Science of Law Journal (2025)
Clausius Scientific Press, Canada

DOI: 10.23977/law.2025.040212
ISSN 2616-2296 Vol. 4 Num. 2

# *A Chaotic Clash: Legal Basis and Attitudes towards the Arbitration Used and Coordinated in Insolvency Proceedings*

**Yuqiong Yang**

*Xi'an Peihua University, Xi'an, Shaanxi, China*

***Keywords:*** Transnational Insolvency, Arbitration

***Abstract:*** With the normalization of Covid-19 situation and geopolitical changes in the past years, transnational or national insolvency become more frequent. As a useful tool for international commercial disputes resolution, arbitration happens more often than ever, especially when a insolvency application has already been submitted. While there already exists a plenty of discussions on the clash and effects of arbitration and insolvency, how to coordinate the two important mechanisms in commercial legal practice is still a critical issue and changing in legislation and practice. Otherwise, as a part of mandatory regulation for public interests in a nation, insolvency seems to have more power and be more systematic than arbitration, which is of autonomy and more about international law that is fragmented in its instinct as any other international laws. This paper will start from the clash of arbitration and insolvency, but mainly focus on analyzing the legal basis and attitudes towards the use of arbitration in some different types of jurisdiction, such as common law, Chinese law and the EU law. After that, it will turn to discuss a potential way to harmonize the clash above and achieve balance.

## 1. Introduction

With the COVID-19 pandemic and the economic crisis caused by it, a large number of companies and corporations submitted insolvent applications to their local courts. The caseload of national courts increased extremely because the breach of contract and the disputes related to insolvency were created under this disaster. Generally, the jurisdiction of insolvency proceedings is decided by the lex personae or lex incorporationis. In transnational insolvency context, the principle of "universality"[1] was taken in a period, but it could not handle with the problems caused by the legal conflicts. Then, the principle of cooperation and coordination[1] was proposed. However, the UNICITRAL adopt the principle of "centre of main interests" ("COMI")[1] which is popularly used in various jurisdictions.

Actually, a jurisdiction may hold its own attitudes to this coordination of insolvency and arbitration, which is totally distinct from another one. It is not just because of the mandatory nature of insolvency law which refers to creditor's interests, other stakeholders' interest and the whole society, but it is also a result of transnational issue regulated in both national law and international law. The international law is fragmented per se. In the need of commercial dispute resolution, it is

both meaningful and practical to study how the main jurisdictions solve the conflicts or clash of insolvency and arbitration, and how or to what extent the two regime coordinate the in their legal systems.

## 2. A clash: when arbitration meets insolvency

### 2.1 Validity of arbitration agreement

Validity, scope ratione materiae, and scope ratione personae of arbitration are three elements of jurisdiction of an arbitral tribunal.[1] "The validity of arbitration agreement concerns the continued validity and existence of arbitration agreements after one of the parties became subject to insolvency proceedings." A valid arbitral agreement is the legal basis and the source of authority for a tribunal properly constituted. As it is regulated in the Art 8(1) Model Law, "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." According to the Art. 8 (1), firstly, a tribunal should be constituted under an arbitration agreement, which should be signed or reached before the first statement on "the substance of dispute". Secondly, there is an exemption that the agreement is null and void, inoperative or incapable of being performed. Here is a question: why might an arbitral agreement be 'null and void, etc.'?

The validity of arbitral agreement is apparently determined by the specific jurisdiction. For instance, under the Art. 142 of the Polish Bankruptcy and Re-organization Law, "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"[15], thus the investment contract in Syska v. Vivendi shall be null and void. From the perspective of the purpose of insolvency, it is related to public interests. Comparing with that, arbitration is related to personal interest of claimants. Except of some jurisdiction in which arbitral applications generally will be rejected in a insolvency proceeding, the autonomy and enforcement of arbitration is permitted and respected unless it might harm the assets. The most crucial effects on the validity of agreement is not just about constituting an lawful tribunal, but also the enforcement referring to the award rendered.

