Arbitration and Insolvency: Issues of Applicable Law

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Contents

I. Introduction

The global economic storm which has been affecting world economy in the last year has raised an increasing interest in the impact of cross border insolvency on international arbitration, as have the recent decisions of the English and Swiss courts in the long-lasting Vivendi/Elektrim dispute. One scenario of particular interest is indeed when a party to the arbitration agreement becomes subject to insolvency proceedings[1] after the

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1 The terms «insolvency» or «bankruptcy» are used to refer to liquidation, bankruptcy and reorganisation proceedings; «insolvent party» or «debtor» to refer to the party to the insolvency proceedings, the company in liquidation or under administration as well as the personal bankrupt; «in-

commencement of the arbitration and before the award is rendered. Many questions then arise as to the effect of the insolvency proceedings on the arbitration agreement, the conduct of the arbitral proceedings, the nature of the claims which can still be heard in the arbitration and the content of the award itself[2].

Insolvency law does have a propensity to interfere with arbitration because it reflects different policy objectives. The underlying principle of almost all insolvency laws is the equality of creditors, hence the centralisation of all claims, the high degree of state control and the mandatory substantive and procedural law provisions affecting the insolvent party's assets, and governing the conduct of the insolvent party, the creditors and the trustee. On the other hand, arbitration is concerned with privity of contract, party autonomy, certainty in commercial transactions, i.e. the upholding of the parties' arbitration agreement in the specific legal relationship between (usually) two parties.

Arbitral tribunals have no lex fori but may be called upon to apply different domestic laws to different issues: the law applicable to the arbitration at the seat of the arbitration (the lex arbitri), the law applicable to the merits (lex causae or lex contractus) and conflict of laws rules. Where does insolvency law fit in? To what extent must or should arbitral tribunals apply insolvency law? To what extent should they be concerned by a risk of annulment of the award or of non-recognition and non-enforceability of the award in the likely place of enforcement?

Whenever arbitration meets insolvency, the critical question is indeed whether the relevant insolvency law provision (or decision of the insolvency courts) is binding on the arbitral tribunal. Can the tribunal just ignore the insolvency proceedings or should the arbitration be stayed or terminated? Should the trustee be allowed a time extension to intervene? Is the arbitration agreement affected? Should certain claims be ignored as non-arbitrable?

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solvency order» as the court order or judgement opening the insolvency proceedings issued by the competent State courts – the «insolvency courts»; and «trustee» as the liquidator, administrator or receiver.

2 A range of issues not considered in this paper also arise when the insolvency order is issued before the arbitration agreement is concluded, or after the arbitration agreement is concluded but before the arbitral proceedings are commenced, or indeed after the award has been rendered.

The approach to these issues is not straightforward. Much has been written in part by reference to domestic insolvency and/or domestic arbitration laws, as it is undeniably difficult to lay down general principles as to which law ought to be applied by arbitral tribunals to which particular issue, given the few international instruments available, the variety of domestic insolvency, arbitration and private international laws, and given the resulting lack of uniform approach by State courts and arbitral tribunals[3].

Issues of applicable law in this area may be tackled from many different angles. This paper seeks to set out some propositions by focusing on the impact of the seat of the arbitration, of the type of issue faced by the arbitral tribunal, and of the place of possible or likely enforcement of the award. These propositions may prove controversial from a doctrinal viewpoint, but, to a large extent, they reflect arbitral practice even if they inevitably do so by reference to specific domestic laws[4].

Not addressed below is the impact of the lex causae as it is generally accepted that the public policy and mandatory provisions of the lex causae should be applied by arbitral tribunals[5]. In practice, however, arbitral tribunals are usually called upon to consider the application of insolvency law provisions, on the one hand, on the arbitral procedure (typically the

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3 For domestic and comparative analyses see *e.g.* BERNET; BIESTERFELD; BROWN-BERSET/LÉVY; BURN/GRUBB; FOUCHARD; HANOTIAU; KAUFMANN-KOHLER/LÉVY; KRÖLL (2006), KRÖLL (2009); LAZIC (1998); LAZIC (1999); LÉVY; PERRET; MOURRE (2007); ROSELL/PRAGER; WAGNER (2008) and WAGNER (2009).

4 The exercise is rendered difficult by the limited availability of both judicial and arbitral case law addressing directly the relevant issues. French case law is abundant in this area, in particular because certain key provisions of French insolvency law have repeatedly been held to form part of international public policy by the French courts.

