

Chapter I

The Arbitration Agreement and Arbitrability

Aman Lekhi/Pranay Lekhi

The Objective Non-arbitrability of Insolvency Related Disputes
An argument in International Public Policy

9783214043285

Austrian Yearbook on International Arbitration 2022

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The Objective Non-arbitrability of Insolvency Related Disputes

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Aman Lekhi*/Pranay Lekhi**

I. Introduction

It is trite to say that the COVID-19 pandemic has not only caused catastrophic consequences on individuals but also caused a marked decline in business activity. The World Bank has posited that as the temporary protection measures in support of businesses are removed around the world, an increase in insolvency filings will follow.¹⁾ As we move out of the pandemic, managing insolvency disputes is going to be fundamental to the global economic recovery. Arbitration is increasingly being viewed as a solution to dealing with complex insolvency disputes. Accordingly, it is essential to query, in the first instance, whether arbitration is an appropriate mechanism for resolving disputes involving insolvent parties or raising questions related to insolvency law.²⁾

Across jurisdictions, the courts retain limited powers of review over arbitral proceedings.³⁾ For this purpose, national laws impose restrictions on what matters may be subject to arbitration, which refers to the “arbitrability” of disputes. Questions of arbitrability may arise in two situations: first, when certain individuals are considered unable to submit their disputes because of their status or function, which is known as “subjective arbitrability”; and

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¹⁾ World Bank Group, *The Calm Before the Storm: Early Evidence on Business Insolvency Filings After the Onset of COVID-19*, 12 (February 25, 2021) available at <https://documents1.worldbank.org/curated/en/962221615273849133/pdf/The-Calm-Before-the-Storm-Early-Evidence-on-Business-Insolvency-Filings-After-the-Onset-of-COVID-19.pdf> (accessed September 5, 2021).

²⁾ Fernando Mantilla-Serrano, *International Arbitration and Insolvency Proceedings*, Arb Intl 52 (1996).

³⁾ DAVID SUTTON ET AL., RUSSELL ON ARBITRATION 4 (24th ed. 2015).

second, when the restrictions on arbitrability are based on the subject matter in issue, which is known as “objective arbitrability”.⁴⁾ The focus of this article would be on the latter.

There exists a general consensus across jurisdictions that the scope of objective non-arbitrability is determined by reference to international public policy.⁵⁾ The justification for the exclusion of certain kinds of disputes is based on the fact that it is inappropriate for private proceedings to rule on matters intrinsic to public policy or determine issues that have an effect *in rem* (that is, rights exercisable against the world at large).⁶⁾ It is for this reason that the two of the most influential works of the United Nations on international commercial arbitration: The New York Convention⁷⁾ and the UNCITRAL Model Law⁸⁾ are limited to disputes that are “capable of settlement by arbitration” (*i.e.* they exclude disputes that are non-arbitrable).⁹⁾

The question of arbitrability of insolvency disputes is not recent and has been analyzed by multiple authors and courts of various jurisdictions.¹⁰⁾ Consequently, it can be unequivocally stated that the so-called “core” insolvency disputes, such as those with respect to granting of winding up or liquidation orders and the appointment of administrators, are non-arbitrable.¹¹⁾ However, most disputes with an insolvent party are not related to these issues but about standard monetary claims against such a party and invariably arising out of

⁴⁾ EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 313 (1999).

⁵⁾ *Id.* at 330; UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 228–230 (2016 ed.); JULIAN DAVID & MATHEW LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 200 (2003); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 US 614, at 639 (holding that in determining arbitrability, national courts must subordinate arbitrability to the international policy favoring commercial arbitration).

⁶⁾ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 80 (3rd ed. 2021).

⁷⁾ The Convention for the Recognition and Enforcement of Foreign Arbitral Awards, June 1958 (New York Convention).

⁸⁾ UNCITRAL Model Law 1985 UN Doc A/40/17 (UNCITRAL Model Law).

⁹⁾ New York Convention, Arts II(1), V(2)(A); UNCITRAL Model Law, Arts 34(2) (b)(i), 36(1)(b)(i).

¹⁰⁾ *Fulham Football Club Ltd v Richards* [2011] EWCA Civ 855 (England & Wales); *Decision 5A_910/2019* (Switzerland); *Quicksilver Greater China Ltd v Quicksilver Glorious Sun JV Ltd and another* [2014] 4 HKLRD 759 (Hong Kong); *WDR Delaware Corporation v Hydrox Holdings Pty* [2016] FCA 1164 (Australia); *Tomolugen Holdings Limited v Silica Investors Ltd* [2015] SGCA 57 (Singapore); *Booz Allen & Hamilton v SBI Home Finance* (2011) 5 SCC 532 (India); VESNA LAZIC, INSOLVENCY PROCEEDINGS AND COMMERCIAL ARBITRATION 43 (1998); Robert von Mehren, *From Vynior's to Mitsubishi: The Future of Arbitration and Public Law*, 12 Brook J Intl L 583 (1986).

¹¹⁾ INSOL International, *Arbitration and Insolvency disputes: A question of arbitrability*, 13 (July 2020) available at https://assets.website-files.com/5eb121c76b6293391902330f/5f56fac6e7176bc3680ce8b6_14829_special-report-on-arbitration-29-jul-2020-final.pdf (accessed September 6, 2021).

contractual agreements (or “non-core” disputes).¹²⁾ Despite widespread literature on the subject, it remains unsettled whether the nature of such disputes that are undoubtedly arbitrable, changes by virtue of the insolvency of a party.

In this context, it has been previously suggested that there are no public policy considerations that would require insolvency related disputes to be rendered non-arbitrable.¹³⁾ This view follows the progress that international arbitration has made for it to be considered amenable to solving an ever increasing variety of disputes. While originally arbitration was limited to claims arising directly out of contractual obligations, now claims based on statutes have also become arbitrable.

Such a pro-arbitration stance in relation to insolvency related disputes has been adopted by many jurisdictions in a number of cases. In the United States of America, it has been previously held that the policy of favoring arbitration in international cases would outweigh the policy related to insolvency.¹⁴⁾ In Austria, the *Oberste Gerichtshof* has also held that, with limited exceptions, administrators are bound by arbitration agreements entered into by the insolvent party prior to insolvency proceedings.¹⁵⁾ Likewise, in England it has been recently held that insolvency related claims would be deemed non-arbitrable only in very rare instances as this would support “the clear policy of English law of upholding arbitration agreements”.¹⁶⁾ Further, the Supreme Court of India (where the insolvency regime is relatively recent) has accepted that subordinate rights, which derive from public actions such as insolvency proceedings, would be arbitrable.¹⁷⁾

From recent jurisprudence, there appears to be a trend favoring the use of arbitration in insolvency disputes by taking into account the facts of the case. The authors of this paper find merit in such an approach. In the first instance, it will be showcased that the underlying policies of insolvency frameworks and arbitration do appear incompatible. It would be highlighted that the commencement of insolvency proceedings changes the nature of the contractual relationship that existed between an entity subject to insolvency proceedings

¹²⁾ DAVID & LEW ET AL., *supra* note 5, at 206.

¹³⁾ Christoph Liebscher, *Insolvency and Arbitrability*, in ARBITRABILITY 178 (Mistelis & Brekoulakis eds., 2009).

¹⁴⁾ SONATRACH v Distrigas Corp 80 BR 606 (D Mass 1987), 610 (United States of America) (the issue for determination was with respect to the determination of damages arising out of a contract).

¹⁵⁾ OGH, Apr 17, 1996, docket no. 7 Ob 2097/96z in RdW 135 (1997) (Austria) (holding that in pre-insolvency arbitration agreements are admissible); Liebscher *supra* note 13, at 169.

¹⁶⁾ Riverrock Securities Limited v International Bank of St Petersburg (JSC) [2020] EWHC 2483 (Comm), at para. 87 (England & Wales) (the avoidance claims in the context of cross-border insolvency proceedings were deemed arbitrable).

