of agreements and awards alike.[45]

Non-arbitrability must similarly be distinguished from the questions of *contractual validity*. While many national laws contain rules on the validity of arbitration agreements – requiring, for instance, the arbitration agreement with consumers to be

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[43] G. Born, *International Commercial Arbitration: Commentary and Materials* (BRILL 2021); G.A. Bermann and G. Cordero-Moss, 'Free-Wheeling Judgments and Awards: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.', *Global Private International Law* (Edward Elgar Publishing 2019); I. Bantekas, The Foundations of Arbitrability in International Commercial Arbitration (2008) 27 *Australian Year Book of International Law* 193.

[44] Note, however, that this term is used differently in different jurisdictions. In the United States, the term also encompasses the validity of the arbitration agreement and the question of jurisdiction to decide the matters of arbitrability, see M. St. Germain, The Arbitrability of Arbitrability Note (2005) 2005 *Journal of Dispute Resolution* 523.

[45] G. Born, *International Commercial Arbitration* (Third edition, Kluwer Law International 2021) §6.01.

signed as a separate document, or only after a dispute has arisen – such laws do not delineate *arbitrability* of the claims: they merely raise the threshold for holding the arbitration agreements valid.[46] Assuming that such requirements are met, the agreement and subsequent award will be enforced.

It is against this backdrop that arbitrability of data protection disputes is to be assessed. As I will argue, data subject compensation claims arising under the GDPR are unquestionably arbitrable.

While the CJEU has not ruled on the arbitrability of *data protection* disputes as of yet, it has held that a wide range of disputes involving significant public interests *are arbitrable*. In particular, the Court has found that both competition and consumer protection disputes are capable of being settled by arbitration.

The seminal CJEU decision in the Eco Swiss[47] case is seen as recognizing the arbitrability of disputes involving EU public policy. In this case, the CJEU held that EU competition law is an integral part of *ordre public* of all EU Member States, requiring them to set aside arbitral awards which are in violation of EU competition rules. The CJEU did not *expressly* rule on the arbitrability of the dispute, but by considering the question of whether the award could be set aside due to a breach of EU competition law, the Court implicitly acknowledged that such disputes could be arbitrated. In other words, the Court's conclusion that the award must be denied enforcement if it is in breach of public policy, supports the converse reasoning: that its enforcement is not precluded by EU law, as long as such breach does not take place. Such an approach taken by the CJEU is fully aligned with international practice

[46] Ibid: "The restrictions imposed in some states on the arbitration of consumer disputes appear to be better categorized as rules of substantive validity than nonarbitrability rules. As discussed below, legislation in some states appears to invalidate specified categories of arbitration agreements (e.g., arbitration agreements between consumers and merchants), rather than to provide for the unenforceability of arbitration agreements as applied to particular categories of claims, disputes, or subject matters. As such, these statutory provisions are better regarded as prescribing rules of substantive validity than nonarbitrability." §6.03

[47] *Eco Swiss China Time Ltd v Benetton International NV* [1999] CJEU Case C-126/97.

– notably, the same conclusion was reached, albeit much more directly, in the landmark *Mitsubishi*[48] case in the US.

The CJEU took the same approach in consumer protection cases. The case of Mostaza Claro[49] involved a Spanish consumer who entered into a contract that contained an arbitration clause. After a dispute arose, it was referred to arbitration as per the contract, and the consumer was ordered to pay certain charges. The consumer later sought to challenge the arbitral award in Spanish courts, arguing that the arbitration clause was unfair and thus unenforceable under the Unfair Terms in Consumer Contracts Directive. The CJEU ruled that national courts must, as a matter of public policy, review the fairness of an arbitration clause even if the consumer did not raise this issue during the arbitration proceedings. Going one step further, in Austurcom,[50] the CJEU held that the courts must assess the fairness of the arbitration clause even when the consumer is entirely passive in arbitration and does not even such a challenge before the court where enforcement is sought.[51] Thus, both cases highlighted the arbitrability of consumer disputes, by addressing the *validity of arbitration agreements,* as a matter of *public policy* – rather than questioning *arbitrability* itself.

The GDPR does not contain any specific rules overriding this principle: there is no specific prohibition against arbitrating data protection compensation claims found in its text.

