A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration

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1 Introduction

The recent global financial crisis, involving the tightening of credit markets, recessionary economies and general lack of economic confidence has resulted in a substantial increase in insolvencies. As in previous economic downturns, these events have focused the attention of lawyers and commentators on the legal implications for companies in financial difficulty. One aspect that has received relatively little attention is the interaction between national insolvency regimes and international arbitration.[1] Given that international arbitration is now considered the *normal* method of resolving disputes arising out of international transactions,[2] the interaction between insolvency and international arbitration is of particular relevance. The regulation of the interaction between these two disciplines will be increasingly important for international commerce, trade and investment.

When a company lacks the resources to pay its liabilities, most legal systems provide for legal mechanisms to either rehabilitate or liquidate the company in order to satisfy the outstanding claims of creditors (which are referred to in this study by the generic term "insolvency proceedings"). A range of interests must be accommodated by these insolvency proceedings. The parties, or stakeholders, affected by insolvency proceedings can include the company (debtor), the owners and management of the company, creditors, employees, guarantors of debt and suppliers of goods and services. The legal mechanisms regulating insolvency must strike a balance, not only between the different interests of the above stakeholders, but also between these interests and relevant social, political and policy considerations that may impact on the economic and legal goals of an insolvency regime.[3]

When a company trades across borders or has operations in multiple countries, complex issues arise when it encounters insolvency. During the lifetime of a company, it may

[1] Both disciplines have individually been the subject of significant academic study, however, interaction between these two different disciplines has, somewhat surprisingly, not been the subject of significant academic study.
[2] GAILLARD and SAVAGE (1999) p. 1; REDFERN and HUNTER (2004) p. 1.
[3] See WESSELS (2004) p. 46 ("Even the more recent European insolvency laws continue to show substantial differences in underlying policy considerations, both in structure and in content.") See also UNCITRAL Legislative Guide on Insolvency Law, adopted 25 June 2004, U.N. Sales No. E.05V.10 (2005) available at <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> pp. 10-16. For the public interests involved in insolvency proceedings see KAUFMANN-KOHLER and LÉVY (2006) p. 275.

acquire assets in multiple countries and enter numerous international contracts.[4] Many of these international contracts will contain arbitration clauses.

International arbitration and insolvency regulation give rise to very different legal procedures, with each having its own distinct purpose, objectives and underlying policy.[5] It has been noted that international arbitration and bankruptcy do not coexist easily.[6] Part of the problem for this is due to competing policy objectives, including:

a) In the case of insolvency regulation, the emphasis is on the equality of creditors, centralisation of claims, rescue of the insolvent party, State control, a transparent and accountable process, a coordinated distribution of assets and authority usually derived from statute; whereas
b) In the case of arbitration regulation, the authority derives from a contractual relationship of the parties (party autonomy that is autonomous from State) and the emphasis is on the resolution of a particular dispute between (usually two) parties and is generally private and confidential.

These competing interests and objectives raise a multitude of issues for arbitrators, parties, national courts and arbitral institutions when insolvency law and international arbitration collide. Arbitrators need to know what law to apply to resolve a particular issue. Parties need certainty in the approach that will be adopted so that they may make informed, rational business decisions. Consistency and predictability in process and outcome is an essential element in ensuring confidence in the international dispute resolution system and maintaining the rule of law.

This study considers one aspect of the interaction between insolvency proceedings and international arbitration, namely the arbitrability of insolvency proceedings. Specifically, it examines the question whether there is a transnational approach to the arbitrability of insolvency proceedings? This question becomes relevant for both national courts and

[4] For example, a corporation based in the US might have a number of contracts with corporations based in a range of countries, for the construction of a gas pipeline, in say Australia. Such a contract will probably involve a number of contractors to build the pipeline, as well as a number of financiers. Each will have rights and obligations under a multitude of contracts. There may be security interests over the land on which the pipeline is built, or on the pipeline itself. The machinery used to construct the pipeline is most likely subject to a charge and was financed by debt. What happens if the US company becomes insolvent owing money to contractor, as well financiers, government departments and employees? Which law should govern the conflict between insolvency and international arbitration? Which law applies? Who applies it? Where will proceedings be held?
[5] KIRGIS (2009) p. 505.
[6] ROSELL and PRAGER (2001) p. 417.

arbitrators when a party to an arbitration agreement becomes insolvent. The fundamental question that must be determined by a national court or an arbitrator when faced with such a situation is whether a dispute can be arbitrated, or whether the insolvency laws of a particular state provide for the exclusive jurisdiction of state courts.

Given the breadth of this topic, this study is necessarily limited in scope. First, it will only consider corporate insolvency and will not deal with individual insolvency as most international business is conducted through corporations and the vast majority of international arbitrations involve corporations. Secondly, for the purposes of this study, international arbitration refers only to international commercial arbitration and does not consider international investment treaty arbitration.[7] Thirdly, this study limits its analysis to the insolvency and arbitration laws of four countries, namely, the United States, England, Switzerland and Australia (the "Relevant Countries").

For the purposes of this study, a *transnational* approach is defined as the adoption of similar or consistent laws, or a similar or consistent approach to similar fact scenarios or legal issues across jurisdictions. This includes whether the substantive laws of each country have similar or consistent insolvency regulations and the effect these have on international arbitration, and whether arbitral tribunals and national courts apply those regulations in a consistent and coherent way.[8]

This study is structured as follows:

1. Section 2 provides an outline of the international arbitration framework and the international arbitration laws of each of the Relevant Countries;
2. Section 3 outlines the legislative framework in relation to insolvency proceedings in each of the Relevant Countries;

[7] It has been commented that there is no reason, subject to limited reservations, to treat arbitrations between a private party and a state or a public entity differently to arbitrations between two private parties. POUDRET and BESSON (2007) §9.

[8] This definition departs from the traditional definition of Transnational law which has been defined by Philip C. Jessup as "the law which regulates actions or events that transcend National frontiers ... includ[ing] both ... public and private international law," and other rules which do not wholly fit into the public/private law distinction. JESSUP (1956) p. 2. The definition has some similarities with that adopted by Lehmann, however, is broader than merely fundamental principles that apply across boarder. Lehmann refers to transnational law as being understood as "describing general principles of law that are recognized by a significant number of national laws. Such general principles of law are different from the legal rules created by private actors because they draw their binding force from national laws. However, they also are not identical to state-made laws, because they are more general principles underlying these laws. The theory of general principles of law is that there are fundamental ideas of justice that can be found in a wide spectrum of national laws and directly applied to legal disputes" LEHMANN (2003-2004) p. 753-754.

3. Section 4 examines the issue of arbitrability in general;
4. Section 5 examines the law applicable to the determination of arbitrability and who makes that determination;
5. Section 6 examines the arbitrability of insolvency proceedings in general terms;
6. Section 7 examines the arbitrability of insolvency proceedings in the Relevant Countries; and
7. Section 8 concludes by examining whether there is a transnational approach to the arbitrability of insolvency proceedings.

2 International Arbitration Framework

2.1 Overview of the international arbitration framework

The practice of resolving disputes by international arbitration works because it is held in place by a complex system of national laws and international treaties.[9] The agreement by the parties to submit any disputes between them to arbitration is the "foundation stone" of modern international arbitration.[10] There must first be a valid agreement to arbitrate for an arbitration to take place.[11] Once a party has provided consent to arbitration that consent cannot be unilaterally withdrawn. The arbitration agreement is an independent obligation separable from any contract within which an arbitration agreement may be contained.[12] Therefore, even if the original contract between the parties comes to an end, or is found to be invalid or unenforceable, the obligation to arbitrate generally survives.[13]

An agreement to arbitrate, like any other agreement, must be capable of being enforced at law. Such an agreement is only effective if recognised by domestic courts.[14] Modern arbitration laws provide for the "indirect" enforcement of arbitration agreements.[15] That is, if one of the parties to an arbitration agreement brings proceedings in a domestic court

[9] REDFERN and HUNTER (2004) §1-01.
[10] REDFERN and HUNTER (2004) §1-08.
[11] An arbitration agreement is usually contained in an "arbitration clause" within a main contract, or in a separate "submission to arbitration". (a *compromis*, or a *compromise*). There may also be what has been called a "standing offer" to arbitrate disputes in the case of bilateral investment treaties.
[12] See MONESTIER (2001) p. 224, (discussing the Supreme Court decision in *Prima Paint v. Flood & Conklin,* 338 U.S. 395 (1967), in which the Supreme Court recognised that arbitration clauses are separable from the contract in which they are contained).
[13] Under the New York Convention and the Model Law recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law. New York Convention, Art.V(1)(a); Model Law Art.36(1)(a)(i) cited in REDFERN and HUNTER (2004) §§1-08 – 1-11.
[14] GOODE (2001) p. 29.
[15] REDFERN and HUNTER (2004) §1-12. See also POUDRET and BESSON (2007) §497.

in breach of that agreement, the domestic court proceedings must be stopped at the request of any other party to the arbitration agreement (unless there is good reason why they should not be stopped).[16]

Likewise, an arbitral award is only effective and enforceable because it is recognised and enforced by domestic legal systems.[17] To promote the recognition and enforcement of international arbitration agreements and awards and provide for uniform principles of recognition and enforcement, multilateral conventions have been entered into by states. Two significant international instruments that established the basic requirements that contracting states recognise and enforce international arbitration agreements and awards (subject to specific limitations) were the 1923 Geneva Protocol and the 1927 Geneva Convention.[18] These instruments have been cited as marking the beginning of contemporary international efforts to facilitate and support the international commercial arbitration process.[19]

The New York Convention[20] (which superseded the 1923 Geneva Protocol and the 1927 Geneva Convention) is now the key international instrument that facilitates and promotes international arbitration by ensuring an international legal framework for the recognition and enforcement of international arbitration agreements and awards.[21] For example, the New York Convention provides that: (1) each Contracting State must "recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences ... concerning a subject matter capable of settlement by arbitration;"[22] (2) courts of the Contracting State, on being seized of a dispute to which an arbitration agreement covered by the Convention applies, "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed;"[23] (3) each Contracting States "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of

[16] REDFERN and HUNTER (2004) §1-12. See for example, Art.4 of the 1923 Geneva Protocol provides that the courts of the contracting state, on being seized of a dispute to which an arbitration agreement covered by the Protocol applies, "shall refer the parties on the application of either of them to the decision of the arbitrators."
[17] See PARK (1983) p. 30; LEW (2008 – 2009) p. 492.
[18] Geneva Protocol on Arbitration Clauses in Commercial Matters, 27 L.N.T.S. 158 (1924); Geneva Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.s. 302 (1929).
[19] BORN (2009) p. 92.
[20] "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards" done at New York on June 10, 1958, United Nations Treaty Series (1954) Vol.330, No.4739, p.38 (the "New York Convention").
[21] Most of the major trading nations of the world have become parties to the New York Convention. At the time of writing, there are more than 140 signatories to the Convention.
[22] Art. II(1) New York Convention.
[23] Art.II(3) New York Convention.

the territory where the award is relied upon, under the conditions laid down in" the Convention;[24] and (4) recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked under specified limited circumstances.[25]

Having noted that there is a key international convention which governs the recognition and enforcement of foreign arbitral awards, it is important to recognise the limits of this convention. The New York Convention is an instrument of international law; but its application with respect to any particular arbitration agreement or award is a matter for the domestic (or national) law and the domestic (or national) courts of the place of enforcement. The exact procedure to be followed, the way in which the convention is to be interpreted and applied are matters which are to be determined by the law of the country in which recognition and enforcement of a particular arbitration agreement or award is sought.[26] Accordingly, the effect that a particular domestic insolvency law may have on the way in which an arbitration agreement or award is recognised or enforced may vary across jurisdictions, regardless of whether each country is a party to the same international convention.

2.2 Overview of the applicable law to an international arbitration

Every arbitration must take place somewhere and will be subject to some legal and regulatory system, for example, the law of the place of arbitration, the arbitration rules and the law of the place of enforcement.[27] In most international arbitrations, there will be more than one system of law or legal rules that are relevant to the conduct of the proceedings and enforcement. It is possible to identify at least five different laws which may affect the conduct of an international arbitration. These are:

a) The law governing the parties' capacity to enter into an arbitration agreement;
b) The law governing the arbitration agreement and the performance of that agreement;

[24] Art.III New York Convention.
[25] Art.V New York Convention. These circumstances include: the invalidity of the arbitration agreement; the lack of notice of the arbitration; that the subject matter of the award is not a difference contemplated by the arbitration agreement; that the composition of the tribunal or the procedure followed was contrary to that agreed by the parties or the law of the country where the arbitration took place; or the award had not yet become binding on the parties, or had been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. For further discussion see LEW (2008 – 2009) p. 493 – 494.
[26] REDFERN and HUNTER (2004) §1-18.
[27] As Lord Mustill said in *Coppée Levalin N.V. v. Ken-Ren Fertilisers & Chemicals* [1994] 2 Lloyd's Rep. 109, 116 (H.L.), "[T]here is the plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in the danger of foundering."

c) The law governing the existence and proceedings of the arbitral tribunal - the "*lex arbitri*;"[28]

d) The law (or the relevant legal rules) governing the substantive issues in dispute - "the substantive law;"

e) The law governing recognition and enforcement of the award (which may be more than one law if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets).[29]

In addition to the above laws, the rules governing the procedures to be followed in the arbitration – the "procedural rules" – will also affect the conduct of an international arbitration.

An issue which arises, particularly in the context of insolvency, is which law will apply, or in the case of a conflict, which law will prevail. As will be seen through the course of this study, choosing the appropriate applicable law can be a complex process and may have a profound effect on the conduct and outcome of an arbitration.

The arbitral process is conducted in accordance with the arbitration law and rules selected by the parties or according to their procedural agreements made before or during the arbitral process; subject to the limits provided by mandatory rules.[30] Parties are free to choose the *lex arbitri* and any procedural arbitral rules, such as ICC Rules of Procedure or UNCITRAL Arbitration Rules. In the absence of a choice by the parties, the arbitrator(s) are usually free to determine rules of procedure as they consider appropriate in accordance with the *lex arbitri*.[31] In the absence of a choice by the parties on the *lex arbitri*, the choice will have to be made for them, either by the arbitral tribunal itself or by a designated arbitral institution.[32] The parties may also agree on the substantive law to be applied to the merits of the dispute. In the absence of an agreement by the parties, the

[28] For a discussion on *lex arbitri* and *lex loci arbitri* see PARK (1983) and GOODE (2001).
[29] REDFERN and HUNTER (2004) §2-04.
[30] LEW, MISTELIS and KRÖLL (2003) §2-44.
[31] For example, Art. 19(2) of the UNCITRAL Model Law provides that failing an agreement of the parties on the procedure to be followed by the arbitral tribunal "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."
[32] For example, Art. 16(1) of the UNCITRAL Arbitration Rules, states that "[u]nless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration." The ICC Arbitration Rules provides that the place of arbitration shall be fixed by the ICC Court of Arbitration unless agreed upon by the parties (art. 14.1).

law applicable to the substantive issues of the dispute may be determined by the arbitrator(s).[33]

2.3 Domestic legal framework for international arbitration

As discussed in section 2.1, the effectiveness of international arbitration as a dispute settlement mechanism relies on the support of domestic legal systems to recognise and enforce international arbitration agreements and awards. This section considers the development of modern arbitration legislation and the domestic legal framework for international arbitration in each of the Relevant Countries.

2.3.1 Development of modern arbitration legislation and the UNCITRAL Model Law

Over the past forty years many states have either enacted international arbitration legislation or updated their existing legislation to provide a more supportive legal framework for international arbitration agreements, proceedings and awards.[34] Two major impetuses for this move to enact or update international arbitration legislation have been the success of the New York Convention, with over 140 countries adopting the Convention and the creation of the UNCITRAL Model Law.

Most modern arbitration legislation affirms the parties' autonomy to agree upon arbitral procedures and the applicable substantive law governing the parties' dispute, while limiting the power of domestic courts to interfere in the arbitral process.[35] There are now very few situations where modern domestic arbitral laws interfere with international arbitration procedures, however, domestic laws require that due process requirements are followed[36] and impose some restrictions on the arbitrability of certain matters and the enforcement of some awards.[37] Some domestic laws limit matters that are arbitrable on

[33] For example, Art. 28 of the UNCITRAL Model Law provides that "[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."
[34] For example, France, Switzerland, Australia and England have all updated their arbitration legislation. The United States legislation on arbitration dates back to 1925.
[35] The scope of interference of domestic courts in the arbitral procedure is typically confined dealing with challenges to jurisdiction, removal of arbitrators, enforcing a tribunal's orders with respect to evidence-taking or discovery, granting provisional or interim measures and appeals from, setting aside and enforcement of arbitration awards. Domestic courts also can assist the arbitral procedure in a limited way, typically, assisting with the appointment, the grant of provisional relief and the collection of evidence. LEW, MISTELIS and KRÖLL (2003) §2-41; BORN (2009) p. 112.
[36] For example, Art. 18 of the Model Law requires that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." For further discussion see BORN (2009) pp. 1765-1776.
[37] LEW, MISTELIS and KRÖLL (2003) §2-41.

the basis of the mandatory requirements in the domestic law or international public policy.[38]

The UNCITRAL Model law was adopted by UNCITRAL in 1985 and was intended to "serve as a model of domestic arbitration legislation, harmonising and making more uniform the practice and procedure of international commercial arbitration while freeing international arbitration from the parochial law of any given adopting state."[39] The UN General Assembly recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."[40] Since its adoption by UNCITRAL the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.[41]

The Model Law provides state courts with very limited powers to interfere with the arbitral process, however, state courts may:

- grant interim measures of protection (article 9);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4));
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3));
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on the question of its own jurisdiction (as a preliminary issue) and a party has requested the court to make a final determination on its jurisdiction (article 16(3));
- assist in the taking of evidence (article 27); and
- set aside an arbitral award on limited grounds (article 34(2)).

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[38] It has been stated that mandatory rules can be: (i) of an internal or domestic mandatory nature; (ii) of a foreign legal order; (iii) of an international character, claiming application irrespective of, any law chosen or determined as applicable; and (iv) pertaining to a truly supranational order (such as sanctions of the UN Security Council). In general, the aim of mandatory rules is to protect economic, social or political interests of a particular State, or a wider community, beyond the interests of individual parties. BLESSING (1997) p. 23 n2.

[39] HOELLERING (1986) p. 327.

[40] Resolution adopted by the General Assembly, 40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (11 December 1985)

[41] For a current list of countries which have adopted the model law see <www.uncitral.org>.

2.3.2 Australia

In Australia, international arbitration is governed by the International Arbitration Act 1974 (Cth) ("IAA"). Australia has a federal system of government, with legislative power divided between the Commonwealth of Australia, six states and two federal territories with their own legislatures. Domestic arbitration is regulated by the law in each state or territory and is governed by the relevant Commercial Arbitration Act of each state or territory.[42]

The IAA is divided into four parts, with Part I merely being an administrative ("preliminary") part. Part II implements the New York Convention;[43] Part III deals with international commercial arbitration and Part IV concerns ICSID. The Model Law is incorporated into Australian Law in section 16 of the IAA. The IAA also provides for a couple of additions to the Model Law, for example, Part III, Division 3 contains provisions for the enforcement of interim measures and the consolidation of arbitral proceedings and section 19 clarifies the meaning of the term 'public policy' for the purpose of articles 34 and 36 of the Model Law.[44] For the purpose of article 6 of the Model Law, section 18 of the IAA designates the Supreme Court of each state or territory, as well as the Federal Court of Australia, to be competent to perform the functions referred to in article 6 of the Model Law. Finally, the IAA allows parties to "opt-out" of the Model Law pursuant to section 21 of the IAA.

2.3.3 Switzerland

International arbitration in Switzerland is governed by Chapter 12 of the Private International Law Act ("PILA").[45] The law creates a regime that applies to all

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[42] New South Wales Commercial Arbitration Act 1984; Victorian Commercial Arbitration Act 1984; Queensland Commercial Arbitration Act 1990; South Australian Commercial Arbitration Act 1986; Western Australian Commercial Arbitration Act 1985; Tasmanian Commercial Arbitration Act 1986; ACT Commercial Arbitration Act 1986; Northern Territory Commercial Arbitration Act 1985. Following amendments made in 1984 and 1993, the Commercial Arbitration Acts of the states and territories are largely uniform. While the Commercial Arbitration Acts primarily deals with domestic arbitration proceedings, parts of it may also apply in international arbitrations where the parties have chosen to opt out of the Model Law. See JONES (2012).

[43] Australia is also a signatory to ICSID, the implementation of which is contained in part IV of the IAA.

[44] Article 34 and article 36 of the Model Law specify the grounds for setting aside and the grounds for refusing recognition or enforcement respectively.
Section 19 of the IAA provides that an award is in conflict with the public policy of Australia if:

(a) the making of the award was induced or affected by fraud or corruption; or
(b) a breach of the rules of natural justice occurred in connection with the making of the award.

[45] Private International Law Act adopted by Swiss Federal Parliament on 18 December 1987, entered into force on 1 January 1989 ("PILA").

international arbitration in which the seat is in Switzerland[46] and at least one of the parties is not domiciled or resident in Switzerland at the conclusion of the arbitration agreement.[47]

The PILA affirms the autonomy (or severability) of the arbitration clause,[48] the right of the arbitrator(s) to determine their own jurisdiction[49] and recognises a broad principle of party autonomy.[50] Article 182(1) of the PILA gives the parties autonomy to determine the procedural rules governing the organisation and conduct of arbitration proceedings - subject only to the requirement of "due process"[51] - and with regard to the selection of the law applicable to the merits of the dispute.[52]

In the absence of a choice of law by the parties, the Swiss law differs from the UNCITRAL Model Law, which provides that the arbitrators must make the determination in accordance with the rules of conflict of laws that they consider appropriate and applicable. Under Swiss law, as under French law, arbitrators are free to determine directly (without having recourse to conflicts rules) the rules of law applicable to the dispute. However, unlike France, the Swiss Law limits the freedom of the arbitrators by requiring that the rule of law selected by the arbitrators must be those with which the case had the "closest connection."[53]

The Swiss international arbitration law is very liberal and favours party autonomy.[54] Nevertheless, there are five grounds to set aside an award:[55]

a) The improper constitution of the tribunal;
b) Erroneous decision of the tribunal regarding its own jurisdiction;
c) Decision going beyond the claims submitted to the tribunal or failing to decide one of the claims;
d) Lack of "due process;" and
e) Public policy (which means "international public policy").[56]

[46] PILA, Art. 176
[47] PILA, Art. 176(1). Parties are free to exclude themselves from the federal law and have cantonal law apply (Article 176(2)).
[48] PILA Art. 178.
[49] PILA, Art. 186.
[50] PILA, Art 182.
[51] PILA, Art. 182(3).
[52] PILA, Art 187(1).
[53] DELAUME (1990) pp. 22-23.
[54] POUDRET and BESSON (2007) §64. For example, Swiss judiciary lends judicial assistance in the conduct of the arbitral process, inter alia, in regard to the constitution of the tribunal, the taking of evidence or the implementation of provisional measures granted by the arbitral tribunal.
[55] PILA, Art. 190(2).

2.3.4 England

Under English Law, international arbitration is regulated by the Arbitration Act 1996 ("AA") and case law that has interpreted that act.[57] The AA comprises 110 sections and 4 schedules. The AA expressly did not follow the UNCITRAL Model Law, but the Model Law had a direct influence on the drafting of the Act.[58]

The AA codifies fundamental arbitration principles, such the autonomy of the arbitration agreement,[59] the competence-competence principle,[60] and the practice that the reasons for the award be given, unless the parties agree otherwise.[61] The AA provides for a high degree of party autonomy, and, apart from a few mandatory provisions, parties are free to exclude large parts of the AA itself in order to adopt procedures of their choice.[62]

The AA ensures the indirect enforcement of arbitration agreements under section 9 by requiring courts to stay legal proceedings. Section 9(4) of the Act provides that the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

English Law has traditionally exerted a strong influence on the conduct of arbitration and has historically ensured that the courts play a role in the supervision of arbitration within England. This tradition subsists to a limited extent in the AA, namely:[63]

a) The courts retain significant powers of intervention in arbitral proceedings;[64]

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[56] DELAUME (1990) p. 23-24. Under Swiss Law, parties to an international arbitration taking place in Switzerland may, if certain conditions are met, exclude the judicial control of the Swiss courts. According to article 192(1), the parties, if they are not domiciled or resident in Switzerland and have no business establishment in that country, may, by means of an express stipulation in the arbitration agreement or a subsequent agreement, exclude all setting aside proceedings or limit such proceedings to one or several of the grounds listed in article 190(2).
[57] Arbitration Act (UK) 1996. This Act also regulated domestic arbitration.
[58] The 1989 Report of the Departmental Advisory Committee on Arbitration Law recommended against the adoption of the UNCITRAL Model Law, although when preparing the Arbitration Act 1996 the DAC paid "at every stage … very close regard" to the Model Law cited in LEW, MISTELIS and KRÖLL (2003) §2-40, fn. 28.
[59] Arbitration Act 1996 (UK), s. 7.
[60] Arbitration Act 1996 (UK), s. 30.
[61] Arbitration Act 1996 (UK), s. 52.
[62] GAILLARD and SAVAGE (1999) pp.72 – 73. Section 1 of the AA sets out that one of the general principles of the AA is that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." An example of the pre-eminence of party autonomy can be found in Section 34(1) which provides that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Sec. 1 of the Arbitration Act 1996 (UK). LITTMAN (1997) p. 269.
[63] GAILLARD and SAVAGE (1999) pp.72 – 73.
[64] For example Secs. 42 – 44.

b) The court has power to determine a preliminary point of law and to hear an appeal of a point of law where English law is applicable to the merits (sections 45 and 69);[65]

c) Numerous mandatory provisions exist (schedule 1);[66] and

d) A party can challenge an award for "serious irregularities affecting the tribunal, the proceedings or the award" pursuant to section 68 of the Act which provides for more grounds than under the New York Convention or the UNCITRAL Model Law.[67]

2.3.5 United States

In the United States, international arbitration is governed by both federal law and state law deriving from statute and court decisions interpreting the governing statutes.[68] International arbitration has been predominantly regulated by the Federal Arbitration Act

[65] Although this can be excluded by agreement of the parties.