### 2.2 Arbitrability of insolvency disputes

The Model Law and New York Convention contain limits to the recognition of arbitral awards related to the disputes derived of insolvency. Otherwise, the full benefit of using arbitration depends on the enforce-ability of the resulting arbitral award in all relevant jurisdictions[5].According to the arbitrability or non-arbitrability doctrine, some certain types of dispute may not be arbitrable, even with a valid arbitration agreement[2]. Firstly, it is a different issue from the validity of agreement[9]. Of course, a valid and properly written agreement is the precondition of everything in arbitration. Non-arbitrability does not mean that arbitral contract is void and null, but the issues submitted in the contract could not be arbitrated. "Arbitrability is, thus, a specific condition pertaining to the jurisdictional aspect of arbitration agreements, and therefore, it goes beyond the discussion on validity. Abitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement)...The conclusion that can be drawn... is that inarbitrability should not be considered as a condition of arbitration agreement's validity."

Secondly, arbitrability is related to the enforcement of agreement and the award rendered under it. It could be raised in the instances of enforcement of arbitral agreement, tribunal's jurisdiction,

setting aside proceedings, and enforcement of award. Art 34 (b) of Model Law provides that "the courts 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.". the Art 36(1)(b) provides that the court may refuse the recognition or enforcement of an arbitral award with finding that 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State ,or the recognition or enforcement of the award would be contrary to the public policy of this State'. According to the Art 34(2)(b)(i) and Art 36(1)(b)(i) Model Law, arbitrability could be taken into account at setting aside and enforcement stages. Otherwise, in Art V(2)(a)(i) New York Convention it provides that arbitrability could be considered at enforcement. But, no one of the two frameworks provide any about a negative list for non-arbitrability, instead leave it to national legislation and jurisdiction. For local courts, In this context, 'incapable of settlement' and 'public policy' are two technical terms, which are not made clear in Model Law, but leave them to 'the signatory States'. to what extent that these definition effects the arbitrability of insolvency disputes is up to the local insolvency laws. Take the Riverrock Securities Ltd v. International Bank of St Petersburg as an example in which the judge explained that "Clearly the English court, as the crucial court, would not enforce an arbitration agreement (whether by stay or ASI) or an award in respect of a dispute which was not arbitrable as a matter of English law, whatever the proper law of the arbitration agreement. "

Thirdly, insolvency could be an area where some disputes might be non-arbitrable. Among arbitrable insolvency disputes, there are disputes concerning the allowance of claims, allocation of enterprise value, violations of bankruptcy orders, complex financial instruments, and disputes between affiliates and inter-company. These disputes are all around the assets or right as a part of the assets of the corporate in bankruptcy. Generally, many jurisdictions allow parties advance an arbitration or law suit on the assets interest. Apparently, as a collective proceeding, insolvency includes a great deal of conflicts of interest and disputes.

## 3. A legal analysis on the use of arbitration in insolvency

### 3.1 The trend of applying ADR mechanisms in insolvency

The ADR mechanisms used in insolvency proceedings could be traced back to 1990s when in practice the courts and insolvent parties used mediation, negotiation and other various alternative mechanisms to settle the disputes in insolvency proceedings. In 2000, the American Law Institute and the International Insolvency Institute adopted 'Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases' in which it encourages insolvency courts to coordinate and communicate with other jurisdictions.[8] In 2012, the AIL delivered a report which expands that work to cover all jurisdictions around the world.[5] Concerning the arbitration, in 2007, the International Insolvency Institute gave a presentation to the UNCITRAL working Group on Cross-Border Insolvency, recommending that "UNCITRAL take its largest success, the New York Convention concerning enforcement of arbitral awards, and make clear its application to international insolvency disputes". [5]The III did the work for the convenience of arbitration in transnational insolvency proceeding context, with enhancing the enforcement of arbitral awards and creating an insolvency arbitration commission "to facilitate the greater use of arbitration in cross-border insolvencies".[5]

