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Cross-border insolvency and arbitration: Navigating jurisdictional conflicts in the resolution of MNC's corporate distress

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Abstract
The intersection of cross border insolvency and international arbitration is among the most challenging issues in modern transnational dispute resolution. Insolvency law is designed to protect creditors collectively, emphasising fairness, transparency, and universal application. Arbitration, by contrast, relies on party autonomy and bilateral enforcement, reinforced by the New York Convention's strong pro-enforcement framework. When multinational enterprises face financial collapse, these different foundations collide, generating disputes over arbitrability, the scope of moratoria, the treatment of avoidance and claw-back claims, and the recognition of foreign insolvency judgments and arbitral awards. This paper analyses these tensions by examining leading case law from the European Union, the United Kingdom, the United States, Singapore, and India. Cases such as Eurofood, Seagon, Rubin, Vidya Drolia, and Qimonda illustrate how courts draw boundaries between collective insolvency claims and contractual disputes. The English rule in Gibbs receives particular attention for its continued disruption of cross border restructurings. The paper also explores the ongoing debates within UNCITRAL's Working Group V on whether international guidance is required to harmonise insolvency and arbitration. The study highlights enduring gaps, including blurred limits of arbitrability, inconsistent treatment of foreign moratoria, and the absence of coordination mechanisms. It proposes reforms such as insolvency-aware drafting, early recognition planning, cross border protocols, and eventual legislative clarification. The argument advanced is for "modified universalism with carve outs," a balanced model in which insolvency governs collective matters while arbitration continues to regulate bilateral disputes.

Keywords: Cross-Border Insolvency**,** International Arbitration**,** COMI, Centre of Main Interests**,** Rule in Gibbs**,** UNCITRAL

Introduction

In today's global economy, companies often operate beyond national borders through complex group structures. They establish subsidiaries in several jurisdictions, raise capital under English or New York law, and conduct activities across different regulatory regimes. When such entities face financial collapse, the resulting insolvency is almost always international in character. Two questions then become central. Which court should oversee the resolution of the process, and what happens to contracts, especially arbitration agreements, once insolvency begins. Insolvency law is collective in nature. It stops individual enforcement by creditors, centralises claims in a single proceeding, and aims to distribute value equitably among all stakeholders. Arbitration works differently. It is voluntary, bilateral, and supported globally by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 [1]. The interaction of these two frameworks produces friction. Insolvency demands central coordination under the lex fori concursus, while arbitration preserves individual bargains and the authority of arbitral tribunals.

This conflict is no longer theoretical. Economic crises, the COVID-19 pandemic, and rising corporate failures have revealed repeated clashes between the two systems. Courts are often asked whether disputes involving insolvent parties remain arbitrable or whether they belong solely to insolvency courts. Many jurisdictions accept that collective issues such as admission of claims, claw-back actions, and distribution must remain outside arbitration, but bilateral contractual disputes may proceed. Further tension arises from moratoria under instruments such as the UNCITRAL Model Law [2], the EU Insolvency Regulation [3], US Chapter 15 [4], and the UK CBIR [5]. These stays require local arbitrations to pause, though proceedings abroad may continue, creating uncertainty for enforcement. This study maps these tensions, examines leading case law, and proposes practical tools to reconcile arbitration and insolvency, showing how both can coexist without undermining each other.

Frameworks and First Principles

The legal order that governs cross border insolvency and arbitration is built from a mosaic of international model laws, regional instruments, and national statutes. Unlike international trade law, which benefits from relatively uniform treaties, the intersection of insolvency and arbitration remains fragmented. To understand why conflicts appear, it is necessary to examine the leading frameworks that shape practice today.

Uncitral Model Laws

The UNCITRAL Model Law on Cross Border Insolvency of 1997 [6] is widely seen as the foundation of modern practice. It rests on four central ideas: recognition of foreign representatives, acknowledgment of foreign proceedings, provision of relief such as moratoria, and judicial cooperation. The Model Law introduced the concept of the Centre of Main Interests (COMI), which anchors recognition of "foreign main proceedings." Once such recognition is granted, an automatic stay usually follows, halting enforcement measures against the debtor's property in that jurisdiction. Later initiatives by UNCITRAL expanded this framework. The 2018 Model Law [7] on Insolvency Related Judgments responds to courts struggling with the enforcement of foreign avoidance and other insolvency orders. The 2019 Model Law on Enterprise

Group Insolvency created mechanisms for coordination in group failures [8]. Together, these instruments reflect the principle of modified universalism, encouraging centralisation while preserving national safeguards.