[66] Schedule 1 prescribes 23 of the provisions of the Act as mandatory. An example is section 33, which provides that:

(1) The tribunal shall:

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

[67] Section 68(2) provides that:

Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

[68] In the United States federal court system, there are eleven circuits that constitute the federal appeals courts (i.e., First Circuit, Second Circuit, etc.) as well as the District of Columbia Circuit and Federal Circuit. The decisions of the Circuit Courts are binding on the district courts in the circuit, but not in district courts in other circuits, or Circuit Courts in other circuits. Circuits may reach different decisions, and when that occurs in serious matters, the case can be heard by the US Supreme Court whose ruling then binds all other courts. See HOLTZMANN and DONOVAN (2005) pp. 4 – 5.

("FAA") since 1925.[69] Chapter 1 of the FAA governs arbitrations conducted within the United States, Chapter 2 implements the New York Convention[70] and Chapter 3 implements the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention).[71]

The United States has a federal policy of favouring and supporting arbitration, however there is still a recurring tension between the application of state law and federal arbitration law.[72] The FAA applies to almost all commercial arbitrations arising out of contracts involving "commerce" in the United States, which includes international arbitrations.[73] In general, section 2 of the FAA has the effect of making an agreement to arbitrate enforceable as a matter of substantive federal law, overriding any inconsistent state law.[74] State law must be applied to agreements to arbitrate in the same manner as the state law is applied to other contracts.[75]

Under the FAA, the agreement to arbitrate is considered to be separate from the rest of the commercial agreement in which it is contained.[76] The FAA provides for indirect enforcement of an arbitration agreement, requiring a court to stay court action, on the request of a party, if a dispute is covered by an agreement to arbitrate.[77] Similarly, if there is an alleged failure, neglect, or refusal of another to arbitrate under a written

[69] Federal Arbitration Act of 1925 (codified as amended in 9 U.S.C. Sect. 1 et seq.)
[70] U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. s. 201 (Supp. 1997) (entered into force for the United States on 29 December 1970).
[71] O.A.S.T.S. No. 42, 14 ILM 336, reprinted in 9 U.S.C. s. 301 (Supp. 1997) (entered into force for the United States on 27 October 1990).
[72] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that the FAA embodies a "national policy favoring arbitration"); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985), quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924); *Allied-Bruce Terminix Cos. v. Dobson* (93-1001), 513 U.S. 265 (1995). (stating that "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate"). See also *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 474 (1989) (stating that a purpose of the FAA was to "place such agreements `upon the same footing as other contracts").
[73] Every state of the United States has an arbitration statute enacted by its state legislature (usually based on the National Conference of Commissioners on Uniform State Laws ("NCCUSL") Revised Uniform Arbitration Act of 2000) and approximately 15 have specific international arbitration statutes.
[74] See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) cited in HOLTZMANN and DONOVAN (2005) p. 4. The FAA (ss. 203 and 302) also provides that any case falling under the New York Convention or the Panama Convention falls within the jurisdiction of the United States federal courts.
[75] See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 62 n. 9 (1995); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993); *Amizola v. Dolphin Shipowner, S.A*., 354 F. Supp. 2d 689, 693-694 (E.D. La. 2004). However, state bankruptcy law - allowing for "revocation of any contract" - may apply to render an arbitration agreement unenforceable in a United States state court. For example in *Benjamin v. Pipoly*, 155 Ohio App.3d 171, 2003-Ohio-5666, §37, the court found that a court-appointed liquidator's statutory authority to disavow contracts allowed her to avoid arbitration clauses in employee contracts without violating the FAA.
[76] HOLTZMANN and DONOVAN (2005) p. 27.
[77] Federal Arbitration Act, s. 3.

agreement for arbitration, then a party to an arbitration agreement may apply to a court for an order directing that the arbitration proceed as provided for in the agreement.[78]

The federal policy of favouring and supporting arbitration is also reflected in the limited grounds available for vacating an arbitral award.[79] Section 10(a) of the FAA provides that:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1) Where the award was procured by corruption, fraud, or undue means.
>
> 2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> 3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
>
> 4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> 5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

[78] Federal Arbitration Act, s. 4.

[79] Federal Arbitration Act, s. 10. Section 10(a) of the FAA provides that:
In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

1) Where the award was procured by corruption, fraud, or undue means.
2) Where there was evident partiality or corruption in the arbitrators, or either of them.
3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

3 Insolvency Framework

3.1 Domestic insolvency framework

When a company faces financial difficulty it is the domestic insolvency law[80] or the *lex concursus* that determines how a company must proceed. The *lex concursus* determines the fundamental conditions and the form requirements of the declaration of insolvency. This law determines who has the capacity to be declared insolvent and the organisation of insolvency proceedings, such as the publication formalities, the competent bodies to inform, the nature, scope and consequences of the dispossession of the insolvent party, as well as the rules concerning the formation of the body of creditors.

The *lex concursus* also governs the management of the insolvent party's assets, the protective measures which may be taken abroad by the administrator or the receiver and the possibility for the administrator to sell the assets by agreement or by public sale. This law defines the "doubtful period" during which certain transactions entered into by the insolvent party may be declared null and void, the effect of the insolvency on current contracts, and the binding nature, after insolvency, of retention of title, liens, charges and mortgages. Finally, this law regulates the liquidation of the company and the judicial supervision of this process.[81]

It is evident that the *lex concursus* has a very wide scope of application. It is one of these laws that are likely to dictate the effect of any insolvency has on arbitration, or potential arbitration proceedings. Accordingly, this section considers the relevant domestic insolvency laws in each of the Relevant Countries.

3.2 Australia

The Corporations Act 2001 (Cth) ("Corporations Act (Cth)") is the principal act regulating corporate insolvencies in Australia. Chapter 5 of the Corporations Act (Cth) contains the majority of provisions regulating the allowed conduct and dissolution of insolvent companies. The Commonwealth Parliament has enacted the Cross-Border Insolvency Act 2008 (Cth) adopting the UNCITRAL Model Law on Cross-border Insolvency into Australian Law. There are four main statutory procedures that may be

[80]Which will be determined by the specific requirements of the domestic law and may be, for example, the place of incorporation, the place of principle business or the place where assets are located.
[81] HANOTIAU (1996) p. 35.

relevant when a company is in financial difficulties as well as separate statutory procedures for individual insolvency (referred to as bankruptcy).

3.2.1 Voluntary administration

The voluntary administration process provides for the business, property and affairs of an insolvent company to be administered in a way that:

a) maximises the chances of the company continuing; or
b) results in a better return for the company's creditors and members than would result from an immediate winding up of the company.[82]

During the period of the administration, there is a general stay of proceedings against the company or its property, except with the administrator's consent or with leave of the court. There are exceptions for secured creditors, holding a charge over the whole or substantially the whole of the company's property, who may exercise powers contained in their security document.

3.2.2 Formal arrangements with creditors

Part 5.1 of the Corporations Act (Cth) provides a mechanism by which a company may enter into a compromise or arrangement (commonly referred to as a 'scheme of arrangement') with its members or creditors.[83]

3.2.3 Receivership

A company enters receivership when a receiver is appointed to assume control over assets that are the subject of a certain form of security. The powers of the receiver are usually contained within the security document and the instrument appointing the receiver. The receiver will attempt to realise assets in order to satisfy the debt due to the secured creditor.

3.2.4 Winding-Up / Liquidation

Under Australian law a company incorporated in Australia may be wound up, or liquidated 'compulsorily' by order of a court or 'voluntarily.'

[82] Corporations Act 2001 s. 435A. For judicial descriptions of the nature and objectives of administration see also *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611 at 612; *Brash Holdings Ltd (admin apptd) v Katile Pty Ltd* [1996] 1 VR 24 at 29.
[83] Corporations Act 2001 (Cth) s. 411.

3.2.4.1 Compulsory Liquidation

A court may order a company to be wound up and appoint an Official Liquidator to liquidate the company.[84] An application to the court for the appointment of a liquidator can be made by the company, a creditor, a shareholder, a director, or the Australian Securities and Investments Commission. In addition to realising the company's assets the liquidator may:

a) sue the directors for insolvent trading;
b) have certain transactions entered into by the company prior to the appointment of the liquidator declared void;
c) publicly examine any person who has been associated with the company; and
d) seek to recover from creditors amounts which were paid to them at a time when the company was insolvent within the six months prior to the commencement of the liquidation.

The Corporations Act (Cth) contains provisions with respect to the staying and restraining of actions and other civil proceedings against a company at any time after the filing of an application for winding up and before the making of a winding up order.[85] Where an order has been made for the winding up of a company, no action or other civil proceedings may be commenced or proceeded with that would affect debts owed to the company except by leave of the court and subject to such terms as the court imposes.[86]

3.2.4.2 Voluntary Liquidation

Where directors of a company determine that the company is insolvent and cannot continue its operations or be rehabilitated, then they may resolve to seek a resolution of shareholders to place the company into liquidation. This is known as a creditors' voluntary liquidation.[87]

3.2.5 Bankruptcy

Insolvency law in Australia follows the English tradition of using different terminology for corporate entities and natural persons. The Bankruptcy Act 1966 (Cth) governs individual insolvencies. Upon bankruptcy, property owned by the bankrupt at the

[84] Corporations Act 2001 (Cth) Pt 5.4.
[85] Corporations Act 2001 (Cth) s. 587(1).
[86] Corporations Act 2001 (Cth) s. 587(2).
[87] A liquidation can also be a member's voluntary liquidation but this occurs when the company is solvent so therefore not relevant for the purposes of this study.

commencement of bankruptcy vests, with some exceptions, in the Official Trustee in Bankruptcy or a trustee registered under the Bankruptcy Act 1966 (Cth). As mentioned above, individual insolvency is beyond the scope of this study.

3.3 Switzerland

The main source of insolvency law (*droit de faillite/Konkursrecht*) in Switzerland is the 1889 Federal Act on Debt Enforcement and Bankruptcy, as amended ("DEBA").[88] Supplementing this act is Chapter 11 (entitled "Bankruptcy and Composition Agreements") of PILA and various other laws relating to financial institutions, insurance companies and the enforcement of obligations.[89] Bankruptcy[90] regulation in Switzerland is part of the general federal law on debt enforcement.[91]

The DEBA provides for two types of proceedings for the enforcement of money claims, namely, "special execution proceedings"[92] and "general execution proceedings."[93] Both types of enforcement proceedings are initiated by a creditor filing an enforcement request with the competent debt enforcement authority.[94]

Special execution proceedings seek to enforce a specific security interest or mortgage against a private individual or corporate debtor for the benefit of a secured creditor. General execution proceedings are mostly directed against companies and involve all creditors jointly participating in the realisation of the debtor's asset when the debtor is insolvent. Swiss law provides for two types of general execution in the case of insolvency or financial distress, namely, composition (i.e. restructuring/rescue) or bankruptcy/liquidation proceedings.

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[88] Federal Statute on Debt Enforcement and Bankruptcy of 11 April 1889, SR/RS 281.1 ("DEBA").

[89] For example the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1998 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989); Swiss Code of Obligations, dated march 30, 1911; the Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities, in force since July 1, 2004; the Swiss federal Law on Banks and Saving Banks and the Swiss Penal Code.

[90] The term bankruptcy is the English term that has been used by commentators. It covers both corporate and individual insolvencies. See generally LUBBEN (2009); STÄUBLI and BATTISTINI-KOHLER (2006).

[91] LUBBEN (2009) p. 41. The initial phase of debt enforcement proceedings is the same for all three types of enforcement proceedings, unless the proceedings are commenced by the debtor. Typically, the creditor must submit an application for commencement of enforcement against the debtor with the debt collection office at the domicile of the debtor or at the registered seat of the entity if registered in the Register of Commerce. STÄUBLI and BATTISTINI-KOHLER (2006) p. 705.

[92] DEBA, Arts. 89-115.

[93] DEBA, Arts. 159-176 and Arts. 293-304.

[94] The responsibility for creating debt enforcement and bankruptcy offices, as well as for providing the first level or two of court supervision is relegated by law of each Swiss canton. Higher supervisory authority is provided by the Federal Tribunal under federal law.

3.3.1 Composition

The DEBA allows companies in financial distress to seek rehabilitation under the protection of the court.[95] These procedures are generally referred to as composition proceedings.[96] The goal of composition procedures is to achieve a settlement with all creditors, (a so-called "composition agreement"). Under composition proceedings the debtor can arrange (under the supervision of the court) a settlement agreement with its creditors and is protected – except for first-class claims and the realisation of collateral for claims secured by a mortgage of real property – from enforcement proceedings in order to work out a suitable offer for a composition. Composition proceedings are only designed to affect non-secured creditors and non-privileged creditors. It does not involve a full reorganisation plan organising all creditors' claims.[97]

The opening of composition proceedings does not result in the loss by the insolvent party of the right to dispose of its assets. The insolvent party is authorised to operate its business under the control of a court appointed commissioner.[98] After the filing of a petition in court, the court is bound to take all necessary conservatory measures to protect the insolvent party's assets. A preliminary moratorium of not more than two months may be granted, if justified. A provisional commissioner may be elected and entrusted to examine the insolvent party's financial status, the prospects for recovery and to supervise the insolvent party's compliance with the conservatory measures imposed by the court.

If a sufficient prospect for recovery is established, the court grants the insolvent party a moratorium for a period of four or six months and appoints one or several commissioners.[99] Depending on the court's ruling, certain acts may require the explicit consent of the commissioner or the commissioner may be authorised to take over the entire business of the insolvent party.[100]

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[95] DEBA, Art. 293.
[96] STÄUBLI and BATTISTINI-KOHLER (2006) p. 709.
[97] STÄUBLI and BATTISTINI-KOHLER (2006) p. 709.
[98] DEBA, Art. 298.
[99] Under article 725 of the Swiss Code of Obligations, dated march 30, 1911, a court can supervise a corporate moratorium proceeding. This type of procedure involves a temporary suspension of all enforcement proceedings initiated by creditors and suspends a declaration of bankruptcy provided that there is sufficient evidence that a financial rehabilitation may be achieved. STÄUBLI and BATTISTINI-KOHLER (2006) p. 706.
[100] STÄUBLI and BATTISTINI-KOHLER (2006) p. 710.

3.3.2 Bankruptcy

Bankruptcy proceedings (i.e. winding-up proceedings) can be opened in Switzerland if the insolvent party is domiciled in Switzerland.[101] A corporation's articles of incorporation determine the place where the corporation is domiciled.[102] When bankruptcy proceedings are opened by a competent judge, the insolvent party loses its authority to dispose of its assets and all business operations are halted. The opening of bankruptcy proceedings results in all other enforcement proceedings against the insolvent party being stayed. Further enforcement proceedings related to claims that arose before the declaration of the bankruptcy are not permitted, except in limited circumstances.[103]

A bankruptcy administrator is appointed by a court and is required to do everything necessary for the maintenance and realisation of the bankruptcy estate. The administrator represents the estate in court proceedings and prepares a schedule of claims.[104] According to Article 197 of the DEBA, a sole (bankruptcy) estate is formed comprising the assets of the insolvent party at the time of the opening of bankruptcy proceedings, irrespective of where those assets are situated (i.e. this includes assets located abroad).[105] Once the assets of the insolvent party are realised, the respective proceeds are distributed proportionally to the creditors after their claims have been assessed by the bankruptcy administrator.[106]

3.4 England

Insolvency law in England is primarily regulated by the Insolvency Act 1986 (UK), as amended by the Insolvency Act 1994 and 2000 and the Enterprise Act 2002, and the

[101] DEBA, Arts. 197-207.
[102] STÄUBLI and BATTISTINI-KOHLER (2006) p. 707
[103] The declaration of bankruptcy affects all obligations of the insolvent party (irrespective of whether they are secured or not) that become due against the estate. Accordingly, the bankruptcy may accelerate the maturity of otherwise not yet due claims, including claims of governmental authorities. The only claims that are exempt from this stay are claims secured by mortgage on the insolvent party's real property. Claims generated during the bankruptcy proceeding itself are distinguished from the other categories of claims and are considered to be costs of the proceeding to be paid prior to the distribution of the proceeds of the estate. STÄUBLI and BATTISTINI-KOHLER (2006) p. 707.
[104] See DEBA, Art. 219.
[105] Article 166 et seq. of the PILA provides for a procedure to request the recognition of foreign insolvency decrees and the concurrent opening of secondary insolvency proceedings in Switzerland. Recognition may be denied if the foreign bankruptcy violates Swiss public policy ("*ordre public*").
[106] The declaration of bankruptcy affects all obligations of the insolvent party (irrespective of whether they are secured or not) that become due against the estate. Accordingly, the bankruptcy may accelerate the maturity of otherwise not yet due claims, including claims of governmental authorities. The only claims that are exempt from this stay are claims secured by mortgage on the insolvent party's real property. Claims generated during the bankruptcy proceeding itself are distinguished from the other categories of claims and are considered to be costs of the proceeding to be paid prior to the distribution of the proceeds of the estate. STÄUBLI and BATTISTINI-KOHLER (2006) p. 707.

Companies Act 2006 (UK). Insolvency Act 1986 regulates both corporate and individual insolvency (or bankruptcy). Most of the provisions of Companies Act 1985 relating to insolvency were repealed and re-enacted in the Insolvency Act 1986, however a few remain, namely sections 196,[107] 425 – 427[108] and 458.[109] England has adopted the UNCITRAL Model Law on Cross-Border Insolvency. There are five main statutory procedures that may be relevant when a company is in financial difficulties.

3.4.1 Administration

A company can be placed in administration by the court (on application by the company, its directors or one or more creditors) or out of court (on the application of a holder of a qualifying floating charge). The court must be satisfied that the company is, or is likely to be, unable to pay its debts before making an order appointing an administrator (except if the application is from the holder of a floating charge).

An administrator (after the changes initiated in the Enterprise Act 2002 (UK)) is obliged to act with the objective of: (a) rescuing the company as a going concern; (b) achieving a better than winding-up outcome for creditors as a whole; or (c) realising property to distribute to one or more secured or preferential creditors.[110]

The most significant feature of administration is that it imposes a freeze or stay on all legal proceedings and creditor actions against the company, including the enforcement of security, while the administrator seeks to achieve the purpose(s) for which the administration order was granted.[111] The effect of the stay is that certain action proscribed by statute may not be pursued against the company without either the consent of the administrators or the permission of the court.[112] The administrators, once appointed, also take possession of the company's assets and have the responsibility for the management of the company's business, assets and affairs during the period of administration.[113]

[107] Dealing with payments of debts out of assets subject to a floating charge.
[108] Concerning arrangements with creditors.
[109] Dealing with fraudulent trading.
[110] FINCH (2009) p. 21.
[111] FINCH (2009) p. 22.
[112] BURN and GRUBB (2005) p. 126.
[113] BURN and GRUBB (2005) pp. 126.

3.4.2 Administrative receivership

Administrative receivership is a security enforcement procedure for holders of floating charges over a company's assets. However, this mechanism has largely been abolished. The law in the England used to provide that when a creditor lent money to a company and secured this by means of a floating charge over the whole or substantially whole of the company's assets, the creditor could appoint an administrative receiver.[114] The administrative receiver could control all assets subject to the security, effectively controlling the company in order to realise the security. The Enterprise Act 2002 (UK) largely replaced receivership with administration and prohibited (with certain exceptions)[115] the use of administrative receivers by holders of floating charges.[116] Now the general enforcement of floating charges is carried out through the administration process.

3.4.3 Formal arrangements with creditors

Companies in distress may be able to negotiate settlements on a variety of terms and such agreements may operate within a statutory format or contractually between the company and its creditors.[117]

3.4.4 Winding-up / Liquidation

Under English law, liquidation is a procedure of last resort. It involves a liquidator being appointed to take control of the company and to collect, realise, and distribute the assets of the company to creditors according to their legal priority. Once this process has been completed the company is dissolved.[118] Liquidation can be either compulsory or voluntary. Compulsory liquidation generally occurs on the petition of a creditor, although a company director, if authorised, a receiver or administrator may also present a petition. Where the company itself instigates a procedure it will do so by means of a creditors' voluntary liquidation.[119]

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[114] See Insolvency Act 1986 (UK), s. 29(2).
[115] See Enterprise Act 2002 (UK), s. 250; FINCH (2009) p. 20.
[116] Subject to certain exceptions, only a secured creditor holding a floating charge dated earlier than September 15, 2003 may appoint an administrative receiver. BURN and GRUBB (2005) p. 126.
[117] Sections 1-7 Insolvency Act 1986 provide for company voluntary arrangement where directors agree with creditors on an appropriate arrangement to resolve outstanding debts.
[118] Insolvency Act 1986 (UK) Sch. 4.
[119] A liquidation can also be a member's voluntary liquidation but this occurs when the company is solvent so therefore not relevant for the purposes of this study. BURN and GRUBB (2005) p. 125.

3.4.5 Bankruptcy

English law uses the term bankruptcy to refer to an insolvent individual. An individual can be declared bankrupt either on his own petition or that of a creditor. The Official Receiver will become the bankrupt's trustee in bankruptcy unless and until another trustee in bankruptcy is appointed. The trustee has a duty to realise the assets of the bankrupt and then to distribute them amongst the bankrupt's creditors.[120]

3.5 United States

Insolvency (or bankruptcy as it is known) in the United States is regulated by a federal statutory law contained in Title 11 of the United States Code ("U.S.C.") (referred to as the "Bankruptcy Code").[121] Bankruptcy proceedings are supervised by and litigated in the United States Bankruptcy Courts. The United States Trustees were established by Congress to handle many of the supervisory and administrative duties of bankruptcy proceedings. Proceedings in bankruptcy courts are governed by the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and local rules of each bankruptcy court.

The Bankruptcy Code imposes an automatic stay of all legal proceedings involving the bankrupt party at the moment a bankruptcy petition is filed.[122] The stay generally prohibits the commencement, enforcement or appeal of actions and judgments against an insolvent party for the collection of any debt or claim that arose prior to the filing of the bankruptcy petition, with certain types of actions exempted.[123] The automatic stay also prohibits collection actions and proceedings directed toward property of the bankruptcy estate itself.[124] Furthermore, certain pre-proceeding transfers of property, secured interests and liens may be delayed or invalidated.

There are two basic types of bankruptcy procedures for corporations in financial distress, namely, a filing under Chapter 11 for reorganisation or a filing under Chapter 7 for

[120] BURN and GRUBB (2005) p. 126.
[121] Congress passed the Bankruptcy Code under its Constitutional grant of authority to "establish... uniform laws on the subject of Bankruptcy throughout the United States" under Article I, Section 8 United States Constitution. The Bankruptcy Code has been amended several times since 1978, most recently in 2005 through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
[122] 11 U.S.C., s. 362(a). The stay arises by operation of law and requires no judicial action.
[123] These actions are listed in sect. 362(b) 11 U.S.C. Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay.
[124] 11 U.S.C., s. 362.

liquidation. Chapter 15, 11 U.S.C. incorporates the UNCITRAL Model Law on Cross-Border Insolvency into US law.[125]

3.5.1 Chapter 11: reorganisation

Chapter 11 contains a number of provisions that are intended to support companies in financial distress and assist them to continue to operate. Under Chapter 11, the company continues to operate and the existing management usually remain in control as "debtors-in-possession."[126] A reorganisation plan is adopted to resolve all of the company's debts. Under the reorganisation plan the company agrees to repay part or all of its debt from future earnings, as opposed to selling assets.[127] A petition to commence Chapter 11 proceedings may be a voluntary, filed by the debtor, or it may be involuntary, filed by creditors.[128]

The U.S. Trustee monitors the progress of a Chapter 11 bankruptcy case and supervises its administration. The U.S. Trustee is responsible for monitoring the operation of the business by the debtor-in-possession and the submission of operating reports and fees.

The debtor-in-possession or the trustee, has what are called "avoiding" powers. These powers may be used to undo a transfer of money or property made during a certain period of time before the filing of the bankruptcy petition.

3.5.2 Chapter 7: liquidation

When a Chapter 7 petition is filed (usually in the bankruptcy court of the place where the insolvent company is organised or has its principal place of business or principal assets) the U.S. Trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee to administer the case and liquidate the insolvent party's non-exempt assets and distribute the proceeds to creditors.[129] Under certain circumstances, a

[125] See H.R. Rep. No. 109-31 at 105 (asserting that Chapter 15 incorporates the UNCITRAL Model Law on Cross Border Insolvency).
[126] 11 U.S.C., s. 1101. Section 1107 11 U.S.C. places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the U.S. trustee or bankruptcy administrator. 11 U.S.C. Sects., 1106, 1107.
[127] WHITE (2007) p. 1021.
[128] 11 U.S.C., ss. 301, 303.
[129] 11 U.S.C., ss. 701, 704.

