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Arbitration and Insolvency: English and Swiss Perspectives

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1. INTRODUCTION

In arbitration, just as in litigation, the insolvency or potential insolvency of a party is a reasonably regular occurrence. Of course, this is not surprising given the nature of the proceedings and, often, the high sums and stakes involved. As a matter of course, therefore, lawyers reading this article are likely to be broadly familiar with insolvency mechanisms and to have encountered occasions when matters of insolvency have affected an arbitration. The purpose of this article is to summarise the law and the effects of insolvency on arbitration and present an analysis of the position in England and Switzerland. It will also consider some insolvency-related problems the tribunal and counsel may encounter during the course of an arbitration.

2. INSOLVENCY IN ENGLAND

Corporate liquidation: compulsory liquidation

The umbrella term "liquidation" applies to two categories of insolvency procedure: voluntary liquidation (i.e. where a company chooses to enter into an insolvency mechanism or its creditors request it and it consents) and compulsory liquidation (where the insolvency process is brought about by a third party). A compulsory liquidation involves the company being wound up by an order of the court, following filing a winding-up petition by the company itself, its directors or its creditors. The petition is an application to the court to appoint a liquidator, whose duty is to collect in the company's assets and distribute them to its creditors (Insolvency Act 1986 Sch.1 para.21; s.124; and s.7(4)(b)).[1] If the application is successful, the court will then issue a winding-up order. There are seven grounds under which the order may be made, the most common of which are s.122(1)(a), where the company has passed a special resolution that the company is to be wound up by the court (i.e. a voluntary procedure); s.122(1)(b), where the company is unable to pay its debts; or s.122(1)(g), where the court is persuaded that it is just and equitable that the company should be wound up.

A company is deemed "unable to pay its debts" if: (i) a creditor, who is owed at least £750, has served on the company a statutory demand and the company has failed to pay the sum owed for more than three weeks since the demand was served; (ii) it has failed to pay a judgment debt; (iii) it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (s.123(1)(e)); or (iv) the value of the company's assets is less than the amount of its liabilities (s.123(2)). On granting the order, the powers of the directors cease and the liquidator takes control of the company and its assets. All employees are automatically dismissed and an official receiver is appointed, who will call a meeting of the creditors to appoint a licensed insolvency practitioner to act as liquidator (s.136(5)). A moratorium on bringing or continuing claims against the company is also imposed. As explained below, this also includes bringing or continuing an arbitration against the company. Meetings may also be held to establish a "liquidation committee" (s.141), which receives reports from and assists the liquidator, approves remuneration and sanctions the exercise of some of his or her powers. The liquidator has wide powers to sell the company's assets, to bring and defend legal proceedings, including arbitrations (see below) and to pay dividends

[1] References are to the relevant part of the Insolvency Act 1986 unless otherwise specified.

to the company's creditors. The liquidator collects in the assets and distributes them in the prescribed order: (i) fixed charges; (ii) expenses of the winding up; (iii) preferential debts; (iv) floating charges; (v) ordinary unsecured creditors (pro rata); and (vi) members (who receive the surplus, if any). Once the assets have been distributed, the company is dissolved.

Corporate liquidation: voluntary liquidation

The purpose of a voluntary liquidation is to wind up the company without involving the court. There are two types: Members' Voluntary Liquidation (MVL) and Creditors' Voluntary Liquidation (CVL). Both are commenced by a voluntary resolution or a special resolution (members' voluntary resolution) or an extraordinary resolution (creditors' winding up) (s.84). Both require 75 per cent of the shareholder vote. An MVL is a solvent liquidation procedure, commenced by the majority of directors filing a statutory declaration of solvency to the effect that, having made a full inquiry into the company's affairs, they are satisfied that the company will be able to pay its debts in full, together with any interest, within a specified period not exceeding 12 months from the commencement of the winding up (s.89(1)). The statutory declaration must then be delivered to the Registrar of Companies, within 15 days of the passing of the resolution.

The members subsequently appoint a liquidator for the purpose of winding up the company and distributing its assets (s.91(1)). On the appointment of a liquidator, the powers of the directors cease (s.91(2)). The liquidator collects in the assets and distributes them in the required order (s.93) (see above). A final meeting of the members is held prior to dissolution where the liquidator shows the shareholders how the company's affairs are fully wound-up.