European Union

The EU Insolvency Regulation (Recast 2015/848) is the most developed regional system [9]. It applies across the Member States except Denmark and addresses jurisdiction, applicable law, recognition, and the operation of secondary proceedings. It codifies COMI and presumes it to be the registered office unless evidence shows that the real seat of administration, visible to creditors, is elsewhere. In 'Eurofood', the CJEU refused to let the parent's collapse displace the subsidiary's COMI [10]. In 'Interedil', the Court reinforced the idea that COMI must be objectively ascertainable [11]. The trilogy of 'Seagon' [12], 'F-Tex' [13], and 'Schmid' [14] established that avoidance actions flow directly from insolvency and belong to the COMI forum rather than arbitration or general civil courts.

United States and United Kingdom

The United States adopted the Model Law as Chapter 15 of its Bankruptcy Code. Recognition of a foreign main proceeding under section 1520 brings an automatic stay, with additional relief possible under section 1521, while section 1506 provides a narrow public policy exception. Cases such as Vitro [15] and Qimonda [16] illustrate the balance between comity and protection of local rights. US courts also limit arbitration in bankruptcy "core" matters, as in United States Lines. The United Kingdom introduced the Model Law through the Cross Border Insolvency Regulations 2006, while section 426 of the Insolvency Act 1986 enables cooperation with certain foreign courts. In 'Rubin v Eurofinance' [17], the Supreme Court declined to extend special recognition to foreign insolvency judgments, and in Singularis [18], the Privy Council restricted common law assistance to remedies known domestically. The continuing rule in Gibbs means English law contracts cannot be discharged abroad without creditor approval, creating real obstacles for restructuring [19]. Across these systems, a shared theme emerges. Insolvency law aspires to collective, centralised resolution, while arbitration protects party autonomy. International frameworks open doors for recognition and cooperation, but they do not provide a unified solution for arbitration within insolvency. This leaves national courts to fill the gaps, producing a patchwork of approaches yet gradually building consensus on key principles such as COMI and modified universalism.

Universalism and Territorialism in Practice

A central debate in cross border insolvency is whether proceedings should be organised on a single international basis or managed separately in each jurisdiction where assets are found. This debate is often described in terms of universalism and territorialism, two approaches that represent very different philosophies.

Universalism

Pure universalism envisions one global process led by the court in the debtor's Centre of Main Interests. That court would exercise exclusive authority, and its decisions would be recognised worldwide. The appeal is obvious: a single proceeding avoids duplication, prevents creditors from racing to local courts, and ensures equal treatment across the creditor body. Yet, universalism in this absolute form has never been realised. States remain cautious of ceding sovereignty, especially where domestic priorities such as employee rights, secured interests, or tax claims are at stake.

Territorialism

At the other end is territorialism. Each jurisdiction administers only the debtor's assets within its borders, applying its own law without recognising foreign insolvency proceedings. This approach protects local creditors and reflects national sovereignty, but it results in fragmented estates, conflicting judgments, and uncertainty for international lenders.

Modified Universalism

Modern practice relies on modified universalism, which balances the two extremes. It accepts a main proceeding at COMI and encourages cooperation, but it allows carve outs for public policy or local interests. The UNCITRAL Model Law and the EU Insolvency Regulation are built on this principle. However, common law systems apply it cautiously. In *Rubin v Eurofinance* the UK Supreme Court declined to automatically enforce a foreign insolvency judgment, while *Singularis* confirmed that assistance cannot exceed the scope of domestic law.

Practical Impact

For arbitration, these theories matter. Universalism centralises collective claims in the COMI forum, restricting arbitration. Territorialism increases the chance of parallel proceedings and inconsistent outcomes. Modified universalism offers a compromise, permitting arbitration of bilateral disputes but limiting enforcement where awards conflict with insolvency orders or public policy.

Fault Lines at the Insolvency–Arbitration Interface

The sharpest tensions between insolvency law and arbitration appear when their operating principles collide. Insolvency is designed to centralise claims and protect collective creditor interests. Arbitration, by contrast, exists to enforce party autonomy and resolve disputes through consent. In practice, four main areas of conflict stand out: arbitrability, the reach of moratoria and automatic stays, the use of anti-suit and anti-arbitration injunctions, and the treatment of avoidance or other insolvency-related claims.

Arbitrability

Arbitrability asks whether a dispute is capable of resolution by arbitration or whether it belongs solely to courts. Insolvency involves rights in rem, meaning that decisions affect all creditors, not just the parties before the tribunal. This collective character explains why many legal systems remove insolvency petitions and related actions from the scope of arbitration.