Chapter 7 case may be commenced by a petition filed by creditors with claims against the insolvent party.[130]

Commencement of a bankruptcy case creates an "estate." The estate technically becomes the legal owner of all property formerly owned by the insolvent party. It consists of all legal or equitable interests of the insolvent party at the time when the bankruptcy petition is filed. Section 726 of the Bankruptcy Code governs the distribution of the property of the estate. There are six classes of claims with each class required to be paid in full before the next class is paid anything.[131] The primary role of a Chapter 7 trustee is to realise the assets in the bankruptcy estate in order to maximise the return to creditors and orderly distribute the proceeds of the estate.

3.6 International insolvency framework

There are several types of legal mechanisms that have been used to address cross-border insolvency which vary in their degree of formality and success.[132] These mechanisms can include reciprocal domestic legislation, judicial cooperation, inter-governmental agreements, multistate treaties or conventions, model laws and legislative guides. Obtaining international consensus on cross-border insolvency regulation has been difficult because, as described by one commentator, insolvency or bankruptcy laws are "broad, deep, and prickly."[133] Due to the invasive character of insolvency regulation, which tends to contain deep normative content and vary substantially from jurisdiction to jurisdiction, it has been said that "a greater recipe for an international conflict of laws in the cross-border setting might be difficult to imagine."[134] Unsurprisingly, the international legal mechanisms that have succeeded in helping to coordinate cross-border insolvencies have generally been of a non-binding character.[135]

An approach that is sometimes used (often in common law-based countries) is to enact legislation specifically dealing with recognition of foreign insolvency proceedings. The legislation allows (or requires) courts in one jurisdiction to recognise certain foreign

[130] 11 U.S.C., s. 303.
[131] 11 U.S.C., s. 726.
[132] For a discussion of the development of multilateral cooperation on insolvency see POTTOW (2004-2005).
[133] POTTOW (2004-2005) p. 942.
[134] POTTOW (2004-2005) p. 942.
[135] See BERENDS (1998) p. 319 (stating that the reason why a few conventions have been adopted is that a "convention is an "all-or-nothing" instrument, a "take-it-or-leave-it" text.")

insolvency proceedings, and provide assistance to foreign courts conducting such proceedings.[136]

An alternative approach has been to create regional regulation to deal with cross-border insolvency cases. The American Law Institute's (ALI's) Transnational Insolvency Project has developed cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three North American Free Trade Agreement (NAFTA) countries - the United States, Mexico, and Canada.[137] Within the European Union, the European Union Regulation on Insolvency Proceedings[138] creates legal rules for dealing with cross-border insolvencies involving parties in Member States. The regulation is directly applicable as part of the national law of each Member State without the necessity of national legislation to bring it into force.[139]

Obtaining international agreement to create multilateral treaties dealing with insolvency has been extremely difficult. There have been almost no successful multilateral treaties dealing with insolvency, with the exception of the Convention Regarding Bankruptcy between Nordic countries[140] and similar treaties between several countries in South America.[141] This difficulty in obtaining international consensus on a multilateral treaty was recognised by the International Bar Association (IBA) when it established the Cross-Border Insolvency Concordat.[142] The IBA adopted that Cross-Border Insolvency Concordat as a framework for harmonising cross-border insolvency proceedings as "an interim step until treaties and/or statutes are adopted by commercial nations."[143]

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[136] For example, in Australia, this approach has been adopted in the Bankruptcy Act 1966 and the Corporations Act 2001. The provisions in these laws generally provide that Australian courts must act in aid of courts of prescribed foreign countries in matters of bankruptcy and insolvency and may act in aid of other countries.

[137] Am. L. Inst., Transnational Insolvency: Cooperation Among NAFTA Countries. Principles of Cooperation Among the NAFTA Countries (Juris Publishing, Inc., 2003).

[138] Council Regulation (EC) No 1346/2000 of 29 May 2000 which came into effect 31 May, 2002.

[139] See Article 249 of the EC Treaty stating: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

[140] Convention Regarding Bankruptcy, Nov. 7, 1933, Den.-Fin.-Nor.-Swed., 155 L.N.T.S. 115 (revised 1977 and 1982) cited in POTTOW (2004-2005) p. 957.

[141] The so called Montevideo Treaties on International Commercial Law cited in BERENDS (1998) p. 316.

[142] International Bar Association Section On Business Law, Committee J, Insolvency and Creditors' Rights, Cross-Border Insolvency Concordat, adopted by the Council of the Section on Business Law of the International Bar Association Paris, France September 17, 1995, adopted by the Council of the International Bar Association Madrid, Spain May 31, 1996.

[143] Report on the Committee J Cross-Border Insolvency Concordat, presented to the Council of the International Bar Association Section on Business Law, Sept. 17, 1995, at 3 cited in NIELSEN, SIGAL and WAGNER (1996) p. 538.

Arguably the most successful international mechanism to assist the regulation of cross-border insolvencies is the UNCITRAL Model Law on Cross-Border Insolvency.[144] This text was created as a legislative text recommended to states for enactment as part of national law, with or without modification. The purpose of the Model Law on Cross-Border Insolvency is to assist countries in developing a modern, harmonised, and fair framework for cross-border insolvencies.[145] The Model Law on Cross-Border Insolvency is fundamentally procedural in focus and does not attempt a substantive unification of insolvency law.[146] UNCITRAL has also produced the UNCITRAL Legislative Guide on Insolvency Law, which is intended to assist in the establishment of a legislative framework for insolvency;[147] as well as the UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings.[148] The purpose of these Notes is to provide guidance for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases.[149]

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[144] UNCITRAL Model Law on Cross-Border Insolvency 1997 (1997) 36 ILM 1386. The Model Law was drafted by the UNCITRAL's Working Group on Insolvency Law, approved and adopted by the Commission in May 1997 and endorsed by the United Nations General Assembly in December 1997 (resolution 52/159).
Legislation based on the UNCITRAL Model Law has been enacted in:
Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1994), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998, 2010), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008), Mexico (1993), New Zealand (1996, 2007), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008), Serbia (2006), Singapore (2001), Slovenia (2008), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Florida (2010), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996).
See <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>
[145] Cross-Border Insolvency Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 6 Tul. J. Int'l & Comp. L. 415 (1998) p. 419.
[146] POTTOW (2004-2005) p. 939.
[147] UNCITRAL Legislative Guide on Insolvency Law, adopted 25 June 2004, U.N. Sales No. E.05V.10 (2005) available at <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> p. 1-2. See also WESSELS (2006) p. 205.
[148] UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, (UN Doc. A/CN.9/WG.V/WP.86) (As adopted by the United Nations Commission on International Trade Law on 1 July 2009, and as adopted by the General Assembly on 16 December 2009, resolution 64/112).
[149] UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, (UN Doc. A/CN.9/WG.V/WP.86) p. 6.

The above discussion has touched on a number of international documents, most of which are of a non-binding, instructive nature. It has been acknowledged that there is a lack of multilateral treaty arrangements with global effect in the context of insolvency.[150] This lack of binding international law addressing cross border insolvency situations is one of most noteworthy features of the international insolvency law framework.[151]

4 Arbitrability

It was noted in Section 2 that international arbitration is effective because it is held in place by a complex system of national laws and international treaties.[152] An agreement to arbitrate must be capable of being enforced at law and recognised by domestic courts.[153] Likewise, an arbitral award is only effective and enforceable because it is recognised and enforced by domestic legal systems.[154] These laws and conventions provide that states retain the power to prohibit the resolution of certain types of disputes outside the domestic courts. States retain the power to declare certain disputes not arbitrable. If an arbitration agreement is entered into to resolve a non-arbitrable dispute, the agreement may be considered invalid and any award made pursuant to that arbitration agreement would be unenforceable. In this way, it has sometimes been recognised that arbitrability is a condition of validity of the arbitration agreement and consequently an arbitrator's jurisdiction.[155]

This Section defines what is meant by the term "arbitrability" and considers the relationship between arbitrability, mandatory rules and public policy.

4.1 Definition of Arbitrability

Judicial power has been described as an essential prerogative of states, although under certain circumstances, states allow parties to enter agreements to give power to arbitrators to settle disputes between them.[156] While recognising party autonomy to submit disputes

[150] UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, (UN Doc. A/CN.9/WG.V/WP.86) p. 12.
[151] UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings, (UN Doc. A/CN.9/WG.V/WP.86) p. 12-13.
[152] REDFERN and HUNTER (2004) §1-01.
[153] GOODE (2001) p. 29.
[154] See PARK (1983) p. 30; LEW (2008 – 2009) p. 492.
[155] HANOTIAU (1999) p. 146; BERNARDINI (2008) p. 504; Swiss Federal Tribunal, 23 June 1992, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara S.p.A. v. M and Arbitral Tribunal*, ATF 118 II 353, 1993(1) ASA Bull. 58, XX Y.B. Com. Arb 766 (1995).
[156] HANOTIAU (1996 B) p. 391.

to arbitration, states retain the power to impose restrictions or limitations on what matters can be referred to and resolved by arbitration. Arbitrability, or more precisely "objective arbitrability,"[157] concerns what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings and belong exclusively to the domain of state courts.[158] For this reason, arbitrability has been described as "one of the issues where the contractual and jurisdictional natures of international commercial arbitration meet head on."[159]

Another category of arbitrability has been referred to as "subjective arbitrability" or "*ratione personae,*" which concerns the types of individuals or entities that are considered able to submit their disputes to arbitration because of their status or function. This concept of arbitrability typically concerns disputes involving states and their instrumentalities or disputes involving parties not referred to in the arbitration agreement, such in complex corporate arrangements. In the context of insolvency, the issue of subjective arbitrability may arise when a trustee or administrator is appointed, particularly whether they have the ability to submit disputes to arbitration or defend proceedings brought against the insolvent entity. This study does not specifically address the issue of subjective arbitrability and as such, the use of the term arbitrability refers to "objective arbitrability."

Arbitrability has been defined in a number of ways, although there is no internationally accepted definition as to what matters are arbitrable.[160] Since states have their own traditions and precepts which differ from state to state on matters of politics, economics, morality and the like, it is unsurprising that there are divergences in approach when states identify the matters which must be resolved by state courts, rather than private dispute resolution.[161] Each state legislator or court may determine that certain factual or legal aspects of commercial relationships involve matters of a public interest and should not be left entirely to the disposal of private parties to resolve through arbitration. In these

[157] LEW, MISTELIS and KRÖLL (2003) p. 187. *See also* GAILLARD and SAVAGE (1999) pp. 312-329; DI PIETRO (2009) p. 91.
[158] MISTELIS (2009) p. 4; POUDRET and BESSON (2007) p. 281; BLACKABY and PARTASIDES (2009) p. 123.
[159] LEW, MISTELIS and KRÖLL (2003) p. 187.
[160] TWEEDDALE (2005) p. 107.
[161] MUSTILL and BOYD (2001) p. 71.

cases, states can either exclude arbitrability of certain matters or provide for control of arbitral awards by state courts when recognition or enforcement is sought.[162]

It has been said that arbitrability is a condition of validity of the arbitration agreement and therefore of the jurisdiction of the arbitration tribunal.[163] However, arbitrability may be better described as a specific condition relating to the jurisdictional aspect of the arbitration agreement, not merely limited to the validity of the arbitration agreement. Arbitrability can be seen as a condition precedent for the arbitral tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), as opposed to a condition of validity of an arbitration agreement (contractual requirement).[164]

Lawrence Shore says:

> Internationally, arbitrability refers to whether specific classes of disputes are barred from arbitration either because of public policy or because they are outside the scope of the arbitration agreement ... arbitrability refers to whether the specific claims raised are of [a] subject matter capable of settlement by arbitration, and are not subject to the exclusive jurisdiction of ... courts.[165]

As seen in Section 2, the New York Convention and the Model Law (where applicable) play an integral role in the recognition and enforcement of arbitration agreements and awards.[166] These instruments do not contain substantive rules on arbitrability; instead leaving the categories of disputes that are arbitrable to each national legislator and court system to determine. Under the New York Convention, for example, the obligation in Article II to recognise and enforce arbitration agreements only exists with respect to agreements concerning a "subject matter capable of settlement by arbitration."[167] Likewise, in Article V(2)(a), the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition or enforcement is

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[162] BÖCKSTIEGEL (1987) p. 183.
[163] HANOTIAU (1996 B) p. 391 ("Arbitrability is indeed a condition of validity of the arbitration agreement and consequently, of the arbitrators' jurisdiction."); BÖCKSTIEGEL (1987) p. 180; BERNARDINI (2008) p. 504. C.f. BREKOULAKIS (2009) pp. 37-40.
[164] BREKOULAKIS (2009) p. 39.
[165] SHORE (2009) p. 70.
[166] New York Convention, Articles II(1) and V(2)(a); Model Law, Articles 34(2)(b)(i) and 36(1)(b)(i).
[167] Article II(1) merely stipulates that arbitration agreements have to be recognised and that national courts have an international obligation to deny jurisdiction (and refer a matter to arbitration) under Article II(3) unless the dispute is not capable of settlement by arbitration. Article II does not contain a rule as to what law governs the question of arbitrability at the pre-award stage which has given rise to a number of divergent view in national court practices. See also LEW, MISTELIS and KRÖLL (2003) p. 190.

sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country.[168]

The phrase "capable of settlement by arbitration" has its origins in the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 where it was a condition of recognition or enforcement in Art 1(2)(b).[169] Arbitrability was also a distinct ground under Article IV(a) of the ICC Draft Convention of 1953 in relation to recognition and enforcement of an award, and it was also a distinct ground in relation to recognition and enforcement under Article IV(b) of the United Nations Economic and Social Council Draft Convention of 1955.[170]

The notion of "capable of being settled by arbitration" or "arbitrability" is also central to the operation of the Model Law. It has been held that these words are to be understood, in both the New York Convention and the Model Law, as dealing with the question "whether the dispute is of the type that comes properly within the domain of arbitration."[171] The types of disputes which national laws may see as not arbitrable, and which were the subject of discussion leading up to the development of the New York Convention and the Model Law, are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency.[172]

The Model Law does not contain any provision defining which disputes are arbitral.[173] Article 1(5) provides that it is not intended to affect other laws of the state that preclude certain disputes being submitted to arbitration. Therefore, in implementing the Model Law, national legislators are completely free to determine which disputes are arbitrable and which are not.

Mustill and Boyd say that "it is not surprising that there is no agreement, either internationally or otherwise, about what arbitrability entails, or about what kinds of subject-matter or what kinds of dispute, fall within one or other of the various

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[168] POUDRET and BESSON (2007) p. 284.
[169] Convention on the Execution of Foreign Arbitral Awards 1927, Art. 1(2)(b) provides: "...the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon."
[170] *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* per Finn, Finkelstein and Allsop JJ, [2006] FCAFC 192, §199.
[171] *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* per Finn, Finkelstein and Allsop JJ, [2006] FCAFC 192, §200.
[172] *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* per Finn, Finkelstein and Allsop JJ, [2006] FCAFC 192, §200.
[173] Under Article 34 and 36 of the Model Law an arbitral award may be set aside or refused recognition or enforcement if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or (ii) the award is in conflict with the public policy of the State.

understandings of the concept."[174] Indeed, the issue of arbitrability was considered by the drafters of the UNCITRAL Model Law, however, during the deliberations it soon became clear that reaching any consensus as to a definition of arbitrability was not going to be possible.

"The concept of arbitrability must be defined by the various national laws, which emphasises the importance of the question of the applicable law."[175] Most national arbitration laws do not regulate which law governs the question of arbitrability; rather specific national laws dealing directly with a specific subject matter, such as insolvency, competition/anti-trust regulation and intellectual property law, generally determine which disputes are arbitrable or not.[176] Therefore, the determination of the law governing arbitrability is of considerable importance as a subject matter may be arbitrable under the laws of one country, but not in another. Determining which law is applicable could therefore determine whether a particular subject matter is arbitrable or not (see below at Section 5).

4.2 Arbitrability, Mandatory Rules and Public Policy

In international matters, determining the arbitrability of a subject matter or dispute involves the balancing of competing policy considerations.[177] The legislators and courts in each country must balance, on one hand, the importance of reserving certain matters of public interest to the domain of state courts; with the public interest of encouraging arbitration of commercial matters, on the other.[178] State legislators and courts maintain a supervisory function and place restrictions on the matters that may be resolved by arbitration.[179] These restrictions are usually in the form of provisions called "*loi d'application immediate*" ("laws of immediate application"), "*lois de police*" ("police laws") or "mandatory rules." These mandatory rules have been defined as an "imperative provision of law which must be applied to an international relationship [or subject matter] irrespective of the law that governs that relationship [or subject matter]."[180]

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[174] MUSTILL and BOYD (2001) p. 71.
[175] POUDRET and BESSON (2007) p. 283.
[176] Switzerland is an example of a country with specific arbitration legislation dealing with arbitrability (Art. 177(1) of the PILA). MISTELIS (2009) p. 10; BLACKABY and PARTASIDES (2009) p. 125 *et seq*.
[177] BRINER (1994) §1.11.2.3.
[178] BRINER (1994) §1.11.2.3; LAZIĆ (1998) pp. 151-154.
[179] BLACKABY and PARTASIDES (2009) p. 123.
[180] MAYER (1986) p. 275.

The application of these mandatory laws may result in a dispute not being arbitrable, either because they confer exclusive jurisdiction within the courts of the state promulgating the mandatory law or because an arbitrable tribunal is not capable to implement these laws. The prevailing view is that arbitrators have a duty to respect mandatory provisions of the law at the seat of arbitration so as to minimise the risk the setting aside of an award.[181]

Mandatory rules of law have been said to typically concern the following areas: competition and anti-trust laws, currency controls, social policy rules to protect weak parties (such as employment law and consumer protection), environmental protection and health laws, measures of embargo, blockade or boycott, and insolvency laws.[182]

There is a considerable overlap between mandatory rules and the public policy ("*order public*") of a state. It is has been commented that "mandatory rules of law are a matter of public policy (and reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws)."[183] These mandatory laws may be part of a state's public policy, although this is not essential.[184]

Public policy reflects:

> .... the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community. Naturally public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.[185]

The principle that states retain certain powers to limit matters that may be determined by arbitration on the basis of public policy is reflected in the New York Convention and Model Law. Article V(2) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the recognition or enforcement of the award would be contrary to the public policy of that country. Article 34(2)(b)(i) of the Model Law, provides that an arbitral award may be set aside if the court finds that the award is in conflict with the public policy of the state where the Model law was enacted.

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[181] POUDRET and BESSON (2007) §146.
[182] MAYER (1986) p. 275; KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 384; BLACKABY and PARTASIDES (2009) p. 125 *et seq*. C.f. BREKOULAKIS (2009).
[183] MAYER (1986) p. 275.
[184] KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 384; BÖCKSTIEGEL (1987) p. 183.
[185] Lew, *Applicable Law* 532 cited in LEW, MISTELIS and KRÖLL (2003) p. 422, n.42.

While these provisions apply to the recognition or enforcement stage of the arbitral process, they concern the very beginning and basis of the arbitration as well.[186] In principle, matters related to public policy may restrict the arbitrability of certain matters.[187] As explained by Karl Heinz Böckstiegel:

> Public policy in the context of international arbitration is normally considered from the basis of the New York Convention where it may be a defence against enforcement once the arbitral award is rendered. Thus the issue appears only in the very end of the arbitral procedure. Public policy in relation to arbitrability, however - although it may still be a defence against enforcement - concerns the very beginning and basis of arbitration, namely the arbitration agreement or arbitration clause.[188]

Historically, public policy considerations have been seen as a restriction on arbitrability, however, it has been increasingly recognised that the relevance of public policy in relation to arbitrability is diminishing.[189] In a leading arbitration text from 1991, it was said:[190]

> The concept of arbitrability, properly so-called, related to public policy limitations upon arbitration as a method of settling disputes. Each state may decide, in accordance with its own economic and social policy which matters may be settled by arbitration and which may not.[191]

More recently, it has been argued that public policy now has little relevance to the issue of arbitrability of international commercial disputes.[192] It is contended that "relevance of public policy to the discussion of arbitrability is essentially very limited, and therefore, the scope of inarbitrability should not be determined by reference to public policy."[193]

It has been suggested that the inarbitrability of certain disputes results, not from public policy considerations, but rather the inherent limitations of arbitration as a dispute resolution mechanism having contractual origins.[194] Given that arbitration is based on the

[186] BÖCKSTIEGEL (1987) p. 178.
[187] KIRRY (1996) p. 374; BÖCKSTIEGEL (1987) p. 178; BREKOULAKIS (2009) p. 21.
[188] BÖCKSTIEGEL (1987) p. 177-178.
[189] KIRRY (1996) p. 374; BREKOULAKIS (2009) p. 21.
[190] REDFERN and HUNTER (1991).
[191] REDFERN and HUNTER (1991) p. 137 cited in KIRRY (1996) p. 374.
[192] KIRRY (1996) p. 379; BREKOULAKIS (2009).
[193] BREKOULAKIS (2009) p. 32.
[194] BREKOULAKIS (2009) p. 32.

consent of the relevant parties, "arbitration has intrinsic difficulties to affect a circle of persons other than the contractual parties to an arbitration agreement."[195]

Key provisions of insolvency law (in particular those aimed at guaranteeing the equal treatment of creditors and the appointment of an administrator or trustee to administer the estate of the insolvent party) are commonly considered mandatory provisions of domestic law.[196] However, it is considered by some that the restrictions on the arbitrability of insolvency disputes arise from the contractual limitations of arbitration, rather than public policy considerations.[197]

5 The Law Applicable to Arbitrability and Determination of Arbitrability

As mention in Section 4.1 the determination of the law governing arbitrability is of considerable importance to determining the arbitrability of a dispute, as a subject matter may be arbitrable under the laws of one country, but not in another. Determining which law applies to the issue of arbitrability can involve a potentially complex choice-of-law analysis. Part of the difficulty in determining the choice of law applicable to the question of arbitrability results from the fact that the questions can arise at different stages of the arbitral proceedings as well as in different forums. The law applicable to arbitrability may vary depending on the forum and whether the question arises before the arbitral tribunal or a court; and whether the court is determining the jurisdiction of the arbitral tribunal or reviewing or enforcing an award.[198] Thus, the issue of arbitrability may arise at various points in the arbitral procedure, including:

[195] BREKOULAKIS (2009) pp. 32-33.
[196] BAIZEAU (2009) p. 100.
[197] BREKOULAKIS (2009) pp. 32-33. In the context of insolvency proceedings, there may be multiple unsecured, secured or preferred or potentially contested claims and multiple parties, such as the insolvent party, the trustee, several creditors. These claims are likely to arise out of different contracts and may contain completely different dispute resolution mechanisms or none at all. In this context, with multiple claims against the insolvent party or trustee, it would be very difficult to determine the order in which the creditors would be paid and the allocation of the available funds. Thus a key purpose of insolvency legislation, namely the allocation of the limited funds to creditors in an orderly manner in accordance with the priority of each creditor's claim, might not be able to be achieved due to the contractual limitations of arbitration. BREKOULAKIS (2009) p. 35.
[198] HANOTIAU (1996 B) p. 393; BORN (2009) p. 516.

a) Before the arbitral tribunal which will decide on it itself, in accordance with the principle of "Kompetenz-Kompetenz";[199]

b) Before a state court (either at the seat of arbitration or elsewhere) where a party which considers that the dispute is not arbitrable, submits it to the state court, which will have to decide upon the objection to the jurisdiction of the arbitral tribunal prior to any award being issued;[200]

c) Before a state court, at the seat of arbitration, where a party may invoke the issue of arbitrability as a ground for a setting-aside procedure after an award has been issued;

d) Before a state court, at a court of an enforcing country, where an objection to arbitrability may be raised by a party before the state court deciding on the recognition and enforcement of the award; and[201]

e) Before a bankruptcy court where the issue of the tribunal's jurisdiction may also arise where the trustee tries to bring a claim against one of the creditors who then invokes the existence of the arbitration agreement as a bar to the proceedings.[202]

When arbitral tribunals or state courts are determining the arbitrability of a dispute, there are, in principle, several choices of law that may govern the issue of arbitrability, namely:

a) the law governing the parties' arbitration agreement;

b) the law of the seat of arbitration;

c) the law of the judicial forum where an arbitration agreement is sought to be enforced;

d) the law of the state in which enforcement of an award is being or may eventually be sought;

e) the law that provides the basis for the relevant substantive claim that is said to be not arbitrable;

f) a uniform international definition of arbitrability.[203]

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[199] According to the *Kompetenz-Kompetenz* principle an arbitral tribunal is empowered to determine the existence and scope of its own jurisdiction. The tribunal has the primary power to rule on the issue of arbitrability. FORTIER (2005) p. 273.

[200] For example, under Article 16(3) of the Model Law, where an arbitral tribunal rules as a preliminary matter that is has jurisdiction (and the dispute is arbitrable) any party may request, within thirty days after having received notice of that ruling, an appropriate state court to decide the issue.

[201] HANOTIAU (1996 B) p. 391; BRINER (1994) §1.7.3; CHUKWUMERIJE (1994) p. 54.