¹⁷⁾ Vidya Drolia v Durga Trading Corporation (2021) 2 SCC 1, at para. 22 (India).

and their counterparties.¹⁸⁾ Consequently, the public policy goals of insolvency law are in stark contrast to that of arbitration.¹⁹⁾ The authors will note that in the background of such competing policies, the objectives of insolvency law may have paramountcy over those of arbitration.

However, the benefits of international arbitration in settling insolvency related disputes in certain cases cannot be discounted.²⁰⁾ Indeed there may be insolvency disputes that are of a purely *in personam* nature that involve a party subject to insolvency proceedings (for instance, the existence of a right to damages under a contract). Therefore, the authors would endorse the fact-sensitive approach where arbitrability of insolvency related disputes is determined on a case-by-case basis by the national courts of the party subject to insolvency proceedings.²¹⁾

As a word of caution, the term “insolvency proceedings” is broad and such proceedings may differ in each jurisdiction.²²⁾ References to “insolvency proceedings” in this article more generally refer to those proceedings that are collective judicial or administrative proceedings, pursuant to a domestic insolvency legal framework in which the assets of a corporate entity are administered or realized for the benefit of its creditors.²³⁾ Additionally, for the avoidance of doubt, references to “international arbitration” are restricted to international commercial arbitration alone.

Given the diverse (and often incompatible) opinions on the arbitrability of insolvency disputes, this is a problem which requires urgent resolution. Section II of this article will trace the general principles that are foundational in the transnational insolvency law framework. Subsequently, Section III will contrast these objectives with those of arbitration. For the purpose of predictability of treatment, it will be argued that insolvency related disputes may generally be treated as non-arbitrable. However, Section IV will support the current trend of courts attempting to balance the competing policy objectives of arbitration and insolvency law by determining arbitrability on a case-by-case basis. Finally, Section V will conclude the analysis by noting why such an approach would best serve the interests of the competing legal regimes, with an emphasis on the enforcement of arbitral awards.

¹⁸⁾ Elizabeth Warren, *Bankruptcy Policy*, 54 Univ of Chicago L Rev 775, at 785 (1987).

¹⁹⁾ Paul Kirgism, *Arbitration, Bankruptcy and Public Policy: A Contractarian Analysis*, 17 Am Bankr Inst L Rev 503, at 505 (2009).

²⁰⁾ Stephan Madaus, *The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings*, 37 J Int Arbitr 449, at 4476 (2020).

²¹⁾ See SIMON VORBURGER, *INTERNATIONAL ARBITRATION AND CROSS-BORDER INSOLVENCY: COMPARATIVE PERSPECTIVES* 115 (2014).

²²⁾ See, e.g., *Re Gatergroup Guarantee Ltd* [2021] EWHC 304 (Ch) (England & Wales) (the court determined that a “restructuring plan” introduced by the Corporate Insolvency and Governance Act 2020 is an insolvency proceeding).

²³⁾ UNCITRAL Model Law on Cross-Border Insolvency Law 1997, Art. 2(a).

II. The International Public Policy of Insolvency Law

The insolvency law framework is key to ensuring a State's economic stability and growth.²⁴⁾ In fact, even prior to the pandemic principles of insolvency law have been considered to be of fundamental importance to a State's growth.²⁵⁾ This criticality of insolvency laws has only become stronger as a consequence of COVID-19. It has been suggested, States undertaking insolvency focused measures during the pandemic assisted in enhancing business viability and, as States move into a post-pandemic world, the insolvency framework would be fundamental in facilitating the global recovery.²⁶⁾

The New York Convention expressly notes that a determination on the public policy is made by reference to the policy of the State where an award is to be enforced.²⁷⁾ However, as noted previously, in order to prevent a nebulous standard of determinations against the New York Convention's pro-enforcement standard, it is common to understand the reference to "public policy" as that to "international public policy".²⁸⁾

According to the International Law Association, the scope of "international public policy" of a State includes those principles, which, among other things, are designed to serve the essential economic interests of the State or *lois de police*.²⁹⁾ The importance of insolvency law as essential to international public policy is apparent from the uncontroversial point of non-arbitrability of core insolvency matters. Nevertheless, the analysis reflects that despite the differences between national insolvency regimes, there remain common grounds which reflect a consistent public policy foundation.

²⁴⁾ UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART ONE 10 (2005) (hereinafter, LEGISLATIVE GUIDE).

²⁵⁾ VORBURGER, *supra* note 21, at 220.

²⁶⁾ World Bank Group, *COVID-19 Outbreak: Implications on Corporate and Individual Insolvency* (April 13, 2020) available at <https://pubdocs.worldbank.org/en/912121588018942884/COVID-19-Outbreak-Implications-on-Corporate-and-Individual-Insolvency.pdf> (accessed September 7, 2021).

²⁷⁾ New York Convention, Art. V(2)(b).

²⁸⁾ HELENA HSI-CHIA CHEN, PREDICTABILITY OF 'PUBLIC POLICY' IN ARTICLE V OF THE NEW YORK CONVENTION UNDER MAINLAND CHINA'S JURIDICAL PRACTICE 17 (2017).

²⁹⁾ Pierre Mayer & Audley William Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 *Arb Int'l* 249, at 253 (2003).

A. Centralization of Proceedings

Foremost among the grounds of commonality is that most insolvency laws collate all proceedings against the debtor in one place and under the supervision of one court or public authority.³⁰⁾

The starker reflection of this centralizing tendency is seen with respect to the cross-border insolvency laws. As a consequence of the relevant *lex fori concurs* the debtor is able to avoid multiplicity of proceedings and promote centralized, coordinated and value-maximizing resolution of cross-border insolvency cases.³¹⁾

This approach is reflected in the UNCITRAL Model Law on Cross Border Insolvency, which provides that upon the commencement of “foreign main proceedings” at the debtor’s center of main interest, a court is entitled to refuse any relief that may interfere with the administration of such proceedings.³²⁾ The UNCITRAL Model Law on Cross-Border Insolvency has been adopted in 53 jurisdictions including the United Kingdom,³³⁾ United States of America,³⁴⁾ Australia³⁵⁾ and Singapore.³⁶⁾ Similarly the EU Insolvency Regulation (Recast) also provides a focus towards giving precedence to proceedings at the debtor’s center of main interests.³⁷⁾

The policy is equally reflected outside the context of the UNCITRAL Model Law and the EU Insolvency Regulation (Recast). For instance, in Austria, the insolvency framework recognizes foreign insolvency proceedings in respect of non-EU States and Denmark if such proceedings are comparable to Austrian insolvency proceedings and the debtor’s center of main interests is located abroad. India is also yet to adopt its draft provisions on cross-border insolvency that incorporate the UNCITRAL Model Law on Cross-Border Insolvency. Nevertheless, the National Company Law Appellate Tribunal (which is the appellate adjudicatory body for insolvency issues), has followed ruled that its preference is to coordinate cross-border insolvency proceedings.

Therefore, from the perspective of international public policy, the preference remains for the consolidation of insolvency disputes with an

³⁰⁾ VORBURGER, *supra* note 21, at 9.

³¹⁾ Irit Mevorach & Adrian Walters, *The Characterization of Pre-insolvency Proceedings in Private International Law*, 21 EBOR 855, at 868 (2020).

³²⁾ UNCITRAL Model Law on Cross-Border Insolvency 1997, Art. 19.4.

³³⁾ Cross-Border Insolvency Regulations 2006, SI 2006/1030 (United Kingdom).

³⁴⁾ Title 11 USC, Ch. 15 (United States of America).

³⁵⁾ Cross-Border Insolvency Act 2008 (Cth) (Australia).

³⁶⁾ Insolvency Restructuring and Dissolution Act 2018, s. 252 (Singapore).

