INTERNATIONAL ARBITRATION V. CROSS-BORDER INSOLVENCY: CHANNELING 'THE CONFLICT OF POLAR EXTREMES' INTO EFFECTIVE LITIGATION STRATEGY

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1. INTRODUCTION

> [A] conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution.[1]

This oft-quoted paragraph from the seminal U.S. Court of Appeals for the Second Circuit decision in *In re United States Lines Inc.*, highlights the policy debate at the intersection of domestic U.S. arbitration and insolvency legislation. And, when you add into the mix the element of the international, the binary polar conflict expands manifold and therefrom emerge issues as convoluted as the serpents on Medusa's head.

Consider these facts: Company A, a U.S. company borrows $100 from Company B, a Chinese company pursuant to a loan agreement, which calls for arbitration of disputes in Hong Kong. Company A files for bankruptcy in the United States, which triggers an automatic stay of all proceedings against Company A. Reacting to this, Company B files an arbitration in Hong Kong to recover amounts outstanding under the loan. The Hong Kong-seated tribunal rules it is not bound by the U.S. bankruptcy court's automatic stay, and a Hong Kong court issues an anti-suit injunction enjoining the U.S. insolvency litigation in aid of arbitration. In these circumstances, which proceeding-the U.S. bankruptcy or the Hong Kong —seated arbitration— will move forward and to what effect?

1 *In re U.S. Lines Inc.*, 197 F.3d 631, 640 (2d Cir. 1999) (citation omitted).

Putting to one side policy debate, practical issues such as the ones outlined in this hypothetical dictate how matters will proceed when dueling international arbitrations and cross-border insolvencies collide. While there is no right or wrong answer to this legal riddle one central theme emerges: there are differences in national regimes related to insolvency and arbitration, which may be effectively arbitraged at the international level by litigants in framing their global litigation strategy. That is the focus of this article.

2. IF A COUNTERPARTY TO AN ARBITRATION FILES FOR BANKRUPTCY, WHAT HAPPENS TO THE ARBITRATION?

In most jurisdictions, the commencement of an insolvency triggers some form of moratorium or stay of legal proceedings-including pending arbitrations-involving the insolvency estate. However, for such a stay under the laws of one country (the United States in the hypothetical discussed above) to have effect on an international arbitration seated in another country (Hong Kong), it must have extraterritorial application. Indeed, while the domestic insolvency legislation may state that its stays have extraterritorial effect, the true test of the remit of such stays depends on whether the counterparty and/or foreign-seated arbitral tribunal will defer to that insolvency regime.

2.1. THE PERSPECTIVE FROM THE UNITED STATES

In the United States, Section 362 of the U.S. Bankruptcy Code provides for an automatic stay of all proceedings-including arbitrations-upon the filing of a bankruptcy petition (whether voluntary or involuntary).[2] Such stays are regarded as a substantial protection for the debtor in that they prevent creditors from taking any action against the debtor or its property absent prior relief from the bankruptcy court. Under the U.S. Bankruptcy Code, the protection of a stay is said to cover the debtor's property 'wherever located and by whomever held'.[3] While several U.S. courts have found that 'the automatic stay applies extraterritorially',[4] there are

2 11 U.S.C. § 362(a)(1) (a bankruptcy 'petition ... operates as a stay ... of... the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of' the petition).

3 11 U.S.C. § 541(a).

4 *In re Ampal-Am. Isr. Corp.*, 562 B.R. 601, 612 n.12 (Bankr. S.D.N.Y. 2017) ('Courts have held that the automatic stay applies extraterritorially ... because the automatic stay protects the bankruptcy court's exclusive *in rem* jurisdiction over 'property of the estate' from dismemberment by creditors.' (citation omitted)); *see also Underwood v. Hilliard* (*In re Rimsat, Ltd.*), 98 F.3d 956, 961 (7th Cir. 1996); *Sec. Inv. Prot.*

practical limitations on the scope of such stays. Although any pending U.S.-seated arbitration comes within the purview of Section 362, what happens if the arbitration is seated outside the United States and involves a foreign counterparty? In that scenario, even though U.S. legislation may describe the automatic stay as having extraterritorial effect, is the foreign seated-tribunal required to recognize it?