A CVL enables an insolvent company to be wound up without a court order. Unlike a compulsory liquidation, there is no automatic moratorium on proceedings against the company. Although the liquidator or any creditor or shareholder may apply to the court for a stay of any proceedings (s.112), including arbitration proceedings. This is also the case in relation to an MVL. Such a stay will not be granted automatically, but will usually be granted where proceedings were commenced after the shareholders' resolution. A CVL is commenced by the members passing an extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business and that it is advisable to wind up. There is no statutory declaration of solvency by the directors. A creditors' meeting must then be held (s.98(1)). The liquidator collects in the assets and distributes them in the required order. The company is then dissolved.

Corporate liquidation: administration

The liquidation procedures referred to above are aimed at the eventual dissolution of the company. Under English law, there is also a company rescue process; similar to Ch.11 proceedings in the United States, which are aimed at the protection and hopefully the eventual turnaround and continued existence of the target company, called administration. The administrator is a licensed insolvency practitioner who is appointed by the company or its directors or a third party upon petition to the High Court. The objectives of the administrator are to enable the company to continue as a going concern to achieve a better result than if the company were put into immediate insolvency; and realising of assets to pay to creditors. The latter objective is only carried out if the administrator reasonably concludes that the former two rescue options cannot be achieved. As discussed below, all of the insolvency mechanisms discussed here have appreciable effects on current or pending arbitrations, again including, noticeably, a moratorium on third parties bringing or continuing legal claims (including court and arbitration proceedings and security enforcement processes) against the insolvent company. The reason for this protection mechanism, of course, is to give the insolvency office holder a breathing space, either to turn the company around, or realise assets sufficiently. If the administration does not succeed, then a form of insolvency process, such as an MVL or a scheme of arrangement (where creditors agree to a distribution scheme), will be put in place prior to dissolution.

Corporate liquidation: administrative receivership

If a floating charge was created after September 15, 2003, floating charge holders can put the company into administration by appointing an administrator to enforce their security. This is called an administrative receivership and is similar to the administration proceedings referred to below. There is no moratorium on claims against the company in an administrative receivership. This mechanism is not available for charges registered after the above date, and charge holders must instead use the administration mechanism described above.

Personal insolvency: bankruptcy

A person can be declared bankrupt following presentation of a bankruptcy petition to the High Court by either the individual concerned or a third party creditor. Following a hearing, the Official Receiver (a government-licensed insolvency practitioner) will be appointed the individual's trustee in bankruptcy. The trustee in bankruptcy will assume legal title to the individual's assets (i.e. his or her legal estate) and distribute them to creditors.

3. ENGLISH ARBITRATION AND INSOLVENCY

Insolvent party entering into an arbitration agreement

Whether an insolvent company or individual is able to enter into a binding arbitration agreement may be largely moot, since a counter-party is unlikely to wish to contract with an insolvent party in the first place and there may not be many situations where a counter-party is insolvent but the counter-party does not realise. However, under English law an insolvent company can enter into a valid arbitration agreement. The position is different in relation to personal insolvencies, where the effect of a personal bankruptcy procedure is to separate the individual concerned from his or her "estate" (i.e. assets), and it is not possible for insolvent individuals to enter into arbitration agreements that will bind their estates.[2] This means that where bankrupts enter into an arbitration agreement, although this may bind them personally, it will not bind their estates, which will be managed by their trustees in bankruptcy. Accordingly, the agreement to arbitrate will be of no practical value until the individual has returned to solvency.

Insolvency of a party to an arbitration agreement

What is the effect on an arbitration agreement which was entered into by a solvent entity which subsequently becomes insolvent? The question of whether proceedings can be instituted against an insolvent entity is discussed below, but is there any legal effect on the agreement itself? There is no effect under English law where a company becomes insolvent, but, again, the same cannot be said of personal insolvencies. In personal insolvencies, the trustee in bankruptcy has the right to disclaim "unprofitable" contracts, including arbitration agreements or contracts containing arbitration agreements (s.315). The Arbitration Act 1996 s.107 also sets out the trustee's power to disclaim an arbitration agreement. If disclaimed, the claimant may still make an application to the High Court for an order that it may commence arbitral proceedings (s.349A(3)), but this requires the consent of the creditors' committee and the court.

[2] Michael Mustill and Stewart Boyd, *Commercial Arbitration Companion to the 2nd edn* (London: Butterworths, 2001), p.152.