³⁷⁾ Regulation (EU) 2015/848 [2015] OJ L141/19 (applying to proceedings commenced after June 26, 2017 and replacing the European Regulation on Insolvency Proceedings, Council Regulation (EC) No. 1346/2000 [2000] OJ L160/1.

optimum level of centralization and deference demanded from ancillary proceedings.³⁸⁾

B. Deprivation of Creditor's Right to Individual Action

Related to ground of centralization of proceedings is the concurrent loss of rights on the part of creditors to bring individual actions against a debtor subject to insolvency proceedings. Despite creditors being important beneficiaries of the insolvency framework, it is a fundamental principle of the insolvency framework to protect the collective and common interest from individual actions by creditors.³⁹⁾

One of the principal mechanisms to afford this protection is by virtue of a moratorium or stay. A stay of creditors' actions provides room to the relevant debtors and enables a thorough examination of its financial situation, which in turn would allow for the equitable treatment of creditors.⁴⁰⁾ Thus, the UNCITRAL Model Law on Cross-Border Insolvency provides for the stay on commencement or continuation of individual creditor action as a key consequence of recognition of "foreign main proceedings".⁴¹⁾ The EU Insolvency Regulation (Recast), among other things, also recognizes that a court may stay the opening of secondary insolvency proceedings.⁴²⁾

Similar protections are also available in the context of commencing domestic insolvency proceedings. In the English law, a debtor may receive protection from creditor action (except with respect to enforcement by financial creditors) at a pre-insolvency stage⁴³⁾ or a statutory moratorium preventing most third-party action against the debtor going into administration.⁴⁴⁾ In the United States of America, the filing of a Chapter 11 bankruptcy petition also triggers an automatic stay barring creditor action.⁴⁵⁾ Likewise, in India, the admission of an insolvency application triggers a moratorium period which

³⁸⁾ Irit Mevorach, *Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism*, 22 EBOR 283, at 287 (2021).

³⁹⁾ International Monetary Fund, *Orderly & Effective Insolvency Procedures* (1999) available at <https://www.imf.org/external/pubs/ft/orderly/> (accessed September 8, 2021).

⁴⁰⁾ LEGISLATIVE GUIDE, *supra* note 24, at 12.

⁴¹⁾ UNCITRAL Model Law on Cross-Border Insolvency 1997, Art. 20.1.

⁴²⁾ Regulation (EU) 2015/848 [2015] OJ L141/19, Art. 1(c).

⁴³⁾ Insolvency Act 1986, Pt. A1, s. A20 (England and Wales).

⁴⁴⁾ *Id.* at Sch. B1.

⁴⁵⁾ Title 11 USC, s. 362 (United States of America) (the automatic stay equally applies upon a recognition of a foreign insolvency proceeding under Chapter 15).

stays any pending actions in respect of the debt as well as bars creditors from initiating new actions.⁴⁶⁾

Another form of limitation on individual creditor action can be found by way of consolidation of creditor claims. In Austria, once insolvency proceedings are commenced, all creditors are required to have their claims processed through the insolvency court.⁴⁷⁾ If a creditor fails to file a claim, they will be unable to participate in the distribution of proceeds from the debtor's estate.⁴⁸⁾

Therefore, despite the variation in scope, it is common ground across insolvency law frameworks that individual creditors do not have an unbridled right to agitate their claims in respect of the debtor. On this basis, it is apparent that it is a core policy of the insolvency law to provide the debtor with space to organize its affairs and minimize the number of forums that may put stress on its fledgling assets. Conversely, if individual creditor action were permitted, it may not only affect the value of the debtor's estate but could also violate the principle of *pari passu* treatment of creditors.⁴⁹⁾

C. The Power to Avoid Certain Transactions

The principle of *pari passu* is said to be the most preponderant principle of insolvency laws around the world.⁵⁰⁾ It dictates that under insolvency law, similarly situated creditors must be treated proportionately to their claim with respect to the debtor's assets.⁵¹⁾ For instance, in English law, this principle is confirmed by statute.⁵²⁾ Further, the United Kingdom Supreme Court has unequivocally confirmed that the principle is one of public policy, which reflects that parties are unable to "contract out of insolvency legislation".⁵³⁾

However, the interpretation of the *pari passu* principle's applicability and scope is subject to debate. The *pari passu* principle in insolvency law is often seen in contradistinction to the provisions of priority of claims. It is common to provide priority rights to preferential creditors as against unsecured or non-privileged claims.⁵⁴⁾ In the United States of America, the Bank-

⁴⁶⁾ The Insolvency and Bankruptcy Code 2016, s. 101 (India).

⁴⁷⁾ Insolvenzordnung (IO) RGBl. Nr. 337/1914, s. 102.

⁴⁸⁾ Wolf Theiss, *Corporate Insolvency Proceedings: Austria*, in EUROPEAN CROSS-BORDER INSOLVENCY para. 3.003 (Marshall & Herrod eds., 2011).

⁴⁹⁾ LAZIC, *supra* note 10, at 38.

⁵⁰⁾ Andrew Keay & Peter Walton, *The Preferential Debts Regime in Liquidation Law: In Public Interest?* 3 C f i LR 84, at 85 (1999).

⁵¹⁾ LEGISLATIVE GUIDE, *supra* note 24, at 6.

⁵²⁾ Insolvency Act 1986, s. 107 (England & Wales).

⁵³⁾ *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, at para. 1 (United Kingdom).

⁵⁴⁾ LEGISLATIVE GUIDE, *supra* note 24, at 270.

ruptcy Code itself provides for circumstances when certain general creditors are given a special priority.⁵⁵⁾ Similar provisions are found in the Austrian legislation as well.⁵⁶⁾

While the debate with respect to the *pari passu* principle is beyond the scope of this article, it is important to note that deviations from the principle are based on social and political considerations and more often than not find clear expression in the legal regime.⁵⁷⁾ This implies that the deviations do not reduce the foundational importance of the *pari passu* principle in insolvency law that prevents the race among creditors.⁵⁸⁾

As a consequence of the *pari passu* principle, it is common for insolvency laws to provide insolvency administrators with the ability to avoid certain transactions. Under English law, if upon the application of an administrator or liquidator the court finds that a transaction giving preference to a person has taken place, it has broad discretion to annul such a transaction's effects.⁵⁹⁾ In the United States of America too, adversary proceedings may be initiated in order to avoid fraudulent transactions or such transactions that may benefit only certain creditors.⁶⁰⁾ Similar provisions for avoidance of preferential transactions are also found in the Indian insolvency framework.⁶¹⁾ In Austria, the relevant insolvency courts have the ability to declare restructuring proceedings null and void if *inter alia* it is found that they were a consequence of fraudulent actions or if preferential treatment was given to certain creditors (*Gläubigerbegünstigung*).⁶²⁾

It has been determined that most jurisdictions provide mechanisms to challenge even valid transactions following the commencement of insolvency proceedings.⁶³⁾ As such, transaction avoidance is an important policy tool for the insolvency law framework to be able to preserve the debtor's assets.

D. Limitation on the Right to Dispose and Manage

Finally, insolvency law frameworks do not only put limitations on creditors' actions but the commencement of insolvency proceedings also alters the rights of debtors or insolvency administrators to dispose of and manage the relevant

⁵⁵⁾ Title 11 USC, s. 507(a) (United States of America).

⁵⁶⁾ Insolvenzordnung (IO) RGBl. Nr. 337/1914, s. 48.

⁵⁷⁾ LEGISLATIVE GUIDE, *supra* note 24, at 271.

⁵⁸⁾ IAN FLETCHER, *THE LAW OF INSOLVENCY 2* (2002).

⁵⁹⁾ Insolvency Act 1986, s. 241 (England and Wales).

⁶⁰⁾ Title 11 USC, ss. 547–548 (United States of America).

⁶¹⁾ The Insolvency and Bankruptcy Code 2016, s. 43 (India).

⁶²⁾ Insolvenzordnung (IO) RGBl. Nr. 337/1914, s. 158 (Austria).