[202] See for example, *Hays & Co v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149 (3rd Cir. 1989). See also BLESSING (1996) pp. 194-195.

Selecting from among these various options is not straightforward and there appears to be little uniformity among national courts and other authorities in making this choice.[204] It has been commented that "[a]greement on the conclusion that there is disagreement seems to be the only common denominator that one can find between arbitrators, courts and publicists regarding the question which is the applicable law on arbitrability".[205] Likewise, it has been noted that the practice of international arbitration proves that the issue of what law governs arbitrability is not an easy one.[206] At its thirty-second sessions, the UNCITRAL has recognised that "[u]ncertainty about, and differences among definition of, which disputes are arbitrable may cause considerable difficulties in practice."[207]

Accordingly, it is impossible lay down specific rules to determine which law governs the issue of arbitrability, as none exist. Rather, this work considers the potentially applicable laws and attempts to derive some, albeit vague, principles that arbitral tribunals and courts apply when considering this issue.

When determining the applicable law, the proper characterisation of the issue is critical for the correct choice of law analysis. Characterising an issue one way or another may lead to the application of different laws, and therefore to different results. For example, an insolvency provision that seeks to render arbitration agreements ineffective or terminate pending arbitration proceedings[208] could be characterised as:

1. Affecting the capacity of the insolvent party;
2. Affecting the substantive validity of the arbitration agreement;
3. Affecting the objective arbitrability of the dispute; or
4. Affecting the arbitration procedure in general.

Characterising the issue one way or another may lead to the application of different laws.[209] Similarly, determining which law applies to govern the issue of arbitrability will

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[203] BORN (2009) p. 517; BLESSING (1996) p. 192. In his report at the International Council for Commercial Arbitration ("ICCA") Congress 1999 in Paris, Marc Blessing identified up to nine different rules of conflict of laws that could apply to arbitrability. BLESSING (1999).
[204] BORN (2009) p. 517.
[205] BÖCKSTIEGEL (1987) p. 184.
[206] HANOTIAU (1996 B) p. 393. HANOTIAU (1999) p. 153; BÖCKSTIEGEL (1987) p. 184.
[207] UNCITRAL, *International Commercial Arbitration: Possible future work in the area of international commercial arbitration*, Note by the Secretariat (A/CN.9/460), 6 April 1999, p. 10.
[208] An example of such a provision is article 142 of the Polish Bankruptcy Law which provides: "Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued." V*ivendi et al. v. Deutsche Telekom et al.*, DFT 4A-428/2008, Decision of the First Civil Law Court of the Swiss Federal Supreme Court of 31 March 2009, ASA Bull. 1/2010, p. 104.
[209] KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 377.

depend on whether the issue is decided before the arbitral tribunal or a supervisory court or enforcement court.

5.1 Arbitrability before the Arbitral Tribunal

The practice of arbitral tribunals concerning the issue of arbitrability varies considerably and the New York Convention is of little assistance, as it is directed primarily at courts and not tribunals.[210] When faced with a question of whether a dispute is arbitrable, the arbitral tribunal must apply a particular law to resolve this question and, hence, must decide which law to apply. In accordance with the principle of *Kompetenz-Kompetenz*, an arbitral tribunal is empowered to determine the existence and scope of its own jurisdiction. In making such a decision, it will review the arbitration agreement, the relevant legal principles affecting its jurisdiction and assess whether the dispute is arbitrable according to the law it determines is applicable.[211]

5.1.1 Law applicable by the Arbitral Tribunal

Arbitral tribunals generally have considerable discretion with respect to determining the applicable law. If the parties have not chosen which law to apply to determine the question of arbitrability, the arbitrators will be required to determine the applicable law. Arbitral tribunals have no forum (or *lex fori*) and are therefore not constrained to apply the conflict of law rules applicable in a particular state.[212]

While various methods may be used to determine the applicable law, the general rule is that arbitral tribunals should, in principle, decide the issue of arbitrability by application of the law that governs the arbitration agreement.[213] This solution is provided for by Article II(1) of the New York Convention[214] and by Article VI(2) of the European Convention of 1961.[215] Where the parties have chosen the applicable law, the arbitral

[210] RANA and SANSON (2011) p. 43.
[211] FORTIER (2005) p. 273; BARON and LINIGER (2003) p. 27; ALFARO and GUIMAREY (1996) pp. 416-420. The arbitral tribunal's determination is not necessarily final as it may be subject to judicial review in the courts at the seat of arbitration or the place of enforcement.
[212] BERNARDINI (2008) p. 511.
[213] HANOTIAU (1996 A) p. 34; HANOTIAU (1996 B) p. 394.
[214] Article II(1) provides:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationships, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[215] Article VI(2) provides:

> In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.
> (a) under the law to which the parties have subjected their arbitration agreement;

tribunal must apply this law.[216] However, in practice, parties usually do not expressly indicate which law governs the arbitration agreement.[217] Accordingly, the most common approach to determine the applicable law is a choice of law analysis, which commonly involves three steps.[218] First, the issue must be characterised by the arbitral tribunal. That is, the arbitral tribunal must define the legal question posed and categorise it within a category of private international law. Second, the arbitral tribunal can then select the choice of law rule that applies to that category. Third, this choice of law rule will then guide the arbitral tribunal to the appropriate applicable law.[219]

Other approaches that arbitrators may adopt to determine the applicable law is to apply a choice of law rule which does not fall within a state system, for example: the application of a choice of law rule contained in an international convention; application of choice of law rule which appears to the arbitrator to represent the most generally accepted tendency in private international law; or the application of the law of the country with which the dispute is more closely related. Alternatively, arbitrators may determine the applicable law without reference to a choice-of-law rule.[220]

Once an arbitral tribunal has determined the law applicable to determine arbitrability they can then determine whether the dispute is arbitrable according to that law. If under the law governing arbitrability the dispute is not capable of settlement by arbitration, then the arbitral tribunal should declare itself incompetent to hear the dispute.[221] If the subject-matter that is not arbitrable only concerns certain claims, then the arbitration agreement may still be partially valid at least if the issues that may be decided through arbitration are distinct from non-arbitrable issues.[222]

(b) failing any indication thereon, under the law of the country in which the award is to be made;
(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.
The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.

[216] Except in the case where the law chosen pay the parties is against international public policy of the seat of arbitration. BERNARDINI (2008) p. 511.
[217] HANOTIAU (1996 A) p. 34; HANOTIAU (1996 B) p. 394. It has been commented that it is generally considered that the arbitration agreement is governed by the same law as the main agreement, translational rules or international trade usages. HANOTIAU (1996 B) p. 395.
[218] KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 376.
[219] KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 376.
[220] HANOTIAU (1996 A) p. 33.
[221] HANOTIAU (1999) p. 157.
[222] HANOTIAU (1999) p. 157.

5.1.2 The effect of the Law of the Seat of Arbitration

The law of the seat of arbitration (the *lex arbitri*) is often relevant to determine the arbitrability of a dispute, as if this law is not correctly applied, then any award may risk being annulled in the courts of that state.[223] As a general rule, arbitrators should seek to ensure that the award is valid in the state in which it is rendered.[224] Arbitral practice suggests that it is primarily by reference to the seat of arbitration that arbitral tribunals determine whether a dispute is arbitrable.[225] Such an approach was applied in ICC Case No. 6162,[226] which concerned a dispute between a French party and an Egyptian party. In that case the arbitral tribunal applied Swiss law - the law of the place of arbitration - to determine the arbitrability of the dispute.

The law of the seat of arbitration may provide that the arbitrability of a dispute be determined either by a rule of conflicts or by a substantive rule of private international law. A rule of conflicts provides a method to determine which law is applicable to a particular subject matter. Arbitrability can then be determined according to that law.[227] Alternatively, some states adopt a substantive rule of private international law that prescribe a particular criteria by which the arbitrability of a dispute should be decided for all arbitrations having their seat in that jurisdiction. An example of this type of law is article 177(1) of the Swiss PILA,[228] which specifies that any dispute relating to economic or financial interest may be submitted to arbitration.[229]

Under article 177 of the PILA, all claims that have a financial value for the parties are arbitrable.[230] Under such a provision, arbitrability is decided in accordance with the law of the seat of the arbitration and any provisions of foreign law governing the issue are not relevant.[231] However, there may be an exception to this principle where a prohibition or restriction on arbitrability contained in a foreign law is a rule of international public

[223] BAIZEAU (2009) p. 100.
[224] HANOTIAU (1996 A) p. 33; BERNARDINI (2008) p. 513; For example, Article 41 of the ICC Rules (2012) provide that an arbitral tribunal "*shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*."
[225] BAIZEAU (2009) p. 100. *See* Award in ICC Case No. 1803 (1972), *reprinted* in 5 Y.B. Com. Arb. 177, 180 (1980); Award in ICC Case No. 6162 (1990), *reprinted* in 17 Y.B. Com. Arb. 153, 158 (1992); Interim Award in ICC Case No. 7673 (1993), *reprinted* in 6 ICC Bull. 56, 57 (1995). However, in principle, the arbitrability of a dispute should not necessarily be decided by application of the law of the seat of the arbitration. *See* HANOTIAU (1996 B) p. 395; LEHMANN (2003-2004) pp. 758-760.
[226] ICC Case No. 6162[226] (1990), *reprinted* in 17 Y.B. Com. Arb. 153, 158 (1992).
[227] BRINER (1994) §1.6.1.
[228] Art. 177(1) of the PILA.
[229] Art. 177(1) of the PILA states: "*Toute cause de nature patrimoniale peut faire l'objet d'un arbitrage.*" KAUFMANN-KOHLER and LÉVY (2006) p. 260.
[230] Swiss Federal Court, *Fincantieri-Contieri Navali Italiani S.p.A. v. M.,* 23 June 1992, ATF 118 II 353.
[231] KAUFMANN-KOHLER and LÉVY(2006) p. 260.

policy.[232] In such a case, the foreign law concerned may give exclusive jurisdiction to foreign courts to hear certain disputes.[233] In such instances, the arbitral tribunal should determine that the dispute is not arbitrable.

The law of the seat may also be relevant to the issue of arbitrability when the law applicable to the arbitration agreement declares the dispute arbitrable, in conflict with the principles of international public policy of the seat of arbitration.[234] In that case the dispute would not be arbitrable.

In the context of insolvency provisions, arbitral tribunals tend to consider that insolvency law provisions bind them where (a) the insolvency order has been recognised in the country of the seat of arbitration; and (b) the law of the seat recognises them as mandatory law and/or part of public policy.[235]

5.1.3 Foreign Policy laws ("*Lois de Police*") of the Place of Performance of the Award

When considering whether a dispute is arbitrable, the law of a possible place of enforcement may be relevant to the arbitral tribunal's determination. Pursuant to Article V of the New York Convention, possible grounds for refusal of enforcement of an award include circumstances where: the arbitration agreement is invalid,[236] the dispute is not capable of settlement by arbitration,[237] or the award is contrary to public policy.[238] Difficulties concerning the arbitrability of a dispute arise where the dispute is capable of settlement by arbitration under the applicable law (commonly the law applicable to the arbitration agreement), but the law of the probable place of enforcement of the award provides that the dispute is not arbitrable.[239] While arbitral tribunals strive to render enforceable awards, it is generally accepted that they are not bound to apply provisions of the possible, or likely place(s) of enforcement.[240]

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[232] HANOTIAU (1996 B) pp. 395-36.
[233] Swiss Federal Court, *Fincantieri-Contieri Navali Italiani S.p.A. v. M.,* 23 June 1992, ATF 118 II 353. See KAUFMANN-KOHLER and LÉVY(2006) p. 260.
[234] HANOTIAU (1996 B) p. 396.
[235] KRÖLL (2006) p. 362.
[236] New York Convention, Article V(1)(a).
[237] New York Convention, Article V(2)(a).
[238] New York Convention, Article V(2)(b).
[239] HANOTIAU (1996 B) p. 396; BÖCKSTIEGEL (1987) pp. 185-86.
[240] BAIZEAU (2009) p. 118. In Switzerland the Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, pp.693-694, decided that, in principle, a restriction on the arbitrability of a dispute under a foreign law should not be taken into account when determining arbitrability. The Court nonetheless made a reservation in the case of incompatibility with

Whether arbitrators apply rules of (international) public policy of the place of enforcement of the award will depend on whether it is possible to determine the place of enforcement with certainty. Other factors, such as the legitimacy of the characterisation of the foreign rule as a matter of international public policy, may also be relevant.[241] For example, in ICC Case No. 6697, partial award rendered in Paris on 26 December 1990,[242] the ICC Tribunal stated:

> [T]he fact that one of the parties is subject to bankruptcy proceedings is not in itself sufficient to render a dispute non-arbitrable per se. … The only disputes which are excluded are those which have a direct link with the bankruptcy proceedings, namely those disputes arising from the application of rules specific to those proceedings. Since Cambior's claim does not have a direct link, the arbitral tribunal has jurisdiction to hear it.[243]

In that case, Casa, a Luxembourg company, had been placed under a system of "controlled administration with a view to liquidating its business." The arbitral tribunal decided the issue according to Luxembourg law. However, it asserted that it applied Luxembourg law because it had to ensure that the award was effective and that enforcement would not be excluded in advance. The arbitral tribunal therefore applied Luxembourg law as it considered that it could not make a decision that would be contrary to the international public policy of the country of likely enforcement.

However, as a general rule, whether or not an arbitral award may be in violation of a mandatory law of a possible place of enforcement should not be the basis of the arbitral tribunal's decision. The place of possible enforcement may not be known or there may be other reasons why a party seeks an award beyond enforceability in a particular state. There may be instances where it is the claimant (or counter-claimant) who requests that the arbitral tribunal ignore the mandatory law of a possible place of enforcement, even if this may jeopardise enforcement in that state. It is the claimant's (or counter-claimant's) prerogative whether it seeks to pursue an award that may nonetheless be at risk on non-enforcement. The claimant may wish to obtain a decision on liability for insurance

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(international) public policy, where it is shown that the foreign court has exclusive jurisdiction. HANOTIAU (1996 A) p. 35.

[241] HANOTIAU (1996 A) p. 33.

[242] ICC Award No. 6697 of 1992, *Casa v Cambior*, 1992 Rev. Arb. 135.

[243] ICC Award No. 6697 of 1992, *Casa v Cambior*, 1992 Rev. Arb. 135.

purposes, in order to obtain relief from a third party or perhaps to assist in settlement negotiations. [244]

Furthermore, under the New York Convention, an enforcement court has discretion whether to enforce an award. The court "may" refuse recognition and enforcement, but will not necessarily refuse enforcement. This is particularly so as it is generally considered that the grounds of Article V(2) should be construed narrowly, in accordance with a pro-arbitration bias.[245]

5.1.4 Transnational Rules

Several arbitral awards have applied "a-national" rules to the issue of the existence and validity of the arbitration agreement.[246] These awards have held that the most appropriate rules of law to decide on the existence and validity of an arbitration agreement contained in an international contact are not those of a particular national law, but rather general principles of law, internationally accepted trade usages and good faith.[247] This approach has been criticised as it may conflict with the law prevailing at the seat of arbitration, particularly if the latter provides for mandatory rules regarding the form and other conditions required for the validity of the arbitration agreement.[248]

5.1.5 Raising the issue of arbitrability *ex offio*

A further question when an arbitral tribunal considers the issue of arbitrability is whether the arbitrators have an obligation to raise the issue of arbitrability if the parties do not raise this issue themselves. It has been suggested that the answer is that except in case of: (i) a violation of international public policy (at least in the country of the seat of arbitration) or (ii) where the defendant party is in default, it should be left to the parties to raise the issue of non-arbitrability of the dispute before the arbitral tribunal.[249] The corollary of this is that in certain cases (for example, if recourse to arbitration would violate the international public policy of the seat of arbitration) an arbitral tribunal may

[244] BAIZEAU (2009) p. 119.
[245] BORN (2009) pp. 2712 - 2717.
[246] ICC Case No. 4131, Interim Award of 23 September 1982, *Dow Chemical v Isover-Saint Gobain*, 110(4) J.D.I. 899 (1983), IX Y.B. Com. Arb. 131 (1984); ICC Case No. 4381, Award of 1986, 113(4) J.D.I. 1103 (1986); ICC Case No. 5065, Interim Award of 1986, 114(4) J.D.I. 1039 (1987).
[247] BERNARDINI (2008) p. 514; *See also* LEHMANN (2003-2004) (arguing that a transnational approach to arbitrability should be adopted).
[248] BERNARDINI (2008) p. 514.
[249] HANOTIAU (1996 B) p. 393; BLESSING (1996) p. 194; c.f POUDRET and BESSON (2007) § 472.

raise the issue of arbitrability *ex officio* and declare that it lacks jurisdiction to decide the dispute.[250]

5.2 Arbitrability before State Court

The issue of the arbitrability of a dispute arises before state courts at different stages of the arbitral process: concurrently with arbitration proceeding (see below at 5.2.1); at the seat of arbitration if an award is challenged (see below at 5.2.2) and at the recognition and enforcement stage (see below at 5.2.3).[251] As a general rule, each court will apply its own criteria to determine the arbitrability of a dispute covered by an arbitration agreement and will characterise an issue for the purpose of determining the applicable law by reference to the *lex fori*.[252]

The law that state courts apply when considering the question of arbitrability was simply set out in a 1986 Belgian case involving an exclusive distributorship between a Swiss and a Belgian party.[253] The contract was governed by Swiss law and contained an arbitration clause. The Belgian party started court proceedings in Belgium, relying on a provision of Belgian law that disputes arising out of distributorship contracts were not arbitrable. The Swiss party applied for the dispute to be referred to arbitration. The application was granted by the Court of Appeal in Brussels, holding that:

> … the arbitrability of a dispute must be ascertained according to different criteria, depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award.
>
> In the first case, the arbitrability is ascertained according to the law which applies to the validity of the arbitration agreement and ... its objects. It is therefore the law of autonomy that provides the solution to the issue of arbitrability.

[250] HANOTIAU (1996 A) p. 34; MAYER (1986) p. 276; BLESSING (1996) p. 194; BORN (2009) p. 835; LEW, MISTELIS and KRÖLL (2003) pp. 219-221. In ICC case no 1110, *Argentine engineer v British company*, 3 Arb Int 282 (1987) with note Wetter, 10 *Arb Int* 227 (1994), XXI *YBCA* 47 (1996) Judge Lagergren raised the question of arbitrability of the subject matter of the case *ex officio*.

[251] It is not uncommon that courts adopt different criteria depending on whether the question of arbitrability arises concurrently with arbitral proceedings or at the recognition and enforcement state. HANOTIAU (1996 B) p. 399.

[252] KAUFMANN-KOHLER, LÉVY and SACCO (2010) p. 377.

[253] Cour d'appel Brussels, 4 October 1985, *Company M v M SA*, XIV YBCA 618 (1989) cited in LEW, MISTELIS and KRÖLL (2003) p. 190.

> An arbitrator or court faced with this issue must first determine which law applies to the arbitration agreement and then ascertain whether, according to this law, the specific dispute is capable of settlement by arbitration. [...]
>
> Within the framework of the New York Convention, the expression 'concerning a subject matter capable of settlement by arbitration', Article II(1) does not affect the applicability of the law designated by the uniform solution of conflict of laws for deciding on the arbitrability of the dispute at the level of the arbitration agreement.
>
> According to the New York Convention, the arbitrability of the dispute under the law of the forum of the award must be taken into consideration only at the stage of recognition and enforcement of the award and not when examining the validity of the arbitration agreement. This rule can be explained by the consideration that the arbitral award will, in the majority of cases, be executed without the intervention of an enforcement court ...[254] [References omitted.]

5.2.1 Arbitrability before a State Court decided concurrently with arbitration proceedings

If a party to an arbitration considers that the dispute is not arbitrable, it may submit the dispute to a court in a particular state while the arbitration is pending. This court will then consider the objection to the jurisdiction of the arbitral tribunal (usually prior to any award being issued). Under the New York Convention, the applicable rule is article II. Under article II(3):

> [t]he court of a Contracting States, when seized with an action in a matter in respect of which the parties have made an agreement within the meaning of that article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

An agreement, within the meaning of article II, requires that the dispute is "capable of settlement by arbitration" under article II(1).[255] For a state court to determine whether the dispute is capable of settlement by arbitration - or arbitrable - it must determine the applicable law to decide this question.

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[254] Cour d'appel Brussels, 4 October 1985, *Company M v M SA*, XIV YBCA 619 (1989) cited in LEW, MISTELIS and KRÖLL (2003) pp. 190-191.
[255] DI PIETRO (2009) p. 94.

As discussed above at 4.1, the issue of arbitrability has sometimes been considered to be a condition of validity of the arbitration agreement, and therefore should be determined in accordance with the law that governs the validity of the agreement.[256] However, when a court determines the arbitrability of a dispute, it is determining a question of jurisdiction.[257] In the majority of cases, courts have determined the question of arbitrability (at the pre-award stage) according to their own national law (which may not be the same as the law of the arbitration agreement).[258] This is frequently done without any conflict of laws analysis.[259] Therefore, the prevailing view seems to be that a national court applies its own law when determining the law applicable to the question of arbitrability in court proceedings.[260] That is, each country determines for itself, which disputes it, considers to be arbitrable according to its laws. This approach and the underlying rationale of applying the national law of the forum are well illustrated by two Italian cases.

In *Fincantieri v Iraq,*[261] the Court of Appeal in Genoa was faced with the question whether disputes relating to the effects of a United Nations embargo against Iraq were arbitrable. Dealing with the question of the applicable law the court held that:

> The answer must be sought in Italian law, according to the jurisprudential principle that, when an objection for foreign arbitration is raised in court proceedings concerning a contractual dispute, the arbitrability of the dispute must be ascertained according to Italian law as this question directly affects jurisdiction, and the court seized of the action can only deny jurisdiction on the basis of its own legal system. This also corresponds to the principles expressed in Arts. II and V of the [New York Convention]. Hence, the answer to the question [of arbitrability] can only be that the dispute was not arbitrable due to [Italian embargo legislation].[262]

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[256] HANOTIAU (1996 B) p. 400.
[257] BREKOULAKIS (2009) p. 20.
[258] LEW, MISTELIS and KRÖLL (2003) p. 191; BORN (2009) pp. 521-522. See for example *Westbrook Int'l LLC v. Westbrook Tech., Inc.,* 17 F.Supp.2d 681; Corte di Appello Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, 4 Riv Arb 505 (1994), XXI YBCA 594 (1996).
[259] LEW, MISTELIS and KRÖLL (2003) p. 191.
[260] LEW, MISTELIS and KRÖLL (2003) p. 193.
[261] Corte di Appello Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, 4 Riv Arb 505 (1994), XXI YBCA 594 (1996) cited in LEW, MISTELIS and KRÖLL (2003) p. 192.
[262] Corte di Appello Genoa, 7 May 1994, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq*, 4 Riv Arb 505 (1994), XXI YBCA 594 (1996) cited in LEW, MISTELIS and KRÖLL (2003) p. 192.

In a case concerning the arbitrability of EC competition law, the Bologna Court of First Instance held that:

> Art. II(3) of the said Convention provides that jurisdiction must be denied if the arbitration clause is null and void, inoperative or incapable of being performed, and that this review can only take place in light of the national law.
>
> This principles becomes even clearer if Art. II(3) is read in conjunction with Art. V(2)(a) of the same convention, which subordinates the efficacy of settlement by arbitration, according to the law of the State where recognition and enforcement are sought.
>
> This provision not only applies to the field which it directly regulated (the efficacy of the arbitral award already rendered); it also applies when the court obtains its own jurisdiction in the presence of an arbitration clause or agreement for international arbitration. It would be totally useless to recognize the jurisdiction of the arbitrator if the award, when rendered, could in no way be enforced in the legal system of the court which has jurisdiction.[263]

While the above is arguably the prevailing view, some courts have considered that the same law should be applied whether article II or article V of the New York Convention applied - that is, that the law of the place of recognition or enforcement may be applied to determine the arbitrability of a dispute.[264] However, it is generally accepted that this is not a practical solution, as the place of recognition or enforcement will generally not be known in advance.[265] Furthermore, it does not appear to be the intention of the drafters of the New York Convention for the same law to be applied under both article II and article V. For example in *Meadows Indemnity v Baccala & Shoop Insurance Services*,[266] a decision of the US Federal District Court Eastern District of New York, the court held that:

> The absence in article II of any reference to the law where enforcement will be sought and the presence of such language in article V may compel the opposite conclusion, i.e. that the delegates to the Convention deliberately excluded any such reference from article II and intended that the law where enforcement is sought is dispositive only of the question whether to enforce an arbitral award and

[263] 18 July 1987, XVII *YBCA* 534 (1992) cited in LEW, MISTELIS and KRÖLL (2003) pp. 192-193.
[264] BERNARDINI (2008) p. 510.
[265] BERNARDINI (2008) p. 510.
[266] *Meadows Indemnity Co Ltd v Baccala & Shop Insurance Services Inc*, 760 F Supp 1036-1045, XVII YBCA 686 (1992) (EDNY 1991).

