INTERNATIONAL ARBITRATION: THE REMEDY TO CROSS-BORDER INSOLVENCY'S ENFORCEMENT WOES IN A POST-MODEL LAW WORLD

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ABSTRACT

*International Arbitration and Cross-Border Insolvency represent distinct yet interconnected areas of law, sharing the common concern of enforceability. While the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments, 2018 (**'MLRE'**) addresses this within the insolvency domain, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**'NYC'**) deals with it in the realm of International Arbitration.*

This paper critically examines the MLRE's effectiveness in enforcement, revealing its shortcomings. It identifies specific gaps that hinder its practical application, particularly regarding the harmonisation of recognition and enforcement standards across jurisdictions. Despite the MLRE, the issue of enforceability in cross-border insolvency persists. Contrarily, International Arbitration under the NYC emerges as the most viable alternative to resolving certain Cross-Border Insolvency disputes, notwithstanding possible challenges with enforcement and recognition of arbitral awards.

1. INTRODUCTION

"Judgments are worthless without the ability to enforce them."[1]

With the advent of rapid globalisation and an ever-changing commercial landscape, the frequency and complexity of Cross-Border Insolvencies

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1. *EM Ltd v Republic of Argentina* 720 F Supp 2d 273, 279 (SDNY 2010).

have been on the rise.[2] These factors have also played an instrumental role in International Arbitration becoming the preeminent form of resolving cross-border commercial disputes.[3] However, at a fundamental level, insolvency and arbitration have been regarded as presenting "*a conflict of near polar extremes.*"[4] This characterisation has arisen in the context of analysing insolvency and arbitration at a policy level. According to this policy-level analysis, insolvency follows an approach of centralisation and aims to safeguard stakeholder interests, while arbitration follows a decentralised approach and is founded on party autonomy.[5]

Notwithstanding these policy-level distinctions, *enforceability* stands out as a unifying concern for both insolvency and arbitration. Indeed, while enforceability has long been viewed as a significant challenge in Cross-Border Insolvency,[6] it is simultaneously lauded as a key advantage in International Arbitration.[7] This contrast is particularly relevant in an era marked by the increasing interconnectedness of economies and the complexities inherent in multinational business operations, which create the urgent need for a coherent global regime for Cross-Border Insolvency.[8] Although there have been multiple attempts to strengthen the enforceability of judgments in Cross-Border Insolvency, these efforts have yet to yield consistent, universal solutions.[9] Most recently, the MLRE has aimed to address these issues, yet questions linger regarding its efficacy and efficiency. On the other hand, the NYC continues to stand as a proven framework, ensuring that arbitral awards are recognised and enforced across jurisdictions worldwide.

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2. Contact Group on the Legal and Institutional Underpinnings of the International Financial System, 'Insolvency Arrangements and Contract Enforceability' (2002) <https://www.bis.org/publ/gten06.pdf>.
3. Nigel Blackaby and others, 'An Overview of International Arbitration', *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022).
4. *US Lines Inc, In re* 197 F 3d 631, 640 (2nd Cir 1999).
5. Ishaan Madaan, 'Insolvency and International Arbitration: An Alternate Perspective' (*Kluwer Arbitration Blog*, 15 June 2020) <https://arbitrationblog.kluwerarbitration.com/2020/06/15/insolvency-and-international-arbitration-an-alternate-perspective/> accessed 15 September 2024.
6. Sandeep Gopalan, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling' (2021) 48 Vanderbilt Law Review 1225, 1227.
7. Blackaby and others (n 3) 1.124.
8. Ian F Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency' (2006) 32 Brooklyn Journal of International Law 767, 768.
9. Gopalan (n 6) 1228.

This paper seeks to determine whether the enforceability of an award can be leveraged as a factor in favor of adopting International Arbitration as the preferred method of resolving Cross-Border Insolvencies. To achieve this, the paper is structured as follows: *Section II* delves into the enforcement complexities inherent in Cross-Border Insolvency, providing a historical context and evaluating failed attempts at reform through international legal instruments. *Section III* examines International Arbitration's advantage in the enforceability of awards, offering a background on the NYC and showcasing its strengths. *Section IV* explores the practical application of International Arbitration in effectively enforcing Cross-Border Insolvency disputes, addressing specific challenges such as capacity, arbitrability, and public policy concerns. Finally, *Section V* concludes by synthesising the findings and advocating for the strategic use of International Arbitration to enhance enforceability in Cross-Border Insolvency cases.