India: Has been clear in this respect. In *Booz Allen v SBI Home Finance* [20], the Supreme Court held that matters involving rights in rem, such as insolvency, winding-up, or criminal law, are not arbitrable. In *Vidya Drolia* [21], the Court reaffirmed that only bilateral contractual disputes may proceed to arbitration, while collective matters must remain in public fora. In *Indus Biotech v Kotak India Venture* [22], the Court refined this further, permitting arbitral referral

before admission of an insolvency petition, but confirming that once a petition is admitted the statutory moratorium under section 14 of the Insolvency and Bankruptcy Code [23] prevents arbitration from continuing.

Singapore: Follows a similarly calibrated approach. In *Tomolugen Holdings v Silica Investors* [24], the Court of Appeal stayed oppression claims for arbitration but emphasised that insolvency processes are inherently collective. Later, in *AnAn Group v VTB Bank* [25], the Court introduced the prima facie test: if a debt is disputed under an arbitration agreement, winding-up proceedings will normally be stayed unless the claim is plainly without merit.

The United States: Takes a pro-arbitration stance through the Federal Arbitration Act [26], but bankruptcy courts retain discretion. In *United States Lines* [27], the Second Circuit refused arbitration where it would disrupt the aims of the Bankruptcy Code, especially collective administration and fair distribution. Core matters such as avoidance claims and plan confirmation are treated as non-arbitrable.

The United Kingdom and the European Union also impose limits. English courts uphold arbitration clauses for contractual disputes but will not permit them to override the jurisdiction of insolvency courts. Within the EU, the Court of Justice in *Seagon v Deko Marty* [28] held that avoidance claims are inseparable from insolvency and must be heard by the COMI court. The general line across jurisdictions is consistent: bilateral disputes may be arbitrated, while collective proceedings remain with insolvency courts.

Moratoria and Stays

A hallmark of insolvency is the automatic stay, designed to halt creditor enforcement and preserve estate value. The UNCITRAL Model Law provides that recognition of a foreign main proceeding produces such relief [29]. In the United States this is codified in Chapter 15, section 1520 [30]. The United Kingdom applies similar rules through the Cross-Border Insolvency Regulations 2006 [31]. In India, section 14 of the Insolvency and Bankruptcy Code [32] mposes a blanket moratorium once an insolvency petition is admitted. When arbitration is seated outside the recognising jurisdiction, proceedings may continue, but enforcement of awards is uncertain. Courts may refuse enforcement under Article V(2)(b) of the New York Convention if the award contradicts a recognised stay or restructuring order [33].

Anti-Suit and Anti-Arbitration Injunctions

Courts sometimes issue injunctions to restrain proceedings that threaten insolvency integrity. Within the EU, the *West Tankers* [34] ruling restricted Member State courts from issuing anti-suit injunctions against each other, though in *Gazprom* [35] the CJEU confirmed that tribunals themselves may grant anti-suit orders enforceable under the New York Convention. After Brexit, English courts regained greater flexibility to grant such injunctions in support of arbitration, though they remain cautious when insolvency policies are at stake. Anti-arbitration injunctions, though rare, have been granted in India and the United States where arbitral proceedings conflicted directly with collective insolvency aims.

Avoidance and Insolvency-Related Claims

Avoidance actions recover value lost through preferential or undervalued transactions and are essential to creditor equality. The CJEU has repeatedly ruled in *Seagon*, *F-Tex*, and *Schmid* that such claims belong to the COMI forum and cannot be diverted to arbitration. In the United States, avoidance is classified as a core bankruptcy matter and is rarely referred to arbitration. Singaporean courts have also recognised that insolvency remedies are class remedies incompatible with private arbitration, as noted in *Larsen Oil v Petroprod* [36].

Emerging Pattern

Across these four fault lines, the pattern is clear. Contractual disputes may be arbitrated, but once insolvency begins, collective mechanisms dominate. Moratoria and injunctions protect the process, and avoidance claims remain within the insolvency court. Arbitration still plays an important role for bilateral claims, yet insolvency law retains primacy wherever the interests of the entire creditor body are engaged. For practitioners, this underlines the need for insolvency carve-outs in arbitration clauses and for careful planning when recognition orders or moratoria may affect arbitral proceedings.

Recognition, Enforcement, and the Rule in Gibbs

The recognition of foreign insolvency proceedings and the enforcement of arbitral awards represent the most visible points of conflict between collective insolvency policy and the pro-enforcement tendency of arbitration. Insolvency law aspires to a single process binding all creditors, while arbitration law, built around the New York Convention of 1958, seeks almost universal enforcement of consensual awards. Neither goal is absolute, and courts have repeatedly confirmed that both are limited by domestic public policy.