To the contrary, the GDPR – and the soft law surrounding it – references out-of-court proceedings on several occasions. The very Art. 79 starts with an important statement – that the data subject's right to an effective judicial remedy exists "*without prejudice* to any available administrative *or non-judicial* remedy".[52] This can be interpreted as a clear acknowledgement of the ability of the parties to resolve their

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[48] *Mitsubishi* (n 25).
[49] *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] CJEU Case C-168/05.
[50] *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] An Chúirt Bhreithiúnais Case C-40/08.
[51] Ibid. at 53
[52] GDPR Art. 79

disputes outside of the court system. The GDPR Art. 40(2)(k) further specifies that, when preparing codes of conduct, the representatives of categories of controllers and processor may provide for "*out-of-court proceedings* and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79."[53] Outside of the primary text of the GDPR, the EU Standard Contractual Clauses provide that, data importers in international data transfers "may offer independent dispute resolution through an arbitration body only if it is established in a country that has ratified the New York Convention."[54]

The policy underlying such a favorable approach to arbitrability is sound. While a certain dispute might involve a matter of public policy, private law claims which emerge from such its potential violations can be resolved through arbitration – as long as the parties are free to dispose with them. This echoes the trust that the courts extend to arbitral tribunals: there is no reason to assume, simply because a dispute involves a certain public interest, that arbitration is inherently unfair. Instead, the fundamental rights and principles of the EU law are safeguarded *ex post*.

V. EU rules cannot invalidate arbitration agreements

If a dispute is arbitrable, the only way to decline *referring it to arbitration* is if the arbitration agreement is found to be "null and void, inoperative, or incapable of being performed".[55]

Under the principle of separability,[56] the validity of arbitration agreements must be assessed independently from the questions of the validity of the main agreement. The main contract can be invalid – for instance, by requiring data subjects to waive their

[53] GDPR Art. 40(2)(k)
[54] Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council, n. 11
[55] New York Convention, Art. II
[56] G Born, *International Commercial Arbitration* (n 44) §4.

right to compensation – but, assuming that the arbitration agreement *itself* is valid, the dispute must be referred to arbitration.

An arbitration agreement is, in essence, a separate contract; raising an immediate question: which law should the court apply to make assess its validity?

As we have seen, the Rome I Regulation cannot be used to determine the law applicable to arbitration agreements. Rather, the New York Convention contains conflict rules which govern their validity; to the exclusion of other conflict rules. The choice to disallow national courts to apply domestic rules to arbitration agreements was a conscious attempt on behalf of the drafters to disallow parallel proceedings and conflicting rulings.

In its Art. V, the Convention clearly states that recognition and enforcement of an award may be denied when an agreement is invalid "under the law to *which the parties have subjected it* or, failing any indication thereon, under the law of *the country where the award was made*." There is a broad consensus that the same conflict rule applies under Art. II, when the courts are asked to refer the parties to arbitration.[57]

Consequently, the law of the forum which is seized is applicable only if expressly chosen by the parties to govern their arbitration agreement; otherwise, either the chosen law, or the law of the seat of arbitration is to be applied.[58]

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[57] The minority view, stating that Art. II should be interpreted differently than Art. V, has drawn broad (and rather vivid) criticism. As stated by Born: "This analysis is unsatisfactory and wrong. There is little, if anything, to recommend applying two different legal rules to the same arbitration agreement at different points in time, with the choice-of-law rules and resulting choices of substantive law varying depending on the point in time at which the issue is considered. That plainly makes little or no sense, as a matter of logic, and squarely contradicts the objective of predictability that underlies private international law and choice-of-law analysis generally, the international arbitration regime in particular and the New York Convention specifically. Further, this analysis produces the highly undesirable result that an arbitration agreement may be found valid (or invalid) at one stage of a dispute, and then subjected to a different law and treated in the opposite manner at a later stage; that will inevitably result in delays and wasted expense, as well as the possibilities of inconsistent decisions about the validity of the same arbitration agreement. Nor does it make sense to suggest that different national courts should be either encouraged or permitted to apply their own local law to the question whether an international arbitration agreement is valid when presented with the question whether to stay or dismiss a parallel litigation. In fact, the opposite is true, particularly in interpreting an international instrument, such as the New York Convention, specifically designed to apply uniform rules and produce uniform results in different national courts."