2. ENFORCEMENT COMPLEXITIES IN CROSS-BORDER INSOLVENCY

A. Historical Context and Challenges

A historical review of Cross-Border Insolvency reveals that the *first* level of resistance emanated from nations' approach to framing their national insolvency legislations. Nations would frame such legislations in accordance with their intrinsic social, political, economic, and policy considerations.[10] These considerations not only impeded the development of a unified and universal framework for Cross-Border Insolvency but also resulted in nations being unwilling to accept insolvency laws of foreign nations and confer upon them extra-territorial effects.[11] Consequently, any Cross-Border Insolvency usually witnessed legal proceedings that were *"diverse and uncoordinated."*[12]

Here, "*resistance*" specifically refers to resistance against recognising and giving effect to foreign insolvency proceedings, including the enforcement of court orders or judgments in another jurisdiction. In practical terms, many nations prioritise protecting their "*local*" creditors and domestic policy interests; for example, traditional admiralty procedures of arrest and attachment allow local creditors to satisfy their claims, notwithstanding the

10. Gopalan (n 6) 1227.
11. Stefan A Riesenfeld, 'The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey' (1976) 24 American Journal of Comparative Law 288.
12. Hannah L Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' 36 Stanford Journal of International Law 23.

insolvency of a foreign shipowner,[13] which makes them reluctant to extend comity or automatically honour foreign insolvency laws.[14]

The *second* level of resistance faced by Cross-Border Insolvency was a result of how different nations approached insolvency through the lens of private international law. In this regard, Professor Fletcher remarks that insolvency is subjected to the *"long-familiar paradox of the subject of private international law,"* i.e., rules that initially sought to accommodate a divergent set of national laws under a single umbrella have continued to propagate the very divergence that was supposed to be redressed.[15] Due to national systems of private international law seeming inextricable from national considerations, the portions of different national systems of private international law dealing with insolvency also seem virtually irreconcilable.[16] In other words, each jurisdiction's private international law is heavily shaped by that nation's own economic, political, and social values, leading to contradictions in how foreign insolvencies are treated.[17] Consequently, the portions of different national systems of private international law dealing with insolvency tend to be irreconcilable, particularly when courts enforce local priorities and procedures above any external framework.

3. FAILED ATTEMPTS AT REFORM THROUGH INTERNATIONAL LEGAL INSTRUMENTS

Despite the problems posed by national insolvency legislations and national approaches to private international law dealing with insolvency, in the 20th Century, there were several attempts to reform the field of Cross-Border Insolvency through international legal instruments. Examples include the Montevideo Treaties of 1889 and 1940 ('**Montevideo Treaties**'), the Bustamante Code of the Havana Conference of 1928 ('**Bustamante Code**'), the Nordic Bankruptcy Convention of 1933 ('**Nordic Convention**'), the European Council's Project relating to a Bankruptcy Convention

13. Martin Davies, 'Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' (2018) 66 The American Journal of Comparative Law 101, 102.
14. ibid 125.
15. Ian F Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2005).
16. P StJ Smart, 'International Insolvency and the Enforcement of Foreign Revenue Laws' (1986) 35 International and Comparative Law Quarterly 704 <https://uniset.ca/microstates2/35IntlCompLQ704.pdf> accessed 28 February 2025.
17. John A E Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"' (2006) 104 Michigan Law Review 1899, 1296.

('**European Council Project**'), the Council of Europe Convention of Istanbul, 1990 ('**Istanbul Convention**') and the European Union Convention on Insolvency Proceedings ('**European Union Convention**').[18]

Although often termed "international," many of these instruments were, in practice, confined to specific regions or blocs of states. Notably, each instrument contained provisions aimed at standardising or simplifying the cross-border enforcement of insolvency decisions: for instance, the Montevideo Treaties provided guidelines on jurisdiction and enforcement among certain South American nations, while the Nordic Convention allowed for recognition of foreign bankruptcy decrees among the Scandinavian countries. Nevertheless, these frameworks focused on geographical or cultural affinities, rather than truly global cooperation.[19]

However, the successes of the Montevideo Treaties, the Bustamante Code, and the Nordic Convention were limited to their respective geographical regions.[20] This is because the nations involved shared linguistic, cultural, and political similarities. Consequently, implementing such instruments would not offer a complete solution to Cross-Border Insolvencies that occur on a more global scale.[21] Further, the European Council Project failed because it proposed to have one liquidator administer the entire insolvency, under all possible legal systems, when there was no mechanism to facilitate the same.[22]

Following the failure of the European Council Project, the Istanbul Convention was introduced in 1990. However, the Istanbul Convention was inherently weak as its 'opt-out' provisions allowed nations to disregard the insolvency proceedings that were underway in the primary forum and also refuse recognition of the powers of a foreign insolvency professional.[23] Lastly, the European Union Convention sought to build upon the framework