Commencing an arbitration by an insolvent party

For insolvent companies, the insolvency office holder (i.e. liquidator or administrator) is given the power to pursue proceedings, including an arbitration,[3] in the insolvent party's name. In the case of an MVL, the liquidator's powers to "bring or defend any legal proceeding" (Sch.4 para.4) does not require the sanction of the court. On the other hand, where there is a compulsory winding up, then the court's consent is required (Sch.4 para.4). As for administrators, their power to bring or defend any action, and the fact that this power includes commencing arbitrations, is contained in Sch.1 para.6 of the Insolvency Act.

Commencing or continuing an arbitration against an insolvent company

Under the Insolvency Act s.130(2), a party must make an application to court for permission to bring an arbitration against a company in compulsory liquidation. Pursuant to *Exchange and Commodities Ltd, Re*,[4] the general practice is that the application will be granted unless the claim can be dealt with more efficiently in the liquidation proceedings. This decision will also include a review by the court of the merits of the case (see *HIH Casualty & General Insurance Ltd, Re*[5]) and where, on a preliminary review, the claim is of such little merit that it would, if it were heard in the High Court, be struck out, then the application will not be granted. The same goes for the MVL mechanism described above. The same goes for administration and other mechanisms where a moratorium is imposed: as a result of the moratorium of claims, a party that wants to bring or continue with an arbitration against the company in administration can only do so with the permission of the court. The English court has held that the moratoria include arbitration proceedings, *A Straume (UK) Ltd v Bradlor Developments Ltd*.[6] The guidelines for when a court (and administrator) will grant permission were set out in *Atlantic Computer Systems Plc, Re*.[7] The relevant factors are: (1) there must be a good case made out by the applicant; (2) if the question relates to proprietary rights and will not affect the administration, the application is normally granted; (3) otherwise the court must conduct a balancing exercise of the parties' interests (i.e. the rights of the claimant against the interests of the liquidation/administration); (4) in the balancing exercise, the interests of proprietary creditors outweigh the interests of unsecured creditors; and (5) the court will not make any decisions on the validity of security unless it is very straightforward. A liquidator/administrator may, at his or her own volition, commence or continue claims in the insolvent company's name (Sch.1 para.6). The same goes for the liquidator of a company (whether appointed in voluntary or compulsory proceedings) (s.165(3)).

With regard to a personal bankruptcy, the court has a discretion to order a stay of an arbitration where a decision on a winding-up petition is pending or has been presented (ss.126(1) and 285(1)).

Security for costs/partial awards

Under the Arbitration Act s.38, the tribunal has the power to order the claimant to pay security for the costs to be incurred by the respondent in defending the claim. The respondent can also apply to the court for an order for security. The tribunal (or the court) will base the decision on whether to order security and the amount of the security on the likelihood that the claimant will be able to pay the respondent's costs following the award. Inevitably, if the claimant is insolvent, or may become insolvent, there is a greater likelihood that it will not be able to pay. It is for the respondent to prove that the claimant will be unlikely to pay its

[3] *Paramount Airways Ltd (No.1), Re* [1990] B.C.C. 130.
[4] *Exchange and Commodities Ltd, Re* [1983] B.C.L.C. 186.
[5] *HIH Casualty & General Insurance Ltd, Re* [2005] EWHC 485.
[6] *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] B.C.C. 333.
[7] *Atlantic Computer Systems Plc, Re* [1992] Ch. 505.

costs, but in the event of an insolvency this may be fairly straightforward. It is not the case, however, that just because a company is insolvent the tribunal will order security. In *Smith v UIC Insurance Co Ltd*[8] for example, an insolvent claimant was not ordered to provide security, on the basis that it still had enough cash to pay for the costs of the arbitration.

It is also possible that the tribunal may order a party to make an interim payment pursuant to a partial award in relation to part of a claim. Of course, the issue of whether to make an award for security for costs, or a partial award, can be an extremely sensitive one, since under the Arbitration Act s.41(6), if the claimant cannot obtain the money to pay for the security or the award, then the respondent may be able to request the tribunal, if the tribunal has issued a peremptory order for payment of the security, and the claimant has failed or refused, to dismiss the claim. This is a particularly strong power, almost unique to England. This raises real practical questions for the tribunal, who must weigh-up the potential prejudice to the respondent should it win, with, on the other hand, the potential effect that the claimant who, if it cannot pay, may be prevented from pursuing its claim. Accordingly, arbitrators will often be faced with a delicate balancing exercise.

