

Insolvency and arbitration during coronavirus (COVID-19)

Arbitration analysis: Duncan Gorst and Josh Redman, associates at Hogan Lovells, discuss the relationship between insolvency and arbitration. They consider the impact the coronavirus (COVID-19) pandemic has had on insolvency and arbitration as well as issues parties should consider when bringing arbitration proceedings against parties at risk of insolvency. The analysis focuses on arbitrations subject to the law of England and Wales (English and England for short), and, unless stated, with an English seat.

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Why is the relationship between insolvency and arbitration significant? And why is this of increased interest during the coronavirus pandemic?

The relationship between insolvency and commercial arbitration is significant because the two areas pursue two separate policy objectives which are at times difficult to reconcile. Commercial arbitration is concerned with private contractual relationships, party autonomy and to a large extent, privacy and confidentiality. Insolvency, on the other hand, is characterised by transparency, mandatory legislation, and the centralisation of competing claims.

Insolvency proceedings can consequently impact contemplated or pending arbitration proceedings in many ways. This includes, for example, issues surrounding the capacity of the insolvent party to arbitrate its disputes, the validity of the arbitration clause and the recognition of arbitral awards by national courts. The exact effect of an insolvency on arbitration proceedings will depend on the law of the contract, the seat of the arbitration, as well as the laws applicable to the insolvency of the distressed or insolvent party.

Although the coronavirus pandemic has had a significant detrimental impact on companies in a number of industries, both in the UK and overseas, the reality is that the insolvency of a business partner is a risk even in normal times. Many countries have introduced new measures aimed at helping businesses stay afloat throughout the pandemic. In the UK, this includes a new debt moratorium introduced by the [Corporate Insolvency and Governance Act 2020 \(CIGA 2020\)](#) and governmental financial assistance to companies. The temporary effect of some of these measures, such as the current restrictions on presenting statutory demands and winding-up petitions due to expire on 31 December 2020, means that there is currently a number of companies still operating that are at risk of failing as soon as these measures expire.

The popularity of arbitration as a dispute resolution mechanism has raised questions as to how creditors can bring claims against distressed and insolvent business partners in contracts subject to arbitration clauses, particularly in a cross-border context where the jurisdiction of the arbitral tribunal and the jurisdiction of the local courts managing the insolvency process may not be the same.

The following answers will explore the perspective from arbitrations subject to English law, and, unless where otherwise stated, with an English seat.

What analysis should be done by a would-be claimant before commencing arbitration proceedings against an insolvent or distressed party? What matters/risks is a claimant looking out for and what steps can be taken to mitigate such risk(s)?

Prospective claimants should conduct a thorough risk analysis of whether or not it makes commercial sense to pursue arbitration based on the distressed or insolvent party's financial position. This includes the steps set out in the answer to the question below on [what practical steps can a party take to monitor another party's risk of insolvency](#). It is also worth considering whether it would be more pragmatic to follow any of the alternatives to arbitration outlined in the answer to question [what are the alternatives to commencing arbitration if there is a risk of insolvency](#) below. If the party is already in or at risk of entering into insolvency proceedings during the arbitration proceedings, prospective claimants should conduct a legal analysis of how bringing or continuing a claim against an insolvent party is possible under the applicable law.

The cost of bringing arbitration proceedings against a distressed or insolvent party is likely to be a key consideration. The financial burden on the claimant will be greater if the distressed or insolvent party cannot pay its share of the arbitrators' fees and, if it is an institutional arbitration, any administrative costs. Even if the claimant is ultimately able to obtain a favourable award, in an institutional arbitration, it will still have to pay the insolvent party's share of the advances on costs at the outset, which it may not be able to recover even if it obtains a favourable award. It may prove difficult, if not impossible, to enforce the award if the insolvent party has entered into an insolvency process in the meantime. Needless to say, if the insolvent party has already been dissolved, the question of arbitration proceedings becomes largely moot.

A potential claimant's risk analysis should also include an assessment of the idiosyncrasies of the parties' arbitration agreement, including the governing law and, if applicable, the arbitration rules. Even where the insolvent party elects not to participate in or actively contest the proceedings, the lack of a 'default' or 'summary' judgment mechanism to quickly dispose of simple or uncontested cases under many arbitration rules means that the solvent party will still have to proceed with the arbitration and establish the merits and quantum of its claim. Many arbitral rules provide for an expedited procedure that may facilitate a more expeditious disposal of the claim but the availability of any such expedited procedure depends on the arbitration agreement and the applicable procedural rules.