18. For an overview of the instruments, *see* Fletcher (n 15) chs 5-7, 221-321.
19. Irit Mevorach, 'Global Frameworks or State-Based Insolvencies — The Problem of Cross-Border Insolvency', *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009) 66 <https://doi.org/10.1093/acprof:oso/9780199544721.003.0004>.
20. Ian F Fletcher, 'International Insolvency: A Case for Study and Treatment' (1993) 27 International Lawyer 429.
21. ibid.
22. Leslie A Burton, 'Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty' (1999) 5 Annual Survey of International & Comparative Law 205.
23. Sean E Story, 'Cross-Border Insolvency: A Comparative Analysis' (2015) 32 Arizona Journal of International & Comparative Law 432.

of the Istanbul Convention in another attempt to create an international legal instrument for Cross-Border Insolvency. In particular, the European Union Convention was spearheaded to ensure that judgments relating to Cross-Border Insolvency were recognised and enforced.[24] However, the European Union Convention was rendered futile at the very outset, as it required the signature of all 15 member nations to take effect,[25] and only 14 nations fulfilled this requirement because it was blocked by the United Kingdom at the last minute following a major political incident (Mad Cow Disease).[26]

4. CRITICAL EVALUATION OF MODEL LAWS ON CROSS BORDER INSOLVENCY

Towards the late 1990s, a breakthrough came in the form of the UNCITRAL Model Law on Cross-Border Insolvency ('**MLCBI**').[27] As of February 2024, the MLCBI has become or has influenced the primary law on Cross-Border Insolvency in 59 nations.[28]

However, a significant concern regarding the MLCBI is the lack of any provisions that address the recognition and enforcement of judgments dealing with Cross-Border Insolvency, despite it being a specific point of discussion in the initial stages of the drafting process.[29] The UNCITRAL published the Guide to Enactment and Interpretation which contains background and explanatory information as a tool for the effective interpretation and understanding of MLCBI.[30] It explicitly notes that doctrines of comity or *on exequatur*, by themselves, are not as effective as legislation in ensuring judicial cooperation for recognition and enforcement of foreign judgments dealing with Cross-Border Insolvency.[31] The MLCBI Guide also remarks that recognising a foreign insolvency proceeding may

24. Burton (n 22) 216.
25. David H Culmer, 'The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?' (1999) 14 Connecticut Journal of International Law 563.
26. ibid.
27. UNCITRAL Model Law on Cross-Border Insolvency 1997.
28. Data about the MLCBI's adoption status is available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
29. Gopalan (n 6) 1233.
30. UNCITRAL Secretariat, 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency' 24 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 15 September 2024.
31. ibid 21.

not have the same legal effects as recognising a judgment passed by a foreign court in an insolvency proceeding.[32]

In light of such specific references, the lack of any provisions regarding enforceability is all the more puzzling. Such an omission has led to inconsistent judicial pronouncements on enforcing foreign judgments dealing with Cross-Border Insolvency.[33] Against this backdrop, UNCITRAL subsequently introduced the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('**MLRE**') in 2018.[34] The primary aim of the MLRE was to address existing issues concerning enforceability and provide a unified framework for the recognition and enforcement of foreign judgments dealing with Cross-Border Insolvency.[35]

While the introduction of the MLRE is undoubtedly welcome, it does not offer a complete solution to the enforceability issues in Cross-Border Insolvencies. This is because of the following issues:

Firstly, the MLRE is unclear about the form and manner of its adoption. The preamble to the MLRE seems to indicate that it serves as complementary legislation to the MLCBI.[36] This raises doubts about whether the MLRE would operate as an independent legislation or become an internal part of the MLCBI.[37]

Secondly, the adoption of the MLRE comes at the cost of legal certainty. This is because of an optional provision that allows the non-recognition of a foreign insolvency-related judgment in instances where the judgment was passed in a country whose insolvency proceedings cannot be recognised under MLCBI. Consequently, differences in adopting such clauses may give rise to a situation where the same judgment may be recognised in one jurisdiction but denied recognition in another.[38]

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32. ibid.
33. *Rubin v Eurofinance SA* (2012) 3 WLR 1019 : 2012 UKSC 46.
34. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment 2019.
35. ibid 11.
36. ibid Preamble 1(f).
37. Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283.
38. Ilya Kokorin, 'UNCITRAL Model Law on Insolvency-Related Judgments: New Chapter in International Insolvency Law' (*Leiden Law Blog*, 13 September 2018) <https://www.leidenlawblog.nl/articles/uncitral-model-law-on-insolvency-related-judgments-new-chapter-in-internati> accessed 15 September 2024.

Thirdly, concerning practical aspects, the MLRE is still a 'model law.' In order to provide for a harmonised and unified system for recognising and enforcing foreign insolvency judgments, the MLRE will have to be adopted by multiple nations. Such large-scale adoption would have to account for the inherent problems of the MLRE, along with differences that may arise when individual nations try to adopt the MLRE.