[58] G Born, *International Commercial Arbitration* (n 44) §4.03.

In order to meet its obligations under the New York Convention, therefore, an EU Member State court must refrain from using EU or its national law to set aside an arbitration agreement, even if such an agreement would be invalid under those sources. Application of instruments such as the Unfair Terms Directive, would be in breach of the Convention, if they were used to *directly* police the validity of arbitration agreements.

This should not be seen as problematic. The fact that an agreement which is considered invalid under the EU law must be enforced – in the sense of referring parties to arbitration – is once again, a mere extension of the legislative trust shown to arbitrators. The ultimate goal of arbitration is to render a final and binding award: arbitral tribunals should, and arguably must, consider the mandatory rules of the EU law when rendering their awards. While an arbitration agreement may be unfair under such mandatory rules, there is no reason to *presume* the resulting award to be; any holding to the contrary would simply violate the most essential principles of the New York Convention.

It is vital to note that the CJEU has never even remotely questioned this stance: its wording is careful and deliberate. In every case involving the interaction between the Unfair Terms Directive and arbitration agreements, it held that the Directive can – and in fact, must – be taken into consideration when enforcement of an arbitral award is sought. However, it never stated that the *arbitration agreements* must be invalidated due to their incompatibility with the mandatory rules of EU law; rather, it stated that such incompatibility must be considered as a matter of *public policy*.[59]

This might sound like a merely technical distinction – but it is not. Under the New York Convention, the implications are important: firstly, a claim of infringement of public policy is a ground to refuse enforcement of arbitration *awards*, not arbitration *agreements*.[60] An agreement that is considered invalid under the EU law but is valid under the law chosen by the parties must be enforced: the courts must decline to hear

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[59] *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (n 48); *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (n 49).
[60] G Born, *International Commercial Arbitration* (n 44) §4.03.

the case, refer the parties to arbitration, and await its outcome. Secondly, once the resulting award is rendered, the fact that the agreement was considered unfair under the EU law can be raised (solely) if it results in an *award* violating EU public policy.

The EU mandatory rules, therefore, can only play a minimal – if any – direct role on the on the *validity of arbitration agreements*, when the term is used within the context of the Art. II and V of the New York Convention. This validity, is instead, only relevant due to its public policy nature.

VI. EU public policy as a safeguard

When an arbitral award is seen as violating public policy, its recognition may be denied under the Art. V of the New York Convention. The public policy doctrine refers to essential, fundamental interests a forum country seeks to protect: its core, indispensable values – such as protection of human rights – should not be subverted through enforcement of foreign arbitral awards.

Assuming that a dispute is arbitrable, public policy is the only ground under the New York Convention which allows for the introduction of rules of the forum into the enforcement decision. However, while this ground may appear to be open-ended, it is designed to be interpreted narrowly; and while frequently argued in practice, the courts routinely decline to hold awards to be in breach of public policy.[61]

Two key elements must be clarified when raising the issue of public policy in relation to data protection disputes: firstly, whether EU data protection rules have a public policy character; and secondly, in which scenarios their violation opens the grounds to a successful enforcement challenge.

The answer to the first question is rather straightforward. While the CJEU has not *directly* framed data protection as a matter of public policy in the context of arbitration, it has underlined its character in a broad variety of cases. In addition to this, the Court has already held that a number of disputes involving the functioning

[61] Ibid; G. Cordero-Moss, Ordre Public and arbitration in Norway; G. Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014).

of the internal market generally,[62] as well as the protection of weaker parties specifically,[63] fall under an umbrella of EU public policy, which, in accordance with the principle of equivalence and effectiveness, have to be applied by national courts.

The second question is less straightforward.

The courts are, under the New York Convention, not meant to act as appellate bodies; their review of the merits of the dispute is supposed to be of limited scope.[64] The courts are neither expected nor allowed to invalidate *all* awards which violate mandatory norms – rather, it is only when the seriousness of such violation rises to such level as to breach fundamental interests that the enforcement may be denied.

However, the level of court control - and the level of the "seriousness" of the breach which triggers a violation of EU public policy, is still unclear under the EU law.