⁶³⁾ Aurelio Gurrea-Martínez, *The Avoidance of Pre-Bankruptcy Transactions: An Economic and Comparative Approach* (2017) available at https://www.iiglobal.org/sites/default/files/media/AGM%202017.%20The%20Avoidance%20of%20Pre-Bankruptcy%20Transactions.%20Final_0.pdf (accessed September 8, 2021).

estate.⁶⁴⁾ These restrictions are placed in relation to the property in the insolvency estate, and in order to ensure that the “common pool” of assets is not affected during the course of the insolvency proceedings.

In cases where the debtor is dispossessed of its property, the consequence is that they lack the authority to effectively perform legal acts concerning the property of the estate.⁶⁵⁾ Therefore, after the commencement of such insolvency proceedings, the debtor’s capacity with respect to performance of acts on behalf of the estate is limited.⁶⁶⁾ These limitations find legislative expression in a number of jurisdictions, including under English law,⁶⁷⁾ Austria⁶⁸⁾ and the United States of America.⁶⁹⁾ In these circumstances, control is transferred to a court-appointed insolvency administrator. Nevertheless, similar provisions are also found with respect to proceedings where the debtor may remain in possession of the property.⁷⁰⁾

Therefore, the limitation on the debtor’s (or, indeed, the trustee’s) right to dispose assets, clearly reflects the underlying policy of insolvency law in ensuring collectivization of resources.

On the basis of the aforementioned grounds, it is apparent that the common policy for insolvency laws across jurisdictions is to achieve one of two goals: (1) the rescue and rehabilitation of a corporate entities; or (2) the maximization of value and preservation of the estate for distribution to the creditors.⁷¹⁾

While the scope and means to achieve these goals differs in each jurisdiction, salient policy grounds are visible in each case. In this respect, the most influential theory on the purpose of insolvency laws is the Creditors’ Bargain Theory.⁷²⁾ This theory views insolvency as a “common pool” problem and notes that a solution to this problem can only be found on the basis of a collective procedure to avoid a situation where it would be a virtual free-for-all for the creditors of a distressed entity.⁷³⁾ If this were not the case, an uncoordinated

⁶⁴⁾ VORBURGER, *supra* note 21, at 9.

⁶⁵⁾ LAZIC, *supra* note 10, at 36.

⁶⁶⁾ *Id.*

⁶⁷⁾ Insolvency Act 1986, s. 127 (England and Wales).

⁶⁸⁾ Insolvenzordnung (IO) RGBl. Nr. 337/1914, s. 2 (Austria)

⁶⁹⁾ Title 11 USC, Ch. 7 (United States of America).

⁷⁰⁾ See, e.g., Insolvency Act 1986, s. 270 (England and Wales) Title 11 USC, Ch. 11 (United States of America).

⁷¹⁾ UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART FOUR: DIRECTORS’ OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY (INCLUDING IN ENTERPRISE GROUPS) 5 (2020).

⁷²⁾ Douglas Baird & Thomas Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U Chic Law Rev 97 (1984).

⁷³⁾ Rolof de Weij, *Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons*, Amsterdam Law School Legal Studies Research Paper No. 2011-44, at 3 (2011).

and individualistic attempt to distribute limited assets would make economic rehabilitation of corporates more difficult.⁷⁴⁾

Therefore, it is fundamental for the purpose of insolvency law that the debtor's individual contractual relationships are transformed to serve the purpose of rescue or maximization. As a common policy, insolvency law frameworks provide for non-adversarial proceedings, grounded, among other things, on the principle of modified universalism. Each of these accept that the most efficient resolution of the insolvency process may ideally occur when a single court is managing the insolvency.⁷⁵⁾ It is for this reason, as explained below, that the international public policy goals of insolvency law are substantively incompatible with the purpose of arbitration.

III. Competing Policy Goals – the Trump of Insolvency Law Utilitarianism

International arbitration has fundamentally opposite policy goals to insolvency law. As the Singapore Court of Appeal has noted:

“On the one hand, arbitration embodies the principles of party autonomy and the decentralization of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralization of disputes so as to achieve economic efficiency and optimal returns for creditors.”⁷⁶⁾

International arbitration has as its fundamental objective, the ability to allow for contractual forum selection to resolve disputes.⁷⁷⁾ In essence, parties choose the forum most favorable to their interests and to avoid the court process. A corollary of this is the reduction of court supervision (which is considered a hallmark of the arbitral process).⁷⁸⁾

In light of the discussion above, it is not difficult to see how this fundamental objective of international arbitration is opposed to the international public policy of insolvency law. Following a declaration of insolvency, insolvency frameworks have as a lynchpin the continued supervision of courts or court appointed practitioners. In the United States of America, the Chapter 11 framework relies heavily on the court to prevent dissenting creditors from holding

⁷⁴⁾ Jodie Krishner, *Design Flaws in the Bankruptcy Regime: Lessons from the UK for Preventing a Resurgent Creditors' Race in the US*, 17 J Bus L 527, at 533 (2015).

⁷⁵⁾ Paul Omar, *The Landscape of International Insolvency Law*, 11 Int Insolv Rev 173, 180 (2002).

⁷⁶⁾ *Larsen Oil v Petropod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21 (Singapore) (the case related to the appellant applying for a stay of proceedings to allow for the relevant parties to resolve their disputes by arbitration, this was dismissed by the court).

⁷⁷⁾ BORN, *supra* note 6, at 68.

⁷⁸⁾ SUTTON et al., *supra* note 3.

out, avoid multiplicity of proceedings and facilitate new financing.⁷⁹⁾ Similarly, under English law, the courts are given a central role to ensure creditor protection in the context of a debt restructuring.⁸⁰⁾ Likewise, in Austria, the *Oberste Gerichtshof* has ruled that following the commencement of insolvency proceedings, the insolvency court has exclusive jurisdiction over the claim verification procedure.⁸¹⁾

From another perspective, the conflict between arbitration and insolvency law is manifested by the rules concerning the stay of proceedings under insolvency frameworks. The European Court of Justice ruled that “it follows from the principles common to the procedural laws of the Member States [...] that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of an insolvency proceeding”.⁸²⁾ The extension of the automatic stay to arbitration upon the commencement of insolvency proceedings has been specifically recognized in multiple jurisdictions, including Austria.⁸³⁾

Under English law, when an insolvency process is ongoing, and an arbitration is commenced, the automatic moratorium prevents an arbitration from proceeding without the leave of the relevant court.⁸⁴⁾ This follows the approach in the UNCITRAL Model Law on Cross-Border Insolvency, which aims to prevent unsecured creditors from receiving an advantage over other creditors that are a part of the collective insolvency process.⁸⁵⁾ Even in India, the Supreme Court has determined that arbitration or related proceedings would be considered *non-est* following the commencement of an insolvency process.⁸⁶⁾ These rules reflect a preference towards insolvency frameworks to prevent the diminution of assets of the debtor and provide the entity with sufficient time to prepare for any proceedings, over the possibility of flexibility of bringing individual and independent claims.⁸⁷⁾

⁷⁹⁾ See Title 11 USC, s. 364(d) (United States of America); Jennifer Payne, *The Role of the Court in Debt Restructuring*, 77 Camb Law J 124 (2018).

⁸⁰⁾ Companies Act 2006, Pt 26 (United Kingdom).

⁸¹⁾ OGH, Apr 17, 2018, docket no. 18 ONc 2/18s (Austria) (The court did hold that in cases where a claim is pending prior to the commencement of insolvency proceedings, the arbitration process may be used on the basis of the equivalence of forum selection clauses).

⁸²⁾ *Commission v AMI Semiconductor Belgium (BVBA)*, Court of Justice of the European Union, Mar 17, 2015, C-294/02, at para. 69.

⁸³⁾ OGH, Mar 17, 2015, docket no. 18 ONc 2/14y (Austria).

⁸⁴⁾ See Insolvency Act 1986, s. 130(2) (England and Wales).

⁸⁵⁾ LEGISLATIVE GUIDE, *supra* note 24, at 344.

⁸⁶⁾ *Alchemist Asset Reconstruction Company Ltd v. Hotel Gaudayan Pvt Ltd*. AIR 2017 SC 5124 (India).