4. TYPES OF INSOLVENCY PROCEDURE IN SWITZERLAND

Bankruptcy

The term bankruptcy describes various types of proceeding intended to liquidate the assets of a debtor (including natural persons and companies) among his creditors. Only debtors registered with a Cantonal Commercial Registry are subject to bankruptcy proceedings. Individuals may also declare themselves insolvent and thus be voluntarily subject to bankruptcy proceedings. Individuals who have committed fraud are also subject to bankruptcy proceedings. In short, the procedure is for a creditor to file its bankruptcy request with the Cantonal debt collection office. The request is also notified to the debtor, who may file an opposition. After consideration of the parties' representations, the court decides whether to open bankruptcy proceedings. The creditors then announce their claims and the court establishes a schedule of claims. A creditors' assembly (i.e. a forum in which creditors are permitted to vote and make representations) decides important matters, such as the realisation of assets. The style and purpose of the bankruptcy process is set out by the court in its bankruptcy decree, in which it declares the debtor bankrupt and chooses between appointing an administrator to administer the debtor's assets/estate (like English administration, a mechanism aimed at the eventual turn-around of the company); or a liquidator to realise the debtor's assets and distribute them to the creditors (which, for companies, may result in their eventual dissolution). Accordingly, the style of the insolvency, unlike in English proceedings, is largely dictated by the court.

Composition proceedings

There are also three types of composition proceeding under Swiss law which specifically allow for the continuation of the debtor's business, which normally involve a moratorium on claims against the company: (1) the simple stay of payment during a limited period of time (the moratorium agreement/*sursis concordataire/Nachlassstundung*; (2) the payment of a percentage on all non-privileged debts (the ordinary composition agreement/*concordat ordinaire/Ordentlicher Nachlassvertrag*); and (3) the partial or total transfer of the debtor's assets to its creditors (the assets transfer composition/*concordat par abandon d'actifs/Nachlassvertrag mit Vermögensabretung*). The application for a composition and the moratorium on claims will be granted if the court considers, after representations, that the reorganisation of the company is likely to be successful. If so, a commissioner is appointed to supervise the debtor's conduct of business and creditors renounce their claims in exchange

[8] *Smith v UIC Insurance Co Ltd* [2001] B.C.C. 11.

for a cash payment. The debtor will usually sell all or part of its assets in order to be able to pay its creditor. The composition court shall approve the ordinary composition agreement. Such approval is subject to the complete payment of the privileged claims, i.e. the claims arising in the course of the composition proceedings which have been approved by the composition administrator and the employees' claims which are outstanding, within six months before the start of the composition proceedings. Under an asset transfer composition agreement, the creditors may either dispose of all or part of the debtor's assets, or sell them to third parties. The debtor is prevented from managing its business.

5. SWISS ARBITRATION AND INSOLVENCY

Insolvent party entering into an arbitration agreement

Pursuant to the Swiss Federal Act on International Private Law (AIPL) art.187(1), the capacity of a party to enter into an arbitration agreement is governed by the rules of the law with which the case has the closest connection. If Swiss law is applicable, in accordance with the Swiss Federal Act on Debt Collection (FADC) arts 237(3)(3) and 253, the receiver will have the authority to enter into arbitration agreements only if it is authorised by either the Creditors' Committee, or the Creditors' Assembly.

Insolvency of a party to an arbitration agreement

This is subject to the law governing the arbitration agreement. Pursuant to AIPL art.178(2), the arbitration agreement is valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law. Under Swiss law, the arbitration clause survives the adjudication of bankruptcy and passes to the estate.[9] In *Clear Star Ltd*,[10] the Swiss Federal Tribunal confirmed that the estate was bound by a pre-existing arbitration agreement.[11]

Instituting an arbitration by an insolvent party

The same conditions must be fulfilled to institute arbitration proceedings by or against an insolvent party. The receiver, instead of the debtor, will have the power to institute them as claimant, or become respondent, but only if it is authorised by either the creditors' committee, or the second creditors' assembly (FADC arts 237(3)(3) and 253).

Insolvency of a party during an arbitration

There is no difference whether the arbitration was instituted before or after the insolvency declaration. Thus, if the estate wants to institute or continue the arbitration after the insolvency declaration, it is represented by the receiver. The insolvency declaration confers on the estate the exclusive legal standing to act instead of the debtor with regard to its assets and liabilities.[12] The creditors and their representatives who were not parties in the arbitration proceedings do not have any specific status or any right with regard to these proceedings, regardless of the issuance of a bankruptcy decree. There is no right to commence

[9] Laurent Lévy, "Insolvency in Arbitration—Swiss Law, Financial Capacity of the Parties" in *German Institution of Arbitration* (Frankfurt: 2004), p.96.