In conclusion, the efficacy of the MLRE is essentially a question of *if* and *when*; the MLRE can attain the levels of success it seeks to achieve only *if* nations across the world adopt it consistently and *when* such an adoption takes place.

5. INTERNATIONAL ARBITRATION'S EDGE: ENFORCEABILITY OF AWARDS

A. Background

Before exploring enforceability as a distinct feature of International Arbitration, it is crucial to grasp the conceptual distinction between *'enforceability'* and *'recognition'*. Recognition is the judicial acknowledgment or confirmation of an arbitral award's validity within a particular jurisdiction.[39] This recognition establishes the award's legal standing and precludes the initiation of new proceedings on the same issues covered by the award, and it is, in a sense, a precursor to its enforceability.[40] In contrast, enforceability goes beyond mere acknowledgment and involves implementing coercive state measures to ensure compliance with the arbitral award.[41] It encompasses the execution of sanctions, such as asset seizure or attachment, to compel adherence to the award's terms under local law.[42] While recognition provides a defensive shield against further litigation, enforceability is a proactive mechanism for securing

39. Javier Rubinstein and Georgina Fabian, 'The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The NYC in Practice* (2008) 91-93.
40. ibid.
41. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) para 11.2.
42. Reinmar Wolff (ed), *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary* (2nd edn, Hart Publishing 2019).

compliance and obtaining redress.[43] Enforcement may entail proceedings in jurisdictions other than the arbitral seat.[44]

Following World War II, the international community recognised the value of peaceful commerce to prevent future conflicts.[45] However, the post-war world witnessed significant transformations, most notably the widespread process of decolonisation.[46] This global phenomenon altered the landscape of international relations as formerly colonised nations gained independence and asserted their sovereignty on the world stage.[47] Consequently, the dynamics among national legal systems became more diverse and no longer dominated solely by a handful of industrialised nations.[48]

In this evolving context, the effectiveness of the arbitral process became increasingly crucial. To steer through, arbitration needed to adapt and integrate itself into a broader array of national legal systems.[49] Unlike the pre-war era, where arbitration primarily involved disputes between industrialised nations, the post-war period demanded a more inclusive and flexible approach to arbitration with a particular focus on enforceability.[50]

The legal effects of international arbitral awards and the post-award proceedings available to challenge or enforce such awards are subject to a well-defined legal framework of international and national law.[51] Enforceability stands as the edifice of International Arbitration.[52] It is the

43. *Brace Transport Corpn of Monrovia v Orient Middle East Lines Ltd* 1995 Supp (2) SCC 280.
44. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' <https://uncitral.un.org/sites/uncitral.un.org/files/media documents/uncitral/en/2016_guide_on_the_convention.pdf>.
45. Pierre A Karrer, 'History of Arbitration', *Introduction to International Arbitration Practice: 1001 Questions and Answers* (Kluwer Law International 2014).
46. Erin Myrice, 'The Impact of the Second World War on the Decolonization of Africa' (2015) Africana Studies Student Research Conference.
47. United Nations, 'Post-War Reconstruction and Development in the Golden Age of Capitalism' in *World Economic and Social Survey* (United Nations 2017) 23, 25-32.
48. ibid.
49. Gary Born, 'Chapter 1: Overview of International Commercial Arbitration', *International Commercial Arbitration* (3rd edn Kluwer Law International 2021).
50. 'Awards Set Aside at the Place of Arbitration' in *Enforcing Arbitration Awards under the New York Convention, Experience and Prospects*, Papers presented at "The New York Convention Day", 10 June 1998 (United Nations Publication, 1999) 24.
51. Gary Born, 'Chapter 22: Legal Framework for International Arbitral Awards', *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 22.
52. A J Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation 1981).

most critical advantage over traditional litigation.[53] The ability to enforce arbitral awards ensures that parties involved in cross-border disputes can obtain meaningful redress and uphold the integrity of their contractual agreements.[54] Without enforceability, even the most meticulously rendered judgments would lack practical value, rendering the arbitration process ineffective in timely and effective resolution to disputes.[55]

B. Introduction to the NYC

In this context, the NYC adopted in New York on 10 June 1958,[56] is described as the most successful treaty in private international law and pivotal in giving International Arbitration its most remarkable feature - enforceability of awards.[57] The NYC seeks to achieve only two things: (1) to ensure that agreements to arbitrate are respected and (2) that awards are enforced.[58] Under Article III,[59] courts must recognise and enforce foreign arbitral awards in accordance with local procedural rules, subject only to the narrow grounds for refusal under Article V.[60] Further, the NYC is also *generally* interpreted uniformly by the courts,[61] which further reinforces the enforceability of arbitral awards at a global scale.[62]