Many of these risks can be mitigated at the outset of a transaction by devoting special attention to the drafting of the arbitration agreement and the rules of procedure that are to apply. It may also be appropriate to consider agreeing an on-demand bond, parent company guarantee, or letter of credit, as these will grant additional security to a party without the need to incur the expense of commencing arbitration.

What practical steps can a party take to monitor another party's risk of insolvency?

There are several ways in which a party can monitor the performance of a business partner it deems at risk of insolvency:

1. •
where available, checking the published financial accounts at the company registry, paying particular attention to the company's current assets and current liabilities and looking for any charges which will soon become due. However, it should be kept in mind that audited financial statements provide an historic snapshot of the financial health of the company, particularly at the moment where in the UK companies have been given longer to file accounts. It may also be possible to obtain the business partner's credit score and/or credit report through credit referencing agencies such as Experian and Creditsafe
2. •
collecting as much information as possible from the press, industry contacts and internal records, paying particular attention to business partners that are settling their invoices erratically
3. •
monitoring filings and notices of the most vulnerable counterparties. For a company registered in England and Wales, this can be done at Companies House, the Business and Property Courts and the Gazette

None of the above methods will paint a complete picture of a company's financial position, but they will certainly provide a valuable insight. A failure by a company to file relevant financial accounts on time may also tell its own story about the company's financial health. The temporary effect of some of the measures introduced to relieve pressure on businesses during the coronavirus pandemic, such as restrictions on presenting statutory demands and winding-up petitions, means that a company may be at risk of failing as soon as these measure expire.

What is the impact of party insolvency before and during an arbitration? It is possible to replace an insolvent party in arbitration proceedings? If so, how?

The exact consequences of a party entering an insolvency process will vary according to the laws of the jurisdiction in which the insolvency proceedings have been started. Under English law, the [Insolvency Act 1986 \(IA 1986\)](#) governs insolvency and its relationship to dispute resolution, including arbitration.

Arbitration proceedings may, subject to some statutory restrictions, be commenced or continued against an insolvent company. Where a party goes into administration, for example, an automatic moratorium comes into force which prevents the commencement or continuation of 'legal process' (which includes arbitration) against the company without the consent of the administrator or the court (IA1986, Sch B1, para 43(6)). A similar stay applies in compulsory liquidation ([IA 1986, s 130\(2\)](#)). [IA 1986, Part A1](#) (introduced by [CIGA 2020](#)) contains a standalone moratorium which a company can apply for provided certain conditions are met, and which has a similar effect to the administration moratorium. Again, consent of the court would be required for the commencement or continuation of any 'legal process' against the company. Unlike administration, however, the court cannot consent to a process being commenced or continued if the creditor is seeking to recover a debt for which the company has a payment holiday during the moratorium.

There is, however, no automatic moratorium on arbitration proceedings in the case of a members' voluntary liquidation or creditors' voluntary liquidation. The court has a discretionary power to order a stay in relation to particular proceedings on the application of a party ([IA 1986, s 112](#)).

Arbitrators, however, are generally not bound by the determinations of national courts outside of the seat of arbitration. They may choose to continue with arbitration proceedings elsewhere even where the national court responsible for the party's insolvency has ordered a stay on proceedings or where

a stay has automatically come into force. This was an issue in *Syska (Elektrim SA) v Vivendi Universal SA and others* [2009] EWCA Civ 677, explained in more detail in the answer to the question: [Indeed, is it possible for insolvency and arbitration proceedings to occur in parallel?](#)

Whether an insolvent party can be substituted with another party in ongoing arbitration proceedings will depend very much on the specific factual and legal circumstances. In *A v B* [2016] EWHC 3003 (Comm), for instance, the High Court upheld the arbitral tribunal's decision to substitute one claimant for another after the original party merged with another company and ceased to exist following a restructuring scheme in India. The court held that the other company could replace the original party in the arbitration as it had legally assumed its obligations under the contract that contained the arbitration agreement.

How, generally, does a solvent claimant establish title to sue a liquidator/administrator or foreign equivalent?