Recognition of Insolvency Proceedings

The UNCITRAL Model Law on Cross Border Insolvency (MLCBI) remains the global standard. It provides for recognition of foreign main proceedings, grants relief equivalent to local moratoria, and permits foreign representatives to manage assets. The United States adopted the framework as Chapter 15 of its Bankruptcy Code. Section 1520 imposes an automatic stay and section 1521 allows further discretionary relief. The United Kingdom follows similar rules through the Cross Border Insolvency Regulations 2006. Recognition is not unconditional. Article 6 of the MLCBI and section 1506 of the US Code authorise courts to refuse recognition if it is manifestly contrary to public policy. In *Vitro*, a Mexican restructuring plan was denied recognition in the United States because it included broad third-party releases, considered inconsistent with domestic principles. In *Qimonda*, by contrast, the Fourth Circuit upheld protection for intellectual property licensees under section 365(n), despite German law that would have allowed termination. These examples show how comity is balanced against national priorities.

Enforcement of Insolvency Judgments

Recognition of proceedings does not automatically extend to judgments. Within the European Union, the Insolvency Regulation (Recast) ensures that judgments connected with insolvency are recognised across Member States. The CJEU in *Seagon*, *F-Tex*, and *Schmid* confirmed that avoidance

actions are part of the insolvency process and must be centralised in the COMI court. Common law jurisdictions have been more cautious. In *Rubin v Eurofinance*, the UK Supreme Court declined to give foreign insolvency judgments automatic recognition outside the ordinary rules of private international law. The Privy Council in *Singularis* confirmed that cooperation cannot go beyond remedies available under domestic law. These decisions reflect the limits of modified universalism in English law.

Enforcement of Arbitral Awards

The New York Convention obliges states to enforce awards, but Article V(2)(b) permits refusal where enforcement would contradict public policy. Awards made in violation of a recognised stay or restructuring order may be unenforceable. If, for instance, a tribunal continues proceedings despite recognition of a foreign insolvency, courts in London or New York could refuse enforcement on insolvency grounds. Nevertheless, courts apply the public policy exception narrowly, placing the burden on the resisting party.

The Rule in Gibbs

The English rule in *Gibbs* [37], dating to 1890, holds that an English law contract cannot be discharged by a foreign insolvency unless the creditor consents or an English court provides relief. This rule was reaffirmed in *Re OJSC International Bank of Azerbaijan* [38], where a foreign restructuring plan failed to compromise English law debts. Because much international finance uses English law documentation, the rule compels debtors to pursue dual strategies: completing a local restructuring while also using an English scheme or Part 26A plan, often supported by Chapter 15 recognition in the United States [39]. Critics argue that the rule is outdated and inconsistent with modern cross border cooperation, yet English courts have continued to uphold it.

Practical Implications

For practitioners, recognition planning is essential. Proceedings must be structured to secure recognition in major financial centres such as London, New York, and Singapore. Arbitration clauses and governing law choices should anticipate insolvency, with carve-outs for collective actions and awareness of Gibbs risk. Even valid awards can fail if they conflict with recognised insolvency outcomes. Insolvency and arbitration thus coexist through a framework of cautious convergence. Recognition is widely granted, enforcement of judgments is conditional, arbitral awards are generally supported but subject to insolvency policy, and the rule in Gibbs remains a powerful obstacle. Success in cross border restructurings depends on careful foresight and precise drafting.

Deep Dive: *Seagon, F-Tex, Schmid* and the EU's Approach to Avoidance Jurisdiction

Avoidance actions, often called claw-back claims, lie at the heart of insolvency law. These actions allow administrators to challenge transactions that reduce the value of the estate or unfairly privilege certain creditors. Common examples include preferences given to one creditor over others, transfers of assets for less than fair value, and fraudulent conveyances designed to shield property from collection. Because they exist solely to protect the collective, most legal systems treat avoidance claims as inseparable from insolvency proceedings and therefore within the exclusive competence of insolvency courts. Within the European Union, this principle has been articulated most clearly by the Court of Justice of the European Union (CJEU) in three important cases: *Seagon v Deko Marty Belgium NV* (2009), *F-Tex SIA v Jadecloud-Vilma* (2012), and *Schmid v Hertel* (2014). Together, they define the jurisdictional reach of the EU Insolvency Regulation and clarify the limits placed on arbitration and general civil procedure.

Seagon v Deko Marty [40]

The case concerned a German insolvency administrator who sought to recover payments made to a Belgian company under German avoidance rules. The defendant argued that jurisdiction belonged to Belgium under the Brussels I Regulation. The CJEU rejected this, holding that avoidance actions "derive directly" from insolvency and must be heard in the COMI court. The ruling confirmed that avoidance belongs to the insolvency framework, not civil procedure, and excluded arbitration from this sphere.