Since the *Eco Swiss* decision opened the door for the "second look"-doctrine – that is, the permission of arbitrability on the assumption that court control can be exercised at a later stage, through public policy defense – two lines of thought have emerged. The minimalist doctrine, emerging from France, stated that the courts should decline enforcement of awards only where the violation of public policy is manifest; if arbitrators have already considered the matter of public policy compliance, the courts should give deference to their views. Conversely, the maximalist doctrine, originating in Belgium, holds that the courts should make a full-scale, independent inquiry into the violation of fundamental EU policies.[65]

The Court has not endorsed either one of these approaches to date. While different AG Opinions offered diverging views - ranging from the deference to arbitral

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[62] *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (n 39); *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] CJEU Case C-381/98; *Eco Swiss* (n 46).
[63] *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* (n 49); *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] CJEU Case C-415/11.
[64] G. Cordero-Moss, 6 Forholdet mellom ordre public, vernetingsavtaler og voldgiftsavtaler [2018] *Norsk ordre public som skranke for partsautonomi i internasjonale kontrakter* 120; U.K. von Tetzschner, 7 Arbitrability som alternativ skranke til ordre public [2018] *Norsk ordre public som skranke for partsautonomi i internasjonale kontrakter* 127.
[65] GA Bermann and G Cordero-Moss (n 42); G. Rühl, Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents? (2007) 15 *European Review of Private Law*.

tribunals, to a full review of the merits of the dispute, the CJEU has refused to explicitly address the issue.[66]

In the context of data protection disputes, the stance that *any* violation of mandatory norms of the GDPR should give rise to a denial of enforcement seems questionable. The CJEU has clearly stated that a compensation claim needs to be measured against the actual harm suffered - and that a mere nuisance experienced by a data subject does not suffice for establishing a valid compensation claim.[67] Invalidating an arbitral award, which, as an example, wrongly interprets the GDPR requirement of providing data subjects with contact details of a data protection officer, would serve little purpose: while the norm which was misapplied was mandatory, it is exceedingly unlikely to give rise to a successful compensation claim. Re-litigating the dispute would serve no purpose: the same conclusion would be likely reached, even if the mandatory norm was applied correctly.

Nor should the fact that an arbitral tribunal has applied non-EU tort law result in an automatic denial of recognition and enforcement. To the contrary, the choice of law rules contained in the Rome I Regulation, inapplicable as they might be, provide a useful guideline: application of foreign law to consumer disputes should not be excluded, as long as consumers are not deprived of protections granted by their national laws. Applying, for example, the laws of California to establish the level of compensation that a data subject can recover does not automatically mean that data subjects are deprived of protection. Such foreign laws can, in fact, contain favorable provisions - such as punitive damages, statutory damages, or rules on minimal amounts to be awarded. As far as such laws are equally or more protective than their EU national counterparts, the fact that they were applied should not be problematic.

Similarly, choosing a seat of arbitration in a third country does not suffice to hold an award to be against public policy. The seat of arbitration is, after all, not a geographic location, and does not refer to the place where actual hearings are held: it is simply a

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[66] GA Bermann and G Cordero-Moss (n 42); G Cordero-Moss, *International Commercial Contracts* (n 60); G Rühl (n 64).
[67] *UI v Österreichische Post AG* (n 31).

"legal domicile" of an arbitral proceeding.[68] The law of the seat of arbitration serves two key purposes: it defines "internal" aspects of arbitration (prescribing typically few mandatory rules, such as the requirement of equal treatment of parties); as well as arbitration's "external" relationship with the courts (for instance, conditions under which interim relief can be sought, or grounds for locally invalidating an arbitral award). Such laws are not harmonized within the EU: however, UNCITRAL Model Law, followed to a great extent around the world, sets some common standards. The mere fact that a foreign law governed certain procedural aspects of arbitration does not result in automatic deprivation of protections conferred by EU law: a foreign law can make it easier to obtain evidence, suspend arbitral proceedings, or annul an award.

The point is, therefore, that the EU Member States cannot simply decline to enforce an arbitral award simply because the GDPR is an element in a dispute, and the dispute involves the application of foreign laws. Instead, a careful, systematic, case-by-case analysis is called for: arbitral awards are only to be invalidated in cases where their enforcement would result in actual, concrete deprivation of the right to compensation, when compared against the backdrop of the applicable national law.