In the case of administration, the first port of call in gaining permission to bring a claim against the insolvent company is the administrator. IA 1986, Sch B1, para 43(6)(a) permits the administrator to consent to the commencement or continuation of a legal process against the company or its property. An administrator may be less inclined to grant permission for a purely monetary claim, particularly if the claimant is an unsecured creditor and it is unlikely that there will be a material return to unsecured creditors in the administration. The claimant would therefore have to obtain a court order granting permission to bring the claim. Similarly, only the court may grant a claimant permission to proceed against a company in a compulsory or provisional liquidation (IA 1986, s 130(2)).

In deciding whether to grant permission to a potential claimant, the court will seek to strike a balance between the legitimate interests of the applicant and the other creditors as set out in *Re Atlantic Computer Systems plc* [1990] EWCA Civ 20.

A claimant is nevertheless advised to be proactive in the bringing of a claim: the limitation period continues to run during an administration moratorium. The court will take the existence of an impending limitation into account when deciding whether to grant permission to bring a claim.

The process by which a claimant establishes title to sue a foreign company in an insolvency process will depend on the place of the insolvency, the governing law of the contract and the seat of the arbitration. The insolvent respondent to arbitration proceedings commenced against it may find that it has to justify to an arbitral tribunal why the arbitral tribunal should take into account an insolvency process instituted outside of the seat of arbitration.

How, generally, are proceedings commenced in the name of an insolvent party?

A company in administration or liquidation retains its separate legal personality, and its estate (including any causes of action) remains vested in the company and do not vest in the insolvency office-holder (save for a rarely-used provision which allows a liquidator to have a company's assets vested in them).

For companies in administration or liquidation, the insolvency office-holder is given the power to pursue proceedings in the name of insolvent party (for administrators: IA 1986, Sch B1, para 60 and Sch 1; for liquidators: IA 1986, ss 165 and 167 and Sch 4). For administrators this power

includes commencing arbitrations [IA 1986, Sch 1, para. 6](#)). The arbitration proceedings can be commenced in the normal way prescribed by the arbitration agreement.

In case the claimant is a foreign insolvent company, a respondent would want to determine whether the foreign insolvency practitioner has the power to commence arbitration on behalf of that company, and whether the foreign office holder has been properly appointed. This is a question for the local insolvency law of the insolvent claimant. An arbitral tribunal may be satisfied with the presentation of the court order appointing the foreign insolvency practitioner that it has title to bring a claim.

How might a party deter a foreign liquidator/trustee in bankruptcy from pursuing claims in local courts in breach of an arbitration agreement? (eg the recent Riverrock case)

If the seat of the arbitration is London, a party may be able to apply for an anti-suit injunction to deter a foreign liquidator from pursuing claims in its local courts in breach of an arbitration agreement. The court has the power to grant an anti-suit injunction restraining foreign proceedings brought in breach of an arbitration agreement ([Senior Courts Act 1981, s 37](#)). The availability of anti-suit injunctions was recently at issue in *Riverrock Securities Ltd v International Bank of St Petersburg* [\[2020\] EWHC 2483 \(Comm\)](#), in which the High Court granted an anti-suit injunction restraining proceedings that had been brought in breach of an arbitration agreement in Russia by the liquidator of an insolvent company.

What issues should be considered concerning the availability of interim relief from tribunals and courts (in support of arbitrations) against insolvent parties?

The arbitral tribunal, a court, and depending on the arbitration agreement, an emergency arbitrator may be able to grant a wide range of urgent temporary relief against distressed and insolvent parties. This is especially relevant when a distressed party is close to entering an insolvency process, as there is a heightened risk that the distressed party may dissipate assets when faced with imminent insolvency proceedings.

Where enforcing interim relief granted by an arbitral tribunal or emergency arbitrator may prove difficult, or where urgent ex parte relief is required, the arbitration proceedings will benefit from being seated in a jurisdiction that enables appropriate relief to be obtained urgently from a court if a risk of dissipation arises, for instance via a freezing order. However, the court may be unwilling to act where a party has the option of seeking relief from an emergency arbitrator or the arbitral tribunal and the arbitration agreement is silent on the issue of interim relief. In *Gerald Metals SA v Timis* [\[2016\] EWHC 2327 \(Ch\)](#), the court dismissed an application for emergency relief, as it held that effective relief was potentially available under the LCIA Arbitration Rules applicable to the underlying arbitration.