In conclusion, International Arbitration has effectively dealt with the issue of enforceability of awards in cross-border disputes. The NYC provides a robust framework with adequate safeguards that facilitate the enforcement of arbitral agreements and awards. Judge Stephen Schwebel, former

53. A J Van Den Berg, *50 Years of the New York Convention* (Permanent Court of Arbitration and International Council for Commercial Arbitration eds, Kluwer Law International 2009).
54. International Council for Commercial Arbitration, 'ICCA's Guide to the Interpretation of the 1958 New York Convention' <https://www.newyorkconvention.org/resources/publications/guide-to-interpretation> accessed 15 September 2024.
55. Franco Ferrari and Friedrich Rosenfeld, *Autonomous Versus Domestic Concepts under the New York Convention*, vol 61 (Wolters Kluwer 2021).
56. NYC, 330 UNTS, No. 4739 (1958).
57. Herbert Kronke, 'The New York Convention Fifty Years on: Overview and Assessment', *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010).
58. Anna Joubin-Bret, 'Foreword: Celebration of the 60th Anniversary of the NYC' in Katia Fach Gómez, *60 Years of the New York Convention: Key Issues and Future Challenges* (Wolters Kluwer 2019).
59. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 art III.
60. ibid V.
61. Berg (n 52) 54-55.
62. ibid 168-169.

President of the International Court of Justice, in just two words, captured the entire enforceability framework in International Arbitration when he said:

> *"It works."*[63]

6. THE USE OF INTERNATIONAL ARBITRATION TOWARDS EFFECTIVE ENFORCEMENT IN CROSS-BORDER INSOLVENCY

A. Preliminary Findings

From the foregoing sections, it is evident that guarantees of enforceability continue to evade the field of Cross-Border Insolvency. While the MLRE is undoubtedly a positive development, it does not fully alleviate enforceability concerns. Considering these factors, the authors wish to posit the increased use of International Arbitration to resolve Cross-Border Insolvency disputes. This is primarily because the enforceability of an arbitral award is a distinct and unmatched advantage of International Arbitration.[64] Additionally, by agreeing to submit their disputes to arbitration, parties will also benefit from the neutrality, predictability, and reliability offered by the arbitration process.[65]

The NYC significantly bolsters the enforceability of arbitral awards. Lauded as the most successful instrument in international commercial law, it is currently in force in nearly 170 jurisdictions – an extent of adoption the MLRE may never attain.[66] Built on a pro-enforcement premise,[67] the NYC obligates courts to interpret its provisions uniformly,[68] allowing refusal of recognition or enforcement only on the narrow and exhaustive grounds of Article V.[69] By contrast, the MLRE's optional provisions and uncertain adoption practices risk inconsistent outcomes.[70] Consequently,

63. S M Schwebel, 'A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1996) 12 Arbitration International 83.
64. Joubin-Bret (n 58); Ferrari and Rosenfeld (n 55); Berg (n 52).
65. Jay Lawrence Westbrook, 'International Arbitration and Multinational Insolvency' (2011) 29 Penn State International Law Review 635.
66. Data regarding contracting states to the NYC <https://www.newyorkconvention.org/countries>.
67. Andreas F Lowenfeld, *International Litigation and Arbitration* (3rd edn, Thomson/West 2006).
68. Westbrook (n 65) 642.
69. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 44) 125.
70. Wolff (n 42).

the NYC consistently emerges as the superior framework for addressing enforceability challenges in Cross-Border Insolvency. Nevertheless, it is important to acknowledge potential hurdles in enforcing arbitral awards, which the following sections will explore in detail.

7. LACK OF CAPACITY: ARTICLE V (1) (A) NYC

The first concern/challenge stems from Article V(1)(a) NYC,[71] which provides that an arbitral award may be denied recognition or enforcement if "*the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity.*" From the wording of the provision, the relevant assessment period should be when the arbitration agreement was concluded.[72] Further, courts worldwide have followed such an interpretation in most cases.[73]

However, an alternative interpretation may be taken in light of the background of Article V(1)(a), wherein concerns regarding the proper representation of the parties throughout the arbitration proceedings were expressed.[74] In the Elektrim Insolvency Case, the Supreme Court of Switzerland dealt with concerns about party representation in arbitration.[75] Elektrim , a Polish company, faced bankruptcy under Polish law while involved in an ICC arbitration in Geneva. Due to Polish law, which deemed arbitration agreements by bankrupt entities void, the ICC tribunal halted proceedings. The Swiss Supreme Court upheld this decision, highlighting conflicts between Polish bankruptcy law and arbitration agreements.[76]