F-Tex v Jadecloud-Vilma [41]

In *F-Tex*, an administrator assigned an avoidance claim to a third-party company, which then pursued the claim in its own name. The CJEU ruled that once the claim was assigned it no longer derived directly from insolvency but had become an ordinary civil action. Jurisdiction then shifted to Brussels I. The decision highlighted that assignment changes the legal character of the claim, raising concerns that assignments might be used to engineer forum changes.

Schmid v Hertel [42]

Schmid dealt with an administrator who sued a defendant domiciled in Switzerland. The question was whether the Insolvency Regulation applied to defendants outside the EU. The Court confirmed that it did, giving the German COMI court jurisdiction. The ruling extended the reach of EU insolvency jurisdiction to third-country defendants, strengthening centralisation but raising questions about recognition of such judgments abroad.

Doctrinal and Practical Implications

The trilogy creates a coherent framework. *Seagon* established that avoidance is for insolvency courts alone. *F-Tex* showed that assignment can shift claims into civil law territory. *Schmid* confirmed extra-territorial reach, even against non-EU parties. Collectively, these cases entrench the view that avoidance actions are an inseparable part of insolvency and cannot be diverted to arbitration. For practitioners, the lessons are clear. Arbitration clauses should contain carve-outs for insolvency and avoidance matters. Insolvency practitioners must consider carefully whether to assign claims, as this can move disputes into ordinary civil jurisdiction. Creditors should anticipate that EU avoidance judgments will circulate freely within the Union, though enforcement outside Europe may be less predictable.

Comparative Note

Other jurisdictions align broadly with this approach. In the United States, avoidance is a core bankruptcy function and rarely arbitrable. Singapore's Court of Appeal in *Larsen Oil*

described insolvency as a class remedy inconsistent with private arbitration. English courts in *Rubin v Eurofinance* accepted insolvency courts' jurisdiction over avoidance but limited recognition of foreign avoidance judgments. The *Seagon–F-Tex–Schmid* trilogy underscores the EU's universalist instinct to centralise insolvency jurisdiction in the COMI court. This strengthens efficiency and creditor equality but narrows the space for arbitration. The approach protects the collective while creating strategic risks, particularly through assignments, and raises enforcement issues beyond the Union. For those navigating cross-border corporate distress, clarity of drafting and foresight in recognition planning remain essential.

COMI: Evidence, Proof, and Practical Checklists

The Centre of Main Interests (COMI) is the cornerstone of modern cross border insolvency law. It determines which court may open the main proceedings and therefore triggers recognition and relief under both the EU Insolvency Regulation (Recast) [43] and the UNCITRAL Model Law on Cross Border Insolvency (MLCBI) [44]. Establishing COMI is often contentious, as it dictates jurisdiction in multinational insolvencies and directly affects recognition, enforcement, and arbitral proceedings.

International Frameworks

Under the MLCBI, Article 2 defines a foreign main proceeding as one that takes place where the debtor has its COMI. Article 16(3) presumes that the registered office is the COMI, unless rebutted by evidence. The EU Insolvency Regulation adopts the same presumption but develops it further. Recital 28 requires that COMI be the place where the debtor conducts the administration of its interests on a regular basis and in a way that creditors can objectively identify. This focus on creditor perception reflects a policy of transparency and predictability.

Key Case Law

In *Eurofood* [45], the CJEU held that the registered office is presumed to be the COMI unless objective, publicly available factors show otherwise. Parent company control was insufficient to displace the presumption if creditors could not reasonably perceive operations elsewhere. In *Interedil* [46], the CJEU explained that COMI must be established by reference to where the debtor organises its economic activities, and this must be visible to third parties. Even if operations shift abroad, registration may still anchor COMI if the company has been dissolved and struck off. The Singapore case of *Zetta Jet* [47] confirmed this approach in a Model Law jurisdiction. Although the company was incorporated in Singapore, its management and creditor relationships were centred in California. The court held that COMI lay in the United States.

Evidentiary Factors

Courts weigh several forms of evidence:

- The registered office as a starting point.
- The actual place of management and decision-making.
- Locations of board meetings and records.
- The presence of employees and business operations.
- Where creditors, banks, and financing agreements are situated.
- The language of contracts and creditor communications.
- Public representations made through filings, websites, and regulatory disclosures.

A crucial test is creditor perception. Would a reasonable creditor believe that the company is administered from the claimed jurisdiction.