In this regard, the Second Circuit's decision in *Fotochrome v. Copal*[5] is instructive. In *Fotochrome*, a Tokyo-seated arbitration was ongoing between Fotochrome (a Delaware corporation) and Copal (a Japanese corporation) when Fotochrome filed for bankruptcy in the U.S. An automatic stay was triggered under U.S. bankruptcy law, which Fotochrome presented to the Tokyo-seated tribunal as a basis for staying the arbitration. The Tokyo-seated tribunal declined to stay the arbitration, and issued an award against Fotochrome. Copal, the Japanese corporation, although victorious in the arbitration now had to have that award enforced in the U.S. The bankruptcy court, unsurprisingly held that the award-issued in violation of the U.S. stay-was not valid, and that it could revisit the merits of the dispute. On appeal, the Second Circuit rejected the bankruptcy court's position in its entirety. Specifically, the Second Circuit ruled that a bankruptcy court has authority to stay an international arbitration only if it had *in personam* jurisdiction over the foreign party. Because, in this case, the defendant Copal (a Japanese corporation), did not have sufficient minimum contacts with the United States, the Second Circuit held that the bankruptcy court did not have jurisdiction to stay the arbitration. In these circumstances, the court upheld the validity of the arbitration award and ruled that it could be enforced in the United States.[6]

Similarly, in *Behring International v. Islamic Republic Iranian Air Force*,[7] the Iran-U.S. Claims Tribunal refused to stay arbitration proceedings, after Behring (a Texas corporation) had filed a Chapter 11 petition in the U.S., on the basis that neither the Algiers Accords (establishing the Iran-U.S. Claims Tribunal) nor the rules

Corp. v. BLMIS (*In re BLMIS*), 474 B.R. 76, 81-82 (S.D.N.Y. 2012); *In re Springer-Penguin, Inc.*, 74 B.R. 879, 884 (S.D.N.Y. 1987) (ruling that under 11 U.S.C. § 105(a), courts have broad equitable powers to enjoin any proceeding that interferes with the administration of the debtor's property, including foreign-seated arbitrations).

5 *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

6 Notably, in so ruling, the Second Circuit observed, that while it may appear 'anomalous that a domestic contracting party might have been restrained from pursuing the arbitration remedy upon the filing of the petition herein, while a Japanese contracting party, similarly situated, may proceed to an arbitration award' in fact, '[t]he result is not quite as anomalous as appears ... . For in a converse situation an American company might procure an arbitral award in the United States against a Japanese firm in financial trouble whose Japanese creditors might be under a stay from a Japanese court.'. See supra note 5 at 519-20.

7 *Behring Int'l, Inc. v. Islamic Rep. Iranian Air Force*, 8 Iran-U.S. Cl. Trib. Rep. 238 (1985).

governing the tribunal contemplate that its proceedings could be regulated by the internal law of either the U.S. or Iran. Highlighting the tension between domestic insolvency law and the parties' choice for a non-partisan international arbitration forum, the tribunal further noted that the purpose of establishing the Iran-U.S. Claims Tribunal was to maintain neutrality, and the application of the U.S. Bankruptcy Code would violate such intent.

The extraterritorial reach of the stays in support of insolvencies also depends on whether the insolvency is a domestic insolvency (i.e., commenced in the United States) or a foreign insolvency (i.e., commenced outside the United States). Although, the U.S. Bankruptcy Code defines property of the estate to include legal or equitable interests of the debtor in property 'wherever located',[8] this holding is limited to domestic bankruptcies commenced under Chapter 11 and Chapter 7 of the code.[9] In the context of a foreign insolvency recognized under Chapter 15 of the code, the automatic stay has a 'more limited extraterritorial application'[10] and only protects the 'property of the debtor that is within the territorial jurisdiction of the United States'.[11]

2.2. INTERNATIONAL PERSPECTIVES

The insolvency regimes of most other countries include provisions either staying proceedings against the debtor (similar to Section 362 of the U.S. Bankruptcy Code) or otherwise limiting the debtor's ability to participate in arbitration proceedings.[12]

Whether or not the domestic legislation of those countries deem these protections to have extraterritorial effect varies across jurisdictions. As one author surveying insolvency regimes in Europe explains:

8 11 U.S.C. § 541(a).

9 *In re Ampal-Am. Isr. Corp.*, 562 B.R. at 612 n.12.