> not the question whether to order arbitration under article II. In fact, the German delegate to the Convention noted the omission of article II(3) of any reference to the law where enforcement will be sought in determining whether an arbitration agreement is 'null and void' and proposed that the article be amended so that arbitral agreements would be related to arbitral awards that were enforceable. The German proposal was voted upon and rejected.[267]

In that case the claimant initiated court proceedings in the United States, despite an arbitration agreement, alleging that the dispute in question was not arbitrable under the law of Guernsey, where the company was incorporated and where an award would have probably been enforced. The court had to decide whether to enforce the arbitration agreement under article II of the New York Convention or whether the claim was not arbitrable. It treated article II as a substantive rule, providing for an autonomous international concept of arbitrability.[268] The court concluded that the fact that an arbitral award would not be enforceable in a particular state does not preclude an arbitral tribunal from applying article II(3) of the New York Convention.[269] The court decided that article II(3) should lead a court to refuse to refer a dispute to arbitration only if:

> ... the arbitration clause itself (i) is subject to an internationally recognised defence such as duress, mistake, fraud, or waiver or (ii) contravenes fundamental policies of the forum State… The purpose of the Convention, to encourage the enforcement of commercial arbitration agreements, and the Federal policy in favour of arbitral dispute resolution require that the subject matter exception of article II(1) is extremely narrow.[270]

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[267] *Meadows Indemnity Co Ltd v Baccala & Shoop Insurance Services Inc*, 760 F Supp 1036-1045, XVII YBCA 686 (1992) (EDNY 1991).

[268] The court continued:

> ... reference to the domestic laws of only one country, even the country where enforcement of the arbitral award will be sought, does not resolve whether a claim is capable of settlement by arbitration under article II(1) of the Convention.
>
> The determination of whether a type of claim is not capable of settlement by arbitration under article II(1) must be made on an international scale, with reference to the laws of the countries party to the convention. The purpose of the Convention, to encourage the enforcement of commercial arbitration agreements, and the federal policy in favour of arbitral dispute resolution require that the subject matter exception of Article II(1) is extremely narrow. [References omitted]

Meadows Indemnity Co Ltd v Baccala & Shoop Insurance Services Inc, 760 F Supp 1036-1045, XVII YBCA 686 (1992) p. 690.

[269] HANOTIAU (1996 B) p. 400.

[270] *Meadows Indemnity Co Ltd v Baccala & Shoop Insurance Services Inc*, 760 F Supp 1036-1045, XVII YBCA 686 (1992) (EDNY 1991).

5.2.2 Arbitrability before a State Court at the Seat of Arbitration if an Application is made to Set Aside an Award

Most modern arbitration laws provide for the possibility of setting aside an award in the seat of arbitration if it is contrary to public policy or the dispute is not capable of settlement by arbitration.[271] Jurisdiction over an annulment action usually vests in the court of the place where the award was made, which is normally deemed to be at the seat of the arbitration.[272] The national court concerned will, in most cases, apply its *lex fori* when deciding whether to set aside an award.[273] Accordingly, article 34(2) of the UNCITRAL Model Law provides that:

> An award may be set aside by the court specified in article 6, only if:
> ...
> (b) the court finds that:
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
> (ii) the award is in conflict with the public policy of this State.[274]

5.2.3 Arbitrability before a State Court at the Recognition and Enforcement Stage

At the recognition and enforcement stage, article V(2)(a) of the New York Convention explicitly refers to the *lex fori* to determine whether the subject matter of the dispute can be settled by arbitration.[275] The courts of the state where an award is sought to be enforced will normally apply its own national law to decide the issue.[276]

It is generally considered that the grounds of Article V(2) should be narrowly construed.[277] The decision of the Second Circuit Court of Appeals of the United States in

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[271] LEW, MISTELIS and KRÖLL (2003) p. 667.
[272] For example, Article 34 of the UNCITRAL Model Law; Sections 67-71 of the English Arbitration Act 1996; Article 191 of the Swiss PILA.
[273] BERNARDINI (2008) p. 517.
[274] Article 34(2)(b)(ii) of the UNCITRAL Model Law provides for a further ground to set aside an award, namely, if the "award is in conflict with the public policy of [the enacting country]."
[275] Article V(2)(a) of the New York Convention states:
> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sough finds that:
> (a) the subject matter of the difference is not capable of settlement by arbitration *under the law of that country*..." [emphasis added]

[276] HANOTIAU (1996 B) p. 402; POUDRET and BESSON (2007) §334. The law of the place of arbitration is, however, not irrelevant for the purposes of enforcement. Under Article V(e) of the New York Convention an award may be refused enforcement if the "award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Article 36(1)(a)(v) of the UNCITRAL Model Law uses the same language. Accordingly, if the subject matter of a dispute is considered to be incapable of settlement by arbitration under the law of the place of the arbitration, and is set aside, then the award may be refused recognition or enforcement. However, this could also be seen as merely the correct application of the law of the place of enforcement.
[277] HANOTIAU (1996 B) p. 403.

the case *Parsons and Whittermore v. Rakta*[278] is often cited to support this view. In that case, the Second Circuit Court of Appeals decided that an arbitral award should be refused enforcement only where enforcement "would violate the forum state's most basic notions of morality and justice."[279] The Second Circuit Court of Appeals held that the arbitral tribunal did not violate United States' constitutional standards of due process by refusing to reschedule a hearing due to a prior speaking engagement of a witness. The witness provided the arbitrators with an affidavit containing most of his proposed testimony, and therefore, presented evidence.

6 Arbitrability of Insolvency Matters in General

The previous section considered what may be termed the "mechanics" of arbitrability, and considered the stages at the issue of arbitrability can be raised, who decides the issue and how it is resolved.[280] In this section, the "substantive" issue, namely what insolvency matters are capable of resolution by arbitration and what matters are reserved to the exclusive jurisdiction of the courts, is examined.

6.1 Arbitrability and Insolvency

The commencement of insolvency proceedings does not, in principle, prevent an arbitral tribunal - seated in a "foreign" jurisdiction to the place of the commencement of the insolvency proceedings - from deciding issues with respect to disputes that have arisen out of or in connection with the non-performance of contractual obligations. In contrast, disputes that derive from the application of insolvency law and relate to the administration of the insolvency proceedings are generally considered not arbitrable.[281]

Most insolvency laws provide for a stay of arbitral proceedings (although generally they do not refer to arbitral proceedings specifically) upon the commencement of insolvency proceedings.[282] The rationale for a stay of arbitral proceedings is: (a) to ensure that the

[278] *Parsons & Whittemore Overseas Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).
[279] HANOTIAU (1996 B) p. 403.
[280] FORTIER (2005) p. 276.
[281] HANOTIAU (1996 A) p. 34.
[282] For example, Insolvency Act 1986 (UK) s. 10(c) ("no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company and its property except with the leave of the court and subject to such terms as aforesaid."); 11 U.S.C. s. 362(a). See e.g. *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252,259 (3d Cir. 2006) ("the scope of the automatic stay is broad and covers all proceedings against a debtor, including arbitration.").

trustee or administrator has sufficient time to review all the creditors' claims and assess the financial situation of the insolvent party; (b) to ensure that all creditors are treated equally in accordance with their respective claims against the insolvent party's estate; and (c) to allow a relevant insolvency court or administrator to decide the particular issue in which the court or administrator has exclusive jurisdiction.[283]

The stay of arbitral proceedings is typically temporary and lasts until:

a) compliance with certain steps, such as, for example in Switzerland, the second meeting of creditors[284] and in Australia after the passing of the resolution for winding up;[285]

b) relief from the stay of proceedings is decided by the insolvency court; or

c) completion of the claims verification process in the insolvency proceedings.[286]

Once a stay of proceedings has been imposed, certain matters related to the insolvency proceedings may be considered non-arbitrable. However, as mentioned above, given that arbitral tribunals have no *lex fori*, the commencement of "foreign" insolvency proceedings in a county other than the seat of the arbitration should not, in principle, effect the conduct of "foreign" arbitration proceedings. This should be the case, regardless of whether the insolvency proceedings are recognised in judicial proceedings in the country of the seat of arbitration.[287] Nevertheless, in cases where upon recognition of the "foreign" insolvency proceedings, the insolvency law of the country of the seat becomes applicable to the insolvent party, failure to comply with those laws could be sanctioned as a breach of a mandatory law or public policy by an annulment court.[288] This should not be the case where the arbitral tribunal has failed to apply the "foreign" public policy (that is, where insolvency law provisions form part of the public policy of the country where the insolvency proceedings were filed, but not the country of the seat of arbitration).[289]

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[283] BAIZEAU (2009) p.101.
[284] DEBA, Art. 207.
[285] Corporations Act 2001 (Cth), s. 500(2). See also section 471B Corporations Act 2001 (Cth) which provides for a stay of "proceedings in a court".
[286] BAIZEAU (2009) pp.101-102.
[287] BAIZEAU (2009) p. 105; MANTILLA-SERRANO (1995) pp. 59-60.
[288] In some jurisdictions creditor's obligations to formally lodge a claim in the insolvency proceedings or the prohibition of orders for the payment of money in favour of a creditor outside the insolvency proceedings will be considered a matter of international public policy. BAIZEAU (2009) pp. 102-105.
[289] In Switzerland a violation of public policy is generally not a ground for annulment of arbitral awards. See Swiss Supreme Court, 28 April 1992, *Fincantieri - Cantieri Navali Italiani SpA and Oto Melara S.p.A. v. M*, DFT 118 II 353.

Arbitral decisions show that arbitral tribunals take into account whether the insolvency declaration was issued at the seat of arbitration or in a jurisdiction foreign to the arbitration proceedings. A number of ICC tribunals have decided that they were not bound by insolvency proceedings commenced in a jurisdiction foreign to the seat.[290] In an interim award in ICC Case No. 6632 of 1993, an arbitral tribunal sitting in Brussels decided that even though an Italian defendant was subject to insolvency proceedings, this did not prevent the tribunal from hearing the parties' claims for security for costs.[291] However, this is not a universal approach, with other ICC tribunals holding that they were bound to take into account insolvency law provisions in a country other than the seat of the arbitration, because the insolvency proceedings had been recognised in the country of the seat.[292] In ICC Case No. 7563 of 1993, the arbitral tribunal took a different approach again and decided that individual proceedings should be suspended in the event of insolvency.[293]

Ultimately, if an award is challenged before the courts at the seat of arbitration, whether these courts would consider a failure by the arbitral tribunal to apply a foreign insolvency law as a valid ground for challenging the award (where the insolvency order was recognised in the country of the seat), will depend on the domestic law of each country and the court's interpretation of international public policy in that jurisdiction.[294] It will also depend on the specific facts of the case, for example, where insolvency proceedings are deliberately filed to disrupt the arbitration, arbitral tribunals can and do ignore such proceedings with minimal risk of an award being annulled.[295]

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[290] See e.g. ICC Award No. 6057 of 1991 in MOURE (2007) p.165 n.26 (seated in Syria, insolvency proceedings in France); ICC Award No. 4415 of 1984, Clunet 1984, pp. 952-956 (seated in Paris, insolvency proceedings in Italy); ICC Award No. 5996 of 1991, cited in MANTILLA-SERRANO (1995) p.57 (seated in Tunisia, insolvency proceedings in France); ICC Case No. 1350, Clunet 1975, p.931 (seated in Switzerland, insolvency proceedings in Austria); ICC Award No. 11028 of 2002, cited in Perret, p.45 (seated in Switzerland, insolvency proceedings in Thailand); BAIZEAU (2009) p.103.

[291] Award of Jan. 27, 1993, unpublished, cited in GAILLARD and SAVAGE (1999) p. 356.

[292] See e.g. ICC Award No. 7205 of 1993 in ARNALDEZ, DERAINS AND HASCHER (1997) pp. 622, 625.
(seated in Paris, insolvency proceedings recognised in France).

[293] GAILLARD and SAVAGE (1999) p. 356. The dispute was between a Belgian bank and a French company and an insurance group. The tribunal held that it could not award costs against the French company in receivership and suspended the proceedings, confining itself to dealing with the principle of liability only.

[294] BAIZEAU (2009) p.103.

[295] See *Société Nationale Algérienne pour la Recherche, le Transport, la Transformation et la Commercialisation des Hydrocarbures (SONATRACH) v. Distrigas Corp*., 80 B.R. 606, 611 (D. Mass. 1987) pp. 795 – 804; BAIZEAU (2009) p.104.

6.2 Matters considered not arbitrable

It is commonly suggested that arbitrators will usually not be competent to adjudicate on certain insolvency issues such as, the nomination of the trustee, the commencement of insolvency proceedings or order an amount to be paid out of the insolvent party's estate.[296] In general, these issues are to be decided by competent state courts with jurisdiction over insolvency proceedings.[297]

These issues have been described as "pure" or "core" matters of insolvency law. Such matters are almost universally considered not arbitrable.[298] As noted above, in relation to "core" insolvency matters, the question of jurisdiction of an arbitral tribunal to decide such matters rarely arises because the insolvency and arbitration proceedings are entirely different proceedings, with distinct purposes and characteristics. Arbitration is a method of settlement of disputes (using adversarial proceedings), whereas "core" insolvency proceedings do not primarily settle disputes, but rather are proceedings for the orderly liquidation or reorganisation of the insolvent party's assets.[299]

As "core" insolvency issues are generally not arbitrable,[300] the real issue is determining what matters are considered "core" insolvency issues.[301] The delimitation between matters that fall within the jurisdiction of state courts and matters that can be determined by arbitration is the crucial question in for state courts, arbitrators and parties. Section 7 (dealing with arbitrability in each of the Relevant Countries) will consider, inter alia, whether each country adopts a consistent approach to which matters are considered to be "core" insolvency matters.

There appears to be no universal answer across jurisdictions regarding which matters are considered to be "core" insolvency issues; not capable of settlement by arbitration.[302] A reason for this lack of consistency in approach is due to the myriad of different insolvency regimes across jurisdictions, reflecting historic, cultural, economic and political norms of each state. A further reason is that it is difficult to categorise matters as "core" and “non-core” insolvency issues, because insolvency provisions often have the double aim of (1) organising the conduct of the insolvency proceedings, and (2)

[296] LAZIĆ (1998) p. 154.
[297] POUDRET and BESSON (2007) p. 282.
[298] LIEBSCHER (2009) p. 166; KAUFMANN-KOHLER and LÉVY(2006) p. 262.
[299] LAZIĆ (1998) p. 155.
[300] LIEBSCHER (2009) p. 166; BORN (2009) p. 809; KAUFMANN-KOHLER and LÉVY (2006) pp. 262-263.
[301] LIEBSCHER (2009) p. 166.
[302] LAZIĆ (1998) p. 157.

permitting creditors to obtain a judgment on their claims - that is, they have both a procedural/administrative function and a substantive function. Hence, certain matters are considered to be of a "mixed" nature.[303] In matters of a "mixed" nature, it may be possible to resolve certain, albeit limited, aspects of insolvency proceedings by way of arbitration or alternative dispute resolution.[304]

This "core/non-core" distinction has been extensively developed in the United States, with the major types of claims asserted under the Bankruptcy Code falling into these two categories.[305] As examined below, in the United States, "core" proceedings involve rights that only arise in bankruptcy, created by federal bankruptcy law.[306] Switzerland has also adopted this "core/non-core" distinction, but given its "substantive" rule on arbitrability, more actions are considered to be of a "mixed" nature.[307]

7 The Arbitrability of Insolvency Matters in the Relevant Countries

This section examines the arbitrability of insolvency matters in each of the Relevant Countries. This involves a comparative examination of the legislation and case law in the Relevant Countries in relation to: (1) the issue of arbitrability in general and the relationship between arbitrability and public policy; and (2) the arbitrability of insolvency disputes. With respect to the later, the arbitrability of three fundamental insolvency actions/proceedings is examined in the Relevant Countries. The insolvency actions/proceedings examined are:

(a) actions where an administrator/trustee attempts to void a transaction;
(b) actions where creditors challenge the schedule of claims; and
(c) actions to include or exclude assets from the estate.

[303] POUDRET and BESSON (2007) pp. 306-307.
[304] For example, in the United States there is a possibility to use compulsory or voluntary arbitration or mediation in the settlement of certain disputes arising in insolvency proceedings.
[305] 28 U.S.C. Sect. 157(b); *In re Winimo Realty Corp.*, 270 B.R. 108, 47 Collier Bankr. Cas. 2d (MB) 186 (S.D. N.Y. 2001). (A bankruptcy court has jurisdiction over all "core proceedings arising under title 11, or arising in a case under title 11.") See also *Matter of Wood*, 825 F.2d 90, 95, 17 Collier Bankr. Cas. 2d (MB) 743, Bankr. L. Rep. (CCH) P 71955 (5th Cir. 1987).
[306] *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149, 1157, 19 Bankr. Ct. Dec. (CRR) 1344, Bankr. L. Rep. (CCH) P 73091, Fed. Sec. L. Rep. (CCH) P 94568 (3d Cir. 1989) cited in OEHMKE (2009) p. 2.
[307] LÉVY(2005) p. 29.

These three actions/proceedings are examined because they are arise in almost all insolvency regimes and the approach to the arbitrability of these insolvency actions/proceedings is representative of the approach taken in relation to other insolvency actions/proceedings in the Relevant Countries.

The focus in this section is on the legislation and case law in each of the Relevant Countries as these are the laws that must be applied to determine whether a dispute is arbitrable; whether that determination is undertaken by an arbitral tribunal or by state courts when enforcing arbitration agreements, or recognising or enforcing arbitral awards.

7.1 Australia

7.1.1 Approach to arbitrability

In Australia, the issue of which disputes are arbitrable, and which are not, has yet to be finally resolved by Parliament or the courts. Non-arbitrable issues are not specifically identified in Australia's arbitration legislation, and it is necessary to refer to specific legislation to determine the matters that are "capable of settlement by arbitration".[308] In principle, a "matter" capable of settlement by arbitration, for the purposes of section 7(2)(b) of the IAA, has been interpreted as "any claim for relief of a kind proper for determination in a court."[309] Australian courts have interpreted the phrase, "matter capable of settlement by arbitration," as referring to two distinct issues:

a) whether the terms of the arbitration clause extend, as a matter of construction, to cover the claim in question (scope); and

b) whether the subject matter of the agreement is "arbitrable", that is "one relating to rights which are not required to be determined exclusively by the exercise of the judicial power" (arbitrability).[310]

In relation to arbitrability, there is no presumption in favour of, nor against, arbitration, in Australian law.[311] In *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading*

[308] GREENBERG, KEE and WEERAMANTRY (2011) p. 188. For example, Section 11 of *Carriage of Goods by Sea Act 1991* (Cth) declares void an arbitration agreement on a bill of lading unless the place of arbitration is in Australia and section 8 of the *Australian Insurance Contracts Act 1984* (Cth) potentially impacts on the arbitrability of disputes related to insurance.
[309] *Elders CED Ltd v Dravo Corp* (1984) 59 ALR 206.
[310] *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 at 351 (Deane and Gaudron JJ). See GARNETT (1999) §3.6.
[311] *ACD Tridon Inc v Tridon Australia* [2002] NSWSC 896. [123], [135]-[136] per Austin J; *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102, [41] per Allsop J; see

Ltd,[312] Justice Allsop advanced a liberal approach to the consideration of arbitrability by Australian courts. In another case, Justice Allsop stated that "the clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, is to give width, flexibility and amplitude to them."[313] However, in *ACD Tridon Inc v Tridon Australia*[314] the Federal Court, when considering the arbitrability of claims arising under the Corporations Act (Cth), said that there was no presumption in favour of arbitrability.

In *Francis Travel Marketing v Virgin Atlantic Airways*,[315] Chief Justice Gleeson, then of the NSW Supreme Court, advocated a broad approach to interpretation of arbitration agreements. His Honour stated that:

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.[316]

It is now well-established that parties may refer claims under Australian statutes, including in relation to the *Competition and Consumer Act 2010* (Cth), (formally known as the *Trade Practices Act 1974* (Cth) ("TPA"), Australia's competition/anti-trust and consumer protection legislation) to arbitration.[317] In many cases the Australian courts

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also *TCL Airconditioning (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 per Hargrave J at 18-20.

[312] *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102.

[313] *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at 36, cited with approval in *Ansett Australia Ltd (subject to a deed of co-arrangement) and Malaysian Airline System Berhad* (2008) 217 FLR 376, at 13. Allsop J explained this "a liberal approach" further in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 (in a passage with which Finn and Finkelstein JJ agreed), where his Honour said (at 87; [165]):

> This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

[314] *ACD Tridon Inc v Tridon Australia* [2002] NSWSC 896.

[315] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

[316] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165 (Meagher and Sheller JJA agreeing, at 168).

[317] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 166-167;

have held that claims under the TPA can be decided by arbitration.[318] In *IBM Australia v National Distribution Services*[319] the New South Wales Court of Appeal held that certain matters related to consumer protection under the TPA are capable of settlement by arbitration pursuant to an arbitration clause that used the words "related to this agreement or any breach thereof." The Court held that an arbitral tribunal, to whom such a dispute had been referred, may exercise the discretionary powers under the TPA which are expressed to be conferred upon a court.[320]

The New South Wales Supreme Court in *Francis Travel Marketing v Virgin Atlantic Airways*[321] and the Federal Court in *Hi-Fert v Kiukiang Maritime Carriers*[322] have confirmed that disputes based on misleading and deceptive conduct (under the old section 52 of the TPA) were arbitrable. However, in *Petersville v Peters (WA)*[323] and *Alstom Power v Eraring Energy,*[324] the Federal Court adopted a slightly different position and held that disputes under the previous part IV of the TPA (anti-competitive behaviour provisions) are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement.[325]

The issue received some attention from Allsop J (with whom Finn and Finkelstein JJ agreed) in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*:[326]

> The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the New York Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. It is unnecessary to discuss the subject in detail. It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the

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Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45, [7].

[318] *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 166 per Gleeson CJ (Meagher and Sheller JJA agreeing, at 168); *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [7] per Finn J; *Seeley International Pty Ltd v Electra Air Conditioning BV* (2008) 246 ALR 589, [21]; W*estrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894, [24].

[319] *IBM Australia v National Distribution Services* (1991) 22 NSWLR 466.

[320] GARNETT (1999) §3.8.

[321] *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160.

[322] *Hi-Fert v Kiukiang Maritime Carriers* (1998) 159 ALR 142.

[323] *Petersville v Peters (WA)* (1997) ATPR 41-566.

[324] *Alstom Power v Eraring Energy* (2004) ATPR 42-009.

[325] JONES (2012) p. 25.

[326] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 98.

> national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the travaux préparatoires was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws. [footnotes omitted]

As can be seen, the approach of Australian courts to the issue of arbitrability is far from settled. However, on balance, it may be concluded that a slight bias exists in favour of the arbitrability of most disputes, subject to there not being a sufficient element of legitimate public interest in the subject matter.

7.1.1.1 Arbitrability and Public Policy

Australia has followed the international trend (arguably precipitated in the United States in *Mitsubishi*[327]) to limit the restrictions on matters that are considered non-arbitrable on the basis of public policy considerations. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[328] the Full Court of the Federal Court of Australia held that claims pursuant to the TPA were arbitrable, notwithstanding the absence of an equivalent consumer protection statute in the law of the forum selected by the parties (which was English law).[329] The court held that the determination of the claims under the TPA by international arbitrators did not offend Australian public policy, whereas the breach of an agreement to arbitrate did.

In *Nicola v Ideal Image Development Corporation Incorporated,*[330] Perram J of the Federal Court held, amongst other things, that public policy principles protected by competition/anti-trust legislation, do not prevent a matter from being decided by arbitration if the issue essentially only concerns the parties to the arbitration agreement, and does not effect broader public interests.[331] Although, in *Clough Engineering Limited*

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[327] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614 (1985); 105 Supreme Court 3346 (1985); XI Y.B. Com. Arb. 555 (1986).
[328] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.
[329] LUTTRELL (2007) p. 140.
[330] *Nicola v Ideal Image Development Corporation Incorporated* [2009] FCA 1177.
[331] *Nicola v Ideal Image Development Corporation Incorporated* [2009] FCA 1177 at 56. The case concerned a dispute arising out of a franchise agreement between the Nicola in Australia and Ideal Image, a United States company. Ideal Image sought a stay of proceedings on the basis that any disputes were covered by an arbitration clause, with the contract being governed by Florida law.

v Oil & Natural Gas Corporation Ltd[332] Gilmour J, also of the Federal Court, affirmed that the TPA is as a "public policy statute" and held that any attempt to contract out of remedies conferred by the TPA may be void and the operation of TPA cannot be ousted by private agreement.[333]

In summary, if there is a sufficient element of legitimate public interest in the application of a particular provision or statute it is generally impermissible to contract out of, or exclude, that provision or statute by virtue of an arbitration agreement.[334] Therefore, certain claims under provisions or statutes that are of a public policy nature will be non-arbitrable.[335] However, in the majority of cases there is generally no restriction on an arbitral tribunal from deciding claims arising out of the TPA or other "public policy" statutes, as long as the issue to be decided does not affect the rights of third parties or the public interest.

7.1.2 Arbitrability of insolvency matters

The arbitrability of insolvency matters has not been specifically dealt with in legislation or widely considered in case law. In relation to bankruptcy and insolvency matters, Australian courts have refused stay of court proceedings where there was an arbitration

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The Nicolas submitted that those parts of their case which depend upon issues of competition law pursuant to the TPA were not suitable for arbitration and hence should not be the subject of a stay of proceedings. The court said that their argument involved the invocation of an established principle which keeps from arbitration certain categories of dispute involving issues of public policy or affecting a broader range of persons than the parties to the arbitration. It was acknowledged that suits concerning competition law have frequently been cited as examples of claims unsuitable, by reason of public policy, for arbitration.