5 *E.g.* RIGOZZI, p. 462 (regarding the public policy of the *lex causae*; citing DTF 120 II 155); POUDRET/BESSON, p. 609 N 706; FOUCHARD/GAILLARD/GOLDMAN, p. 848 N 1517; LAZAREFF, p. 137; MOURRE (2007), p. 166 N 28 (in the context of insolvency). *Contra*: RADICATI DI BROZOLO, pp. 453-460, esp. p. 455 and pp. 459-60 (in the absence of other connecting factors to the *lex arbitri*); VOSER, pp. 339-340. See also the discussion in MAYER (1986), p. 275 (the arbitrator must apply mandatory law *«[...] whenever the following three statements are true: the mandatory rule belongs to the lex contractus, the parties have not expressly excluded its application (which is doubtless exceedingly rare in practice), and finally one of the parties has invoked it before the arbitrators. The situation is different whenever any one of these conditions is not fulfilled»).*

issue of stay), or, on the other, on the validity of the arbitration agreement, and in both cases the tribunal's main concern should be the lex arbitri.

II. The Impact of the Seat of the Arbitration

The main restriction on the international arbitral tribunal is the risk of annulment by the courts of the seat of the arbitration[6]. There are few jurisdictions in which the parties can agree to waive their right to challenge arbitral awards, as they can in Switzerland[7]. As explained below, the available case law suggests that it is primarily by reference to the seat of the arbitration that arbitral tribunals consider whether or not insolvency law should be applied.

Specifically, arbitral tribunals tend to consider themselves bound by insolvency law provisions essentially where (a) the law of the seat recognizes them as mandatory law and/or part of the public policy; and (b) the insolvency order has been (or could be) recognised in the country of the seat. The case of the EU (seat of the arbitration and insolvency proceedings filed within the EU) is governed by specific conflict of laws rules as set out in the EC Regulation on Cross Border Insolvency, also applied by arbitral tribunals.

A. Insolvency proceedings filed in the country of the seat of the arbitration

Under most legal systems, key provisions of insolvency law (in particular those aimed at guaranteeing the equal treatment of creditors and the proper administration of the insolvent party's estate by the trustee) are considered mandatory provisions of domestic law (lois de police or lois d'application imperative), and even at times as part of the domestic and international public policy as defined by the national law.

Since arbitral tribunals have no lex fori, they should not be concerned with the mandatory law provisions or the domestic public policy of the

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6 As to the risk of non-enforcement see Section IV below.

7 Art. 192 PILS. It is the case also in Sweden, Tunisia and Belgium; for a discussion on Art. 192 PILS, see *e.g.* BAIZEAU; BESSON; JERMINI/ARROYO.

country of the seat. Such provisions should only be binding on the arbitral tribunal where they form part of the international public policy recognized by the law of the seat[8]. Accordingly, as illustrated by the decisions discussed below, in several jurisdictions, State courts and arbitral tribunals, appear to concur that where insolvency proceedings are filed in the country of the seat, the arbitration may have to give way to certain mandatory insolvency rules, as well as certain decisions of the insolvency courts, so as to avoid the risk of annulment of the award.

Many of the court decisions and awards available concern the requirement for a stay of the arbitral proceedings because it is a recurrent issue in practice. Most national insolvency laws provide for an automatic stay once insolvency proceedings are filed (although usually without a specific reference to international arbitral proceedings). The rationale is twofold: first, the trustee requires time to review all the creditors' claims and assess the financial situation of the insolvent party; secondly, once insolvency order is issued, all creditors ought to be treated equally and thus individual actions by creditors are prohibited. In the context of arbitration, a stay of the proceedings may also be required in order to allow the insolvency courts to decide on issues in respect of which they have exclusive jurisdiction, i.e. that are non-arbitrable.

The stay of pending proceedings is usually temporary, until (a) compliance with certain steps such as the filing of claims by the creditor and the formal notification of the trustee, e.g. France[9], or the second meeting of creditors, e.g. Switzerland[10]; (b) relief from the stay is decided by the insolvency courts, e.g. United States[11]; United Kingdom[12]; or (d) completion of the actual claims verification process in the insolvency

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8 *E.g.* POUDRET/BESSON, p. 609 N 706; RADICATI DI BROZOLO, p. 461. For a discussion on whether mandatory laws of the seat systematically form part of public policy, see RADICATI DI BROZOLO, Chap III at 341 *et seq.* and Art. 1 (d) of the Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (2003) at www.ila-hq.org. In the context of insolvency proceedings, see *e.g.* MOURRE (2007), p. 166 N 28; BROWN-BERSET/LÉVY, pp. 671-672 and p. 674 (commenting on the position in Switzerland where Swiss insolvency law is precisely not a matter of international public policy) and PERRET, p. 39 (on the issue of arbitrability of specific claims). See also below as part of the discussion on the examples of judicial and arbitral case law.