10 *In re JSC BTA Bank*, 434 B.R. 334, 343 (Bankr. S.D.N.Y. 2010) (Peck, B.J.) (Here, a Kazakh bank, commenced reorganization proceedings in Kazakhstan, and subsequently sought recognition in the U.S. of the Kazakh proceeding under Chapter 15. The U.S. bankruptcy court granted recognition of the Kazakh proceeding as a foreign main proceeding, along with the protections afforded by Section 1520 of the U.S. Bankruptcy Code, which includes the stay of legal proceedings under Section 362. Prior to the U.S. bankruptcy court's recognition order, an arbitration had been commenced in Switzerland against the Kazakh bank by a French bank. The Kazakh bank failed to enjoin the Swiss arbitration on the basis of the U.S. stay, and then unsuccessfully applied to the U.S. bankruptcy court to find the French bank in contempt for a willful violation of that stay.).

11 See supra note 10.

12 *See generally* S. VORBURGER, 'International Arbitration and Cross-Border Insolvency: Comparative Perspectives, International Arbitration Law Library', (Kluwer Law Int'l 2014), pp. 180-91.

In Germany, the insolvency law automatic stay provisions do not apply to international arbitrations. Under English law, the automatic stay of proceedings —including arbitrations— depends on the type of insolvency proceeding and mostly involves a discretionary decision by English courts. The automatic stay imposed by French insolvency law ... applies also to international arbitration. It also is triggered upon the formal recognition of a foreign insolvency in France. The scope of the Swiss automatic stay ... does not apply to international arbitrations.[13]

Turning eastwards to Asia, again, every country has its own distinctive approach. For example, in China, the applicable insolvency legislation,[14] which includes a provision for the stay of pending arbitrations,[15] is expressly stated to apply to 'the debtor's property outside of the territory of the People's Republic of China'.[16] By contrast, in India, although a similar moratorium prohibiting the commencement or continuation of proceedings against the debtor is triggered, the legislation is silent as to whether the proceedings to be enjoined include foreign proceedings.[17] The legislation in Singapore, offers a third approach whereby, the court ordering a stay of proceedings may order this to apply 'to any act of any person ... within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere'.[18]

Ultimately, the specifics of the national legislation may not be a deterrent for a foreign-seated tribunal. As was demonstrated in both *Fotochrome* and *Behring International*, regardless of whether a country's domestic insolvency legislation is stated to have extraterritorial effect, its enforceability really depends on whether the foreign-seated tribunal decides to defer to that country's laws.

13 See supra note 12, p. 191.

14 *See* Enterprise Bankruptcy Law of the People's Republic of China, Art. 20 (Aug. 27, 2006), (available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/74665/108007/F161827255/CHN74665%20Eng2.pdf>).

15 See supra note 14 ('After the people's court accepts an application for bankruptcy, any civil action or arbitration involving the debtor that has been started but has not yet been concluded shall be suspended; however, the action or arbitration can proceed after an administrator takes over the debtor's property.').

16 See supra note 15, Art. 5.

17 *See* The Insolvency and Bankruptcy Code, 2016, Part II § 14 (May 28, 2016), https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf. The moratorium provision under Section 14 is broadly worded, and could, in theory, encompass a stay of both local and foreign proceedings. Note however, the stated territorial scope of the legislation applies only to the 'whole of India'. See supra note 16, § 1(2). On that basis, an argument could be made that the legislation has no extra-territorial effects. Again, other provisions in the statute envision that administrators may attach a debtor's property 'located in a foreign country'. See supra note 16, § 18(f)(i).

18 Insolvency, Restructuring and Dissolution Act of 2018, § 64(5)(b) (Oct. 31, 2018), (available at <https://sso.agc.gov.sg/Acts-Supp/40-2018/Published/20181107#pr64->).