The U.S. Bankruptcy Judge Allan Gropper on July 2012 published an article in the American Journal of Bankruptcy Law entitled "The Arbitration of Cross-Border Insolvencies".[5] Otherwise, it is proposed by Judge Gropper that international arbitration is a viable alternative approach to achieve uniformity and cooperation in cross-border insolvency disputes.[5]

Other ADR mechanisms are rather frequent and earlier to be used in practice, Lehman

Cross-Border Insolvency Protocol exemplifies this with that the court encouraged the debtors to negotiate in a good faith to resolve their disputes with the insolvent.[8] Comparing with other alternative mechanisms, arbitration is relatively long-term, inefficient and with high costs. However, arbitration is de facto vastly used, and there established a complete and mature framework across the world. To study the use of arbitration in solvency proceedings empirically, there are two cases below which could provide a look at the use of arbitration.

## 4. Attitudes towards jurisdiction and utility of arbitration in insolvency

### 4.1 Common law angle

In common law jurisdiction, there seemed a trend of using public interest or public policy to restrain arbitrations where insolvency proceedings have been initiated in parallel. [10]The case of Bresco discussed supra is a case in point. Actually, in the Court of Appeal, the Judges rejected the appeal of Bresco, stating that "given that they had been in liquidation for 3 years by the time of the reference and Lonsdale had a cross-claim, it was neither just nor convenient for the adjudication to continue." The core of this judgment is that the award rendered by the adjudicators could be changed because of the long-term liquidation and the cross-claim. It is to say the final result of the dispute would be determined by the liquidation, instead of the adjudication which just establishes temporal obligations and might be changed by other facts or proceedings. It is a undervaluation for the adjudication by treating it as a "futile" resolution of dispute. Even though the Supreme Court changed the judgment and upheld Bresco's appealing, and followed a "more generous approach"[6]. A similar approach showed in Australian case, New Cap Reinsurance Corporation Limited v A E Grant & Ors, Lloyd's Sydicat No. 991[10] and the Singapore Court of the Peroprod Ltd in liquidation v. Larsen Oil and Gas Pte Ltd [2010] SGHC 186[10].

Otherwise, in respect to the validity of the arbitration agreement it would not be determined by the insolvency law but by the lex arbitri. A recent case shows an approach to adopt this "lex arbitri" principle. The England and Wales High Court decided to grant Riverrock Securities Limited ("Riverrock") an interium anti-suit injunction on the bankruptcy proceedings in Russia brought by the International Bank of St. Petersburg ("IBSP") in Riverrock v. IBSP (Joint Stock Company). IBSP is a bank established in Russia and declared insolvent later there. Riverrock is a company incorporated in England and Wales. IBSP reached nine contracts with Riverrock purchasing securities in the form of credit link notes[12]. The contracts are subject to English law substantially and including an arbitration clause in which it states LCIA rules to be used in arbitration and London as the seat of arbitration. After the commencement of insolvency, IBSP tended to invalidate the contracts with Riverrock for saving the bank's assets under the Russian Bankruptcy Law and the Civil Code of Russia. Therefore, Riverrock turned to English courts seeking an interim anti-suit injunction. The court held that "the avoidance claims brought in the foreign bankruptcy proceedings fell within the scope of the LCIA arbitration agreements concluded between Riverrcok and IBSP and were arbitrable as a matter of English law, even though such claims were non-arbitrable under Russian law."[1] This is following the decision of the Vivendi, but this time the court shows an apparent trending of pro-arbitration or pro-lex arbitri. In addition, it also mirrors an approach to the principle of favorem validitatis which means in favor of the use of arbitration.