What are a party's options if insolvency proceedings are brought in breach of an arbitration agreement?

If a creditor presents a winding-up petition in relation to a debt, and the debt is disputed and subject to an arbitration agreement, the receiving party may seek to have the winding-up petition dismissed. The starting point for a court is the judgment in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589. In that case, the Court of Appeal held that a winding-up petition based on a debt which was the subject of an arbitration clause would be dismissed or stayed in favour of arbitration.

This question was recently revisited in *Telnic Ltd v Knipp Medien Und Kommunikation GmbH* [2020] EWHC 2075 (Ch). In that case, the court upheld a stay (and not a dismissal) of a winding-up petition on the basis that the debt was disputed and subject to an arbitration agreement.

If the arbitration is seated in London, England, a party may also be able to apply for an anti-suit injunction to deter a foreign liquidator from pursuing claims in local courts in breach of an arbitration agreement. See answer to question [how might a party deter a foreign liquidator/trustee in bankruptcy from pursuing claims in local courts in breach of an arbitration agreement? \(eg the recent Riverrock case\)](#) above. Otherwise, a party may be able to object to the jurisdiction of the court in the foreign proceedings, which will then decide on the validity of the arbitration cause and may stay the foreign proceedings on that basis.

Indeed, is it possible for insolvency and arbitration proceedings to occur in parallel?

Insolvency proceedings (particularly administrations) and arbitration proceedings frequently do occur in parallel, subject to the moratoria explained above in the answer to question [what is the impact of party insolvency before and during an arbitration? It is possible to replace an insolvent party in arbitration proceedings? If so, how?](#)

The existence of parallel proceedings can become particularly challenging in cross-border insolvencies, as well as arbitration proceedings not seated in England or arbitration proceedings involving English companies, but not subject to English law. The arbitral tribunal needs to decide which country's law governs the recognition of insolvency proceedings as well as the legal consequences of the insolvency. Different tribunals will inevitably decide this question differently depending on the circumstances.

This was reflected in the dispute between Elektrim SA, and Vivendi Universal SA. The companies had entered into two agreements, with one agreement providing for LCIA arbitration in London and the other providing for ICC arbitration in Switzerland. In the course of both arbitration proceedings, Elektrim SA filed for insolvency in Poland. Under Polish law, the arbitration agreements were considered invalid and the arbitrations were required to be discontinued. Elektrim SA argued to both arbitral tribunals that the arbitral tribunals now lacked jurisdiction and the arbitration proceedings should end.

The LCIA arbitral tribunal determined that English law governed whether the arbitration should continue and decided that it had jurisdiction to continue dealing with the dispute. The ICC tribunal determined that Polish law governed whether the arbitration should continue, that it lacked jurisdiction, and that the arbitration would be suspended. Both these arbitral decisions were reviewed by the English and Swiss courts and were upheld as valid (*Syska & Anor v Vivendi Universal SA and*

others, [2009] EWCA Civ 677, Swiss Federal Tribunal, 31 March 2009, *Vivendi SA and others v Deutsche Telekom AG and others*, 428/2008)

What are the potential costs consequences of pursuing claims in arbitration against distressed/insolvent parties?

The claimant might need to advance, and ultimately bear, the entire costs of the proceedings, only to not recover anything, and the ultimate enforcement of an award may fail due to the impecuniosity of a distressed or insolvent respondent. In addition to the insolvent party's likely lack of funds, insolvency law may make it difficult and sometimes even prevent distressed and insolvent companies from making payments to a third party.

Once an insolvency process has started, the relevant insolvency office-holder is subject to strict rules that will determine whether they can commence or continue arbitration proceedings and the extent to which costs or an award can be paid. Arbitration institutions generally set an advance on costs before arbitration proceedings can continue, to cover arbitrators' fees and administrative charges. Each party normally pays half of these costs. If one party cannot pay, then the other party will often have to make up the advance before the arbitration can continue. In ad hoc proceedings, arbitrators will sometimes invoice for their work at intervals and are likely to do so if they perceive a risk of non-payment if they delay until they have written the award. This can pose a significant further cost burden for the solvent party if the distressed or insolvent party either is not able or is not willing to pay.