This point is further exemplified by the oft-discussed insolvency of Elektrim S.A., a Polish company involved in two parallel arbitrations: (i) an ICC arbitration seated in Geneva, and (ii) an LCIA arbitration seated in London. After both arbitrations were commenced, Elektrim S.A. was declared bankrupt in Poland. Under Polish law in effect at the time, arbitration agreements entered into by a debtor are annulled and pending arbitrations are to be discontinued. Relying on this, Elektrim S.A. sought to discontinue the pending arbitrations but achieved diametrically different results. The London tribunal (applying English law pursuant to applicable EC regulations) ruled that arbitration agreements are not annulled by bankruptcy, and the arbitration could continue (a ruling later upheld by the English Court of Appeal).[19] By contrast, the Geneva tribunal (applying Polish law pursuant to Swiss conflict-of-laws rules) found that the arbitration agreement was no longer effective, and the arbitration was discontinued (a decision later upheld by the Swiss courts).[20]

3. ARE THERE CIRCUMSTANCES WHERE INSOLVENCY PROCEEDINGS SHOULD DEFER TO ARBITRATION?

The suspension of arbitrations in favor of insolvency is potentially open to criticism by those who ask: shouldn't parties who have expressly contracted to have their disputes decided in arbitration (and out of court) have that contractual bargain recognized? And, in circumstances where an entity commences insolvency for purposes of avoiding that contractual bargain, what recourse is available?

In obvious contrast to automatic stays in support of insolvency, the commencement of an arbitration does not typically trigger an automatic stay of the insolvency. However, courts in many common law jurisdictions have the discretion to stay or dismiss litigation (including insolvencies) that impinge on an agreement to arbitrate. Two scenarios where that discretion may be exercised are discussed below.

3.1. WINDING-UP PETITIONS FOR A DEBTOR'S FAILURE TO PAY ITS DEBTS MAY BE ENJOINED IN FAVOR OF ARBITRATION

Insolvency and arbitration often collide in the context of involuntary petitions commenced by creditors to wind-up a debtor who fails to pay its debt. In circumstances where the underlying debt is subject to an arbitration clause, a deb-

19 *See Syska v. Vivendi Universal S.A.* [2009] EWCA Civ. 677.

20 *See Vivendi S.A. v. Deutesche Telekom AG*, No. 4A_428.2008 (First Civ. Law Ct., Mar. 31, 2009).

tor may wield the arbitration as a shield to stave off an unwanted bankruptcy (i.e. seeking to deny the debt) whereas a creditor may use the insolvency as a sword to cut through the arbitral process (on the theory that the debt ought not to be disputed). This issue has been the subject of extensive debate in recent years in the context of creditors either commencing insolvencies that (in the view of the debtor) are in bad-faith to avoid arbitration or, conversely, debtors raising the prospect of arbitration in a manner that (in the view of the creditor) is a sham defense made in order to stall insolvency.

In England, where the underlying debt triggering the involuntary winding-up petition is subject to an arbitration agreement, the insolvency proceeding will be stayed or dismissed in favor of arbitration 'save in wholly exceptional circumstances'.[21] Any other compromise between the conflicting interests of insolvency and arbitration 'would inevitably encourage parties to an arbitration agreement-as a standard tactic-to bypass the arbitration agreement ... by presenting a winding up petition',[22] and it

would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately ... [which] would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 [Arbitration] Act.[23]

The English position has been described by the courts in the British Virgin Islands as 'com[ing] close to the automatic stay position' where the winding-up petition will be stayed in favor of the arbitration agreement.[24] In that jurisdiction, the Court of Appeal of the Eastern Caribbean Supreme Court rejecting the English approach, has held that winding-up petitions should not be stayed in favor of arbitration unless the debts are disputed on 'genuine and substantial

21 *Salford Estates (No.2) Ltd. v. Altomart Ltd.* [2014] ECWA Civ. 1575, ¶ 39. (Here, the Court of Appeal upheld the dismissal of a winding-up petition in order to compel the parties to resolve their dispute over the debt by arbitration. Although the court found that the mandatory stay provisions of the English Arbitration Act, 1996 —requiring the stay of legal proceedings in favor of arbitration— does not apply to winding up petitions, under the English Insolvency Act, 1986, courts have discretion whether to order winding up. And, the court should, save in 'wholly exceptional circumstances', exercise that discretion consistently with the legislative policy embodied in the English Arbitration Act and stay or dismiss the winding-up petition.).

22 See supra note 21 ¶ 40.

23 See supra note 22; *see also Eco Measure Mktg. Exch. Ltd. v. Quantum Climate Servs. Ltd.* [2015] EWHC 1797 (Ch), *880 (observing that '[t]he result of *Salford* … is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause').