### 4.2 EU law angle

From 1890 to 1990, various treaties and conventions were signed among the Member States of EU. On Septembre 1968, the Brussels Convention on Jurisdiction and The Enforcement of Judgments in Civil and Commercial Matters was enacted, but the Art. 1 of the Convention excluded

“the bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings” and the arbitration, since a separate and special Convention was being drafted. However, concerning this article, the dispute in the case Gourdain v. Nadler (C-133/78) arose a calling for “a separate insolvency convention, which dealt with the insolvency of both individuals and companies and other bodies, seemed to be the only method of achieving harmony in this area of the law”. After several years of drafting and arguing, the EC Insolvency Regulation came into effect on May 2002, and then EC Regulation on Insolvency Proceedings in 2015. With its Art. 3 provides that “The courts of the Member State within the territory in which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (‘main insolvency proceedings’). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties...” and “Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State”, the Regulation follows the “centre of a debtor’s main interests” or COMI, and lex incorporationis mode to divide the jurisdiction of insolvency proceeding into two categories: main proceeding and terrtorial (secondary) proceeding. With regarding to the law applicable, the Regulation provides that “save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the ‘State of the opening of proceedings’)” in the Art. 7 and Art. 35 that the applicable law in secondary proceeding shall follow the “territorial” rules too.

Especially, Art. 18 that was cited, analyzed and applied in the Bresco of English court, provides that “The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat”[14]. However, the core of discussion on this article arisen in cases is whether the applicable law of arbitration is procedural or substantial? Obviously, the English court held that it was substantial so that English law could be applied against Polish insolvency law. In comparison, the Swiss court held the opposite opinion. Clearly, the EU law holds a similar attitude towards the arbitration in insolvency proceedings with the Art. 18.

According to Art. 33 of the Regulation, with regard to the recognition and enforcement of judgment handed down in the context of insolvent proceedings, the EU law leaves public policy reservation for the Member States.

### 4.3 Chinese law angle

In the Vivendi before the Swiss court, the Swiss court applied the Polish Insolvency Law and rendered that the Elektrim had no legal capacity to perform an arbitral agreement and the arbitration contract lost its effect since the day Elektrim declared insolvent. Concerning the legal capacity and validity of arbitration contract, Art. 44 of China Incorporate Insolvency Law provides that “The creditor to whom the debtor owes when the case is accepted shall exercise his right in accordance with proceedings prescribed in this Law.” On November 2020, the Supreme People’s Court published the Minutes of Conference on National Courts’ Civil and Commercial Trial Work (“Minutes”). According to the Art. 110 of the Minutes, the creditors should submit the declaration of claims, and if he have opposite opinion on the debt registered in the Form of Claims, he is entitled to initiating a proceeding. Otherwise, even though the Article of Minutes is for the civil trial

work, in the Understanding and Application of the Minutes ("Understanding") published by the Supreme Court it provides that arbitration should also be subject to the Art. 110. Namely, creditors should declare their claims, and if they do not recognise the register, then they have the right to lawsuit or arbitration. Thus, there is a pre-procedure set before execution of rights. Insolvency is designed for accounting and managing assets of insolvent to pay creditors subject to the pari passu principle[5]. In nature and teleologically, insolvency proceedings exclude particular and single claims before courts or arbitral tribunals.

Referring to the arbitrability of insolvency, the Chinese insolvency law does not list the situations, but the Art. 3 of the Arbitration Law lists two instances in which parties are not allowed to arbitration, by providing that "The following disputes shall not be submitted to arbitration: 1. disputes over marriage, adoption, guardianship, child maintenance and inheritance; and 2. administrative disputes falling within the jurisdiction of the relevant administrative organs according to law." It could be considered as the "public policy test"[5] which includes personal liberty and human rights, and administrative affairs of the country. Actually, in practice the disputes related to insolvency handled with by the local courts or tribunal are all about assets and interests.

Concerning the validity of arbitration agreement, the Art. 8 of the Understanding provides that there exist arbitral clauses or arbitration agreement between the parties of contract, the parties should confirm the debts before the tribunal chosen.[5] This article accepts and establishes the principle of in favorem validitatis on the validity of arbitration agreement in insolvency. Therefore, in principle Chinese law recognise the validity of aribtral agreement.

## 5. A harmonization: potential way to coordinate

In Bresco, the judge held that "In a purpose approach, cash-flow and an abstract accounting exercise designed to assist the liquidators in recovering assets in order to pay a dividend to creditors."[13] He said that to prove that insolvency in nature collides with arbitration. "...the solution to the incompatibility issue is the one that was adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication." Although the High Court rebutted the statement of the court and gave a more "generous approach"[6] to coordinate the insolvency proceeding and the adjudication. Certainly, there are some effects of insolvency on arbitration and a legal clash. Then, the question is whether an injunction could be the solution to the clash? If not, how could the two big regimes coordinate with each other?