Is seeking security for a claim or a freezing order an option for solvent claimants in proceedings against insolvent/distressed parties?

Although theoretically an application for security for a claim might be available either expressly or by implication under the powers provided to tribunals to grant interim measures, applications are rarely made, and it is a remedy that is almost never granted by arbitral tribunals. Article 25.1(i) of the LCIA Rules, for instance, expressly refers to an arbitral tribunal's power:

'to order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner'.

Security for a claim would, in any event, be practically unenforceable against an insolvent party, whose ability to pay a potential adverse award would not be changed by an order for security for claim. As with security for costs, insolvency law may make it difficult and sometimes even prevent distressed and insolvent companies from making payments to a third party. Security for a claim is therefore unlikely to be option for solvent claimants in proceedings against insolvent/distressed parties.

Freezing orders, like other interim injunctions, are generally available in support of arbitration proceedings ([Arbitration Act 1996, s 44](#)). Although frequently sought against distressed and insolvent parties, freezing orders are in no way a security over the assets of the respondent. A freezing order is a form of in personam relief that only acts to prevent a respondent from dealing with or disposing of its assets. It is not equivalent to a charge, it does not provide security over the assets of an insolvent

company, and it does not give the claimant priority over other creditors in the event that the respondent becomes insolvent. If a solvent claimant does successfully obtain a freezing order, and has served that order on third parties, this order would probably be enforceable. It would, however, be of little practical value, as a later arbitration award would still rank as an unsecured debt against the insolvent company, rendering the freezing order inconsequential.

One solution may be for a claimant to carefully assess whether it may be able to assert a proprietary claim against a distressed or insolvent respondent. This is conceptually not the same as obtaining security for a claim, but the existence of a proprietary claim may nevertheless increase the chance of the claimant making a full recovery. Otherwise a claimant might consider the alternatives to commencing arbitration as discussed below.

In ad hoc arbitration, will arbitrators seek security for their fees?

Whether an arbitral tribunal has the power to seek security for its fees depends on the applicable curial law and arbitration rules. Arbitration rules ordinarily give the arbitral tribunal the power to grant interim measures upon application of a party and would not allow an arbitral tribunal to order such a security on its own initiative. In the case of the LMAA Terms, the tribunal is given express power to request 'reasonable security for its estimated costs (including its fees and expenses) up to the making of an award'. An arbitral tribunal in an ad hoc arbitration may request an advance at the outset of the case. In the event that one party cannot, or will not pay its share of the costs, including the arbitrators' fees, the other party will be expected to do so. This means that if an insolvent respondent cannot pay, the claimant will have to advance everything if it wants the case to continue.

If the claimant is insolvent, in institutional arbitration, might a respondent have to pay advances on costs, in substitution for the claimant, while the claimant's insolvency office-holder seeks local court permission (if required) to do so?

At the beginning of an institutional arbitration parties are required to pay an advance on costs to arbitral institutions which generally covers the arbitrators' fees and the costs charged by the arbitral institution for administering the arbitration. Depending on the amount in dispute, the advance can be substantial.

Arbitral institutions ordinarily request the claimant and respondent to pay their shares, normally one half each, of the advance on costs. If the claimant does not pay, institutional rules may prevent the proceedings from going forward unless the respondent pays the claimant's share of advance costs. For example, Article 24(8) of the **LCIA Rules** states that:

'Failure by a claiming, counterclaiming or cross-claiming party to make promptly and in full any required payment may be treated by the LCIA Court or the Arbitral Tribunal as a withdrawal from the arbitration of the claim, counterclaim or cross-claim respectively, thereby removing such claim, counterclaim or cross-claim (as the case may be) from the scope of the Arbitral Tribunal's jurisdiction under the Arbitration Agreement, subject to any terms decided by the LCIA Court or the Arbitral Tribunal as to the reinstatement of the claim, counterclaim or cross-claim in the event of subsequent payment by the claiming, counterclaiming or cross-claiming party.'

Similarly, Article 37(6) of the [ICC Rules](#) provides that:

‘When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn.’