⁸⁷⁾ VORBURGER, *supra* note 21, at 191.

Further, as international arbitration is a purely contractual phenomenon, in principle, it has no relation to a specific territory.⁸⁸⁾ This implies that there may be instances where the automatic stay of arbitral proceedings would be inapplicable in cases where the arbitration takes place in a jurisdiction that does not recognize the moratorium upon the commencement of insolvency proceedings.⁸⁹⁾ Consequently, international arbitration indeed has the ability to undermine a collective, fair and organized insolvency process. Unsurprisingly, in *Re United States Lines Inc* it was held that the policies of the two frameworks are principally incompatible as “bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution”.⁹⁰⁾

Additionally, while the existence of international arbitration is based entirely on a consensual determination by the parties,⁹¹⁾ one of the roles of insolvency law is to alter precisely those contractual relationships. For instance, with respect to the “anti-deprivation” rule under common law, contracts that provide for the transfer of a debtor’s assets upon insolvency are invalidated.⁹²⁾ This principle follows from the common purpose of insolvency law to ensure that the property of an insolvent entity is administered for the maximum benefit of its creditors. It has been suggested that such an “anti-deprivation” rule is justified on the basis of promoting the principle of *pari passu* asset distribution.⁹³⁾

Similarly, a number of jurisdictions incorporate rules that invalidate “*ipso facto*” clauses. “*Ipso facto*” clauses are provisions in contractual agreements that allow a counterparty to terminate the contract on the occurrence of an event such as insolvency.⁹⁴⁾ In the United States of America, upon the commencement of insolvency proceedings, the Bankruptcy Code invalidates all contractual provisions that modify or terminate executory contracts⁹⁵⁾ as well as any such clauses that have the effect of transferring the debtor’s assets to other parties.⁹⁶⁾ The European Union Restructuring and Insolvency Directive

⁸⁸⁾ Paolo Vitale, *The Stay of International Arbitration in International Insolvency Law and the Problem of Public Policy*, INSOL World – Second Quarter 2021, at 16.

⁸⁹⁾ LEGISLATIVE GUIDE, *supra* note 24, at 344.

⁹⁰⁾ *In Re United States Lines Inc*, 197 F.3d 631 (2d Cir. 1999) (United States of America) (held that a proceeding is a “core” proceeding as the relevant contracts were essential to the debtor’s estate).

⁹¹⁾ NIGEL BLACKABY ET AL., REDFURN AND HUNTER ON INTERNATIONAL ARBITRATION, para. 1.08 (2015).

⁹²⁾ *Perpetual Trustee Co. Ltd. v BNY Corporate Trustees Trustee Services* [2010] 3 W.L.R. 87 (United Kingdom).

⁹³⁾ Roy Goode, *Principles of Corporate Insolvency Law*, 186 (2005).

⁹⁴⁾ *In Re S. Pac. Funding Corp.*, 268 F.3d 712, 715 (9th Cir. 2001) (United States of America).

⁹⁵⁾ Title 11 USC, s. 365(c) (United States of America).

⁹⁶⁾ Title 11 USC, s. 541(c) (United States of America).

also extends a similar prohibition on the enforcement of “*ipso facto*” clauses.⁹⁷⁾ Last year, the United Kingdom also introduced the Corporate Insolvency and Governance Act, which also included that any provision that allows for the termination of a contract for *inter alia* the supply of goods and services would cease to apply once the counterparty enters into an insolvency procedure.⁹⁸⁾

In this respect, the provisions in insolvency law to avoid transactions also becomes relevant. Insolvency frameworks provide the ability to insolvency administrators to select those contracts that may be beneficial for the estate and reject others which would be onerous.⁹⁹⁾ Similar to the objectives above, insolvency law recognizes that relationships, which may otherwise appear to be only *inter partes*, assume a different form upon the commencement of insolvency proceedings. Following such commencement, the central objective of insolvency law goes beyond the pale of respecting contractual relationships.¹⁰⁰⁾

On this basis, the Supreme Court of India has alluded to the ability of insolvency law to transform proceedings that may otherwise be considered *in personam* into those that are *in rem*.¹⁰¹⁾ Illustratively, following insolvency proceedings, contractual agreements between the debtor and its supplier assume a greater purpose to ensure the maximum return not for the counterparty but for the debtor’s creditors. Therefore, the role of creditor priority reflects the first instance of the utilitarian policy of insolvency frameworks. This allows for the establishment of an efficient redressal mechanism for creditor claims, while simultaneously prohibiting any individual creditor to be treated favorably.¹⁰²⁾ Even with respect to the goal of rehabilitation of the debtors, the utilitarian goal is difficult to miss. Rehabilitative insolvency proceedings are not based on the protection of an individual debtor, but are, as Margaret Howard explains, to ensure that the economic impact of a prospective insolvency is reduced on the society as a whole.¹⁰³⁾ Whatever one’s opinion on the utilitarian theory of justice, these goals of insolvency law ensure that the

⁹⁷⁾ Directive (EU) 2019/1023, O.J.L172/18, Art. 7.

⁹⁸⁾ Corporate Insolvency and Governance Act 2020, ss. 233A, 233B (United Kingdom); Lorna Hotton & Jasmine Norris, *UK Corporate Insolvency and Governance Act: effects on ipso facto clauses*, 8 JIBFL 550 (2020).

⁹⁹⁾ Michael Andrew, *Executory Contracts in Bankruptcy: Understanding ‘Rejection’*, 59 U Colo L Rev. 845, 895 (1988).

¹⁰⁰⁾ Andrew Keay, *The Avoidance of Pre-liquidation Transactions; An Anglo-Australian Comparison*, JBL. 515, 519 (1998).

¹⁰¹⁾ *Pioneer Urban Land and Infrastructure v Union of India*, 2019 SCCOnline SC 1005, at para. 39 (India) (in a real estate matter, the court determined that a home buyer who prefers an insolvency process should not expect immediate recovery of principal due to the nature of the process).

¹⁰²⁾ Barry Adler, *Bankruptcy Primitives*, 12 Am Bankruptcy Inst Law Rev 219, 233 (2004).

¹⁰³⁾ Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio State Law J 1047, 1088 (1987).

collective good is prioritized over individual action. This is in stark contrast to the preference for individualism in arbitration procedures.¹⁰⁴⁾

Accordingly the prioritization of insolvency related disputes over the arbitration would also not be contrary to the New York Convention as the limitations of the process of arbitration are well recognized.¹⁰⁵⁾ The notion of objective arbitrability under Articles II(1) and V(2)(a) of the New York Convention shows that the arbitration process is not amenable to certain kinds of disputes. Significantly, the New York Convention departed from the approach of the 1924 Geneva Protocol, to establish that both commercial and other types of disputes may be considered non-arbitrable, depending on the categorization of the relevant subject-matter by States.¹⁰⁶⁾

The purpose of limiting the use of arbitration in certain kinds of disputes rests on the conclusion that the special role of an arbitrator is to effectuate the intent of the parties rather than the requirements of enacted legislation.¹⁰⁷⁾ Therefore, disputes that relate to rights *in rem* are generally considered non-arbitrable.¹⁰⁸⁾ As noted above, in the case of insolvency laws, it is unquestionable that when issues concern “core” insolvency disputes, they remain non-arbitrable due to their impact on the rights of third-parties and a public policy requirement in favor of such disputes being governed by courts. The purpose of such proceedings is not the settlement of disputes but for the collective execution or reorganization of the debtor.¹⁰⁹⁾

However, it would be simplistic to delineate only certain kinds of insolvency related disputes as “core” on this basis, as it is undoubtedly the purpose of the insolvency framework in general to achieve the goal of maximizing the collective good. The initiation of proceedings shifts the focus from individual contracts, to the preservation of value for the society at large. It is, therefore, unsurprising that no jurisdiction has been able to provide a definitive list of what are “core” insolvency disputes.¹¹⁰⁾ In order to give effect to the fundamentally important public policy objectives of insolvency laws and arbitration, there may be merit in claiming that insolvency related disputes should necessarily be considered non-arbitrable as a rule. This would ensure predictability of treatment of insolvency related claims. However, the fundamental question that remains is how best to determine the exceptions to this rule to ensure that the advantages of alternative proceedings that may facilitate insolvency proceedings, are not lost.