COMI Shifting

Debtors sometimes relocate their COMI to access favourable restructuring regimes. While lawful, such moves raise fairness issues for creditors. The EU Recast introduced a safeguard: if the registered office has been moved within three months before filing, the presumption that it reflects COMI does not apply. English courts in *Hellas Telecommunications* [48] accepted a genuine shift where creditors had notice and operations were real, illustrating that COMI shifting is permitted if transparent.

Practical Checklist

Practitioners preparing or contesting COMI should gather:

- Incorporation documents and public filings.
- Board minutes and location of senior management.
- Bank accounts, financing arrangements, and business records.
- Contracts, creditor correspondence, and employee information.
- Marketing materials and online representations.
- Evidence of any recent relocations and their timing relative to insolvency filings.

COMI determinations remain complex and open to litigation. Courts demand objective, verifiable evidence and resist claims of hidden control by parent companies. Despite criticism of uncertainty, COMI continues to serve as the primary jurisdictional compass in cross border insolvency. For practitioners and arbitral tribunals, preparing evidence that reflects creditor perception is essential, since COMI defines where proceedings will unfold and whether arbitral awards will be recognised or stayed.

Recurring Conflict Patterns and Practical Management

Cross border insolvency and arbitration meet most directly when multinational businesses face financial collapse. Over the last twenty years, courts and tribunals have confronted repeating patterns of conflict between collective insolvency policy and arbitral autonomy. These patterns can be grouped into six categories: COMI shifts and forum shopping, finance documents with arbitration clauses, the effect of moratoria, anti-suit or anti-arbitration injunctions, avoidance actions, and the English rule in *Gibbs*. Each illustrates the tension between collective coordination and individual consent.

COMI Games and Forum Shopping

Debtors sometimes relocate their Centre of Main Interests to jurisdictions with restructuring-friendly regimes, such as the United Kingdom or Germany. The CJEU in *Eurofood* and *Interedil* emphasised that COMI is presumed at the registered office unless objective evidence shows otherwise. English courts in *Hellas Telecommunications* accepted a genuine COMI shift where creditors had notice and the move was operationally real. The lesson for practitioners is that debtors must document genuine relocation, while creditors should be ready with evidence of continued ties to

the original forum. Tribunals should remain alert to enforcement risks where awards conflict with recognised COMI proceedings.

Finance Documents and Arbitration Clauses

Financial contracts often contain arbitration clauses, but insolvency raises questions about their scope. Indian jurisprudence in *Booz Allen*, *Vidya Drolia*, and *Indus Biotech* distinguishes between arbitrable contractual claims and non-arbitrable insolvency petitions. Singapore courts in *Tomolugen* and *AnAn Group* take a similar approach, giving weight to arbitration before insolvency admission. US courts, such as in *United States Lines*, refuse arbitration where it threatens bankruptcy objectives. Drafting should therefore include clear insolvency carve outs and provisions for coordination between tribunals and insolvency courts.

Moratoria and Continuity of Arbitration

Recognition of a foreign main proceeding under the MLCBI, Chapter 15 in the US, or CBIR in the UK generally triggers a moratorium. Section 14 of India's Insolvency Code does the same once proceedings are admitted. Arbitral tribunals seated in the recognising state are expected to halt. Where arbitrations continue abroad, any resulting awards may be refused enforcement under Article V(2)(b) of the New York Convention if they undermine a recognised stay. Practitioners should ensure tribunals are promptly notified and encourage case management pauses to prevent unenforceable results.

Anti-Suit and Anti-Arbitration Injunctions

Creditors may pursue parallel proceedings despite insolvency stays. EU law after *West Tankers* bars Member State courts from issuing anti-suit injunctions, though *Gazprom* confirmed that tribunals may issue their own anti-suit orders. Post-Brexit, English courts again have wider discretion to issue injunctions, though they remain cautious. India and the US have occasionally issued anti-arbitration injunctions to preserve insolvency processes. Cross border protocols can help reduce reliance on such measures by allocating disputes in advance.

Avoidance and Estate Claims

Avoidance actions are universally recognised as core insolvency functions. The CJEU trilogy (*Seagon*, *F-Tex*, *Schmid*) placed them firmly within COMI jurisdiction. US and Singapore courts follow the same approach. Arbitration clauses cannot override this allocation. Parties should draft contracts to exclude avoidance disputes, and tribunals should decline jurisdiction over such claims.