Perram J explicitly rejected this submission of the Nicolas, referred to the decision of Allsop J (with whom Finn and Finkelstein JJ agreed) in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45. Perram J did not characterise the present proceedings as being "anti-trust or competition disputes" and they were not concerned with the control or abuses of market power (at 59-60).

It was held that in cases such as this, essentially concerning a private commercial arrangement between two parties, there is absent the "element of broad public interest in the outcome to warrant the conclusion that only the local national courts should be involved in their resolution."(at 61) In the consumer protection part of the TPA, the standards which were imposed were clearly set; "the arbitrator would not be called upon to assess the nature of the public interest thereby protected nor is it likely that any determination by the arbitrator is likely to have an impact beyond the parties to the arbitration." (at 61).

[332] *Clough Engineering Limited v Oil & Natural Gas Corporation Ltd* [2007] FCA 881.

[333] This case concerned a dispute in relation engineering works on an undersea oil and gas field off the coast of India. The Indian party sought to call on performance guarantees given by Clough and after the Indian party terminated the contract, Clough commenced proceedings in Australia against them for breach of contract and unconscionable conduct in contravention of s 51AA of the *Trade Practices Act 1974* (Cth). Clough applied on an *ex parte* basis to the Federal Court of Australia for an injunction to restrain the Oil & Natural Gas Corporation from calling on the performance guarantees. LUTTRELL (2007) pp. 140-141.

[334] Other examples include the *Insurance Contracts Act 1984* (Cth) or the *Carriage of Goods by Sea Act 1991* (Cth).

[335] RICH 2010 p. 8.

agreement, without expressly holding that these matters are inherently not arbitrable.[336] Similarly, in *ACD Tridon Inc v Tridon Australia Pty Ltd*[337] Austin J held that, while most matters under the *Corporations Act* (Cth) could be referred to arbitration (if the clause was worded appropriately and that matters concern the parties' rights stemming from contract rather than statute), the parties could not refer to arbitration matters relating to the winding up of a corporation, as this is a matter stemming from statute and involves the interests of third parties.[338]

7.1.2.1 Non-arbitrable Matters

As mention, there is no specific legislation defining which insolvency matters are non-arbitrable or not "capable of settlement by arbitration." The type of insolvency matters that are arbitrable, or not arbitrable, has yet to be refined in the case law.[339] Nevertheless, some broad principles may be identified.

The winding-up of a company lies in the exclusive jurisdiction of the relevant court as this is a matter in which there is of public interest and requires court involvement.[340] Likewise, insolvency matters regulated by the *Corporations Act* (Cth) involving the interests of third parties (not covered by the arbitration agreement) will also be considerer not arbitrable.[341] In such circumstances, the mandatory stay of judicial proceedings in favour of arbitration provided for in the IAA would not apply, and an award that determined such an issue, may result in that award being refused enforcement in Australia.

In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd*,[342] the parties to a joint venture agreement agreed to arbitrate "any dispute, difference or question touching," inter alia, the dissolution or winding up of the "association" which was their joint venture entity. The Victorian Supreme Court declined an application for an order staying a winding up proceeding - under the Victorian commercial arbitration legislation - on the ground that the arbitration clause was null and void because it had the effect of "obviating the

[336] *Tanning Research Laboratories v O'Brien* [1990] HCA 8 (1990).
[337] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (The case concerned a shareholders dispute where the Shareholders' Agreement and a Distribution Agreement each contained an arbitration clause. An order was sought for the first defendant to be wound up).
[338] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at 193 following *A Best Flooring Sanding Pty Ltd v Skyer Australia Ltd* [1999] VSC 170 at 191.
[339] RICH (2010) p. 7.
[340] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at 193; *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 at 18.
[341] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at 192; *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170.
[342] *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170.

statutory regime for the winding up of a company" which can only be done by a court and not by an arbitral tribunal.[343] The Court's decision was partly based on public policy considerations surrounding the process of winding up a company pursuant to court order. An additional ground seems to have been that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause.[344]

7.1.2.1.1 Voidable transactions

Part 5.7B Division 2 of the *Corporations Act* (Cth) is headed "Voidable Transactions" and provides, at section 588FE, that certain transactions are voidable depending on the type of transaction and when the transaction occurred. Section 588FF(1) lists the orders that a court may make regarding voidable transactions when a company is wound up.

The provisions of the *Corporations Act* (Cth) related to voidable transactions would appear to not be arbitrable as the rights arise out of statute and orders in relation to these provisions may only be made by a court. In relation to orders that a court can make regarding voidable transactions under section 588FF(1) of the Corporations Act (Cth), Palmer J observed in *Tolcher v National Australia Bank Ltd*[345] that a section 588FF(1) order vindicates "not property rights which the company itself would have had prior to liquidation, but rather statutory rights which the liquidator alone has under" the statutory scheme in consequence of winding up.

In *New Cap Reinsurance Corporation Ltd v A E Grant & Ors, Lloyd's Syndicate No 991,*[346] Barrett J of the New South Wales Supreme Court, considered claims under the voidable transaction provisions in Part 5.7B of the *Corporations Act* (Cth) in the context of a reinsurance contract that contained an arbitration agreement. Barrett J avoided directly deciding that claims under Part 5.7B were not arbitrable, instead finding that the "matters in difference" in the proceedings were matters arising from a statutory cause of action, not arising out of or in connection with the reinsurance contract containing the arbitration agreement.

The case concerned two payments made by New Cap prior to the winding up the company that were argued to be "voidable transactions". The defendants objected to the proceeding in Australia, arguing that they were in breach of the agreement for arbitration

[343] *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 per Warren J at 18.
[344] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at 191. See also MORRISON (2005) p. 405.
[345] *Tolcher v National Australia Bank Ltd* [2003] NSWSC 207.
[346] *New Cap Reinsurance Corporation Ltd v A E Grant & Ors, Lloyd's Syndicate No 991* [2009] NSWSC 662.

in the relevant reinsurance contracts. It was argued that any claims that New Cap and the liquidator had in connection with the reinsurance contracts had to be submitted to arbitration in London. Barrett J held that the objection of the defendants should not deter the court from making the orders sought, as the arbitration agreement was part of the agreement between New Cap and the defendants, which was separate to the proceeding under section 588FF(1) of the *Corporations Act* (Cth), in which the liquidator of one party to the reinsurance contact, seeks an order for the payment of money.

Barrett J said:

> This proceeding has nothing to do with the reinsurance contract. It was a proceeding upon a statutory cause of action maintainable by the liquidator of one of the former contracting parties. The cause of action is not available to the contracting party itself. Its liquidator, when suing upon the statutory cause of action, does not attempt to enforce some right of the contracting party.[347]

On the basis of the wording of Part 5.7B of the *Corporations Act* (Cth) and the judgments in *Tolcher* and *New Cap Reinsurance Corporation*, the better view is that provisions of the Corporations Act (Cth) related to voidable transactions are, in general, not arbitrable as the rights arise out of statute and orders in relation to these provisions may only be made by a court. Nevertheless, while the rights created by Part 5.7B may not be enforced through arbitration, there would appear to be no restriction on an arbitral tribunal hearing and deciding whether a particular transaction is voidable. Although, the arbitral tribunal would not have jurisdiction to make orders under section 588FF as this would be in the exclusive domain of the courts.[348]

7.1.2.1.2 Challenges to the schedule of claims

The provisions in the *Corporations Act* (Cth) regulating the proof and ranking of claims are found in Division 6. Section 555 of the *Corporations Act* (Cth) provides that debts and claims proved in a winding up of a company rank equally, except as otherwise provided for in the Act. Section 556 sets out the schedule of claims or "priority

[347] *New Cap Reinsurance Corporation Ltd v A E Grant & Ors, Lloyd's Syndicate No 991* [2009] NSWSC 662 at 87.

[348] In P*etroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v Larsen Oil and Gas Pte Ltd* [2010] SGHC 186 the Singapore High Court addressed the issue of arbitrability of claims arising in bankruptcy proceedings and decided that avoidance claims, filed by an insolvent company, are non-arbitrable due to their public character and effect of other creditors. That judgment was recently confirmed by Singapore's Court of Appeal in *Larsen Oil and Gas Pte Ltd vs Petropod Limited (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21 where the Court set out standards on the basis of which the arbitrability of claims would have to be determined in cases where one party was insolvent.

payments" in the winding up of a company (excluding secured debts or claims).[349] In general, a creditor must provide proof of a debt to the liquidator and the liquidator determines whether to a debt is payable, the quantum of the debt and the priority of payment.[350] A person can apply to the court if they are aggrieved by an act, omission or decision of a liquidator.[351]

The *Corporations Act* (Cth) provides that the schedule of claims can only be challenged in the court. Accordingly, there does not appear to be any ability to challenge the schedule of claims before an arbitral tribunal, and hence this may be considered not arbitrable. This conclusion is made on the basis of the legislated procedure to be adopted and its non-compatibility with the arbitral process, rather than the inherent non-arbitrability of the subject matter for public policy reasons.

7.1.2.1.3 Assets of the estate

In Australia, the liquidator, in the case of a winding-up, determines whether a debt is to be allowed[352] and the calculation of that debt.[353] Following a decision of the liquidator, a person can appeal to the court if regarding the decision of a liquidator.[354] Accordingly, it would appear that determining the assets of the estate is a decision that must be taken by the liquidator or the court and would not be arbitrable.

7.1.2.2 Arbitrable Matters

There is, similarly, no specific legislation defines which insolvency matters are arbitrable. The current position with respect to the *Corporations Act* (Cth) is that generally *inter partes* claims under that Act are capable of settlement by arbitration. Where a claim involves statutory powers akin to general law powers and there are no public policy considerations, then there is no restriction on the arbitrability of such disputes.

[349] Secured creditors must prove debt in accordance with section 554D of the *Corporations Act 2001* (Cth).
[350] See for example, *Corporations Act 2001* (Cth)s. 554A(3).
[351] *Corporations Act 2001* (Cth) s. 554A(6).
[352] See *Corporations Act 2001* (Cth) s. 553 which provides for debts and claims, prior to the relevant date are admissible to proof against the company in winding up.
[353] *Corporations Act 2001* (Cth) s. 554A(6).
[354] *Corporations Act 2001* (Cth) s. 554A(6).

7.2 Switzerland

7.2.1 Approach to arbitrability - a substantive approach

In Switzerland, Article 177 of the PILA, provides that "any dispute involving property can be the subject-matter of an arbitration".[355] Where the arbitral tribunal has its seat in Switzerland and one of the parties is not domiciled in Switzerland[356] this "substantive rule" of international private law determines arbitrability.[357]

The concept of disputes involving property ("*vermögensrechtliche Anspruch*"; "*cause de nature patrimoniale*") has been interpreted broadly. In 1992, in the *Ficantieri* case, the Swiss Federal Tribunal held that matters that:

> …fall into the scope of this provision [are] all claims that have a financial value to the parties, whether as an asset or a liability, in other words those rights that have, at least for one of the parties, an interest that can be valued in money.[358]

The case determined that any claim having a financial value is, in principle, arbitrable, regardless of whether the rights concerned can be freely alienated by the parties (which is a common restriction in other European countries). The Swiss Federal Tribunal held:

> Article 177 … of the Act does not make arbitrability dependent on the alienability of the right in dispute, so that it is wrong to assimilate the 'involvement of property', within the meaning of this provision, with the freedom to alienate … Those are two different criteria …[359]

The substantive nature of Article 177 of the PILA has been explicitly recognised by the Swiss courts. For example in the *G.S.A.* case of 1992, the Swiss Federal Tribunal decided that arbitrators can and must decide disputes governed by European antitrust law, holding that:

> The arbitrability of a case in international matters is dealt with in Article 177 of the Private International Law Act, which constitutes a substantive rule of private international law … Consequently, the question of arbitrability is regulated by the

[355] Although this approach to arbitrability is unique amongst the countries considered in this study, it not uncommon amongst continental European countries. For example a similar approach can be found in Germany the Code of Civil Procedure, paragraph 1030(1) provides that "Any claim involving an economic interest can be the subject of an arbitration agreement."
[356] PILA, Art. 176(1).
[357] LÉVY (2005) p. 28.
[358] Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, commentary by F. Knoepfler; XX Yearbook 766 cited in KIRRY (1996) p. 383.
[359] Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, commentary by F. Knoepfler; XX Yearbook 766 cited in KIRRY (1996) p. 383.

> *lex arbitri*, irrespective of possibly stricter provisions contained in the *lex causae* or the national law of the parties …[360]

The Swiss Federal Tribunal emphasised that the substantive approach had been deliberately adopted in reaction to the uncertainties of the conflict of law method, and stated, in the *Ficantieri* case, that in adopting the arbitrability test in Article 177 of the PILA, the Swiss legislator:

> … intended to eliminate all the difficulties related to the conflicts of law approach …, in particular the need to research the law applicable to the determination of the arbitrability of the case.[361]

The Swiss Federal Tribunal also stated that Swiss courts and arbitral tribunals, having their seats in Switzerland, should not be concerned with the fate of awards made in Switzerland once they are submitted to foreign courts in the context of enforcement proceedings. In *Fincantieri* the Tribunal continued, stating that:

> In opting for the substantive regulation of arbitrability, the federal legislator chose a solution which maybe does not exclude that awards made in Switzerland will not be enforced in such or such country. It did so, however, with full awareness of the matter, leaving it to the parties only to appreciate the risk to which they are exposed by reason of a possible non recognition of the arbitral award.[362]

As noted by the Swiss Federal Tribunal, this purely "substantive" determination of arbitrability excludes any conflicts of laws analysis, meaning that arbitrability will be determined only on the basis of Swiss law requirements.[363] The Swiss Federal Tribunal said:

> The legislature having selected the criterion for arbitrability which is dependant on the nature of the dispute and not on the law governing such dispute, has determined that there is, in principle, no case in which restrictions and

[360] Swiss Federal Tribunal, 28 April 1992, *G.S.A. v V.S.p.A.* [1993] *Rev. Arb.* 124, commentary by L. Idot; (1993) XVII *Yearbook* 143 cited in KIRRY (1996) p. 383.
[361] Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, commentary by F. Knoepfler; XX Yearbook 766 cited in KIRRY (1996) p. 383.
[362] Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, commentary by F. Knoepfler; XX Yearbook 766 cited in KIRRY (1996) pp. 383-384.
[363] LÉVY (2005) p. 28. Subject to a different applicable rule (such as the ICC Rules of Arbitration), the law of the likely place of enforcement does not determine arbitrability.

> prohibitions to be found in foreign law with respect to arbitrability should be taken into account.[364]

Therefore, in principle, an arbitral tribunal seated in Switzerland will not take into consideration any further prohibition of, or restriction to arbitrability (such as the law of a foreign country, for instance the *lex concursus*, or the law of a potential country of enforcement).[365] Accordingly, all disputes involving "property" are arbitrable. Even disputes that may involve (foreign) public policy are considered arbitrable.[366]

There is, however, an exception to this general principle provided for in article 190(2)(e) of the PILA.[367] Pursuant to this provision, an arbitral tribunal seated in Switzerland must take into consideration Swiss public policy otherwise an award may be set aside if it is incompatible with that public policy (see below at 7.2.1.1). It has been said that:

> An award is incompatible with material public policy where it violates fundamental legal principles of substantive law to such an extent that it is no longer compatible with the legal order and the recognised system of values; among such principles, one will find the binding character of a valid contract, good faith, the prohibition of misuse of law, the prohibition of discriminatory or confiscatory measures as a protection of incapacitated persons.[368]

The Swiss Federal Tribunal has not had an opportunity to deny arbitrability of a dispute involving property due to public policy considerations. The comments of the Swiss

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[364] Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691, pp.693-694.

[365] LÉVY (2005) p. 29; LÉVY(2002) p. 79. An even more liberal approach to arbitrability in international cases was adopted in France by the Cour de Cassation in the *Dalico* case of 20 December 1993 [1994] *Rev. Arb.* 166. In that case, the Cour de Cassation established the principle that now governs the approach of French courts to the issue of validity of an arbitration agreement. The principle is that:

> … pursuant to a substantive rule of international arbitration law, the arbitration agreement is legally independent from the main agreement which incorporates it either directly or by reference, and … its existence and validity are to be appreciated, subject to mandatory rules of French law and international public policy, based on the mutual intent of the parties, without a need for a reference to any state law.

KIRRY (1996) pp. 384-385.

[366] LÉVY (2005) p. 29. The Swiss Federal Court will not quash an award because the arbitrator does not take into consideration foreign public policy. However, this does not forbid the arbitrator from taking foreign public policy into consideration, especially if this is provided for in the procedure chosen by the parties, for example under the ICC Rules (Swiss Federal Tribunal, 23 June 1992, *Ficantieri-Cantinieri Navali,* [1993] Rev. Arb. 691).

[367] PILA, Art 190(e) provides that "[p]roceedings for setting aside the award may only be initiated ... where the award is incompatible with public policy". BUCHER and TSCHANZ (1996) pp. 43-44.

[368] This definition has been repeatedly used by the Swiss Federal Tribunal, for instance, in *SFTD*, June 11, 2001, UEFA, (2001) 3 BASA 566 (570) (2d) to define public policy as a ground to set aside an award, cited in LÉVY (2005) p. 29.

Federal Tribunal therefore remain obiter dictum; however, they do indicate that the public policy exception to arbitrability is very restrictive.[369]

In conclusion, if Swiss law is being applied to the determination of the arbitrability of a particular subject matter, a "foreign" law calling for its own application may be taken into consideration only in accords with Swiss law. In principle, such "foreign" laws will restrict the arbitrability of a dispute only if they protect interests that would conform to the Swiss definition of public policy. If Swiss law ignores such interests, or does not consider such interests demand a restriction on arbitrability, then an arbitral tribunal sitting in Switzerland should not determine that the dispute is non-arbitrable based on the public policy of a "foreign" law. Thus, in the context of insolvency, under Swiss law, foreign laws, such as the *lex concursus*, will have only a very limited role when it comes to determining arbitrability.[370]

7.2.1.1 Arbitrability and Public Policy

Under Swiss law, considerations of public policy rarely affect the arbitrability of a dispute. As mentioned, the Swiss Federal Tribunal has not had an opportunity to deny arbitrability of a dispute involving property due to public policy considerations. In 1975 the Swiss courts held that a dispute concerning the validity or termination of a contract could be referred to arbitration even if one of the parties raises an argument based on a public policy rule.[371] In a decision of the Swiss Federal Tribunal in 1992, the Tribunal held that, in an arbitration having its seat in Switzerland, the arbitrator had jurisdiction to review the validity of an agreement under Article 85 of the EC Treaty, setting aside the award of an arbitral tribunal that had declined to conduct such a review.[372]

7.2.2 Arbitrability of insolvency ("bankruptcy") matters

In accordance with the above principles, matters relating to bankruptcy will generally be arbitrable under Swiss law.[373] The arbitrability of bankruptcy disputes in Switzerland has

[369] LÉVY (2002) p. 80.
[370] LÉVY (2005) p. 29.
[371] Chambre des Recours du Canton de Vaud, *Ampalgas*, 28 October 1975; (1981) *Journal des Tribunaux* III, 71 cited in KIRRY (1996) p. 378 n. 17.
[372] Swiss Federal Tribunal, 28 April 1992; [1993] *Revue de Droit Suisse* 364, commentary by P. Bernardini; [1993] *Rev. Arb.* 124, commentary by L Idot; (1993) XVII *Yearbook* 143 cited in KIRRY (1996) p. 378 n. 18.
[373] The term "bankruptcy" is generally used in the literature on Swiss insolvency law and will be used here.

been widely recognised by commentators.[374] Substantive law actions can generally be decided within the framework of bankruptcy proceedings without too many restrictions,[375] particularly actions concerning the recognitions or denial of the existence of a debt ("*action en reconnaissance ou libération de dettre"*), for restitution of monies paid without cause ("*répéitition de l'indu*"), and in validation of a freezing order ("*validation de séquestre*").[376] Nevertheless, "core" bankruptcy matters may not be subject to arbitration and will be considered not arbitrable.

7.2.2.1 Non-arbitrable Matters

Matters that are considered to be "core" bankruptcy matters and cannot be determined by an arbitral tribunal.[377] These "core" matters include: the initiation of insolvency proceedings; appointment of trustees; verification and acceptance the creditor's claims and the administration of the reorganisation or liquidation of a company pursuant to the DEBA. For example, a corporation cannot file for "bankruptcy" before an arbitrator, because this filing must be made to a competent court,[378] and the bankruptcy dispute will usually not be covered by an arbitration agreement.[379] Likewise, a corporation cannot notify an arbitrator that it is insolvent. Such a notification must be made to the competent court.[380]

7.2.2.2 Arbitrable Matters

While matters that relate to "core" insolvency proceedings are not arbitrable, most actions that relate to bankruptcy proceedings are arbitrable in Switzerland.[381] These matters have been termed actions of a "mixed" nature.[382] The key question is what matters are considered "mixed" in nature and able to be resolved through arbitration.

It is impossible to establish a complete list of all actions that will be arbitrable, but some general guidelines can be enumerated. Arbitral tribunals having their seats in Switzerland

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[374] POUDRET and BESSON (2007); LÉVY(2005); LÉVY(2002); KAUFMANN-KOHLER and LÉVY (2006); STÄUBLI and BATTISTINI-KOHLER (2006); KAUFMANN-KOHLER, LÉVY and SACCO (2010).
[375] There may, however, be restrictions placed on the ability of remedies that an arbitrator may award.
[376] POUDRET and BESSON (2007) pp. 307-308.
[377] LÉVY (2005) p. 29.
[378] Swiss Code of Obligations, Arts. 716a, 725-725a, 729b.
[379] LÉVY (2005) p. 29. For example, a dispute over priority between two creditors is unlikely to be covered by an arbitration agreement given that the two creditors will have probably never had any contact with each other.
[380] See Swiss Code of Obligations, Arts. 716a-725-725a, 729b. LÉVY (2002) p. 83.
[381] LÉVY (2002) p. 83; KAUFMANN-KOHLER and LÉVY(2006) p. 262.
[382] POUDRET and BESSON (2007) pp. 306-307.

are considered to have jurisdiction to adjudicate substantive disputes that arise while a party is subject to bankruptcy proceedings.[383] Actions which may be considered of a "mixed" nature and arbitrable include: (i) actions involving preferences; (ii) actions concerning fraudulent conveyances (such as donations, granting of security for already existing liabilities, discharge of claims in kind rather than in cash, payments of debts which have not come to term);[384] (iii) decisions for the admission of creditors into the schedule of claims, for example, if a trustee rejects the claim, an arbitral tribunal may rule on a challenge of the schedule of claims, or alternatively, if the trustee accepts the claim and a third-party creditor objects, arbitrators will have jurisdiction to determine the creditor's challenge to the admission of another creditor into the schedule of claims;[385] (iv) actions to include or exclude assets from the estate;[386] (v) set-off exceptions may be arbitrable;[387] (vi) the determination of the class of creditors in which a claim should be classified; (vii) actions where a creditor challenges the schedule of claims[388] and (viii) whether certain claims are to be paid directly from the estate rather than be included in the schedule of claims.[389]

7.2.2.2.1 Voidable transactions

Under Swiss law fraudulent transactions or undue preferences are voidable at the election of the trustee.[390] These types of elections are often regarded as pure enforcement actions as opposed to “mixed” or “substantive” actions. The trustee can either resist an action for performance of a contract that allegedly constitutes a fraudulent transaction (*exceptio*

[383] LÉVY (2005) p. 30.
[384] LÉVY (2002) p. 83; LÉVY (2005) p. 30. In Switzerland, actions to determine the voidance of fraudulent transactions may be considered actions that involve property and thus are arbitrable under Art. 177(1) of the PILA. It has been argued that these are not ordinary bankruptcy proceedings as Art. 289 of the DEBA grants jurisdiction to the court of the respondent's domicile and does not provide for the exclusive jurisdiction of the bankruptcy court. Furthermore, the parties may settle such actions. LÉVY (2005) p. 30 n.32. The trustee's actions to set aside are arbitrable as they involve property. There is no doubt that the trustee may enter into an arbitration agreement in relation to these actions.
[385] LÉVY (2005) p. 30 citing DFT 125 III 108.
[386] DFT 56 III 233. The proprietary actions (Arts. 242(2) and 242(3) DEBA) of third party against the estate appear to be of a mixed nature as they involve substantive and bankruptcy issues. In principle, they should thus be arbitrable. LÉVY (2005) p. 30.
[387] LÉVY (2005) p. 30. Lévy also states that French courts have a contrary view in that they hold view it as contrary to public policy to make an award that would be an executory decision against the estate. Cour d'Appel de Paris, February 27, 1992, (1992) Revue de l'arbitrage 590, note P. Ancel cited in LÉVY (2005) p. 30, n. 33.
[388] Federal Statute on Debt Enforcement and Bankruptcy, Art. 250 (*action en contestation de l'état de collocation*). KAUFMANN-KOHLER and LÉVY(2006) p. 262.
[389] DFT 106 III 121: The Federal Court held that the characterisation of a debt as binding the estate itself is a substantive law matter rather than a debt collection matter. See also ICC award 4415, Clunet (1984) pp. 952 et seq., especially 954, note S.J. cited in LÉVY (2005) p. 30, n. 34.
[390] Art. 289 DEBA.

pauliana) or claim a refund of the performance under such a contract (*actio pauliana*). These types of actions occur under the rules of bankruptcy and are not contract remedies of the debtor. However, Art. 289 of the DEBA does not grant jurisdiction to the bankruptcy court to decide this issue, but rather to the courts of the domicile of the defendant. Therefore, the *actio pauliana* can be seen not strictly as a bankruptcy proceeding.[391] Furthermore, the parties are free to settle these types of disputes between themselves. As a result there does not seem to be grounds to assert public policy concerns requiring that these types of actions be exclusively brought before a bankruptcy court. Accordingly, it would appear that these types of actions would be arbitrable under Swiss law in accordance with article 177 of the PILA.[392]

7.2.2.2.2 Challenges to the schedule of claims

Under Swiss law there does not appear to be any restriction on the ability of an arbitral tribunal to determine the class of creditors to which a claim should be assigned or whether a claim should be paid out of the estate directly, rather than included in the schedule of claims.[393] Therefore, challenges to the schedule of claims may be determined by arbitration.