In theory, a respondent is free to pay the advance of the claimant. For instance, Article 37(5) of the ICC Rules provides that ‘any party shall be free to pay any other party’s share of any advance on costs should such other party fail to pay its share’. There is, however, unlikely to be a reason why a respondent would want to pay these costs. If a respondent has claims of its own that it wishes to bring, it could wait until the proceedings have been discontinued before bringing them in separate arbitration proceedings.

How may security for costs play a role in proceedings involving an insolvent/distressed parties?

[Section 38\(3\)](#) of the Arbitration Act 1996 provides that ‘the tribunal may order a claimant to provide security for the costs of the arbitration’. This is reflected in most institutional rules, for example Article 25.1(i) of LCIA Rules and Article 28.1 of ICC Rules. This is normally made through a bank guarantee, although a bank guarantee may be more difficult to obtain for an insolvent or impecunious claimant. When deciding whether or not to grant security for costs a tribunal is likely to give consideration to the prospects of success of the claimant’s claims and the defences to those claims, the claimant’s ability to satisfy an adverse costs award and the availability of the claimant’s assets for enforcement of an adverse costs award, whether the claimant has adequate ‘after the event’ (ATE) insurance (see below) and whether it is fair in all of the circumstances to require the claimant to provide security for the respondent’s costs ([CI Arb, Applications for Security for Costs , 2015](#)).

Security for costs most commonly plays a role in proceedings involving an impecunious or insolvent claimant. The situation is further complicated where a claimant becomes impecunious or insolvent during the pendency of arbitral proceedings. The impecuniosity or insolvency of a claimant who is bringing a claim indicates that it would be unable to satisfy an adverse costs award, but does not automatically decide the matter. The claimant’s insolvency or impecuniosity will have to be balanced against a number of factors such as the timing of the application and whether or not the parties have paid advances on the arbitrators’ fees and administrative charges.

Security for costs commonly takes the form of a payment of monies into the account of an independent stakeholder to be released upon the resolution of the claimant’s claims but does not always necessarily take this form. As explained above, insolvency law may make it difficult and sometimes even prevent distressed and insolvent companies from making payments to a third party. Security can be given in a variety of forms including a parent company guarantee, parent company bond or the assignment of a financial instrument. In the context of an insolvent or impecunious claimant, payment is often made by the claimant company itself, but it can also be made by claimant’s creditors or (in very rare circumstances) by the insolvency office-holder responsible for the day-to-day management of the claimant.

Is third-party funding of claims against insolvent/distressed parties generally available? Is third-party funding of claims by insolvent/distressed parties generally available? Will funded insolvent claimants have to provide security for respondents' costs? Or will an ATE policy trump any applications for security for costs?

Impecuniosity may not be an obstacle to a distressed or insolvent party bringing or defending arbitration proceedings if it can enter into a third-party funding arrangement. Legal claims can be valuable assets whose realisation can benefit both the creditors to the insolvent party as well as the funder. Third-party funding will alleviate the financial burden that would otherwise prevent a party from commencing or continuing claims. In assessing potential investment, third-party funders usually consider recoverability, the economics of claims (in particular, realistic claim value and costs/value ratio), advisory team expertise and the merits of the claim, as well as relevant restrictions imposed by some jurisdictions and arbitration rules. As third-party funding can be expensive, funder buy-in is essential, as is considering portfolio options and single case financing. The third-party funding arrangement will need to be valid under insolvency law applicable to the insolvent party.

A third-party funder will be reluctant to provide funding for an arbitration against an insolvent respondent as any award, due to the respondent's impecuniosity, is likely to be difficult to enforce.

ATE insurance is taken out after a legal dispute has already arisen and covers the risk that the insured party will be unsuccessful in the arbitration and found liable for costs. Where a funded party has taken out ATE insurance to cover any adverse costs award, this may satisfy a tribunal and defeat an application for security for costs. The [report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration](#) concluded that the terms of any funding arrangement, including ATE insurance, may be relevant in an application for security for costs if relied upon to establish a party's ability to meet any adverse costs award. In the ICSID arbitration *Eskosol S p A in liquidazione v Italian Republic*, [ICSID Case No. ARB/15/50](#), for instance, the arbitral tribunal rejected Italy's application for security for costs as Eskosol had an ATE insurance policy in place which covered the amount of the requested security.