9 Art. L622-21 of the French Commercial Code.

10 Art. 207 of the Swiss Debt Collection and Insolvency Act.

11 S. 362(d) of the United States Bankruptcy Code.

12 S. 130(2) of the English Insolvency Act 1986.

proceedings (which may take weeks, months or even years), e.g. the Netherlands[13], Italy[14].

In France, the failure by an arbitral tribunal seated in France to stay pending arbitral proceedings may lead to the annulment of the award for breach of international public policy[15]. The position would probably be the same in Italy[16] and in the Netherlands[17], but not in Germany[18], nor - most likely – in Switzerland. Swiss scholars indeed appear to agree that a failure to stay the arbitration would not be incompatible with public policy, even if the insolvency proceedings were filed in Switzerland, provided that the failure to stay would not violate due process or the principle of equality of treatment of creditors[19].

Aside from the issue of stay, arbitral tribunals may need to concern themselves with other insolvency law provisions which may form part of the international public policy of the country of the seat and ought to be applied to avoid a risk of annulment. In some jurisdictions, this will be true of the creditor's obligation to formally lodge a claim in the insolvency proceedings (even absent a formal stay by the arbitral tribunal)[20], or the prohibition of orders for the payment of money in favour of a creditor

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13 Art. 29 of the Dutch *Faillissementswet*.

14 Art. 51 of Decree no. 267 of 16 March 1942 as modified by Decree-Law 5/2006 of 9 January 2006. See also PERRET, p. 44; NIGRO/SANDULLI, p. 321.

15 *Cour de cassation*, 8 March 1988, *Société Thinet v. Labrely* Rev. Arb. 1989, p. 473 and note ANCEL, p. 476; *a contrario* (award upheld) *Cour de cassation* 5 February 1991, *Société Almira Films v. Pierrel*, Rev. Arb. 1991, p. 625; *Cour d'appel de Paris*, 30 March 1999, *De Coninck et al. v. Zanzi*, Cahiers de l'arbitrage (2002), p. 321; *Cour d'appel de Paris*, 15 March 2001, *Albert v. Frabeltex*, Cahiers de l'arbitrage (2002), p. 332. See also FOUCHARD, pp. 481-483; ROSELL/PRAGER (2001), pp. 425-426 and p. 429.

16 PERRET (2007), pp. 44-45; KRÖLL (2006), pp. 18-31, although there does not appear to be any Italian court decision directly on point.

17 In the Netherlands, the stay of pending monetary claims against the estate is mandatory and scholars appear to agree that it *must* be applied by courts and arbitrators, which would suggest that it is a matter of public policy (although the issue has not been decided by the Dutch courts as such): SNIJDERS at Art. 1020, N 5 and 6; LAZIC/MEIJER, p. 898.

18 KRÖLL (2009), pp. 38-41.

19 BROWN-BERSET/LÉVY, pp. 675-674; POUDRET/BESSON, p. 505 N 584; PERRET, p. 46; LÉVY/SCHLAEPFER, p. 134 and KAUFMANN-KOHLER/LÉVY, p. 23.

20 In Germany: KRÖLL (2009), p. 40 (although the discussion was in the context of enforcement proceedings).

outside the insolvency proceedings[21]. Another issue that may arise (although rare in practice) is that of the non-arbitrability of certain monetary claims as a result of the insolvency order[22].

The available arbitral case law shows that tribunals do ask themselves whether the insolvency order was issued in or outside the country of the seat. In a number of ICC awards, tribunals held that they were bound to take into account provisions of insolvency law because the insolvency proceedings had been filed in the country of the seat of the arbitration[23], or that, a contrario, they could be ignored at least in part because the insolvency proceedings had been commenced in another country[24].

Ultimately, whether the courts of the seat would consider a failure by the arbitral tribunal to apply a particular provision of insolvency law as a valid ground for challenging the award where the insolvency order was issued in the country of the seat will evidently depend on their own municipal law – and the scope of their international public policy.