Of course, an injunction could not be the absolute solution to the clash between the two regimes. Because it could neither distinguish the difference of jurisdiction, nor fill up the gaps of fragmentation in the international legal framework. As summed up above, localization and fragmentation is the main characteristics under the clash. The localization is not a synonym of "territorialism"[2]. The former is a fact, while the latter is the result of legislative choice. In detail, as the judge held in the case, fragmentation and localization exactly refer to jurisdiction (validity of arbitration agreement and arbitrability) and utility (recognition and enforcement) that are important elements of the effects and conflicts. Despite of that, applicable law (procedural and substantial) is another key issue. An injunction has no chance and is not sufficient to handle with these all issues.

The unification on coordinating the insolvency with the arbitration could be an efficient way to improve the certainty and predictability of parties' rights. As discussed above, the EU law is a part of the Member States' legal system. In the case Vivendi, the English court applied the Regulation as a rule of conflict determining the applicable law and jurisdiction. Even though the controversial judgment of the English court arose a debate over the application of EU law in the case, the Regulation still increases the predictability and certainty of the arbitration in insolvency.

Firstly, before the birth of Regulation, the Brussels Convention takes bankruptcy and arbitration

as an exception from its scope. The case Gourdain v. Nadler in which the de facto manager of a legal person to pay a certain sum into the assets of a company was considered as a case given in the context of bankruptcy proceedings within the paragraph 2 of Article 1, arose a call for a "separate insolvency convention". In the context, the EC Insolvency Regulation (No. 1346/2000) and the later Regulation (No. 2015/848) were published subsequently.

Secondly, under the Regulation and other EU laws, when national courts of the Member States apply the Regulation to a case, and parties of the case have a different understanding or deem that the national court misuses or ignores the EU law, are entitled the right to submit this misuse or ignoring to the Court of Justice in EU. Moreover, the Regulation establishes a set of rules on applicable law, jurisdiction, recognition and enforcement. The EU law establishes an uniform and transnational convention on the bankruptcy and arbitration, providing a foreseeable and certain instruction for commercial disputes and civil disputes related to insolvency in EU. Thus, it seems that an unified convention is a cure to fragmentation of this area of law.

Thirdly and most importantly, an unification of the rules concerning the coordination of arbitration and insolvency could also be a solution to the localization under the clash of arbitration and insolvency. The localization is a common form of every kind of rule, because legislation and jurisdiction is an main part of sovereignty of a country. No to say, even the EU still respects public policy of the Member States. However, when it goes extremely local, the transparency of the law would be decreased because of the use of different language and distinct judicial system, and it also could increase the complexity of the law, especially for a law per se within a lot of conflicts. Of course, it is really hard to unify some principles or rules on insolvency in various kinds of jurisdiction. But, legislation of this kind could be a good way to provide predictability and certainty to the parties involved in arbitral proceedings where one party is insolvent.

However, regulation or convention of EU-like mode that is mandatory and immediate effects, which might not be proper and operable for other jurisdictions. In the respect of voluntary model, the United Nations Commission on International Trade Law ("UNICITRAL") did some efforts on the guidance of unification of international insolvency law in the early 20th century. Separately, the UNICITRAL published the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and other documents. The Model law need not to be transformed into domestic law or taken as a part of national law, but is a soft law to guide the legislation towards a legal trend. This mode is suitable for different jurisdictions, especially under the regional communities and the "Initiative of One Belt One Road of China". Because it is an internationalization of commercial course in which there exist massive conflicts in trade and investment law, especially referring to dispute resolution mechanisms.

To sum up, transnational convention or guideline seems to be a good way to a harmony and a coordination between arbitration and insolvency. Importantly, an arbitration-friendly approach is an efficient and economic way to solve disputes and achieving the maximum value of assets and rights as part of assets for an insolvent corporate.