However, whether an ATE insurance policy will suffice for security for costs will depend on the exact terms of the policy. Insurance policies are generally voidable and may therefore not provide the same level of security as a payment into an escrow account, a bank bond, or a guarantee. Where an impecunious party or liquidator seeks to rely on an ATE insurance policy to defeat a security for costs application, it must demonstrate that the policy does actually provide the requested security.

What impact may insolvency of a respondent have on the recognition and enforcement of an award issued against it? Can the award creditor take any steps to mitigate non-enforcement risk?

In an international context, an insolvent party may try to resist the recognition of an arbitral award on the basis that the insolvency law in the place where enforcement is sought affects, eg, the substantive validity of the arbitration agreement (Article V(1)(a) [New York Convention](#)), the scope of the arbitration agreement (Article V(1)(c) [New York Convention](#)), the capacity of the parties (Article V(1)(a) [New York Convention](#)), the objective arbitrability of the dispute (Article V(2)(b) [NYC](#)) or argue that the award should be set aside on public policy grounds (Article V(2)(b) [New York Convention](#)). As for enforcement, in an insolvency process, an arbitral award is an unsecured debt that ranks *pari passu* with all unsecured creditors. In England, a party may not bring individual enforcement proceedings against a party subject to an English compulsory liquidation ([IA 1986, s 130\(2\)](#)) or administration ([IA 1986, Sch B1, para 43\(6\)](#)). Exploring the alternatives to arbitration set out below may therefore be the more sensible approach, as incurring costs pursuing a solely monetary claim may be pointless if recovery of the award is impossible or the amount recovered is nominal—for example, because the insolvent respondent's estate leaves little or nothing for unsecured creditors. To mitigate the risk of obtaining an ultimately unenforceable arbitration award, it is worth considering the alternatives to commencing arbitration set out in the answer to the question below.

What are the alternatives to commencing arbitration if there is a risk of insolvency?

What are the alternatives to commencing arbitration if there is a risk of insolvency?

Continuing business with a struggling business partner may be preferable to tipping them into insolvency, especially if the relationship with them is valuable and worth protecting. Temporarily reducing or spreading payments over a longer timeframe may not only be a way of renegotiating the agreement but may also provide the distressed party with much needed cash flow assistance and may ensure its survival. Non-binding mediation or expert determination may facilitate the negotiations while still keeping them amicable. It is nevertheless important for the solvent party to safeguard its own contractual rights to ensure that it is adequately protected for the future. This could be accomplished through the strengthening of termination rights in favour of the solvent party to provide it with more flexibility to terminate the contract. In cases where the party at risk of insolvency is a buyer (and the solvent party the seller), reinforcing retention of title provisions may also be sensible, so that the title to goods delivered does not pass to the seller until payment is received in full. This would give the seller the security of prepayment and allow the seller to repossess the goods from an insolvent buyer.

Enforcing termination provisions or retention of title provisions against an insolvent business partner is, however, not always straightforward. Under [CIGA 2020](#), for instance, new provisions were introduced into [IA 1986, s 233B](#) which, with exceptions, prevent a supplier from exercising termination rights or doing any other thing under a contract for the supply of goods or services where the termination right is triggered by the counterparty going into an insolvency process.

Where the parties have a bank guarantee or on-demand bond or letter of credit in place from a third party, the solvent party may be able to request and receive payment without commencing arbitration. It would then be incumbent on the insolvent party to establish that the solvent party was not entitled to make demand under the credit support document.

Presenting, or leveraging the threat of a winding-up petition to the court could be a powerful tool to obtain payment, although winding-up petitions should not be used as debt collection tools. However, if there is any dispute as to the existence of the debt, a winding-up petition will usually be dismissed in favour of arbitration where the relevant debt arises in connection with a contract that contains an arbitration agreement. Again, [CIGA 2020](#) introduced, with retrospective effect, restrictions on the presentation of a winding-up petition based on the debtor's inability to pay debts unless the creditor can show that the debtor's financial difficulties have arisen for a reason not related to coronavirus. Waiting for the beginning of formal insolvency proceedings and submitting a proof of debt may prove less costly than incurring the cost of formal arbitral proceedings. The solvent party will need to balance this against the risk of becoming one of many unsecured creditors vying for what (if anything) is left over after the secured creditors and the costs of the insolvency process have been paid.

Interviewed by Gloria Palazzi.



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