7.2.2.2.3 Assets of the estate

In Switzerland, there does not appear to be any restriction on the ability of an arbitral tribunal to determine which assets are included or excluded in the estate of the insolvent company. The Swiss Supreme Court has held that the issue of whether a debt binds the estate directly is a matter of substantive, rather than bankruptcy law[394] and therefore arbitrable.[395]

7.3 England

7.3.1 Approach to arbitrability

English arbitration legislation does not provide for a rule on arbitrability and there is generally very consideration of this subject.[396] The English Arbitration Act

[391] KAUFMANN-KOHLER and LÉVY (2006) p. 264.
[392] KAUFMANN-KOHLER and LÉVY (2006) p. 264.
[393] KAUFMANN-KOHLER and LÉVY (2006) p. 265.
[394] ATF 107 III 113, 304/305; ATF 106 III 121, 121/122. See also ICC Award 4415 of 1984.
[395] LÉVY (2002) p. 83.
[396] BORN (2009) p. 786.

"conspicuously omits any treatment of the subject..."[397] and preserves the common law position in respect of arbitrability.[398] Mustill & Boyd have commented that "English law has never arrived at a general theory for distinguishing those disputes that may be settled by arbitration from those which may not."[399] The authors submit that the general principle is that "any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration."[400]

The English jurisprudence confirms that there are few matters that are considered not arbitrable, with the House of Lords, in *Fiona Trust & Holding Corporation v Privalov*[401] explicitly adopting a presumption in favour of arbitration. In *ET Plus SA v. Jean-Paul Welter*,[402] where the defendants were seeking a stay of the UK court proceedings in favour of arbitration proceedings in France, Gross J affirmed the arbitrability of competition law claims, commenting that "[t]here is no realistic doubt that such 'competition' or 'anti-trust' claims are arbitrable..."[403] In *Re Vocam Europe Ltd*[404] the English High Court rejected arguments that disputes concerning minority shareholder rights under the *Companies Act* 1985 were not arbitrable. More recently, in *Fulham Football Club (1987) Ltd v Richards*,[405] Lord Justice Patten, delivering the leading opinion, held, amongst other things, that while Section 994 of the *Companies Act* 2006 gave shareholders "an optional right to invoke the assistance of the court in cases of unfair prejudice ... there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy."[406]

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[397] MUSTILL AND BOYD (2001) p. 70 n. 19.
[398] Arbitration Act 1996 (UK) s. 81(1)(a).
[399] MUSTILL AND BOYD (1989) p. 149.
[400] MUSTILL AND BOYD (1989) p. 149.
[401] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40.
[402] *ET Plus SA v. Jean-Paul Welter* [2005] EWHC 2115 (Comm.)(QB).
[403] *ET Plus SA v. Jean-Paul Welter* [2005] EWHC 2115 (Comm.)(QB) para. 51.
[404] *Re Vocam Europe Ltd* [1998] B.C.C. 396 (Ch.).
[405] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855. The case concerned an unfair prejudice petition brought by Fulham Football Club regarding allegations that Sir David Richards, chairman of the Football Association Premier League, had acted as an unauthorised agent with respect to the transfer of Peter Crouch from Portsmouth to Tottenham Hotspur Football & Athletic Company Limited, to the detriment of Fulham. Richards and the Premier League applied for a stay of the unfair prejudice petition under Section 9 of the *Arbitration Act* 1996 on the grounds that the issues raised in the petition fell within the scope of the arbitration agreements contained in the Rules of the Football Association and the Premier League's rules.
[406] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, at 78.

While most matters will be considered arbitrable, certain matters, nonetheless, remain non-arbitrable based on public policy considerations. For example, arbitrations that have as its object the payment of monies for a bribe have been held to not be arbitrable.[407]

Likewise, it have been recognised that under English law the types of remedies that an arbitral tribunal can award are limited by considerations of public policy and by the fact that the arbitrators are appointed by the parties and not by the state. For example, an arbitral tribunal cannot impose a fine or a term of imprisonment, commit a person for contempt, make an award which is binding on third parties or affects the public at large, issue a divorce decree or issue a winding-up order.[408]

7.3.1.1 Arbitrability and Public Policy

Since the introduction of the *Arbitration Act 1996* (UK) there are very few matters are considered non-arbitrable on the basis of public policy considerations in England.[409] While the issue of non-arbitrability on the basis of public policy has seldom come before the English courts, it is apparent from *obiter* in a number of cases that English courts construe the non-arbitrability of matters on the basis of public policy narrowly. For example, in *ET Plus SA & Ors v Welter & Ors*[410] Justice Gross stated that "there is no realistic doubt that 'competition' or 'anti-trust' claims are arbitrable.[411] Lord Justice Waller in *Soleimany v Soleimany*[412] commented that only in the case of palpable illegality an English court would declare that there was no arbitrable dispute, or refuse to grant a stay in favour of arbitration, on the ground that an arbitrator could not lawfully enforce the contract.[413]

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[407] *Hub Power Co Ltd (HUBCO) through Chief Executive v Pakistan WAPDA through Chairman* PLP 2000 SC 841. In *O'Callaghan v Coral Racing Ltd* [1998] EWCA Civ 1801 the English Court of Appeal held that an arbitration clause in a gaming agreement, which referred disputes to the editor of The Sporting Life, was void as under English law gaming agreements are unenforceable and the arbitration agreement could not survive independently. The Court of Appeal held that this was not a valid arbitration agreement, as English law did not recognise any legal relationship between the parties.

[408] MUSTILL AND BOYD (1989) p. 149.

[409] SUTTON, GILL and GEARING (2007) p. 18. See also *Tamil Nadu Electricity Board v St-Cms Electric Company Private Ltd* [2007] EWHC 1713 (Comm); *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 (Comm); *Soleimany v Soleimany* [1998] EWCA Civ 285.

[410] *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 (Comm).

[411] *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 (Comm) at 51. *c.f. Accentuate Ltd v ASIGRA Inc* [2009] EWHC 2655 where the English court suggested that an arbitration agreement will be considered "null, void and inoperative" insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law.

[412] *Soleimany v Soleimany* [1998] EWCA Civ 285.

[413] See also *Holman v Johnson* (1775) 1 Cowp. 341, 343 ("no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act").

In the context of proceedings to enforce arbitral awards, English courts have considered whether enforcement should be refuse due to breaches of public policy. In *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*[414] it was argued that the contract (governed by Swiss Law) was null and void as it was procured by bribery. In that case, the arbitral tribunal (in an ICC case conducted in Geneva) found the contract was not invalid and awarded damages. In considering an appeal against an order to enforce the award in England, the Court of Appeal held that the enforcement of the award, effectively upholding a contract which was tainted by bribery, did not contravene English public policy as the procuring of the contract did not violate the domestic public policy (or *bona mores*) of the country where it was to be performed.

In *Soleimany v. Soleimany*[415] the Court of Appeal declined to enforce an award (made in England) on public policy grounds due to the illegality of the underlying contract. The Court of Appeal said that parties to an illegal contract "cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it."[416]

7.3.2 Arbitrability of insolvency matters

As mentioned, English arbitration legislation does not provide for a rule on arbitrability and the arbitrability of insolvency matters has not been specifically considered in legislation.[417] As a matter of law, insolvency does not affect the ability of a party to proceed with arbitration.[418] In *Fulham Football Club (1987) Ltd v Richards*[419], Lord Justice Patten cited Mustill & Boyd as commenting that:

> … it does not follow from the inability of an arbitrator to make a winding-up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes *inter se* as shareholders to a

[414] *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 WLR 811.
[415] *Soleimany v. Soleimany* [1998] 3 W.L.R. 811.
[416] *Soleimany v. Soleimany* [1998] 3 W.L.R. 811, 824. See also *Eco Swiss China Time Ltd v. Benetton Int'l NV*, C-126/97 [1999] E.C.R I-3055 (E.C.J.) where the European Court of Justice made similar comments when affirming that Article 81 of the EU Treaty is a matter of public policy, stating that:

> "a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (ex. Art 85) where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."

[417] LIEBSCHER (2009) p. 170. Although the *Arbitration Act 1996 (*UK) introduced a specific procedure into the *Insolvency Act* 1986 (UK), namely s. 349A, which provides that if a trustee in bankruptcy adopts a contract with an arbitration agreement, that arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.
[418] LIEBSCHER (2009) p. 170.
[419] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855.

> process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process. [420]

Accordingly, whether an insolvency matter is arbitrable under English law will depend on whether the dispute engages third party rights or involves a matter of public interest.

7.3.2.1 Non-arbitrable matters

Under English law there is no specific legislation defining which insolvency matters are non-arbitrable. Mustill & Boyd comment that there must be a "hard core" of situations where instinct suggests that arbitration is not the right method to determine the dispute. They suggest that section 103(3) of the *Arbitration Act 1996* (UK) takes for granted that a line can and must be drawn between those issues which are arbitrable and those which are not, however, there is no body of authority which suggests how and where that line should be drawn.[421] Nevertheless, from the case law, some faint lines may be identified.

It is clear that an arbitral tribunal is unable to wind up a company or make orders affecting third parties.[422] Therefore, any insolvency procedure that will affect the interests of third parties will not be arbitrable. Prima facie, this would include: (i) issuing orders for the payment of monies owed by the insolvent company, as this would affect third party creditors; (ii) the determination of the schedule of claims; or (iii) the exercise of a statutory power to intervene in and set aside transactions with third parties.[423]

In *Fulham Football Club (1987) Ltd v Richards*, Lord Justice Patten noted that members of a company (all parties to a shareholders agreement) cannot override the provisions of the *Insolvency Act 1986* (UK) which apply on liquidation by agreeing between themselves - or with a particular creditor - that property which belongs to the company in liquidation can be dealt with other than in accordance with the *Insolvency Act*.[424] It was held that the exercise of a liquidator's statutory power to intervene in and set aside transactions with third parties, in the context of the insolvency regime, are rights vested in

[420] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 at 40.
[421] MUSTILL and BOYD (2001) p. 75.
[422] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 per Lord Justice Patten at 33. See also *Insolvency Act 1986* (UK) s. 117.
[423] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 per Lord Justice Patten at 74.
[424] See *British Eagle International Air Lines Limited v. Compagnie Nationale Air France* [1975] 1 WLR 758.

the liquidator for the benefit of the creditors as a whole and cannot be overridden by a contract entered into by the company prior to its liquidation.[425]

7.3.2.1.1 Voidable transactions

Sections 238 and 239 of the *Insolvency Act 1986* (UK) respectively provide for avoidance of transactions made at an undervalue or where preferences are given. Each section provides that "the court shall, on such an application, make such orders as it thinks fit for restoring the position to what it would have been..."[426] These sections of the *Insolvency Act 1986* (UK) specifically provide that that the court has authority to make orders to avoid transactions and that applications must be made to the court. Therefore, determinations concerning voidable transactions are likely to not be arbitrable as the rights arise out of statute and only a court may make orders in relation to these provisions.

7.3.2.1.2 Challenges to proof of debts and dividends declared

In England, basic rule concerning the priority of creditors in a winding up is that the claims are treated equally; subject to whatever security a creditor may have over the insolvent company's assets and claims of certain preferential creditors.[427] Rule 4.180 of the *Insolvency Rules* 1986 provides that the liquidator shall, subject to the retention of such sums as may be necessary for the expenses of the winding up, declare and distribute dividends among the creditors in respect of the debts which they have respectively proved. Rule 4.82 provides that the liquidator can admit or reject a proof of debt in whole or in part and Rule 4.83(1) provides that if a creditor is dissatisfied with the liquidator's decision with respect to the proof (including any decision on the question of preference), the creditor may apply to the court for the decision to be reversed or varied.

It would appear that under the Rules, challenges to debts admitted or rejected by the liquidator, and dividends declared, are to be brought before the court, and would therefore not be arbitrable. However, the Rules are not restrictive and do not say that a creditor can only apply to the court, so it may therefore be possible, assuming all creditors agree to be bound by arbitration, for such challenges to be arbitrated. Nevertheless, better view, remains that such challenges are not arbitrable.

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[425] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 per Lord Justice Patten at 74.
[426] *Insolvency Act 1986* (UK) ss. 238(3) and 239(3).
[427] *Insolvency Act 1986* (UK) ss. 107 and 143.

7.3.2.1.3 Assets of the estate

In England, the liquidator or the court, in the case of a winding-up, determines the assets of the estate and the debts that are owed and recoverable from contributories.[428] Accordingly, it would appear that determining the assets of the estate is a decision that must be taken by the liquidator or the court and would not be arbitrable as such a decision may affect rights of third parties not engaged in the arbitration.

7.3.2.2 Arbitrable matters

As English legislation does not define which insolvency matters are arbitrable, one must look to case law to determine which matter are arbitrable. In *Fulham Football Club (1987) Ltd v Richards*, Lord Justice Patten commented, in *obiter*, that even where a party was seeking a remedy which could only be granted by the court, the arbitration agreement should operate as an agreement to first let the arbitrator decide on the subject matter of the claim, and on whether a lesser remedy would be suitable, before approving an application to the court.[429] One can tentatively conclude from this *dicta* that most insolvency matters, apart from orders that would affect third parties, are capable of, at least at first instance, being determined by arbitration.

Lord Justice Patten differentiated between the "subject matter" of the dispute (in that case the allegation of unfair prejudice) that was held to be clearly arbitrable, and the remedies that might be granted as a result. Lord Justice Patten acknowledged that there were certain remedies that only a court could grant (such as ability to order the winding-up of a company on just and equitable grounds under section 122(1)(g) *Insolvency Act 1986* (UK)). These were orders that had a wider "third-party" or *in rem* effect that went beyond the parties engaged in the dispute and could therefore not be granted by an arbitral tribunal. However, the fact that certain remedies could not be granted by an arbitral tribunal did not make the "subject matter" itself non-arbitrable.

Lord Justice Patten held that the relevant legislation did not contain express provisions excluding unfair prejudice disputes from arbitration. Similarly, the *Arbitration Act 1996* (UK) and the *Insolvency Act 1986* (UK) do not contain express restrictions on what insolvency matters are arbitrable. Accordingly, it is reasonable to conclude that most insolvency matters, save for those affecting third parties, are arbitrable.

[428] *Insolvency Act 1986* (UK) Chapters VI - VIII.
[429] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 per Lord Justice Patten at 25.

7.4 United States

7.4.1 Approach to arbitrability[430]

The FAA does not address the issue of arbitrability[431] and it has generally been left to judicial decisions and provisions in other legislation to define the limits of arbitrability under United States law.[432] Until the 1970s, a substantial number of matters were considered non-arbitrable under United States federal law.[433] It was in 1974 that the United States Supreme Court in *Scherk v. Alberto-Culver Co.*[434] started to expand the scope of arbitrable matters. In that case, the Supreme Court held that an arbitration clause in an international contract is valid and effective even in disputes involving important public policies of the forum, such as those arising under the Securities Exchange Act of 1934.[435]

Arguably the most significant expansion to the field of matters that are arbitrable in the United States occurred in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*[436] The Supreme Court in *Mitsubishi* elaborated on the ruling in *Scherk*, finding that international arbitral tribunals have jurisdiction to decide matters involving federal

[430] The term "arbitrability" is not used consistently in the United States, or by Unites States courts and is often used to refer to (i) whether a specific subject matter is capable of being arbitrated (objective arbitrability); (ii) whether a party has capacity to enter into an arbitration agreement (subjective arbitrability); and (ii) whether a dispute is outside the scope of the arbitration. BARON and LINIGER (2003) p. 28, fn 3; SHORE (2009) para 4-2. The definition of "arbitrability" is generally a far broader in the United States than in other jurisdictions. As the capacity of parties and scope of the arbitration agreement will be considered in Chapter 4, the term arbitrability is used in this chapter to refer only to whether a specific subject matter is capable of being arbitrated.

[431] BORN (2009) p. 781. Although the FAA does contains one explicit exclusion from matter that are arbitrable contained in 9 U.S.C. § 1 which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". Pursuant to 9 U.S.C. § 2 all other arbitration agreements in writing "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".

[432] For example, anti-trust and securities legislation. See *Wilko v. Swan*, 346 U.S. 427 (1953); *Zimmermann v. Continental Airlines, Inc*., 712 F.2d 55 (3d Cir. 1983), cert. denied 104 S.Ct. 699 (1984); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *A&E Plastik Pak Co., Inc. v. Monsanto, Co.*, 396 F.2d 710 (9th Cir. 1968); *American Safety Equipment v. J.P. Maguire* 391 F.2d 821 (2nd Cir. 1968).

[433] See e.g. *American Safety Equipment v. Maguire* 391 F.2d 821 (2nd Cir. 1968) (Court of Appeals for the Second Circuit held that antitrust claims were not arbitrable because of "the pervasive public interest in enforcement of the antitrust laws."); *Wilko v. Swan,* 346 U.S. 427 (1953) (pre-dispute agreements to arbitrate claims of securities fraud (brought under the 1933 Securities Act) were held to be unenforceable).

[434] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (The case involved a dispute over the arbitrability of a claim in relation to an arbitration agreement contained in a contract for the purchase of business including trademarks by a US buyer and German and Lichtenstein organised seller).

[435] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974).

[436] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth In*c., 473 U.S. 614 (1985); 105 Supreme Court 3346 (1985); XI Y.B. Com. Arb. 555 (1986).

antitrust claims arising from an international transaction. Delivering the opinion of the Supreme Court, Justice Blackman wrote:

> [I]nternaitonal comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[437]

Justice Blackman continued, commenting "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration."[438] It was stressed that "there is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism"[439] to enforce United States antitrust laws. Furthermore, the Court said "[w]e must assume that if Congress intended the substantive protection afforded by a given statue to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history."[440]

In *Mitsubishi* the Supreme Court held that antitrust claims were, in principle, arbitrable and established what has been termed the "second look" doctrine.[441] This doctrine provides that United States courts will take a "second look" at an arbitral tribunal's decision when applying United States law, such as United States' antitrust law, when enforcing an award. The Supreme Court said "[h]aving permitted the arbitration to go forward, the national courts ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[442]

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[437] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614, 629 (1985).

[438] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614, 639 (1985). The approach in *Mitsybishi* somewhat echoes the approach of the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), 103 Supreme Court 927, 941, where the Court stated:

> [A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defence to arbitrability.

[439] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614, 636 (1985).

[440] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614, 628 (1985). The presumption of arbitrability, albeit in a slightly different context, was clearly enunciated in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986) where it was stated that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986) quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

[441] See BARON and LINIGER (2003); LOWENFELD (1986).

[442] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614, 638 (1985). The "second look" doctrine has also been adopted in the E.U. in *Eco Swiss China Time Ltd v. Benetton Int'l NV*, C-

More recently, the U.S. Supreme Court has noted that "questions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration."[443]

7.4.1.1 Arbitrability and Public Policy

Since *Mitsubishi*, United States courts have expanded the subject matters that may be arbitrable. As a consequence, the types of controversies that are considered not arbitrable due to public policy considerations have significantly been reduced.[444] The Supreme Court, and courts of appeals, have held that claims under a number of Federal Acts are now arbitrable, for example, claims under the 1933 Securities Act,[445] the Securities Exchange Act 1934,[446] the Racketeer Influenced and Corrupt Organizations Act (RICO),[447] Magnuson-Moss Warranty Act,[448] Uniformed Services Employment and Reemployment Rights Act,[449] as well as employment discrimination claims under Title VII.[450]

In the context of proceedings to enforce arbitral awards, several U.S. cases demonstrate a reluctance on the part of U.S. courts to refuse to enforce foreign awards based upon considerations of public policy.[451] For example, in *Northrop Corporation. v. Triad International Marketing S.A.*,[452] the Ninth Circuit Court of Appeal refused to consider the law of a foreign country when determining whether there had been a violation of "public

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126/97 [1999] E.C.R I-3055 §32 (E.C.J.) where the European Court of Justice, when affirming that Article 81 of the EU Treaty is a matter of public policy, held that "the ordinary courts may have to examine those questions [of Community law], in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances." See also BORN (2009) p. 797. However, the "second look" approach is not necessarily applied in all US States when dealing with domestic arbitrations. For example, in *Avnet, Inc. v. H.I.G. Source Inc.*, C.A. No. 5266-VCP (Del. Ch. Sept. 29, 2010) the Court of Chancery of the State of Delaware decided that issues of procedural arbitrability, such as the conditions precedent for arbitration, are decided by the arbitrator, whereas the Courts will presume that the parties intended issues of substantive arbitrability (for example, the scope of and arbitration clause), to be decided by a Court, absent evidence that the parties "clearly and unmistakably intended otherwise." See also *James & Jackson LLC v. Willie Gary LLC*, 906 A.2d 76, 79 (Del. 2006).

[443] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24-25 (1983).

[444] See e.g. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer et al.*, 515 U.S. 528 (1995); *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206 (6th Cir. 1995), *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110 (3d Cir. 1993); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth, Inc*., 473 U.S. 614 (1985); *Kamakazi Music Corp. v. Robbins Music Corp*., 684 F.2d 228 (2d Cir. 1982); *Scherk v. Alberto-Culver Co*. 417 U.S. 506 (1974).

[445] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

[446] *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987).

[447] *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987) at 242.

[448] *In re American Homestar of Lancaster, Inc.,* 50 S.W.3d 480 (Tex. 2001).

[449] *Garrett v. Circuit City Stores, Inc*., 449 F.3d 672 (5th Cir. 2006).

[450] *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

[451] GIBSON (2009) p. 130.

[452] *Northrop Corporation. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987).

policy."[453] The party resisting enforcement of the award argued that enforcement would be a violation of public policy and the Court of Appeal ruled that, despite a regulation in Saudi Arabia, which made illegal (in that country) a military contract for payment of commissions to an agent, the marketing agreement (containing the arbitration agreement) remained enforceable under California law (the governing law chosen by the parties).

In *Parsons & Whittemore Overseas Inc. v. Societe Generale De L'Industrie Du Papier*,[454] the defendant argued that enforcing an award would contravene U.S. public policy due to the strained relationship between the U.S. and Egypt following the 1967 Arab-Israeli war. The Second Circuit Court of Appeal rejected this contention, noting that interpreting public policy in order to protect national interest would strongly undercut the efficacy of the New York Convention.[455]

While there may be a reluctance to refuse enforcement of foreign awards on the basis of public policy considerations, U.S. courts have done so, particularly in bankruptcy cases. For example, in *Victrix S.S. Company, S.A. v. Salen Dry Cargo A.B.*[456] the Court of Appeal for the Second Circuit refused to enforce an arbitration award made in London (attaching assets) due to ongoing, related, Swedish bankruptcy proceedings. The Court determined that enforcing the London arbitration award would conflict with U.S. public policy, ensuring equitable and orderly distribution of local assets of a foreign company in bankruptcy proceedings.[457]

7.4.2 Arbitrability of insolvency ("bankruptcy") matters

In the United States the arbitrability of bankruptcy disputes is determined by reference to whether the matter is considered "core" or "non-core".[458] Matters that are considered "core" bankruptcy proceedings are, in general, not arbitrable. The Bankruptcy Code does not contain a general definition of a "core" proceeding, but it has often been defined as: a proceeding "involving a right created by federal bankruptcy law and which would only arise in bankruptcy";[459] a proceeding integral to the bankruptcy process;[460] or a

[453] *Northrop Corporation. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987) at 1271.
[454] *Parsons & Whittemore Overseas Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974).
[455] *Parsons & Whittemore Overseas Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).
[456] *Victrix S.S. Company, S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709 (2d Cir. 1987).
[457] *Victrix S.S. Company, S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 714 (2d Cir. 1987).
[458] 28 U.S.C. Sect. 157(b).
[459] *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). See also NEUFELD (1991) pp. 528; KURTH (1996) p. 1009.

proceeding that could not exist outside of the bankruptcy case.[461] To assist in determining which matters are considered "core", the Bankruptcy Code contains, at 28 U.S.C. Sect. 157(b)(2), a non-exhaustive list of "core" proceedings.[462] However, as noted by the Eleventh Circuit in *Whiting-Turner Contracting Co. v. Elec. Mach. Enters. Inc*. (*In re Elec. Mach. Enters., Inc.*),[463] since the list is non-exhaustive, the court must inquire as to the nature of a "core" versus a "non-core" proceeding. The Eleventh Circuit commented that:

> … in *In re Toledo*, we stated that '[i]f the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. *Cont'l Nat'l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1348 (11th Cir.1999) (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987)).' ... A proceeding is not core '[if] the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy.'[464]

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[460] FIELDING (2008) p. 13.