24 *Jinpeng Grp. Ltd. v. Peak Hotels & Resorts Ltd*, Claim No. BVIHCMAP 2014/0025, ¶ 47 (Dec. 8, 2015).

grounds'.[25] In that decision, the BVI court, notwithstanding the pendency of a Hong Kong-seated arbitration, given the risk of dissipation of assets (among other factors), refused to stay the local insolvency proceedings.[26]

This issue-i.e., whether there is a presumption that winding-up petitions should ordinarily be stayed in favor of arbitration *or* only be stayed if the debtor shows that there is a *bona fide* dispute to be determined in arbitration-has generated significant debate in many other jurisdictions including Hong Kong,[27] Singapore,[28] and the Cayman Islands.[29]

Although this particular issue has not been the subject of debate in the United States, the U.S. Bankruptcy Code does provide that involuntary bankruptcies for failure to pay debts can be commenced if the debt triggering the petition is not 'the subject of a *bona fide* dispute'.[30] And, in at least one case, where a debtor

25 See supra note 24, p. 3.

26 See supra note 25; *cf. IS Investment Fund Segregated Portfolio Co. v. Fair Cheerful Ltd.*, Claim No. BVIHC (COM) 2020/0034, ¶ 9 (July 16, 2020) (Here, the BVI Commercial Court dismissed a petition to wind-up a BVI company —without testing whether the debt could be disputed on substantial and reasonable grounds— in favor of a Hong Kong-seated arbitration as mandated under the parties' agreement. The court distinguished *Jinpeng* on the basis that there was no risk of assets being dissipated, and the matter was an ordinary commercial dispute with no allegations of fraud or bad faith.).

27 *See, e.g.*, *Lasmos Ltd. v. Sw. Pac. Bauxite (HK) Ltd.* [2018] HKCFI 426, ¶ 31 (following the approach in *Salford*, the court held that a winding-up petition should 'generally be dismissed' if the underlying debt is subject to an arbitration agreement). *Lasmos* has been criticized with more recent judgments suggesting that it is not sufficient for a debtor to raise an arbitration agreement to defeat a winding-up petition but that, consistent with the pre-*Lasmos* position, the debtor must establish it has a *bona fide* defense on substantial grounds. *See, e.g.*, *Dayang (HK) Marine Shipping Co., Ltd. v. Asia Master Logistics Ltd.* [2020] HKCFI 311, ¶ 57; *cf. But Ka Chon v. Interactive Brokers LLC* [2019] 4 HKCA 873, ¶ 66.

28 *See, e.g.*, *AnAn Grp. (Singapore) Pte Ltd. v. VTB Bank (Pub. Joint Stock Co.)*, [2020] SGCA 33, ¶¶ 47, 48 (Here, the court ruled that the petition filed by a Russian state-owned bank to wind up a Singaporean company for its alleged failure to pay a debt must be dismissed, and the dispute arbitrated pursuant to the parties' arbitration agreement. Applying *Salford*, the court held a '*prima facie* standard' of review applies to determine whether the winding-up proceedings should be stayed or dismissed in favor of arbitration. By contrast, where no arbitration agreement is involved, the debtor has to surmount a higher 'triable issue standard' of review —requiring a showing of a *bona fide* dispute in order to defeat the winding-up petition.).

29 *Compare In re China CVS (Cayman Is.) Holding Corp.*, CICA (Civil) Appeal Nos. 7 & 8 of 2019, ¶¶ 2-3, 138-141, 145 (C.A. Apr. 23, 2020) (Cayman Is.) (refusing to stay a winding up petition for the just and equitable winding-up of a company even though the relevant shareholders' agreement included an arbitration clause), *with In re SPhinX Grp.*, CICA No. 6 of 2015, ¶¶ 4, 49, 52-53(C.A. Feb. 2, 2016) (Cayman Is.) (upholding a stay of domestic liquidation proceedings in favor of an international New York-seated arbitration where the substantive merits of a dispute between the liquidators and certain third parties was governed by an arbitration agreement).