Dual Track Recognition and the Gibbs Problem

The rule in *Gibbs* preserves English law debt contracts from discharge in foreign proceedings. The Court of Appeal in *International Bank of Azerbaijan* reaffirmed its strength. This forces debtors into dual track strategies: combining foreign restructurings with English schemes or restructuring plans, and often seeking Chapter 15 recognition in the US. Practitioners should anticipate this by aligning governing law and seat or considering alternatives to English law if flexibility is required. The recurring conflicts between insolvency and arbitration are not random but predictable. They revolve around COMI shifts, finance contracts, moratoria, injunctions, avoidance claims, and the Gibbs doctrine. Managing them requires foresight. Contract drafters should incorporate insolvency carve outs, insolvency representatives must secure recognition early, and tribunals should adapt case management to avoid unenforceable awards. With careful coordination, arbitration and insolvency can coexist as complementary mechanisms rather than adversaries.

The Emerging UNCITRAL Debate on Insolvency's Effects in Arbitration

National courts and regional frameworks have given case-driven responses to the friction between insolvency and arbitration, yet the lack of global consistency continues to generate uncertainty. For this reason, UNCITRAL's Working Group V has for more than a decade debated whether international guidance is needed to clarify how insolvency proceedings affect arbitration. The discussion highlights a fundamental policy trade-off: protecting arbitration's contractual certainty versus safeguarding insolvency's collective goals.

Uncitral's Mandate

UNCITRAL has been central in shaping cross border insolvency practice. Its Model Law on Cross Border Insolvency (1997) provides the backbone for recognition. Later texts, such as the Model Law on Recognition and Enforcement of Insolvency Related Judgments (2018) and the Model Law on Enterprise Group Insolvency (2019), extend this framework. None, however, directly addresses arbitration. This omission is striking given that arbitration is the dominant method for resolving cross border disputes, supported by the New York Convention of 1958. Insolvency, by contrast, remains court-based. Their collision was inevitable, and the absence of guidance leaves tribunals and courts with conflicting approaches.

Early Discussions

Between 2009 and 2014, the issue surfaced indirectly while delegates debated recognition of insolvency judgments. Some states argued that arbitration should always yield to insolvency once proceedings were recognised under the MLCBI. Others resisted, stressing that this would undermine the enforcement reliability of the New York Convention. By 2014, UNCITRAL circulated background papers showing a rise in arbitrations complicated by insolvency objections, but consensus was elusive.

Renewed Focus

The adoption of the 2018 Model Law on Insolvency Related Judgments revived the debate. While it created mechanisms for recognition of judgments that stay arbitration, it did not specify how arbitral awards themselves should be treated if issued during insolvency. From 2019 to 2021, some delegations pushed for guidance on three points: the effect of moratoria on arbitrations, the arbitrability of insolvency-linked claims such as avoidance, and the impact of MLCBI recognition on tribunals seated abroad. Others argued that arbitration already has a strong treaty basis and should not be restricted further.

Current Themes

Recent debates from 2022 onwards have focused on three issues. First, arbitrability: many states support clarifying that core insolvency matters such as avoidance or plan

confirmation are non-arbitrable, while contractual disputes remain arbitrable. Second, the effect of moratoria: some states argue tribunals cannot be bound by foreign stays unless legislation provides, while others say recognition of a main proceeding under the MLCBI should oblige tribunals to suspend proceedings. Third, enforcement: insolvency representatives argue awards conflicting with plans should be unenforceable, while arbitral institutions caution that too much discretion would weaken the New York Convention.

Policy Trade-Offs and Possible Outcomes

The debate reflects a clash of values. Insolvency depends on efficiency, fairness, and centralisation. Arbitration depends on party autonomy and predictability. Both regimes rely on international treaties but pursue different goals. Possible outcomes include: (1) a non-binding legislative guide clarifying when insolvency overrides arbitration, (2) model clauses that anticipate insolvency by including carve-outs and disclosure duties, or (3) a full model law, though this remains politically difficult.

Implications

Until guidance emerges, practitioners must prepare for uncertainty. Arbitration clauses should include insolvency carve-outs. Recognition strategies must anticipate enforcement risks under Article V(2)(b) of the New York Convention. Arbitral institutions should adopt rules requiring disclosure of insolvency proceedings. Ultimately, insolvency will continue to dominate collective claims, while arbitration retains strength for bilateral disputes. The challenge is to design hybrid solutions that respect both systems and provide greater predictability in transnational restructurings.

Towards a Practical Playbook

The preceding analysis shows that the meeting point of insolvency and arbitration is full of recurring challenges: disputes over arbitrability, moratoria, avoidance claims, recognition hurdles, and the continuing effect of the rule in *Gibbs*. Practitioners cannot wait for a perfect global solution. They must instead work within the current patchwork of laws and cases to create strategies that protect clients and reduce uncertainty. A practical playbook can be built around three areas: contract design, procedural strategy during financial distress, and recognition and enforcement.