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21 In France: *Cour de cassation*, 6 May 2009, *SELAFA MJA v. Société International Company For Commercial Exchanges Income*. See also MOURRE (2007), p. 159 N 17. This would apparently not be the case in Germany: KRÖLL (2006), N 18-37, provided however that the claims have been registered with the trustee and the trustee participates in the arbitral proceedings: KRÖLL (2009), p. 40.

22 The position would most likely differ depending on whether the *lex arbitri* specifically defines arbitrable disputes as including all claims involving a «financial» or «economic» interest, as it does in Switzerland (Art. 177(1) PILS) or in Germany (§ 1030(1) ZPO).

23 *E.g.* of arbitral tribunals admitting claims but refraining from ordering any payment including by way of set-off: ICC Award No. 8133 of 1999, in JOLIVET (2006), p. 24; ICC Award No. 7205 of 1993, in ARNALDEZ/DERAINS/HASCHER, pp. 622 and 625, and in MANTILLA-SERANO, p. 70 (seat in Paris, insolvency proceedings filed in France).

24 *E.g.* of arbitral tribunal's refusal to stay the arbitral proceedings: ICC Award No. 6057 of 1991, in ARNALDEZ/DERAINS/HASCHER, p. 487, also cited in MOURRE (2007), p. 165 N 26 (seat in Syria, insolvency proceedings in France); ICC Award No. 4415 of 1984, Clunet 1984, pp. 952-956 (seat in Paris, insolvency proceedings in Italy; the issue was also that of the discontinuance of the arbitration); ICC Award No. 5996 of 1991, cited in MANTILLA-SERRANO, p. 57 (seat in Tunisia, insolvency proceedings in France); ICC Case No. 1350, Clunet 1975, p. 931 (seat in Switzerland, insolvency proceedings in Austria); ICC Award No. 11028 of 2002, cited in PERRET, p. 45 (seat in Switzerland, insolvency proceedings in Thailand). See also the discussion on arbitral practice in KRÖLL (2006), pp. 374-376 N 18-54 to 18-58.

It will however also depend on the facts of the case. Where insolvency proceedings are deliberately filed to disrupt the arbitration (e.g. in a case of fraud), arbitral tribunals can and do ignore such proceedings without a risk of being sanctioned by the annulment courts[25].

B. Recognition of the insolvency order in the country of the seat of the arbitration

Another issue that arises (outside the specific regime of automatic recognition within the EU) is the impact of the recognition or possible recognition of the «foreign» insolvency order in the country where the arbitration is pending.

In most countries, foreign insolvency judgments are not automatically recognised by State courts: an application for recognition must be made pursuant to the municipal private international law[26].

For instance, in Switzerland, recognition is only possible to the extent that the debtor holds assets in Switzerland and recognition results in the opening of «ancillary» insolvency proceedings governed by Swiss insolvency law, which will only apply to the insolvent party's assets, rights and proceedings in Switzerland[27].

In France, on the other hand, there is a choice between opening «local» insolvency proceedings where the debtor has its primary or secondary place of business in France[28], or seeking the exequatur of the foreign insolvency order[29], in which case the foreign insolvency law will apply in France with respect to the debtor's assets and proceedings in France. In

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25 *E.g.* U.S. District Court, Massachusetts, 17 March 1987, *Sonatrach v. Distrigas*, Yearbook of Comm. Arb'n XX (1995), pp. 795-804.

26 For a general discussion on the different regimes of recognition and the principles of territoriality vs. universality of insolvency, see WAGNER (2008), pp. 33 *et seq.* For the regime of automatic recognition within the EU, see Section II.C below.

27 Art. 166 and 167 of the Swiss Debt Collection and Bankruptcy Act.

28 Art. R600-1 of the French Commercial Code. French courts may also admit the opening of «local» insolvency proceedings where the debtor has contractual relationships in France or, where the creditor has the French nationality. The proceedings will bind the debtor's «universal» assets, not just its assets held in France, subject of course to the applicable rules in the State in which those other assets are held.

29 Art. 509 of the French Code of Civil Procedure.

such circumstances, the applicable relief – for example, a stay of other pending proceedings or a freezing of assets – will depend on the relief available under the applicable foreign insolvency law, subject to principles of French public policy.

In countries that have adopted the UNCITRAL Model Law on Cross Border Insolvency, like the U.S.[30], once the main foreign insolvency proceedings are recognized, the (for instance) U.S. courts may grant a range of measures of relief with respect to the debtor's assets, proceedings and creditors within their jurisdiction, including a stay of pending proceedings, pursuant to U.S. insolvency law. Such measures may include a temporary stay of pending arbitral proceedings involving the debtor[31]. In addition, the foreign trustee is then empowered to open «local» insolvency proceedings in the U.S.