¹⁰⁴⁾ James Gire & D. W. Carment, *Dealing with Disputes: The Influence of Individualism-Collectivism*, 133 J Soc Psychol 81 (1993).

¹⁰⁵⁾ LEGISLATIVE GUIDE, *supra* note 24, at 344.

¹⁰⁶⁾ BORN, *supra* note 6, at 1031.

¹⁰⁷⁾ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), at 58 (United States of America).

¹⁰⁸⁾ LORD MUSTILL & STEWART BOYD, *COMMERCIAL ARBITRATION* 73 (2001).

¹⁰⁹⁾ DAVID & LEW ET AL., *supra* note 5, at 206.

¹¹⁰⁾ LAZIC, *supra* note 10, at 156.

IV. Determining the Scope of Non-arbitrability – A Solution in Modified Universalism

The need for the centralization of disputes on the commencement of insolvency proceedings arises from the creation of additional, and often self-contained, disputes against the debtor. Insolvency frameworks are at a cross-roads where it is suggested that all elements of the legal system meet.¹¹¹⁾ As a consequence, disputes that arise may be diverse and range from those involving rights *in rem* (such as those concerning priority of creditors) as well as private claims (such as those agitated in pre-existing disputes with the insolvent debtor).¹¹²⁾ Therefore, the efficient redressal of such claims is equally essential in ensuring that the insolvent estate is not brought under stress and the benefit of the insolvency framework is maximized.

As noted by Stephen Madaus, in recent history courts have confronted complex insolvency proceedings, where alternative dispute resolution proceedings have been able to assist in the efficient resolution of such claims.¹¹³⁾ Similarly, insolvency courts, especially in the United States of America, have been willing to provide for arbitration to solve certain kinds of insolvency disputes as well.¹¹⁴⁾

These decisions can be reconciled with the overall purpose of insolvency law by reference to the concept of “modified universalism”. While scholars generally recognize that a “one forum, one law” approach would be ideally suited to resolve insolvency disputes,¹¹⁵⁾ there is a pragmatic recognition that multiple jurisdictions should “cooperate to achieve a result as close to the ideal as circumstances and existing domestic law permit”.¹¹⁶⁾ As such, the notion of “modified universalism” encompasses the existence of separate proceedings in different jurisdictions until such time as these separate proceedings are more convenient and in aid of the primary insolvency action.¹¹⁷⁾

The norm of “modified universalism” grounds both the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation

¹¹¹⁾ PAUL DIDIER, THE PROBLEMS SURROUNDING THE LAW OF INTERNATIONAL INSOLVENCY (1989).

¹¹²⁾ LAZIC, *supra* note 10, at 11.

¹¹³⁾ Madaus, *The (Underdeveloped) Use of Arbitration*, *supra* note 20, at 450.

¹¹⁴⁾ *In Re Nortel Networks Inc.*, 737 F.3d 265 (3d Cir 2013) (United States of America).

¹¹⁵⁾ John Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 Brook J Corp Fin & Com L 202, 202 (2014).

¹¹⁶⁾ Jay Westbrook, *A Global Solution to Multinational Default*, 98 Mich L Rev 2276, at 2301 (2000).

¹¹⁷⁾ Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, 32 Ox J Leg Stud 325, 327 (2012).

(Recast).¹¹⁸⁾ The UNCITRAL Model Law on Cross-Border Insolvency recommends that concurrent proceedings may be initiated in another State after the commencement of “foreign main proceedings” with respect to the assets in the other State, and for the purpose of cooperation with the jurisdiction in which the “main” proceedings are initiated.¹¹⁹⁾ Similarly, the EU Insolvency Regulation (Recast)¹²⁰⁾ has as its objective the establishment of common rules on cross-border insolvency proceedings, based on principles of mutual recognition and co-operation.¹²¹⁾

Thus, current insolvency frameworks recognize that debtors may be subject to separate proceedings.¹²²⁾ However, “ancillary” or “secondary” proceedings are intended to promote procedural convenience and cost efficiency, which would preserve the integrity of debtors as well as protect the substantive rights of the claimants.¹²³⁾ Accordingly, in the absence of an “ideal” single court, a dominant “home” court is created, to which other proceedings will defer to for the purpose of facilitating the goals of centralization of disputes and administration of creditor claims.¹²⁴⁾

The concept of “modified universalism” provides us with the scope of when alternative forms of dispute resolution, including arbitration, may be used in the case of insolvency related disputes. Therefore, arbitration proceedings may be used for efficient dispute resolution of insolvency related disputes, especially in cases of international insolvencies.¹²⁵⁾

Therefore, a determination on when arbitration may be initiated can fall either within the jurisdiction of the arbitral tribunals or that of national courts. Following the doctrine of competence-competence, international tribunals have the power to consider and decide disputes concerning their own jurisdiction.¹²⁶⁾ However, despite the virtual uniformity in the doctrine’s recognition, there is unusual diversity and uncertainty regarding its application.¹²⁷⁾ Accordingly, the authors are of the opinion that such a determination should be made by a relevant insolvency court, where “main” insolvency proceedings have been initiated. This approach follows the trend of a fact-sensitive

¹¹⁸⁾ Mevorach & Walters, *The Characterization of Pre-insolvency Proceedings*, *supra* note 31, at 868.

¹¹⁹⁾ *Id.* at Art. 28.

¹²⁰⁾ Regulation (EU) 2015/848 [2015] OJ L141/19 (applying to proceedings commenced after June 26, 2017 and replacing the European Regulation on Insolvency Proceedings, Council Regulation (EC) No. 1346/2000 [2000] OJ L160/1).

¹²¹⁾ Regulation (EU) 2015/848 [2015] OJ L141/19, Recital 23.

¹²²⁾ LEGISLATIVE GUIDE, *supra* note 24, at 41.

¹²³⁾ UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW: PART THREE 27 (2012).

¹²⁴⁾ Jay Westbrook, *National Regulation of Multinational Default*, in Economic Law and Justice in Times of Globalisation 778–779 (Monti et al. eds., 2007).

¹²⁵⁾ Madaus, *The (Underdeveloped) Use of Arbitration*, *supra* note 20, at 476.

¹²⁶⁾ BORN, *supra* note 6, at 1141.

¹²⁷⁾ WILLIAM PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 232 (2012).

enquiry of the viability of arbitration in insolvency related claims that would, in turn, resolve multiple underlying issues of non-arbitrability of insolvency disputes.¹²⁸⁾

First, it would remove the arbitrary distinction between “core” and “non-core” insolvency issues. Since the peculiarities of insolvency law disbar the possibility of effectively addressing every circumstance that may arise, in the United States of America, the Court of Appeal in the Second Circuit has stressed the importance of determining the type of dispute in question for the purpose of arbitrability, by noting:

“Certainly not all core bankruptcy proceedings are premised on provisions of the [Bankruptcy] Code that inherently conflict with the Federal Arbitration Act; [...] In exercising its discretion over whether, in core proceedings, arbitration provisions ought to be denied effect, the bankruptcy court must still carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause.”¹²⁹⁾

Second, such a reading of the scope of arbitrability would further the pro-arbitration stance taken by courts of multiple jurisdictions. Under English law, the case of *Fulham Football Club (1987) v Richards* endorsed a fact sensitive approach noting that “jurisdictional limitations on what arbitration can achieve are not decisive of the question whether the subject matter of the dispute is arbitrable”.¹³⁰⁾ Similarly, the Singapore Court of Appeal also favored a determination on the nature of the underlying dispute to “strike a balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognizing that there are jurisdictional limitations on the powers that are conferred to an arbitral tribunal”.¹³¹⁾

The determination of arbitrability on a case-by-case basis also understands that there may be certain disputes where arbitration may serve as an equivalent forum to courts, without adversely impacting the insolvency process. In Austria, the courts have determined that if a creditor claim is disputed, the verification procedure (*Prüfungsverfahren*) may be conducted by an arbitral tribunal under certain circumstances.¹³²⁾ In a recent judgment, the Indian Supreme Court has also recognized that creditors cannot initiate an insolvency resolution process till such time as the underlying claim attains finality from

¹²⁸⁾ George Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YJIL 37, 38 (2012).