VII. Working around the New York Convention

So far, we have concluded that data protection disputes are arbitrable; that the EU law is not directly applicable to questions of enforcement of arbitration agreements due to the New York Convention conflict rules, and that EU public policy is only to be invoked when an arbitral award violates the fundamental essence of the right to compensation. This stems from the ground principles of the New York Convention: the arbitrators are to be trusted, the disputes are to be referred to arbitration, and the enforcement is to be denied only exceptionally.

Can EU Member State Courts, on a national level, take a more skeptical approach – putting arbitration agreements and awards under exceptional scrutiny – while still

[68] G Born, *International Commercial Arbitration* (n 44) §26.

allowing the disputes to be arbitrable? I do not see a way that this can be done – that is, without violating the New York Convention.

One potential approach would be to hold arbitration agreements as invalid, assuming that the disputes they are emerging from are unforeseeable at the time of the conclusion of the contract with a data subject – in our introductory example, when the app was used for the first time. Such an approach was taken by the CJEU in the CDC case,[69] where a jurisdiction clause, encompassing an unlawful competition tort claim, was deemed unenforceable under the Brussels I Regulation, seeing as it failed to result in sufficient foreseeability:

> "The purpose of [a jurisdiction clause] is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.
>
> In the light of that purpose, the referring court must, in particular, regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of its participation in an unlawful cartel.
>
> Given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction."[70]

Applying this approach to *arbitration* clauses strikes me as mistaken: as established earlier, the scope, validity, and *characterization* of a claim should be done in accordance with the law governing it, or, failing this, the law of the seat of arbitration.

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[69] *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (n 39).
[70] Ibid para 70-71

Another path through which the Member State courts may attempt to decline enforcement of an arbitration agreement is through extensive interpretation of the CJEU *Ingmar*[71] case. In this case, the Court dealt with issues of governing law in commercial agent contracts and the mandatory nature of certain directives. Ingmar GB Ltd, a UK-based commercial agent, represented Eaton Leonard Technologies Inc., a California-based company, in the European market. When Eaton Leonard ended the contract, Ingmar claimed compensation under UK law implementing the EU Commercial Agents Directive.[72] This dispute arose from the lack of such protection in the initial agreement, governed by the law of California.

In its decision, the CJEU underscored that the choice of law in international contracts could not derogate from mandatory provisions implemented by Member States in accordance with EU directives. The court grounded its ruling in the principles of loyalty and effectiveness, reinforcing the EU legal order's supremacy, holding that the protective provisions laid down in the Commercial Agents Directive were mandatory in nature. Thus, the Court held that they must be applied where the commercial agent carried on his activity in a Member State "although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country".[73]

Some national courts have used *Ingmar* ruling to invalidate arbitration and jurisdictional clauses, despite the fact that CJEU was silent on this issue. Of particular note is the (in)famous case in which a German court (OLG München) held that an arbitration agreement should be denied enforcement if there is a "likelihood" of non-application of EU law.[74] The court held that "the Californian courts and arbitral tribunals could reasonably come to the conclusion that the contract between the parties should be governed exclusively by Californian law", without substantiating its claims.

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[71] *Ingmar GB Ltd v Eaton Leonard Technologies Inc* (n 61).
[72] EU Directive 86/653/EEC on self-employed commercial agents
[73] *Ingmar* at 25
[74] G Rühl (n 64)., citing OLG München, 17 May 2006 – 7 U 1781/06

The decision has been criticized vocally. It failed to consider any empirical and factual evidence suggesting that arbitrators would render an invalid decision; it also failed to engage in an in-depth examination of Californian law which was selected in a choice of law clause.[75]

There are two principal reasons why such an approach would be very ill-advised in data protection disputes.

Firstly, it would clearly run against to the New York Convention. As seen above, Art. II does not allow for considerations of local public policy; the application of overriding mandatory rules cannot, and should not, be a way to override the conflict rules of the Convention and decline referring parties to arbitration.[76]Convoluting overriding mandatory norms with the public policy should not be done – even under the EU legal sources.