[10] *Clear Star Ltd* Unreported April 9, 1991.

[11] ATF 117 II 94; Pierre-Yves Tschanz (1991) *Revue de l'Arbitrage* 709; cf. Werner, "Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause" (1991) 8 *Journal of International Arbitration* 13.

[12] Pierre-Robert Gillieron, *Commentaire de la Loi Fédérale sur la Poursuite pour Dettes et la Faillité, Article 159-270* (Lausanne Payot, 1999), fn.19, art.240.

an arbitration against an insolvent party, if a statutory moratorium is in place, unless the creditors' committee or assembly or the receiver, or, if they refuse, the court permits it following an application from the aggrieved party.

Assignment of right to arbitrate

A contractual non-assignment clause does not prevent the transfer of an arbitration clause from a debtor to its representative estate, unless the parties have expressly excluded arbitration in the case of the bankruptcy of one of them, which is unusual. In other words, the limitation of transferability of the contract is not applicable to the assignment of the contract to the estate after the adjudication of bankruptcy. As for assignment after insolvency per se, Swiss commentators and the Swiss Federal Tribunal have stated that arbitration clauses are transferred by the assignor to the assignee together with any claims that may be assigned, without the need of the debtor's consent, unless a special agreement or special circumstances suggest that the arbitration clause was intended to be effective only between the original parties.[13]

Security for costs

Under Swiss law, the arbitral tribunal has the power to order an estate to pay security for the costs of the respondent. The issues are the same as under English law. Although not security for costs as such, ICC arbitral award No.6697[14] held that Swiss law would not allow a party to make a provisional payment on account of the final award, such as to post a bond guaranteeing the enforcement of the final award, as this would be contrary to the equality among creditors.[15]

6. PAYMENT OF THE ARBITRATORS' COSTS

The insolvent party may not have enough money to pay the administering institution's fees and costs. What happens if the office-holder/receiver does not pay? Many institutional rules provide that the other party may pay the costs for the defaulting party. Pursuant to the Swiss Rules of International Arbitration (Swiss Rules) art.41(4), for example, if the parties do not pay the advance in full within 30 days after the receipt of the request, the arbitral tribunal shall inform the parties in order that one or other of them may make the required payment. If such payment is not made, the tribunal may suspend or terminate the proceedings. The party who cannot pay may have some protection, although if it is the claimant, it may next face an application for security for costs.

In Switzerland, the tribunal will apply the most applicable of the three laws set forth in AIPL art.178(2) to the issue regarding the validity of the arbitration clause. Unless the applicable institutional rules provide otherwise, a tribunal having its seat in Switzerland will not consider the clause invalid. However, an arbitration clause is a contract and, under the theory of *pacta sunt servanda*, financial problems do not release a party from its contractual obligation. A tribunal could thus consider that non-payment of the costs is a contractual breach nullifying the arbitration clause and thus ending the arbitration. If one of the parties then institutes litigation in Switzerland, alleging the nullity of the arbitration clause, the court

13 Andreas Von Tuhr and Arnold Escher, *Allgemeiner Teil des Schweizerischen Obligationenrechts*, 3rd edn (Zürich: Schultess Polygraphischer Verlag, 1974), p.357; Th. Rüede and R. Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht* (Zürich: Schultess, 1980), pp.69–70; Pierre Jolidon, *Commentaire du Concordat Suisse sur l'Arbitrage* (Berne: Staempfli, 1984), pp.140–141; ATF 103 II 75, pp.75–80.

14 ICC arbitral award No.6697, December 26, 1990.

15 (1992) *Revue de l'Arbitrage* 135.

will have to rule on an arbitration defence and might accept jurisdiction on the grounds that the arbitration clause was inoperative.[16]

7. STAYING THE ARBITRATION AND OTHER COMPLEXITIES

Will the tribunal stay the arbitration upon the insolvency of one of the parties

Under English law, what will be the likely reaction of the tribunal if one of the parties becomes insolvent and is put into an insolvency mechanism during an arbitration? As a matter of practicality, it is likely that the tribunal will, after having considered all the circumstances and the particular insolvency mechanism, order a short stay to enable the liquidator, administrator or other legal representative of that party to get up to speed in relation to the proceedings, possibly instruct new counsel and decide on its position in relation to the arbitration. Certainly, under the Arbitration Act and the main institutional rules, the tribunal has the power to make an order for the just management of the proceedings and to allow all parties to participate on an equal footing in the arbitration. Of course the tribunal will also consider the need to keep proceedings on track, and the right of the non-insolvent party to continue with the proceedings without delay, and this is likely to have an effect on the length of the stay. The tribunal may also need to hear the insolvent party on whether it is *able* to continue to participate in the proceedings.