¹²⁹⁾ *United States Lines*, *supra* note 90, at paras. 14–15.

¹³⁰⁾ *Fulham Football Club Ltd*, *supra* note 10, at para. 84.

¹³¹⁾ *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] 1 SLR 373, para. 103 (Singapore).

¹³²⁾ OGH, Apr 17, 2018, docket no. 18 ONc 2/18s (Austria).

using an arbitral process, as the rights do not become *in rem* till a default is conclusively determined.¹³³⁾

Finally, a fact sensitive approach taken by a relevant insolvency court would also further the “public policy” of the insolvency framework. The primary benefit of using international arbitration rests on its ability to render enforceable awards by virtue of the New York Convention.¹³⁴⁾ As noted above, Article V(2)(b) of the New York Convention limits the enforceability of awards in case they are “contrary to public policy”. However, a generally accepted definition of a violation of public policy has not been found.¹³⁵⁾ There is, however, no question about the insolvency frameworks providing the backbone of a State’s economic framework. The task to distinguish arbitrable from non-arbitrable disputes should not be left to the nebulous concept of “public policy” alone.¹³⁶⁾ In case the courts of a jurisdiction where a debtor is subject to insolvency proceedings, determines on the facts of a particular dispute that it is amenable to arbitration, it would ensure that any award that may come out of the arbitral proceeding would be robust and not be subject to challenge on enforcement on the nebulous ground.

Further, it is the legal and ethical obligation of any arbitrator to use reasonable efforts to issue an enforceable award.¹³⁷⁾ In furtherance of this duty, an arbitrator is not expected to engage in guesswork or adopt strategic decisions.¹³⁸⁾ Thus, a determination by the court of confirming the arbitrability of the dispute would equally facilitate the duties of arbitrators. Taken together, the process would enhance coordination between multiple proceedings, which would facilitate the principle of “modified universalism”.

In this context, international arbitration would be used following a fact sensitive determination by analyzing the nature of the underlying dispute. In cases of multifaceted insolvency disputes, arbitration could undoubtedly be used in cases such as those involving complicated financial instruments¹³⁹⁾ and

¹³³⁾ *Indus Biotech Pvt Ltd v Kotak India Venture (Offshore) Fund*, Arbitration Petition (Civ) No 48/2019 (March 26, 2021) (India) (the case related to redeemable preference shares, and there was a dispute with respect to the formula to be applied for conversion, which the court determined was suitable for arbitration).

¹³⁴⁾ MARIKE PAULSSON, THE 1958 NEW YORK CONVENTION IN ACTION 97 (2016).

¹³⁵⁾ Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy*, *supra* note 29, at 252.

¹³⁶⁾ Madaus, *The (Underdeveloped) Use of Arbitration*, *supra* note 20, at 458.

¹³⁷⁾ Anibal Sabater & Lidia Rezende, *An Arbitrator’s Obligation to Use Reasonable Efforts to Issue an Enforceable Award and Its Interaction with the New York Convention*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 20 (Gomez & Lopez-Rodriguez eds., 2019).

¹³⁸⁾ *Id.* at 31.

¹³⁹⁾ Edna Sussmann & Jennifer Gorski, *Capturing the Benefits of Arbitration for Cross Border Insolvency Disputes*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 167–168 (Rovine ed., 2013).

to facilitate out-of-court settlements.¹⁴⁰⁾ Conversely, a fact-sensitive determination would provide further certainty to the process of arbitration and ensure that the advantages of enforcement are retained.

V. Conclusion

The policies of insolvency laws and international law are in a “conflict of near polar extremes”¹⁴¹⁾ While insolvency law attacks the very nature of contractual relationships and individual claims, international arbitration seeks to facilitate them. It is, therefore, unsurprising that commentators continue to grapple with the question of arbitrability of insolvency related disputes.¹⁴²⁾

With the growing possibility of insolvency related disputes burgeoning following the pandemic, their efficient resolution has assumed greater importance. Insolvency laws, across jurisdictions, demonstrate a common international policy to ensure either the effective rehabilitation of the debtor or the maximization of value for distribution to creditors. In this context, the centralization of disputes is integral to the achievement of these goals. Consequently, the commencement of insolvency proceedings converts rights that would otherwise be considered *in personam* into those that are *in rem*.

There is merit in the claim that international arbitration may facilitate the proliferation of disputes and forums. The framework concerning international arbitration itself recognizes the limitation of the process in settling every kind of dispute. It is for this reason that the New York Convention circumscribes the scope of disputes that may be resolved by arbitration, and specifically includes that awards contrary to the public policy of a State would be unenforceable. Thus, a priority is given to insolvency proceedings, which is reflected, among other things, by the stay of arbitration proceedings. Therefore, to ensure that there is certainty in efficient treatment of insolvency disputes, it could, in the first instance, be suggested that the incompatibility of the two frameworks renders insolvency related disputes objectively non-arbitrable.

However, with the rise in increasingly complex multi-jurisdictional insolvency cases,¹⁴³⁾ the use of alternative proceedings may facilitate the utilitarian goals of insolvency laws. Accordingly, the concept of “modified universalism” provides us with the scope of when certain insolvency related disputes may be subject to arbitration. This would require a fact-sensitive

¹⁴⁰⁾ Alan Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 Am Bankr L J 201, 229 (2012).

¹⁴¹⁾ Lexa Hilliard, *International Arbitration and Insolvency: ‘A Conflict of Near Polar Extremes’*, 14 Int Corp Rescue 83 (2017).

¹⁴²⁾ See Klaus Sachs, *Insolvency Proceedings in International Arbitration*, 1 Collected Courses Intl Acad Arb L 1 (2011).

¹⁴³⁾ See, e.g., *In Re Nortel Networks Inc.*, 737 F.3d 265 (3d Cir 2013) (United States of America).

approach by relevant insolvency courts to balance the “conflict of polar extremes”.

It is evident that in most jurisdictions the “major battles between the courts and arbitration have already been fought and won by the latter”.¹⁴⁴⁾ Therefore, there is no reason to suggest that in appropriate insolvency disputes the courts would not defer to arbitration. However, such a fact-sensitive approach with courts acting as conduits for the arbitral process may facilitate the purpose of limiting any adverse impact on the debtor’s estate, as well as ensuring the strength of an eventually enforceable arbitral award.

¹⁴⁴⁾ ADAM SAMUEL & MARIE-FRANÇOISE CURRAT, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH SWEDISH, SWISS US AND WEST GERMAN LAW 22 (1989).

9783214043285

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MANZ Verlag Wien

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Too Late for This Arbitration? – Introducing New Claims in Pending Proceedings

Irene Welser/Samuel Mimnagh

I. Introduction

With the continued emphasis that has been placed by users and institutions alike on the time and cost effectiveness of its procedures, parties, in particular respondents, are often placed under considerable time pressure to prepare their answers to arbitrations that have been initiated. Most arbitral rules impose strict time limits on the period within which a respondent is expected to provide their answer to a request for arbitration (often within 30 days, although extensions may be available). These limits, in particular in complex cases or disputes that span years rather than months, may represent a considerable challenge for parties and in particular counsel when putting together all the information and deciding whether there exist grounds for the filing of a counterclaim. Consequently, many respondents may need to introduce their (counter-) claims at a later stage of the proceedings.