Ruhl explains that under German national law, the EU mandatory norms would regardless take precedence; with the New York Convention having the same status as federal laws, it would rank lower in the legal hierarchy than the EU *acquis*.[77] Still, rendering a decision in breach of the New York Convention is ill-advised: such a decision would likely encounter resistance in foreign fora, and, if taken to the extreme, could trigger broader state responsibility for treaty violation. Such concerns are valid in the EU context too; after all, under the Brussels I (Recast) Regulation, a decision on whether an arbitration agreement is void "should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of

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[75] Ibid. at 896

[76] M. Broberg and N. Fenger, The Law of Arbitration and EU Law – like Oil and Water? (2022) 7 *European Investment Law and Arbitration Review Online* 87; F. Ferretti, EU Internal Market Law and the Law of International Commercial Arbitration: Have the EU Chickens Come Home to Roost? (2020) 22 *Cambridge Yearbook of European Legal Studies* 133; K. Thorn and W. Grenz, 'The Effect of Overriding Mandatory Rules on the Arbitration Agreement', *The effect of overriding mandatory rules on the arbitration agreement* (Otto Schmidt/De Gruyter european law pub 2010) (https://www.degruyter.com/document/doi/10.1515/9783866539297.187/html) accessed 6 June 2023;; J. Kleinheisterkamp, Overriding mandatory norms in international arbitration (2018) 67 *International & Comparative Law Quarterly* 903; M. Ebers, Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata: From Océano to Asturcom [2010] *SSRN Electronic Journal* (http://www.ssrn.com/abstract=1709347) accessed 6 June 2023;.

[77] G Rühl (n 64) 900.

whether the court decided on this as a principal issue or as an incidental question". Disputes spanning multiple Member States,

Secondly, and importantly, it would be *unnecessary* to apply the rules of the GDPR as overriding mandatory norms. Nothing under the GDPR, as we have seen, precludes arbitrability of compensation claims. In addition to this, *Ingmar* dealt with the extraterritorial application of the Commercial Agents Directive. The GDPR already includes *its own* rules on extraterritoriality: by virtue of its Art. 3, it is clearly applicable to the processing of personal data carried out by a controller or a processor not established in the Union, on the condition that they offer goods and services to data subjects in the Union, or monitor their behavior. There is no need to murk these clear rules with a patchwork of improvised extraterritoriality dedicated to compensation claims alone.

Therefore, unless arbitrators are extended actual trust, and actual power to rule – with minimal judicial interference, reserved to public policy evaluations – only one drastic measure remains: to hold data-subject compensation claims non-arbitrable. This is, for reasons outlined above, both undesirable and inconsistent with the current CJEU case law.

VIII. Conclusion

Data protection disputes are difficult. Litigating cases in which a person is required to prove that they have suffered harm due to the unlawful processing of their personal data might be deeply traumatizing. The publicity of the proceedings, the long and costly process of appeals, and the uncertain process of enforcing a judgment against defendants established outside of the EU – can certainly create a "litigation chill".

Arbitration presents a viable alternative for dispute resolution in data protection cases. When – and if – conducted fairly, it provides distinct advantages including confidentiality, speed, cost-efficiency, and improved enforceability across borders.

However, arbitration isn't without its complications and potential drawbacks. Skeptics could advocate for these disputes to be deemed non-arbitrable, citing

concerns over private entities deciding on matters of public policy and fundamental rights.

Yet, this distrust is not always well-founded; and should certainly not be presumed in each case. As per the New York Convention's guiding principles, arbitrators *should be trusted* to preside over arbitrable disputes, and, barring extreme circumstances, their awards should be enforced. As such, EU Member State Courts should rely on the arbitrators' judgment, avoid invoking EU law to assess the arbitration agreement's validity when referring a dispute to arbitration and enforce any award that does not conflict with EU public policy – even if it violates a mandatory GDPR norm. The New York Convention calls for a case-by-case analysis; and this is what the courts must do.

If we take mistrust as our starting point, the only solution is to bar data protection compensation claims from being arbitrable. This would be ill-advised.

At present, there seems to be insufficient evidence to warrant barring arbitration in data protection disputes. There's no substantive proof to suggest a systemic misuse of arbitration, nor is there evidence indicating that arbitrators will outright dismiss EU data protection laws. Furthermore, there's no certainty that the application of foreign tort law to compensation claims will invariably lead to unfavourable outcomes.

This is an all-or-nothing approach, leaving no space for half-measures. The only way to uphold the NYC is to either hold the disputes non-arbitrable or to give arbitrators a chance to – arbitrate.