[461] See *Sanders Confectionary Prods. Inc. v. Heller Fin. Inc.,* 973 F.2d 474, 483 (6th Cir. 1992); *Eglinton v. Loyer (In re G.A.D.)*, 340 F.3d 331, 336 (6th Cir. 2003).

[462] 28 U.S.C. Sect. 157(b)(2) provides that "Core proceedings include, but are not limited to:

> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul, or modify the automatic stay;
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
> (I) determinations as to the dischargeability of particular debts;
> (J) objections to discharges;
> (K) determinations of the validity, extent, or priority of liens;
> (L) confirmations of plans;
> (M) orders approving the use or lease of property, including the use of cash collateral;
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
> (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

Note that the Supreme court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) found that section 157(b)(2)(C) was unconstitutional, holding that a bankruptcy court lacks the constitutional authority to enter final judgment on a counterclaim asserted by a debtor where the counterclaim is unrelated to the underlying claim (as the defendant to the counterclaim has the right to have a claim heard by a life-time appointed Article III judge).

[463] *Whiting-Turner Contracting Co. v. Electric Machinery Enterprises, Inc. (In re Electric Machinery Enterprises, Inc.),* 479 F.3d 791 (11th Cir. 2007).

[464] *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007). *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987) ("If the proceeding does not involve a substantive right

As stated by Judge Peck in *JPMorgan Chase Bank, N.A. v. Charter Communications Operating, LLC (In re Charter Commc'ns)*,[465] "distinguishing between core and non-core proceedings is not a mechanical exercise." Nonetheless, United States courts have found that many matters in the context of bankruptcy proceedings are arbitrable, particularly those which relate to international arbitrations due to the strong policy of the FAA favouring arbitration in international cases.[466]

In general, when a matter is considered "core" the bankruptcy court has jurisdiction to hear and determine all matters and enter all appropriate orders and judgments. If an arbitration clause impacts a "core" matter, bankruptcy courts have discretion to deny a motion to compel arbitration. In contrast, matters classified as "non-core" may only be heard and determined by a bankruptcy judge with the consent of the parties;[467] otherwise the bankruptcy courts must compel arbitration.[468]

Historically, bankruptcy courts in the United States retained significant discretion in determining whether to compel arbitration.[469] However, in *Hays & Co v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,*[470] the Court of Appeals for the Third Circuit overruled its decision in *Zimmerman v Continental Airlines Inc*,[471] holding that, inter alia, bankruptcy

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created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding…").

[465] *JPMorgan Chase Bank, N.A. v. Charter Communications Operating, LLC (In re Charter Commc'ns)*, 409 B.R. 649 (Bankr. S.D.N.Y. 2009).

[466] See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987). LEW, MISTELIS and KRÖLL (2003) p. 206 citing *Société Nationale Algérienne pour la Recherche, le Transport, la Transformation et la Commercialisation des Hydrocarbures (SONATRACH) v. Distrigas Corp*., 80 B.R. 606, 610 (D. Mass. 1987).

[467] 28 U.S.C. Sect. 157(c)(2).

[468] See e.g. *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007); *MBNA America Bank v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002).

[469] 28 U.S.C. Sect. 157(3).

[470] *Hays & Co v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149 (3rd Cir. 1989).

[471] *Zimmerman v Continental Airlines Inc* 712 F 2d 55 (3d Cir, 1983), cert. denied, 464 US 1038, 79 L Ed 2d 165, 104 S Ct 699 (1984) (a pre-1984 amendment to the Bankruptcy Code decision of the Third Circuit in which the trustee of a debtor commenced proceeding against Continental Airlines in the bankruptcy court. The trustee claimed that Continental improperly withheld $200,000 that was owed to the debtor. Continental moved to compel arbitration pursuant to an arbitration clause. The bankruptcy court decided that it was vested with discretion regarding the decision to compel or deny arbitration because the determination in such a proceeding would affect the amount, existence, and priority of claims to be paid out of the debtor's general funds and thus, involve interests of creditors (at 56). The bankruptcy court held that bankruptcy proceedings were not capable of settlement by arbitration because of their importance to the smooth functioning of the commercial activities of the nation. The bankruptcy court held that such proceedings were one of the few areas where Congress has expressly pre-empted state court jurisdiction. The bankruptcy court said:

> "because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better relaized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus, while a bankruptcy court would have the power to stay proceedings

courts had no discretion when deciding on the enforcement of arbitration agreements in "non-core" matters, unless it is proved that "the text, legislative history, or the purpose of the *Bankruptcy Code* conflicts with the enforcement of an arbitration clause".[472]

Various circuit courts have noted that where a matter is "non-core" in nature, a bankruptcy court generally has no discretion and must compel arbitration.[473] Although the Circuits tend to disagree as to the standard that the bankruptcy court must apply when exercising its discretion. The Second Circuit in *MBNA America Bank v. Hill,*[474] decided that bankruptcy courts generally do not have discretion to refuse to compel arbitration of "non-core" bankruptcy matters, or matters that are simply "related to" bankruptcy cases.[475] The Second Circuit stated:

> Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters, which implicate "more pressing bankruptcy concerns." In re U.S. Lines, Inc., 197 F.3d at 640. However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Arbitration Act or that arbitration of the claim would "necessarily jeopardize" the objectives of the Bankruptcy Code. Id. This determination requires a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy.[476]

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pending arbitration, the use of this power is left to the sound discretion of the bankruptcy court". (at 59-60).

[472] *Hays & Co v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 885 F.2d 1149 (3rd Cir. 1989) at 1156-57.

[473] See e.g. *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007); *MBNA America Bank v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002); *In re Anthony*, 334 B.R. 780, 787 (Bankr. N.D. Miss. 2005). In "non-core" matters, bankruptcy courts are competent to hear such disputes and to issue findings of fact, but they lack the competence to enter final orders.

[474] *MBNA America Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006) (MBNA sought to enforce the arbitration clause in a consumer credit agreement between it and a debtor. The debtor filed a class action against a credit card company alleging violations of the automatic stay provisions in the Bankruptcy Code. The bankruptcy court identified the debtor's claim as "core" and denied MBNA's motion, determining that the bankruptcy court was the most appropriate forum for adjudicating the matter. The Second Circuit reversed that decision of the district court (which affirmed the bankruptcy court's decision) holding that as the debtor had received discharge of under chapter 7 and the case was fully administered, the resolution of the debtor's claim would have no effect on the bankruptcy estate (at 109)).

[475] *MBNA America Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006) at 108.

[476] *MBNA America Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006) at 108. See also *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 796 (11th Cir. 2007) (concluding that where a bankruptcy court when dealing with "core" proceedings must determine whether arbitration agreement "inherently conflicts with the underlying purposes of the Bankruptcy Code").

In *United States Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association (In re U.S. Lines, Inc.)*,[477] the Court of Appeal for the Second Circuit commented:

> Core proceedings implicate more pressing bankruptcy concerns, but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration. 'Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code.' *Insurance Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1067 (5th Cir. 1997). However, there are circumstances in which a bankruptcy court may stay arbitration, and in this case the bankruptcy court was correct that it had discretion to do so.[478]

The Third Circuit in *Mintze v. American General Fin. Services. Inc.* (*In re Mintze)*,[479] decided that the "core"/"non-core" distinction does not affect whether the bankruptcy court has discretion to refuse arbitration or enforce an arbitration agreement. It was held that the bankruptcy court did not have discretion to refuse to enforce the arbitration clause because the proceedings were not based on provisions of the Bankruptcy Code and Congress did not intend to preclude a waiver of the statutory rights at issue.[480] This decision reversed previous decisions of the Third Circuit, which held that bankruptcy

[477] *United States Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association (In re U.S. Lines, Inc.)*, 197 F.3d 631 (2d Cir. 1999) (the case concerned thousands of claims from past employees for asbestos related injuries caused while sailing that were allegedly covered by protection and indemnity insurance policies. The United States Lines Trust sued in the Bankruptcy Court for seeking a declaratory judgment to establish the Trust's rights under the insurance contracts. The bankruptcy court held that the action was within its core jurisdiction and denied the defendants' motion to compel arbitration of the proceedings. The District Court reversed and held that the insurance contract disputes were not core proceedings. The Court of Appeal reversed the decision, holding that the declaratory judgment proceedings are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, the Court of Appeal said that the "bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor.... The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers." (at para. 28)).

[478] *United States Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Association (In re U.S. Lines, Inc.)*, 197 F.3d 631 (2d Cir. 1999) at para. 26.

[479] *Mintze v. American General Fin. Services. Inc.* (*In re Mintze)*, 434 F.3d 222 (3d Cir. 2006) (The debtor commenced an action against her mortgage company to enforce a pre-petition rescission and the court found that there was no bankruptcy issue to be decided by the bankruptcy court so the arbitration clause must be enforced).

[480] *Mintze v. American General Fin. Services. Inc.* (*In re Mintze)*, 434 F.3d 222 (3d Cir. 2006) at 231.

courts generally have discretion to refuse to enforce arbitration clauses in "core" matters.[481]

It is apparent from the above that there is no uniform approach amongst the Circuits regarding whether: (i) a matter is classified as "core" or "non-core", or (ii) once classified as "core" or "non-core", arbitration will be compelled or refused.

7.4.2.1 Non-arbitrable matters

As can be seen from the above analysis determining which matters are non-arbitrable is a difficult task, which ultimately can only be done on a case-by-case basis, taking into account whether compelling arbitration would jeopardise the objectives of the Bankruptcy Code.[482] Nevertheless, the following types of matters may, in general, be considered to be non-arbitrable.

7.4.2.1.1 Voidable transactions

Chapter 5 of title 11 of the U.S.C.[483] provides that the trustee may avoid any transfer of an interest of the debtor in property in respect of certain transactions specified in 11 U.S.C. Sect. 547(b). For example, transactions made while the debtor was insolvent (or transactions occurring within 90 days prior to the date of the filing of the petition) that enable a creditor to receive more than the creditor would otherwise be entitled to receive may be avoided.[484] As 28 U.S.C. Sect. 157(b)(2)(F) provides that proceedings to determine, avoid, or recover preferences are considered "core" proceedings, such transaction are, in general, not arbitrable.

7.4.2.1.2 Challenges to the schedule of claims

Statutory priorities or schedule of claims are set out in 11 U.S.C. Sect. 507, which provides a list of expenses and claims with priority in bankruptcy proceedings. This

[481] See e.g. *SFC New Holdings Inc. v. The Earthgrains Co., (In re GWI Inc.)*, 269 B.R. 114, 117 (Bankr. D. Del. 2001); I, 181 B.R. 195, 202 (Bankr. E.D. Pa. 1995).
[482] For example: in *Lewallen v. Green Tree Servicing*, LLC, 487 F.3d 1085 (8th Cir. 2007) the court refused to compel arbitration of a core matter in relation to claims under the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Report Act (FCRA) and the Fair Debt Collection Practices Act (FDCPA) on the grounds that the right to arbitrate had been waived; *in In re Brown*, 354 B.R. 591 (D.R.I. 2006) the court refused to compel arbitration in relation to a Truth in Lending Act claim; whereas in *In re Farmland Industries*, *Inc.*, 309 B.R. 14 (Bankr. W.D. Mo. 2004) the court ordered the arbitration of construction contract between contractor and Chapter 11 debtor that involved a "core" matter; and in *In re Rozell*, 357 B.R. 638 (Bankr. N.D. Ala. 2006) the court compelled arbitration in relation to Truth in Lending Act claim. See also LAZIC (1999) §4.3.2.2.3.
[483] 11 U.S.C. Sect. 547.
[484] See e.g. *In re Oakwood Homes Corp.*, 2005 WL 670310 (Bankr. D.Del. 2005).

section does not specify whether proceedings to determine the schedule of claims are "core" or "non-core", although 28 U.S.C. Sect. 157(b)(2)(B) does define that the "allowance or disallowance of claims against the estate or exemptions from property of the estate..." are "core" proceedings. It may be argued that determining schedule of claims falls within 28 U.S.C. Sect. 157(b)(2)(B) or perhaps the general provision in 28 U.S.C. Sect. 157(b)(2)(A) ("matters concerning the administration of the estate") and as such these proceedings would, therefore, not be arbitrable.

7.4.2.1.3 Assets of the estate

Determining which assets are part of the estate are likely to fall within the 28 U.S.C. Sect. 157(b)(2)(A) ("matters concerning the administration of the estate") and therefore classified as "core" proceedings. Thus proceedings concerning the assets of the estate would be considered not arbitrable. For example, in *Canal Corp. v. Finnman (In re Johnson)*[485] the Fourth Circuit found that the finding of a constructive trust and the determination of the proper distribution of the *res* of that trust are "core" proceedings and not arbitrable. The Fourth Circuit stated that:

> … the only proper forum for determining whether assets held by a debtor are held in constructive trust is the bankruptcy court. [A] determination of the proper distribution of that trust [is] intimately tied to the traditional bankruptcy functions and estate, and therefore, [it is a] core matter within the clear jurisdiction of the bankruptcy court.[486]

However, given the lack of uniformity of approach by various United States courts it would seems that whether proceedings to determine the assets of the estate are arbitrable will have to be decided on a case-by-case basis.

7.4.2.2 Arbitrable matters

Similarly, the task of determining what matters are arbitrable is neither simple nor straightforward. The starting place is to determine whether a matter is "non-core" and

[485] *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir.1992) (the debtor filed bankruptcy following the collapse of an illegal pyramid scheme. The bankruptcy court permitted a class of plaintiffs to bring a declaratory suit and held that the bulk of the funds in the debtor's estate were to be held in constructive trust for the defrauded investors. The bankruptcy court then determined the proper distribution of the funds in the trust to the class of plaintiffs. Two of the class plaintiffs objected arguing that the bankruptcy court was without jurisdiction to determine who was entitled to the distribution of the funds. In affirming the district court's upholding of the bankruptcy court's decision, the Fourth Circuit noted that "it was necessary for the bankruptcy court to determine the proper beneficiaries [of the trust] concurrent with its finding of a constructive trust" (at 402)).

[486] *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir.1992) at 402.

refer to 28 U.S.C. Sect. 157(b)(2). If the matter is not listed in at 28 U.S.C. Sect. 157(b)(2), then, given the FAA policy in favour arbitration in international cases, the matter will generally be arbitrable. For example, in *In re Electric Machinery Enterprises, Inc.,*[487] the Eleventh Circuit held that the contractual claim asserted by Electric Machinery Enterprises (in bankruptcy) against Whiting-Turner for monies owed was not a "core" proceeding, overturning the findings of the bankruptcy court and district court (and distinguishing the case from *In re Johnson*).[488] The Eleventh Circuit further noted that, even if it the claim was a "core" proceeding, there was no evidence that arbitrating Electric Machinery Enterprises' claim would present an inherent conflict with the underlying purposes of the Bankruptcy Code. The Eleventh Circuit found that the dispute was therefore arbitrable and ordered arbitration.[489]

7.5 Effect of the UNCITRAL Model Law on Cross-Border Insolvency

In Australia, England and the United States, the UNCITRAL Model Law on Cross-Border Insolvency has been adopted, which contains provisions on the treatment of foreign insolvency proceedings. While the UNCITRAL Model Law on Cross-Border Insolvency does not directly address issues of arbitrability, Article 20 provides that where foreign insolvency proceedings have been recognised, the "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights obligations or liabilities is stayed."[490] The Guide to the UNCITRAL Model Law on Cross-Border Insolvency, in paragraph 145, clarifies that the term "individual actions" is intended to cover actions before an arbitral tribunal.[491] Therefore, individual actions or before an arbitral tribunal are to be stayed where foreign insolvency proceedings have been recognised, affecting the ability of arbitration actions to proceed.

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[487] *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791 (11th Cir. 2007) (Whiting-Turner entered into a subcontract with the debtor, Electric Machinery Enterprises, Inc., (EME) to provide electrical work on a theme park construction. EME filed for bankruptcy and brought proceedings in bankruptcy court, alleging that Whiting Turner owed money and Whiting Turner moved to compel arbitration).

[488] *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791 (11th Cir. 2007) at 796 (In contrast to *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir.1992), the Eleventh Circuit held that the disputed assets are not held by the debtor. Rather, they are held by a third party (Whiting-Turner), and the proceeding between Electric Machinery Enterprises and Whiting-Turner does not involve a claim by a bankruptcy creditor against funds held by the bankruptcy debtor's estate. *In re Johnson* involved creditors who made claims against the debtor's estate in bankruptcy court for liquidation of assets held by the debtor, a proceeding which the Fourth Circuit found to be "core").

[489] In re Electric Machinery Enterprises, Inc., 479 F.3d 791 (11th Cir. 2007) at 796.

[490] BERENDS (1998) pp. 362-368.

[491] UNCITRAL Legislative Guide on Insolvency Law, adopted 25 June 2004, U.N. Sales No. E.05V.10 (2005) available at <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

In general, if foreign insolvency proceedings have been recognised in a country, then the commencement or continuation of arbitration proceedings having its seat in that country should be stayed. Indeed, it may be that it would be against the public policy of the country for the arbitration proceedings to proceed. Likewise, if the enforcement of an arbitration award is sought in a UNCITRAL Model Law on Cross-Border Insolvency country that has recognised a foreign insolvency proceeding, then the enforcement proceedings should also be stayed as they concern the debtor's assets, rights obligations or liabilities.

8 Transnational Approach to Arbitrability of Insolvency Proceedings

This study has examined the arbitrability of insolvency proceedings in international arbitration in order to answer the question whether there is a transnational approach to the arbitrability of insolvency proceedings. The previous sections have examined: the legislative framework in relation to international arbitration and insolvency proceedings in each of the Relevant Countries; the issue of arbitrability in general and the law applicable to the determination of arbitrability; the arbitrability of insolvency proceedings in general terms and the arbitrability of insolvency proceedings in the Relevant Countries. This section examines whether there is currently a transnational approach to the arbitrability of insolvency proceedings (section 8.1); and proposes the development of a legislative guide to be the basis for a future transnational approach to the arbitrability of insolvency proceedings (section 8.2).

8.1 The Current Transnational Approach

The insolvency laws and regulations in each of the Relevant Countries provide for relatively similar mechanisms, intended to ensue an orderly reorganisation or liquidation of the insolvent company's assets, the equal treatment of creditors and the centralisation of claims. The insolvency laws and regulations also contain specific provisions for:

(a) administrators/trustees to void certain transactions;
(b) creditors to challenge the schedule of claims; and
(c) determining which assets are included or excluded from the estate.

As seen in section 7, determining the precisely which types of insolvency proceedings are arbitrable is a difficult and complex task, as the legislatures in the Relevant Countries have not specifically addressed this issue. In relation to the arbitrability of disputes in general, Australia, England and the United States ("Common Law Countries") have also not specifically identified which matters are arbitrable. In these Common Law Countries it is necessary to refer to specific legislation and case law to determine the matters that are arbitrable. In contrast, Switzerland adopts a unique (amongst the countries in this study) approach; providing for a substantive rule on arbitrability.

It has been shown above that in each of the Relevant Countries there is a "core" set of insolvency matters that are not arbitrable. In this category are, amongst other matters, the commencement of insolvency proceedings, the nomination of the trustee, and the ordering of the winding-up of a company. However, once the obvious "core" matters are identified, it is difficult to determine which other insolvency matters fall in this "core" category.

Australia and England do not specify which insolvency matters are arbitrable and which are not. The United States provides a non-exhaustive list of "core" matters, but the Circuits have taken divergent paths when determining the discretion of the bankruptcy courts and therefore which matters are arbitrable. While it is unclear exactly which insolvency matters are arbitrable in each of the Common Law Countries, it can be concluded that the key insolvency matters examined in this study are not arbitrable, namely, voiding transactions, challenging the schedule of claims and determining the assets of the estates. These jurisdictions adopt different terminology, but ultimately provide for a similar approach. In essence, the Common Law Countries provide that insolvency proceedings will be arbitrable, unless the proceedings affects the rights of third parties or concern rights that only arise in insolvency or are created by the insolvency law.

In contrast, the substantive rule of arbitrability under Swiss law - which states that all disputes that involve property are arbitrable – provides that most insolvency matters are arbitrable. In particular, the key insolvency matters examined in this study are arbitrable under Swiss law, as these matters involve property interests.

It can be concluded that there are many common approaches to the arbitrability of insolvency disputes amongst the Relevant Countries, particularly between the Common Law Countries. However, the lack of certainty in approach in determining which insolvency proceedings are arbitrable under the law of each Relevant Country makes it

difficult to conclude that there is transnational approach. Although, the observation can be made that there is a consistent approach in the fact that the issue has not been specifically addressed in any of the Relevant Countries

8.2 A Future Transnational Approach to the Arbitrability of Insolvency Proceedings

This study has shown that while there are similarities amongst the Relevant Countries with respect to the arbitrability of insolvency proceedings, the issue has been largely ignored by national legislatures. This dearth of regulation creates uncertainty and a lack of predictability. As international arbitration has become the "normal" method for resolving international disputes, there is a need for a more certain, predictable and consistent approach to determining the arbitrability of insolvency disputes, particularly in the current economic climate, with the spectre of increasing insolvency proceedings.

It is submitted that there is a need to develop a legislative guide on the arbitrability of insolvency proceedings that could be used as a model for national legislatures to amend their laws and regulations to specifically address this issue. Such a guide could also be a useful reference point for arbitral tribunals when faced with questions concerning the arbitrability of an insolvency matter.

In recent years, the international community and European Union have made progress in developing regulations aimed at ensuring a more consistent approach to dealing with cross-border insolvency cases – for example, the UNCITRAL Model Law on Cross-Border Insolvency,[492] the UNCITRAL Legislative Guide on Insolvency Law[493] and the EU Regulation on Insolvency.[494] Likewise, domestic laws on the regulation of international arbitration are also becoming more consistent, with a number of laws either adopting the UNCITRAL Model Law on Commercial Arbitration[495] or using it as a guide to develop their own arbitration laws.[496] These developments demonstrate both the

[492] UNCITRAL Model Law on Cross-Border Insolvency 1997 (1997) 36 ILM 1386.
[493] UNCITRAL Legislative Guide on Insolvency Law, adopted 25 June 2004, U.N. Sales No. E.05V.10 (2005)
available at <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.
[494] Council Regulation (EC) No 1346/2000 of 29 May 2000. See also the Asian Development Bank's Report on Promoting Regional Co-operation in the development of Insolvency Law Reforms, 2004. See also WESTBROOK (1996) for a comparison of some initiatives to harmonise insolvency laws.
[495] UNCITRAL Model Law on International Commercial Arbitration, 1985 (UN Docs. A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).
[496] Richard Garnett argues that "[i]t is clear that in recent times a strong trend has emerged toward the reduction of differences in national arbitration laws." GARNETT (2002) p. 400.

desirability for more transnational regulation and ability of the international community to develop such mechanisms.

A legislative guide would, it is submitted, greatly enhance certainty and predictability for the international business community and provide a basis for the development of a transnational approach to the arbitrability of insolvency proceedings. Such work could be conducted under the auspices of UNCITRAL or perhaps another international organisation, where experts from the fields of comparative insolvency law and arbitration could collaborate to develop this legislative guide.

The development of such a legislative guide no doubt involves a number of challenges. Arguably, the greatest challenge is to develop an internationally accepted list of insolvency matters that are arbitrable and that would be compatible with the various insolvency regulations in each jurisdiction. For example, such a list of arbitrable matters, may be easily incorporated into the insolvency law of the United States, as 28 U.S.C. Sect. 157(b) already contains a similar list, however, would be more difficult to incorporate into Swiss law, with its substantive rule on arbitrability. Furthermore, each jurisdiction has its own specific insolvency procedures and terminology. Developing a list of arbitrable matters that will have universal application to insolvency regimes worldwide may be very challenging indeed. This problem was noted by UNCITRAL, at its thirty-second session, on the "Possible future work in the are of international commercial arbitration" commenting that:

> … in searching for the best approach that would be workable world-wide and that would provide desired degree of certainty and transparency, one would face a dilemma. The more general the formula, the greater would be the potential risk of divergent interpretation by courts of different States; the more detailed the list, the greater would be the of non-acceptance by States and, to the extent the list would be accepted, the greater would be the risk of solidifying matters and this impeding further development towards limited the realm of non-arbitrability. Nevertheless, a considered attempt seems desirable since the result of a world-wide discussion would in itself be revealing and useful.[497]

[497] UNCITRAL International Commercial Arbitration: Possible future work in the area of international commercial arbitration, Note by the Secretariat (A/CN.9/460), 6 April 1999, para. 34.

Furthermore, the arbitrability of insolvency proceedings is a sensitive issue. Many states may be reluctant to adopt the proposals in such a guide as they may not accord, or be perceived to accord, with that states public policy or economic, political or social values.

Nevertheless, these challenges are not insurmountable, and the benefits outweigh the difficulties. It is argued that such a guide would foster a more certain transnational approach to the arbitrability of insolvency proceedings and aid national courts and international arbitral tribunals. The commensurate benefits may include greater certainty and predictability for the international business community, reduced arbitration/litigation and transaction costs, enhanced transparency and greater confidence in the international legal system.

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