Naturally, respondents are best served by raising their claims at the time of their first submission, even if such inclusion is merely cursory and under-developed, but in practice, a party may not possess of sufficient information at the time of the introduction of the case by the claimant (in particular where considerable time has passed since the occurrence of the event in dispute and the initiation of the arbitral proceedings). The question then arises: How and when should parties introduce their claims following the submission of their first written submission? Further: Is this still permissible in the ongoing proceedings?

The question of whether it is permissible to enter a new claim in ongoing proceedings and the rules for its admission by the arbitral tribunal is of particular importance when the time-bar is near and claims are soon to become prescribed. For instance, parties in such cases may want to take extra measures to ensure their legal rights are protected. Parties may try to simultaneously enter a new claim (or raise a counterclaim) in one proceeding whilst also initiating new proceedings in parallel in order to guarantee the claim is entered before prescription results. In such cases, the opposing party could raise the *lis pendens* defense. This leads to a precarious situation where the *lis pendens* argument can be affirmed by the second arbitral tribunal before the decision on the permissibility of the entry of the new claim is taken in

the first arbitration. If the first arbitral tribunal subsequently does not permit the new claim, it may be too late to start a third proceeding. It will then be a matter of the applicable rules and law to decide whether there is a possibility to ‘re-open’ the second arbitral proceedings, an issue that bears additional insecurity. Therefore, the problem is not theoretical, but a highly pertinent one.

The authors have set out to explore a number of institutional/arbitration rules and the stipulations they have set out for the manner in which parties are expected (and required) to file their claims. In the course of this assessment, particular attention will be paid to the question as to how the VIAC Rules of Arbitration and Mediation 2021 (“**Vienna Rules**”) and the ICC Arbitration Rules 2021 (“**ICC Rules**”) deal with the entry of claims and specifically the definition and significance of the term “new claim” for such arbitrations. Lastly, the authors will draw a number of conclusions from this assessment and provide some practical guidance to practitioners for future arbitrations.

II. Selected Arbitration Rules and the Entry of New Claims

The arbitration rules of the VIAC, LCIA, SCC, UNCITRAL and ICC prescribe procedures that are similar in effect. In the following, an overview of the general approaches adopted by arbitral institutions/rules is provided in order not only to identify their similarities, but also particular differences that should be borne in mind.

A. The 2020 LCIA Arbitration Rules

Turning first to the 2020 LCIA Arbitration Rules, which entered into force on October 1, 2020 (the “**LCIA Rules**”). It provides, as most arbitral rules do, that claims and counterclaims should, principally, be included in the request for arbitration for claimants¹⁾ and the response for respondents.²⁾ While claimants naturally have an advantage in preparing their request for arbitration as they are the party to institute the proceedings and will therefore generally only be pressured in the timing of that introduction by economic concerns or the statute of limitation, respondents are provided with a deadline of 28 days for their response.³⁾ It is therefore not unusual for these initial submissions to

¹⁾ 2020 LCIA Rules, Article 1.1(iii).

²⁾ 2020 LCIA Rules, Article 2.1(iii).

³⁾ 2020 LCIA Rules, Article 2.1; although this period may be reduced or extended at the discretion of the LCIA Court.

be prepared in summary form,⁴⁾ both so as not to reveal too much of one's case strategy at such an early stage of the proceedings, as well as because cases are usually not sufficiently advanced at this stage to provide a comprehensive statement either in favor or in response of any given claim.

Newly introduced with its 2020 iteration are Articles 1.5 and 2.5 (applicable to the request for arbitration and the response respectively), which state that “[a]t any time [...] prior to the appointment of the Arbitral Tribunal the LCIA Court may allow a [party] to supplement, modify or amend” their first submission (entered under Articles 1 and 2 of the LCIA Rules). This affords some leeway to the parties, although such scope is technically limited to the correction of “any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature”. The language used in this article is relatively broad, however, as the definition of “any ambiguity or any mistake of a similar nature” does not necessary preclude a substantive alteration to the nature of a claim. The article neither expressly allows nor disallows a party to amend the substance or nature of its claims.⁵⁾ It remains to be seen how narrowly or broadly the LCIA Court decides to interpret these articles before their effectiveness can be ascertained.

In addition to their interpretation, these articles also do not confer a specific right on the parties to make such modifications or amendments, rather it remains within the purview of the LCIA Court to consent to such alterations. The LCIA Rules do not, therefore, provide parties with any general entitlement to introduce new claims after the filing of their first submission.

Articles 1.5 and 2.5 are limited temporally to the period until the arbitral tribunal has been appointed, thereafter, the LCIA Rules empower the tribunal to decide on the matter of the supplementation, modification or amendment of any claim or counterclaim.⁶⁾ This power is expressly contained in the detailed description of an LCIA tribunal's 'additional powers' under Article 22 of the LCIA Rules. By specifically permitting the supplementation and modification of a party's claim, the LCIA Rules acknowledge the potential that a party may, subject to the arbitral tribunal's consent, introduce new claims into the proceeding also after the arbitral tribunal has been constituted.⁷⁾ Of course, such new claims must always remain within the bounds of the applicable arbitration agreement pursuant to which the arbitral tribunal has been appointed.

The assessment an arbitral tribunal is expected to perform when considering to permit or refuse the supplementation or modification of a party's

⁴⁾ L. Richman, *Chapter 5: Request for Arbitration, in ARBITRATING UNDER THE 2020 LCIA RULES: A USER'S GUIDE* Chapter 5, para. 23 (M. Scherer, L. Richman et al., 2021).

⁵⁾ *Idem* at Chapter 5, para. 43.

⁶⁾ 2020 LCIA Rules, Article 22.1.

⁷⁾ L. Richman, *supra* note 4, Chapter 17, para. 25.

claim is not made clear on the fact of Article 22. When taken as a whole, however, the LCIA Rules provide in Article 14.1. the general duties of the arbitral tribunal to act fairly and impartially as between all parties⁸⁾ as well as to adopt procedures “*suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute.*”⁹⁾ When read in light of Article 14, it is clear that the additional powers afforded to arbitral tribunals under Article 22 are guided by similar considerations as are found in other arbitral rules, including in particular questions of timeliness and cost-efficiency. Consequently, parties should be cognizant of the fact that despite the broad and near unlimited wording contained in Article 22, real limits exist on a party’s ability to introduce new claims after the constitution of the arbitral tribunal. The circumstances of the introduction of such claims will be scrutinized by the arbitral tribunal, and where the supplementation or modification is likely to prejudice the other party or cause undue delay, such a change can be disallowed.

Therefore, the LCIA Rules unequivocally provide parties with the possibility of amending their claims and introducing new claims at a later stage. At all points after the filing of each party’s first submission, however, that possibility is made subject to the approval of either the LCIA Court or the appointed arbitral tribunal.

B. The 2013 UNCITRAL Arbitration Rules

The amended UNCITRAL Arbitration Rules as adopted in 2013 (“**UNCITRAL Rules**”), having served as a foundation for many institutional arbitration rules, are very similar to the provisions of the SCC Rules previously discussed. Of note is the fact that these rules have, of course, broader application by virtue of their being used principally for ad hoc arbitration and require no specific agreement on any arbitral institution.

The UNCITRAL Rules also envisage the parties should ideally identify their claims with their initial submissions, for claimant the notice of arbitration and for respondent the response thereto.¹⁰⁾ Thereafter, the UNCITRAL Rules provide that the amendment or supplementation of a claim or counterclaim may occur unless the arbitral tribunal considers it inappropriate having regard specifically to any consequent delay in the proceedings, prejudice suffered by the other party or any other circumstance. Additionally, such new claim must also expressly be within the jurisdiction of the arbitral tribunal.¹¹⁾

⁸⁾ 2020 LCIA Rules, Article 14.1(i).

⁹⁾ 2020 LCIA Rules, Article 14.1(ii).

¹⁰⁾ 2013 UNCITRAL Rules, Articles 3(3)(e)-(f) and 4(2)(e) respectively.

¹¹⁾ 2013 UNCITRAL Rules, Article 22(1).