If the insolvent respondent does not continue to play a part in the arbitration, perhaps because it cannot pay the tribunal's or the administering authority's fees or it simply chooses not to, there is no summary judgment mechanism in arbitration. If the other party, for whatever reason, wishes to obtain an award against the insolvent party (although the value of the award would be questionable), then the claimant will nevertheless have to continue the arbitration without its counterparty and prove all the elements of its claim. This will of course have costs implications, and although it is likely that the claimant will obtain a favourable award on the merits and on costs, it will have also paid the other side's share of the fees. The benefits of continuing the arbitration in these circumstances are, of course, highly questionable.

As for Swiss law, FACD art.207 provides for the stay of any civil pending procedure (whether in court or in arbitration) up to the 10th day following the date of the creditors' second assembly, save for urgent cases. The purpose of this stay is to allow the receiver to assess the overall situation and to review the information on the pending proceeding in order to make any necessary decision. This provision is not a matter of international public policy.[17] However, the stay appears to be rather a procedural issue to be determined by the *lex arbitri* not the *lex concursus*. In the absence of agreement between the parties, or an obligation under the arbitration rules chosen by the parties in accordance with AIPL art.182, a tribunal having its seat in Switzerland may stay the proceedings but has no duty to do so. The tribunal shall take into account the parties' interests and the requirements of speed and efficiency.[18] A stay is generally granted on restrictive conditions. If the tribunal's decision does not respect the fundamental principles of procedure and international public policy, the award may be set aside, AIPL art.190, or its enforcement may be denied (New York Convention art.V). Thus, an arbitral tribunal sitting in Switzerland shall stay the arbitration proceedings only if public policy considerations require it.[19] In practice, the tribunal will order a stay if the parties agree, or due process requires it, for instance to allow the receiver

[16] Gabrielle Kaufmann-Kohler and Laurent Lévy, "Insolvency and International Arbitration" in *The Challenge of Insolvency Law Reform in the 21st Century* (Zurich: Schultess, 2006), pp.271–273.

[17] ATF 93 III 84, p.89.

[18] ATF 199 II 386, p.389.

[19] ATF September 7, 1993, *Fincantieri Cantieri Navali Italiani SpA* (1994) *Bulletin ASA* 251.

as a newcomer to the proceedings some time to get familiar with the case and be in a position to properly continue and present it.

Must the tribunal respect foreign insolvencies?

So far, the analysis has only been of the tribunal's reaction to English insolvency proceedings. But an interesting question is what heed a tribunal must give to foreign insolvency proceedings affecting a party to an arbitration in England? In *Felixstowe Dock and Railway Co v US Lines Inc*[20] and *Banque Indosuez SA v Ferromet Resources Inc*,[21] the court considered a situation where Ch.11 proceedings had been commenced in the United States and an injunction had been issued by a US court, of purported global effect, preventing creditors bringing any proceedings against the Ch.11 company. Two companies nevertheless tried to bring proceedings in England to attach assets of the Ch.11 companies in the jurisdiction. The cases went different ways, as a result of their differing facts, but the key question the court asked was whether the creditor's interest would in any event be protected by the Ch.11 proceedings. If not, then the court will not recognise the effect of the proceedings and the injunction and will allow the creditor to attach the assets in England. What this means is that, depending on the facts, courts and tribunals will not necessarily have to treat themselves bound by foreign insolvency proceedings. Furthermore, a tribunal is not under any obligation to respect foreign proceedings as a result of any international principles of comity and reciprocity, which will leave its position even more flexible. On the other hand, a sensible tribunal will always consider the submissions of a party involved in an insolvency process, and the necessary effects this will have on its role in the arbitration and take a common sense view on whether to accept submissions on the effect on the party and the proceedings. It is likely however, that if it can be proved that the party is insolvent, then at the very least a stay will be granted, on the principles set out above, in order for the insolvency office-holder to get its house in order.

[20] *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] Q.B. 360.
[21] *Banque Indosuez SA v Ferromet Resources Inc* [1993] B.C.L.C. 112.