30 11 U.S.C. § 303(b) ('An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title —(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a

commenced an involuntary winding-up petition in an effort to avoid arbitration, the petition was dismissed as having been brought in bad faith, with the court noting that the use of involuntary bankruptcy as a litigation tactic in pending proceedings should not be countenanced.[31]

3.2. COURTS AT THE SEAT OF THE ARBITRATION MAY ISSUE ANTI-SUIT INJUNCTIONS TO ENJOIN FOREIGN INSOLVENCIES

The second scenario where insolvencies may be stayed in favor of arbitrations arise from anti-suit injunction jurisprudence. Anti-suit injunctions in aid of arbitration are typically sought in circumstances where parallel litigation is commenced in contravention of the parties' arbitration agreement.[32] When parallel insolvencies and arbitrations are commenced in different countries, courts at the arbitration seat may issue anti-suit injunctions to enjoin the foreign insolvency. Oftentimes such anti-suit injunctions are in direct conflict with the stays issued by the insolvency courts in aid of the debtor's insolvency.

This conflict-between stays issued in support of insolvency and anti-suit injunctions in aid of arbitration-was tested recently in a pair of cases involving automatic stays issued pursuant to the U.S. Bankruptcy Code and foreign seated arbitrations, one seated in Bermuda and the other seated in Hong Kong.

In the first example, the Bermuda Supreme Court issued anti-suit injunctions in aid of a Bermuda-seated arbitration commenced by certain Bermuda-based creditors against a U.S. debtor that was in Chapter 11 (and protected by stays issued by the U.S. bankruptcy court). In issuing the anti-suit injunction enjoining adversary proceedings before the U.S. bankruptcy court in favor of its local arbitration, the Bermuda court dismissed an argument that it should stay its hand "based on the premise that an extra-territorial doctrine of US bankruptcy law arguably supersedes Bermuda statute law.' '.[33] Reacting to the

bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $16,750 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.').

31 *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015) (Here, the Third Circuit held that even if the statutory requirements for involuntary bankruptcy are met, if the creditors file the petition in bad faith —for example, to avoid arbitration— then the bankruptcy petition should be dismissed.).

32 *See generally* G. B. BORN, 'International Arbitration: Law and Practice', (Wolters Kluwer, 2015, 2nd ed.), pp. 68-69.

33 *Ironshore Ins. Ltd. v. MF Glob. Assigned Assets LLP*, Case No. 2016: No. 394, Reasons for Decision, ¶ 4 (Bermuda Sup. Ct. Dec. 23, 2016) (quoting *ACE Berm. Ins. Ltd. v. Peers Pederson as Plan Tr. for the Estates*

anti-suit injunction, the U.S. bankruptcy court commented that although it could not 'force the Bermuda Court to recognize and enforce a decision of th[e] [U.S.] Court'[34] it could enforce its stay of the arbitration by holding the Bermuda-based claimants in contempt.[35] While ultimately, the U.S. court concluded that the arbitration clause in dispute was broadly phrased, and pursuant to the pro-arbitration policy under the U.S. Federal Arbitration Act, the matter ought to be resolved by arbitration in Bermuda,[36] it did so without ceding that the U.S. bankruptcy court rather than Bermudian courts had jurisdiction to decide whether arbitration was the correct forum.[37]

The second example is the multi-jurisdictional battle involving the 2018 bankruptcy of Toys 'R' Us, wherein the automatic stay under Section 362 of the U.S. Bankruptcy Code came into direct conflict with an anti-suit injunction issued by a Hong Kong court. In that case, Toys 'R' Us filed for bankruptcy in the United States and was afforded protections under Section 362. As a part of its reorganization, the company sought to sell one of its key Asian assets pursuant to a court-supervised auction. The company's Asian partner, however, filed an ICC arbitration in Hong Kong under the parties' shareholders agreement to block that sale. In aid of that arbitration, the seat court in Hong Kong issued an *ex parte* injunction enjoining Toys 'R' Us from proceeding with its auction. The U.S. court reacted by extending the automatic stay protecting the toy company, and enjoining the Hong Kong arbitration.[38] With these directly conflicting orders in place, should or could the arbitration proceed? That question remains unanswered because the parties reached a settlement.[39]

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of Bos. Chicken Inc. [2005] Bda LR 44, a case in which CJ Kawaley granted a similar *ex parte* anti-suit injunction by way of enforcing agreements to arbitrate insurance coverage disputes).

34 *MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 562 B.R. 55, 63 (Bankr. S.D.N.Y. 2017).