Where does this leave international arbitral tribunals? Given that arbitrators have no lex fori, the recognition of «foreign» insolvency proceedings in the country of the seat of the arbitration should have no effect on the arbitration, regardless of the consequences of such recognition on judicial proceedings in the country of the seat[32]. However, where, upon recognition of the «foreign» insolvency proceedings, the insolvency law of the country of the seat (rather than the «foreign» insolvency law) becomes applicable to the insolvent party, its non-compliance could be sanctioned as a breach of mandatory law or public policy by the annulment courts. This should not be the case where the arbitral tribunal has only failed to apply the «foreign» public policy (i.e. where insolvency law provisions form part of the public policy of the country where the insolvency proceedings were filed, but not the country of the seat)[33]. As noted above[34], ultimately, this will be a question of municipal arbitration law.

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30 Other countries include the United Kingdom, Japan and South Africa. Some countries such as Spain and Argentina have not adopted the Model Law but have enacted legislation largely inspired from it.

31 Ss. 1520 and 362 of the U.S. Bankruptcy Code. See also WAGNER (2009), pp. 64-65.

32 *E.g.* MOURRE (2007), pp. 165-166 N 27; MANTILLA-SERRANO, pp. 59-60.

33 In Switzerland, violation of foreign public policy is not a ground for annulment of arbitral awards: Swiss Supreme Court, 28 April 1992, *Fincantieri – Cantieri Navali Italiani SpA and Oto Melara S.p.A. v. M*, DFT 118 II 353 (on the issue of arbitrability). For the (similar) position in France: see MAYER (1994), pp. 646-648.

34 See above Section II.A.

The available arbitral case law suggests that arbitral tribunals do consider the question of recognition, at least a contrario, in order to decide whether or not they can safely ignore the provisions of «foreign» insolvency law. In one ICC case, an arbitral tribunal seated in Damascus rejected an application for a stay of the arbitration on the basis inter alia that, absent any specific steps, the insolvency proceedings filed in France had no effects in Syria[35], suggesting that the position may have differed if the French insolvency order had been formally recognized in Syria. In another case, an ICC tribunal seated in Paris refused to stay the arbitration on the basis of U.S. insolvency law where the U.S. insolvency order had not been recognized in France and French insolvency proceedings had not been opened[36].

In other instances, the arbitral tribunal considered whether the foreign insolvency proceedings were capable of being recognized in the country of the seat (France), and since they were not, refused to stay the arbitration to allow the trustee to intervene[37], or even to recognize the power of the trustee (rather than that of the management of the claimant company) to represent the insolvent party in the arbitration[38]. In those cases, however, the arbitral tribunal apparently suspected an abuse of right on the part of the respondent State against the claimant company subject to the insolvency proceedings in that State.

Hence, in one instance[39], the trustee had been appointed in (apparently) ex parte insolvency proceedings upon the petition of the respondent Sta-

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35 ICC Award No. 6057 of 1991, in ARNALDEZ/DERAINS/HASCHER, p. 487.

36 ICC Award (unpublished) commented in ROSELL/PRAGER, pp. 424-425.

37 ICC Award No. 5954 of 1991 cited in MANTILLA-SERRANO, p. 57 (seat in Paris, insolvency proceedings in an African State) and *Cour d'appel de Paris*, 12 January 1993, *République de Côte d'Ivoire v. société Norbert Beyrard*, Rev. Arb. 1994, pp. 685-693, esp. p. 693 («[...] *Considérant qu'il s'ensuit que le refus du tribunal arbitral de donner effet au jugement ivoirien de faillite et, par voie de conséquence, de faire application des principes de suspension des poursuites individuelles des créanciers, de dessaisissement du débiteur et d'interruption de l'instance, (lesquels sont non seulement d'ordre public interne mais d'ordre public international, même dans le cas où l'arbitrage, se déroulant en France, n'est pas soumis à la loi française), n'est pas contraire à l'ordre public international (article 1502-5° du nouveau Code de procédure civile), de sorte que le moyen de nullité invoqué sur ce fondement doit être rejeté*»).