However, on 16 October 2012, the Swiss Supreme Court reconsidered its position in the Elektrim Case and held that the previous decision could not serve as a general precedent applicable to other jurisdictions or legal systems.[77] This is because of the specific provisions of the Polish legal

71. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(1)(a).
72. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 44) 140.
73. ibid 141.
74. Westbrook (n 65) 650.
75. Stefan Kröll, 'Arbitration and Insolvency' in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023) para 58.4.3. <https://www.cambridge.org/core/product/identifier/9781108378390%23CN-bp-58/type/book_part> accessed 8 January 2025.
76. Culmer (n 25).
77. Nathalie Voser, 'Insolvency and Arbitration: Swiss Supreme Court Revisits Its Vivendi vs. Elektrim Decision' (*Kluwer Arbitration Blog*, 5 December 2012) <https://

system, which were relevant in the particular context of the Elektrim Case.[78] While the new decision of the Swiss Supreme Court affords greater clarity, parties choosing to arbitrate disputes relating to Cross-Border Insolvency must exercise continued caution to understand the possible implications of legal provisions such as Article 142 of the Polish Bankruptcy and Reorganization Act.[79]

8. ARBITRABILITY: ARTICLE V (2)(A) NYC

The second concern/challenge is that of non-arbitrability. Non-arbitrability refers to the inherent limitation preventing the use of arbitration for specific issues right from the start.[80] The NYC allows states to deny recognition and enforcement of an award if "*[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country*."[81]

In Cross-Border Insolvency, the issues are primarily divided into 'core' and 'non-core.'[82] Core proceedings involve the administrative aspects of insolvency proceedings, wherein the courts or insolvency administrators function akin to enforcement authorities. They entail adjudicating rights established by national bankruptcy law, which are specific to bankruptcy proceedings or which could not have arisen outside of such proceedings.[83] Further, matters classified as 'core' are consistently deemed non-arbitrable.[84]

Notably, one reason many jurisdictions categorise insolvency matters as 'non-arbitrable' is the distinction between rights *in rem* and rights *in personam*.[85] Insolvency typically concerns rights in rem, affecting the entire pool of creditors and stakeholders, whereas arbitration is restricted to contractual or private (*in personam*) claims between specific parties.

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arbitrationblog.kluwerarbitration.com/2012/12/05/insolvency-and-arbitration-swiss-supreme-court-revisits-its-vivendi-vs-elektrim-decision/> accessed 15 September 2024.

78. Polish Bankruptcy Reorganization Act 2003, art 142.
79. Pierre A Karrer, 'Views on the Decision by the Swiss Supreme Court of March 31, 2009, in Re Vivendi et al. v. Deutsche Telekom et Al.' (2010) 28 ASA Bulletin 111, 112.
80. Berg (n 52).
81. NYC, 1958, art V(2)(a).
82. A N Resnick, 'The Enforceability of Arbitration Clauses in Bankruptcy' (2007) 15 American Bankruptcy Institute Law Review 183.
83. *Mitsubishi Motors Corpn v Soler Chrysler-Plymouth Inc* 1985 SCC OnLine US SC 203 : 87 L Ed 2d 444 : 473 US 614 (1985).
84. 'Fulham Football Club (1987) Ltd v Sir David Richards and Ors' (2011) 2011 Arbitration Law Reports and Review 363.
85. Gary Born, *International Commercial Arbitration. Part 1: International Arbitration Agreements / Gary B. Born* (3rd edn, Kluwer Law International BV 2021) s 6.04 [F].

Singapore, for example, treats disputes that arise upon the onset of insolvency as non-arbitrable,[86] reflecting a strong policy to protect collective creditor interests.[87] By contrast, English courts have shown more flexibility; in cases such as *Riverrock Securities Ltd v. International Bank of St Petersburg (JSC)*,[88] they have permitted the arbitration of certain 'insolvency' claims that do not undermine the collective nature of insolvency or prejudice the rights of third parties.[89]

Consequently, parties need to evaluate whether issues are suitable for arbitration, as it may not be a practical substitute for *all* insolvency-related disputes and cannot entirely assume the responsibilities of national courts in insolvency proceedings.[90] Instead, arbitration could aid in resolving contentious issues that have proven challenging to settle in cross-border insolvencies, thereby simplifying the process.[91]

The following are three insolvency-related disputes where arbitration and its mechanisms for enforcing awards could expedite and enhance resolution efficiency:

9. CLAIMS ALLOWANCE

Typically, the claims allowance process involves establishing a deadline for creditors to submit claims against the debtor's estate, followed by the bankruptcy court's examination and potential objection to these claims. This process allows the debtor to counterclaim against filed claims, potentially seeking recovery for preferential or fraudulent transfers.[92]