Contract Design

Carve-outs for Collective Actions: Contracts should state clearly that matters such as insolvency, restructuring, claim admission, and avoidance actions belong to insolvency courts, not arbitration. Sample wording could provide: "Disputes relating to insolvency, winding up, or avoidance are reserved to the competent insolvency court. All other disputes shall be resolved by arbitration." This reflects case law in *Seagon* and *Vidya Drolia* and avoids enforcement problems.

Coordination with Governing Law: Where contracts are governed by English law, the rule in *Gibbs* poses risks because foreign insolvency cannot discharge English-law debts without consent. Parties should therefore align governing law with jurisdictions that recognise foreign restructurings, or consider multi-tier clauses that provide arbitration for bilateral disputes but English schemes or restructuring plans for collective changes.

Notice and Cooperation Duties: Contracts should also require parties to notify tribunals and courts of insolvency filings and cooperate to coordinate proceedings. This reduces surprises and promotes efficient case management.

Procedural Strategy During Distress

Early Recognition: Insolvency representatives should seek recognition of main proceedings in major jurisdictions at the earliest opportunity. Recognition under the MLCBI, Chapter 15 in the US, or CBIR in the UK clarifies the application of moratoria and gives tribunals grounds to suspend.

Engaging Tribunals: When insolvency is raised as a defence, tribunals should request disclosure of proceedings, pause the case until courts clarify, and invite submissions on enforcement risks under Article V(2)(b) of the New York Convention. This avoids awards that later prove unenforceable.

Anti-Suit and Anti-Arbitration Measures: Creditors and debtors must carefully decide when to seek injunctions. In the EU, *West Tankers* restricts anti-suit relief, while post-Brexit England allows more flexibility. Tribunals themselves may issue anti-suit orders enforceable under the New York Convention, as confirmed in *Gazprom*.

Recognition and Enforcement

Within the EU, insolvency judgments circulate automatically under the Recast Insolvency Regulation. In other jurisdictions, recognition depends on domestic adoption of the MLCBI or the principle of comity. UK common law, especially after *Rubin* and *Singularis*, requires stricter conditions. Arbitral awards rendered in breach of stays may be refused under Article V(2)(b). Practitioners should therefore avoid pushing arbitration against recognised moratoria. Where English-law debt is involved, dual-track strategies remain essential. This means combining local restructuring with English schemes or Part 26A plans, and securing Chapter 15 recognition in the US. Such triangulation ensures global reach despite *Gibbs*.

Conclusion and Way Forward

The relationship between cross border insolvency and arbitration is marked by persistent tension rather than seamless cooperation. Insolvency law is designed to protect the collective interests of creditors by centralising proceedings, imposing moratoria, and enabling courts to reverse transactions that harm the estate. Arbitration, by contrast, rests on private consent, delivering predictability, confidentiality, and global enforceability under the New York Convention. When corporations collapse across multiple jurisdictions, these two systems inevitably collide. This study has identified the major points of friction *viz*., uncertainty about which disputes are arbitrable, the disruptive impact of moratoria on arbitral continuity, the special status of avoidance claims, and the enforcement difficulties caused by foreign restructurings, especially under the English rule in *Gibbs*. Comparative experience shows that while most jurisdictions accept insolvency's primacy in collective matters, they diverge on the treatment of bilateral disputes and the recognition of foreign

insolvency judgments. The absence of a harmonised global standard magnifies these conflicts. UNCITRAL has acknowledged the issue but has not yet offered binding guidance, leaving courts to decide case by case and practitioners exposed to uncertainty. A way forward requires targeted reforms and practical measures. National statutes should codify clear boundaries on arbitrability, expressly reserving collective issues such as claim ranking, avoidance, and moratoria enforcement to insolvency courts, while permitting arbitration of contractual disputes. States adopting the MLCBI should clarify that recognition of a foreign main proceeding suspends local arbitrations, preventing tribunals from rendering unenforceable awards. English lawmakers should reconsider the *Gibbs* rule and explore legislative solutions that recognise foreign restructurings which meet basic standards of transparency and creditor protection. Courts and practitioners should promote cross border cooperation protocols, drawing lessons from the Jet Airways precedent. UNCITRAL, even through soft law, could provide much needed guidance on the interaction of insolvency and arbitration. Ultimately, the goal is not to privilege one system over the other but to build frameworks that allow them to function in a coordinated manner. Insolvency will remain the forum for collective resolution, but arbitration can continue to play a valuable role in bilateral disputes if properly aligned. Predictability, fairness, and efficiency can only be achieved if courts, legislators, and contracting parties act together to reduce fragmentation and foster coherence.

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