## 6. Conclusion

Arbitration as a dispute resolution in insolvency background is not a brand-new issue of this area, but the conflicts have been heated up because of the COVID-19 pandemic. Especially, with the pandemic situation, economic crisis occurs globally and hits transnational trade and investment. A large bulk of businesses have to face the difficulties and close down[9]. With this disaster, an increasing number of insolvent applications were submitted to the national courts. Transnational disputes on the breach of commercial contracts happen more frequently than ever. No to mention,

the insolvency proceeding per se is a dispute producer. In the background, it will invoke a wave of disputes.

In common, when an insolvent proceeding starts, the creditors are only allowed to submit their claims to the insolvent court or the trustee in bankruptcy. However, based on the statement and description above, if the massive disputes are gathered in a national court, it will be a high workload for the local court. Handling with a large number of disputes, local courts will be stressful and face more complicated issues in its jurisdictional framework. Thus, ADR mechanisms could be useful in this situation, especially the alternative dispute solutions have already been used widely in practice.

Comparing with other alternative solutions, arbitration is a more "judicial" way to settle arguments. The tribunals are always constituted under local law and certain arbitration rules. There are some arbitrators playing judge-like role to decide the case according to the applicable laws. Most importantly, the awards rendered by tribunals could be recognized and enforced directly before the court and under a "prima facie" principle. Otherwise, arbitration is more efficient, convenient and autonomy-directed than a proceeding before national courts.

However, when an arbitration confront with insolvency proceedings, there will be a lot of conflicts. Under the clash of insolvency and arbitration, the international legal landscape will be rather fragmented and localized. Different from the "territorism", the fragmentation is caused by the nature of international law and the sovereignty of different countries. In addition, the localization is characterized by the conflicts of laws referred to the disputes of insolvency proceedings. The two characteristics are the two critical elements of the landscape, concerning all the issues of jurisdiction, the validity of arbitration agreement, arbitrability, applicable law, conducting of arbitration proceedings, recognition and enforcement of arbitral award, and the like.

In the case Bresco, the Court of Appeal held that "there is a basic incompatibility between adjudication and the regime set out in the Rules. The former is a method of obtaining an improved cashflow quickly and cheaply. The latter is an abstract accouting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors", and the Court defined the "incompatibility" into two aspects, namely "jurisdiction and utility". Within the two aspects, the validity of contract and arbitrability, recognition and enforcement are included. In sum, the use of arbitration in solvency proceedings depends on the validity of contract, arbitrability, conduct of arbitration and the enforcement of arbitral award.

In detail, the validity of contract is the precondition and determining factor of arbitration proceeding, because the authority and scope of arbitration are decided by the autonomy of parties that is presented in the arbitration agreement. Otherwise, the arbitrability is closely related to the recognition and enforcement of the arbitral agreement and awards rendered by the tribunal constituted under the contract. The Model law and NYC provides two bars on arbitrability: the "public policy" and "capable of settlement"[3], which are also determined by the local law or the lex concursus. Even in the EU law that should be taken part into the national legal system of the Member States, still leave the public policy part to the States. With regard to the "capable of settlement", there is an argument on whether "capable of settlement" is procedural or substantial in the case Vivendi in the English court and the Swiss court. The difference of the two legal systems is that the English law took the EU law as part of its national legal system. Based on this, even the judgment is really controversial, the English law adopted the Regulation of EU and held that the capacity of performing was procedural. Because of the different local legal system and attitudes, the two courts rendered the opposite judgments. However, only few jurisdictions hold an extremely object and negative attitude. Generally, there are many disputes derived of insolvency could be arbitrated, including the disputes concerning the allowance of claims, affiliate or inter-company disputes, allocation of enterprise value, disputes about violation of bankruptcy orders and so on[5]. The pro-arbitration mode is vastly used and has a sufficient legal basis on the adopting of arbitration

in insolvent proceedings. Especially, many jurisdictions do not ban arbitration outside of the door.