35 *MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 562 B.R. 41 (Bankr. S.D.N.Y. 2017).

36 *MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 571 B.R. 80, 90 (Bankr. S.D.N.Y. 2017).

37 *See MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.)*, 562 B.R. 866, 877 (Bankr. S.D.N.Y. 2017).

38 *See Toys* 'R' *Us, Inc. v. Fung Retailing Ltd.,* No. 17-34665, Adv. Proc. No. 18-03090 (Bankr. E.D. Va. Sept. 27, 2018) (Dkt. No. 25). By contrast to *Fotochrome*, in this case, the U.S. courts justified the extension of its stay to the foreign arbitration on the basis that it had personal jurisdiction over the company's Asian partner because the partner had submitted to the U.S. court's jurisdiction by participating in the U.S. insolvency proceedings. *See Fung Retailing Ltd. v. Toys* 'R' *Us. Inc.*, 593 B.R. 724, 734 (E.D. Va. 2018).

39 *See* Press Release, Toys 'R' Us, Toys 'R' Us Asia Announces New Joint Ownership Structure (Nov. 16, 2018), (available at <https://www.funggroup.com/wp-content/uploads/2018/11/TRU-Press-Release_16Nov-EN.pdf>).

The above examples are illustrative of how litigators can strategically pit stays issued in support of insolvencies against anti-suit injunctions issued in aid of arbitration. And, although arbitration may be favored (as was the case in the first example), given the clear tension between the jurisdiction of the insolvency court and the arbitration seat court, any jurisdictional conflict is likely to enlarge the dispute and create complex (and costly) debate.

4. CONCLUSION

The foregoing discussion demonstrates that the confluence of international arbitration and cross-border insolvencies is fertile ground to formulate litigation strategy on a global scale.

A key tool that emerges at this intersection are stays. Whether issued in aid of arbitration or insolvency, stays are powerful tools that can be employed to influence the course of international disputes. Stays issued in support of insolvencies may be deployed to stall arbitration proceedings and to avoid paying arbitration awards. Conversely, anti-suit injunctions issued in aid of arbitration may be used to block insolvencies or disrupt restructurings.

As the case law canvassed in this article demonstrates, it is difficult to predict with any certainty whether a stay of arbitration triggered by an insolvency in one country-or, for that matter, an anti-suit injunction issued against an insolvency proceeding-will be honored by a tribunal or court in a different country. From the perspective of international litigation strategy, by arbitraging the differences in the regulatory regimes across jurisdictions, the desired outcome-of pressing forward with one proceeding and stalling the other-may be achievable. For example:

a) To increase chances that an arbitration proceeds, one might consider choosing a seat that is not the home jurisdiction of either counterparty. Why? Because any insolvency is likely to be commenced in the parties' home jurisdictions, and an arbitration seated in those jurisdictions will be subject to the stays issued by the domestic bankruptcy courts. By seating the arbitration in a third country, those proceedings may be beyond the reach of the home jurisdiction's stays thus preserving the ability to have the dispute resolved in accordance with parties' bargained-for terms.

b) To minimize the chances of being subjected to an involuntary winding-up proceeding over the non-payment of a debt, one might designate arbitration in the controlling documents. That contractual choice, in itself, may be reason for a bankruptcy court to stay its hand (an option that is simply unavailable if the parties consent to courts). And, to the extent possible, chose a seat in a jurisdiction where the default is to stay or dismiss winding-up petitions in favor of arbitration (e.g., England or Singapore).

Central to these considerations are two choices. First is the choice of arbitration itself. Designating arbitration may give parties the option of having the dispute heard outside of the insolvency forum and concomitant opportunities to stay the insolvency or obtain other relief in aid of arbitration. Second is the choice of seat, which (as arbitration practitioners are keenly aware) is always critical. Factors that typically influence the choice of seat are whether the jurisdiction has pro-arbitration policies and the seat court's approach to recognition and enforcement of arbitral awards. In the context of insolvency, as the *Elektrim/ Vivendi* dispute makes clear, the seat is often the single variable that may be dispositive of whether an arbitration will go forward in the face of a competing foreign insolvency. Accordingly, in choosing a seat, due regard to the principles that courts at the seat will apply in the event of an insolvency is an additional data-point for practitioners to consider.