86. *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* 2011 SGCA 21 (Singapore Court of Appeal) 24-26.
87. Clyde & Co, 'The Law Applicable to Arbitrability — The Singaporean Approach' (*Insights*, 13 December 2023) <https://www.clydeco.com:443/insights/2023/12/the-law-applicable-to-arbitrability-the-singaporea> accessed 8 January 2025.
88. *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* 2020 EWHC 2483 [67] [72].
89. ibid 87 (ii).
90. Allan L Gropper, 'The Arbitration of Cross-Border Insolvencies' (2012) 86 American Bankruptcy Law Journal 201.
91. Velislava Hristova and Andrés Eduardo Alvarado Garzón, 'International Arbitration and Cross-Border Insolvency — Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-Border Insolvency-Related Disputes' (2021) 12 Journal of International Dispute Settlement 693.
92. Jimerson Birr, 'Recovering from Non-Debtor Entities' (*Bankruptcy and Restructuring*, 23 April 2020) <https://www.jimersonfirm.com/services/bankruptcy-and-restructuring/recovering-from-non-debtor-entities/> accessed 8 January 2025.

Given the diverse geographical locations of creditors in multinational insolvency cases, arbitration panels closer to their domicile may offer a more convenient forum for resolving claims allowance disputes.

Similarly, multinational debtors may refer specific claims allowance issues to arbitration, mainly if there are concerns about foreign creditors' compliance with decisions rendered by the bankruptcy court. This consideration becomes more pronounced if the debtor intends to assert counterclaims and enforce judgments in its favor arising from such counterclaims.

10. DISPUTES BETWEEN AFFILIATES

According to the MLCBI, the primary case typically resides in the debtor's "center of main interest," while ancillary cases operate in jurisdictions where the debtor holds assets or conducts business.[93] Each case asserts control over distinct estates of the debtor's assets, resulting in multiple "estates" for the multinational debtor. Disputes may arise among these cases regarding determining the true center of paramount interest and the designation of the primary case. Additionally, conflicts may emerge among the estates concerning the allocation and utilisation of the debtor's assets across various jurisdictions. Arbitration can be used to resolve a dispute between two ancillary cases of a multinational debtor regarding the allocation of assets in different jurisdictions.

For example, the Nortel cases exemplify the challenges of resolving disputes efficiently across multiple jurisdictions.[94] Despite initial agreements documented in an 'Interim Funding and Settlement Agreement,' disputes arose over the allocation of proceeds from asset sales among the estates in Canada, the United States, and the United Kingdom. Attempts at mediation failed, leading to motions filed in the U.S. and Canadian courts seeking an allocation protocol.[95] The joint proceedings incurred avoidable costs, including technology expenses and increased legal fees due to duplication of representation and prolonged trials. The bankruptcy fees amounted to around $2 billion and finally took seven years to resolve.[96]

93. MLCBI, art 2.
94. Lauren L Peacock, 'A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial' (2015) 23 American Bankruptcy Law Journal 543.
95. Leif M Clark, 'Managing Distribution to Claimants in Cross-Border Enterprise Group Insolvency' (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 112.
96. Daniel Fisher, 'Nortel Bankruptcy Fees Near $2 Billion as Creditors, Pensioners Fight Over Assets' *Forbes* <https://www.forbes.com/sites/danielfisher/2016/04/05/

Arbitration could have streamlined the process and reduced duplicate proceedings, legal costs, and technology expenses while also eliminating the possibility of separate appeals due to its enforceability mechanisms, ultimately offering a more cost-effective solution.

11. WORKOUT PLANS & DEBT RESTRUCTURING

When an organisation's assets are spread across various regions, restructuring efforts may require a workout arrangement as the most feasible course of action.[97] However, these workouts often demand significant resources and time and, most importantly, are not binding on the parties.[98] Many countries have adopted statutory alternatives reminiscent of the pre-packaged reorganisation plan utilised in the United States to address such challenges.[99] These alternatives aim to facilitate mutually agreeable solutions between organisations and their primary creditors, minimising debt adjustments among critical stakeholders to expedite necessary resolutions.[100]

Adopting arbitration principles provides a promising avenue for establishing a more streamlined, fair, and cost-effective process compared to traditional pre-packaged plans for resolving conflicts among primary creditors of organisations and ensuring enforceability.

For instance, through contractual arrangements, borrowers could choose to arbitrate specific post-default issues with their primary institutional lenders, major suppliers, and bondholders. An arbitration expert specialising in international restructuring could mediate disputes, including the equitable distribution of enterprise value among stakeholder groups. Consequently, integrating arbitration into workout plans presents an opportunity to secure

nortel-bankruptcy-fees-approach-2-billion-as-court-hears-arguments-over-assets/> accessed 15 September 2024.