In addition, despite of the function of arbitration as a pressure relief for national courts, arbitration is also acceptable among parties to the dispute. The autonomy is the basis of arbitration, the parties should agree on the tribunal, seat of arbitration, language and rules applicable in the arbitral proceeding. Otherwise, arbitration is quasi-judicial solution to dispute. Arbitral awards could be enforced before national courts. In sum and de facto, arbitration and other alternative solutions are used in insolvency proceedings in many jurisdictions.

As it is said in Bresco, "the opposite conclusion about compatibility might encourage a more general approach to the construction of the provisions conferring jurisdiction." An arbitration-friendly approach is take in various jurisdictions, including the common law countries and civil law countries. Otherwise, the in favorem validitatis principle is taken in many legal systems, such as English law, Brazil law, Chinese law and the EU law. This is a trend of the use of arbitration which has a sufficient basis in insolvency proceedings. Actually, many arbitration organizations take new rules to solve the distance problem caused by COVID-19 situation. In the context of international commerce and COVID-19 pandemic, a "generous approach" could be taken. Additionally, the complexity made by localization and fragmentation should be taken into account by companies, judges and lawyers.

## References


*[1] Simon Vorburger (2014), International Arbitration and Cross-Border Insolvency: Comparative Perspectives, Kluwer Law International.*

*[2] Born GB (2020), International Commercial Arbitration: Three Volume Set Rubino-Sammartano M, International Arbitration Law and Practice, Third Edition (Juris Publishing, Inc 2014).*

*[3] Hristova V and Alvarado Garzón AE (2021), "International Arbitration and Cross-Border Insolvency—Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-Border Insolvency-Related Disputes", Journal of International Dispute Settlement.*

*[4] De Luis García E (2020), "Arbitraje Para Conflictos Ambientales: Una Aproximación Desde Los Derechos Humanos" THEMIS Revista de Derecho 505.*

*[5] Stephan Madaus (2020), 'The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings', Journal of International Arbitration, Issue 4, pp. 449-478, https://kluwerlawonline. com/journalarticle/Journal+of+International+Arbitration/37. 4/JOIA2020021*

*[6] Alipak Banerjee and Payel Chatterjee (2021), 'Arbitration and Insolvency: Co-relation or Collision?', in Romesh Weeramantry and John choong(eds), Asian Dispute Review, pp.117-121.*

*[7] Chan D and Rajagopal S (2021), "To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes" Volume 38 Journal of International Arbitration.*

*[8] Edna Sussmann & Jennifer Gorski (2013), Capturing the Benefits of Arbitration for Cross Border Insolvency Disputes, in Contemporary Issues in International Arbitration and Mediation: the Fordham papers 167–168.*

*[9] Shumilina, Vera , and S. Nikitin . Bankruptcy in Small Business in Connection with The Pandemic, Business security management in modern conditions (2021), at 148.*

*[10] Chuah, Jason (2011), Resolving Unresolved Relationship Problems – The Case of Cross Border Insolvency and Pending Arbitrations European Company and Financial Law Review, 2011, Available at SSRN: https://ssrn.com/abstract=2064968*

*[11] "National Report for Mexico," , Commencement of Insolvency Proceedings (Oxford University Press 2012) <http://dx.doi.org/10.1093/oso/9780199644223.003.0012> accessed September 26, 2021*

*[12] Velislava Hristova and Boris Praštalo (2020), 'Arbitrating Insolvency Disputes? The English High Court Showcases Its Pro-Arbitration Stance Once Again', http://arbitrationblog.kluwerarbitration.com/2020/11/19/arbitrating-insolvency-disputes-the-english-high-court-showc ases-its-pro-arbitration-stance-once-again/ accessed 21 September 2021.*

*[13] Bresco Electrical Services Limited (in liquidation) v. Cannon Corporate Limited [2019] EWCA Civ 27.*

*[14] European Insolvency Regulation on Insolvency Proceedings (2015).*

*[15] Elektrim (in bankruptcy) v Vivendi Universal SA [2008] EWHC 2155 (Comm).*