97. Topher McCulloch, 'What is the Difference Between Creditor Workouts and Bankruptcy?' (*LP*, 21 September 2020) <https://www.lplegal.com/content/difference-between-creditor-workouts-bankruptcy/> accessed 8 January 2025.
98. Jose M Garrido, 'Out-of-Court Debt Restructuring' (World Bank 2012) Study 66232 para 16 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/417551468159322109/out-of-court-debt-restructuring>.
99. Dennis F Dunne, 'Prepackaged Chapter 11 in the United States: An Overview' (*The Art of the Pre-Pack*, 2nd edn, 4 March 2022) <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-2/article/prepackaged-chapter-11-in-the-united-states-overview> accessed 15 September 2024.
100. Sudhaker Shukla and others, *Creditor Led Resolution Approach in Fast-Track Corporate Insolvency Resolution Process* (Insolvency and Bankruptcy Board of India 2023) 21.

enforceable outcomes across multiple jurisdictions, thereby enhancing the efficiency and efficacy of debt restructuring efforts amidst economic crises.

Therefore, while arbitrability concerns hinder the resolution of specific 'core' insolvency issues, the parties can nonetheless use arbitration as an effective dispute resolution mechanism for 'non-core' issues, especially the ones elaborated above.

12. PUBLIC POLICY: ARTICLE V (2) (B) NYC

The third concern/challenge is the public policy restriction, as outlined in Article V(2)(b) of the NYC.[101] It provides a mechanism for a court to decline recognition and enforcement of an arbitral award if it violates the public policy of the country in question.[102] This provision serves as a crucial safeguard against undue interference with the legal frameworks of individual states. However, public policy is interpreted restrictively across jurisdictions.[103]

When considering insolvency matters, it is essential to understand the role of public policy within this context. Insolvency laws are deeply ingrained in domestic legal systems and aim to ensure equitable treatment of creditors, maximise asset value, and facilitate efficient resolution of insolvency proceedings.[104] These laws often reflect the fundamental economic and social values of a nation.[105]

In practice, the main public policy concern regarding insolvency and arbitration often revolves around equal treatment of creditors. Courts in various jurisdictions, such as France and Germany, have consistently upheld that individual creditors should not pursue their claims outside of insolvency proceedings to the detriment of other creditors' interests.[106] Given this backdrop, it is imperative for arbitration panels to exercise caution when arbitrating cross-border insolvency-related disputes. When

101. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(2)(b).
102. Wolff (n 42).
103. P Mayer and A Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 249.
104. United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>.
105. ibid.
106. *Société de Bâtiment et de Béton Moulé (SBBM) v Saret* (1992) Case No 90-12569 (France, Cour de Cassation).

handling insolvency-related disputes, they must proactively consider the public policy dimensions of the jurisdiction(s) in which enforcement is sought.The impact on and balance of creditors' interests must be carefully considered to avoid running afoul of public policy restrictions.

In conclusion to this section, while challenges persist in enforcing cross-border insolvency matters, utilising International Arbitration under the NYC offers a superior avenue. Its enforceability, neutrality, and predictability outweigh concerns associated with incapacity, arbitrability, and public policy, providing a promising framework for resolving disputes efficiently and effectively in cross-border insolvency.

13. CONCLUSION

The enforceability of awards stands as the cornerstone of International Arbitration, elevating it above traditional litigation in the realm of cross-border commercial disputes. This unparalleled advantage is fortified by the NYC, whose widespread adoption and consistent judicial interpretation provide a robust and predictable framework across nearly 170 jurisdictions.

In stark contrast, cross-border insolvency grapples with significant enforcement challenges. Despite the introduction of the MLRE, the field remains hindered by uncertainties. The MLRE's optional provisions and ambiguities regarding its integration with existing laws undermine its efficacy, rendering it incapable of offering the same guarantees of enforceability as the NYC.

While potential obstacles such as issues of capacity, arbitrability, and public policy may arise during the enforcement of insolvency-related arbitral awards, these challenges are not insurmountable. Through meticulous drafting of arbitration agreements and strategic navigation of the arbitration process, parties can effectively mitigate these risks. Arbitration offers a flexible and efficient mechanism to resolve non-core insolvency disputes thereby, enhancing the overall efficiency of cross-border insolvency proceedings.

In conclusion, while the MLRE represents a commendable effort toward harmonising insolvency laws globally, it currently falls short of delivering the requisite assurances of enforceability. International Arbitration, buttressed by the NYC's proven track record, offers a superior framework for resolving cross-border insolvency disputes. By leveraging this mechanism, parties can achieve enforceable and equitable outcomes, thereby advancing the efficacy and integrity of international commercial law.