38 ICC Award of 2009, unpublished (seat in France, insolvency proceedings filed in a foreign State).

39 *Ibid.*

te. The arbitral tribunal held that whether the insolvency proceedings (which only had territorial effects) could be recognized in France by an arbitral tribunal had to be decided pursuant to French law, including principles regarding the recognition of foreign judgments in France, with essentially four requirements[40]: that (a) the insolvency courts had jurisdiction over the company; (b) the insolvency order had become final and binding; (c) the insolvency proceedings had respected due process and fair trial (as required by the law of the seat and by Article 6 ECHR); and (d) recognition of the insolvency order would not violate fundamental rules and principles pertaining to international public policy (which could possibly overlap with the strict requirement for due process and fair trial). In the case at hand, there was insufficient evidence that the insolvency order had been properly served on the company, so that the third requirement was not met; the insolvency proceedings could not be recognized by the arbitral tribunal seated in France and only the management of the company had standing in the arbitration[41].

C. The case of the EU: the EC Regulation 1346/2000 on cross border insolvency

One scenario that calls for special consideration is the one where both the seat of the arbitration and the place where the insolvency proceedings were filed are within the EU, a scenario which since May 2002 calls for the application of EC Regulation 1346/2000 on Cross Border Insolvency («the EC Regulation»)[42].

The purpose of the EC Regulation is to ensure the effective and efficient management of insolvency proceedings within the EC market and avoid forum shopping. It therefore embodies two principles:

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40 *Cour de cassation* 20 February 2007 *Cornelissen* (although not cited by the arbitral tribunal).

41 It is unclear from the award whether, *a contrario*, if the arbitral tribunal had concluded that the insolvency order was capable of recognition in France, it would have decided differently not only on the issue of representation but also on other issues (such as *e.g.* stay) by applying the «foreign» insolvency law.

42 The EC Regulation which can be found at http://eur-lex.europa.eu does not apply to Denmark.

1. The principle of universality with the automatic recognition and effect of insolvency proceedings in one EU Member State in all other EU Member States[43]; and

2. The application to such effect of the insolvency law of the country where the insolvency proceedings were opened[44], with certain exceptions.

The first issue that arises is whether an arbitral tribunal seated in the EU and faced with an insolvency order affecting one of the parties to the arbitration issued by the insolvency courts of another EU Member State is bound to apply the entirety of the EC Regulation, including its conflict of laws rules. There has been limited doctrinal or judicial debate on this issue[45], and there does not appear to be any widely published State court decision or any ECJ decision on the consequences of an arbitral tribunal not applying the (or certain provisions of the) EC Regulation.

In the recent English court decisions in the Vivendi/Elektrim case[46], it was taken for granted that the arbitral tribunal had to apply the entirety of the EC Regulation; the issue was that of the interpretation of the Regulation as part of a challenge of the award on jurisdiction[47]. Even outside such challenge, it cannot be excluded that a failure to apply the Regulation could be considered as a breach of public policy by State courts within the EU and could lead to an annulment of the award on that basis[48]. The EC

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43 Preamble, para. 22, Art. 16 and 17. Art. 3.2 deals with secondary insolvency proceedings which may be filed in another Member State, for which the provisions regarding recognition differ. Note however the public policy restriction in Art. 26.

44 Preamble, paras. 12 and 23 and Art. 4.

45 See *e.g.* VIRGOS/GARCIMARTIN, p. 142 N 261.

46 *Syska (acting as the administrator of Elektrim SA (in bankruptcy)) and another v Vivendi Universal SA and others*, [2008] EWHC 2155 (Comm) (High Court) and [2009] EWCA Civ 677 (Court of Appeal).

47 It was common ground between the parties that the EC Regulation applied to the question before the court, *i.e.* which law applied to the effect of the Polish bankruptcy order on the arbitration: *Syska v Vivendi Universal* [2008] EWHC 2155, para. 9.

48 WAGNER (2009), p. 62. This is the position accepted by the ECJ and in some EU countries in the context of the European anti-trust legislation (Art. 81 EC Treaty): *e.g.* in Germany, *Oberlandgericht*, Thuringia, 8 August 2007, 4 Sch 03/06; in the Netherlands, *Gerechtshof*, The Hague, 24 March 2005, cases Nos. 04/694 and 04/695; ECJ Case C-126/97, *Eco Swiss China Ltd. v. Benetton International NV*, 1 June 1999. Arguably,

Regulation is therefore of fundamental importance for international arbitration.

What are the relevant provisions of the Regulation? The starting point is Article 4 (Law applicable) which provides:

> *«1. Save as otherwise provided in this Regulation, the Law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. [...]»*

Article 4.2 sets out specific issues to be determined by the insolvency law, including:

> *«(e) The effects of insolvency proceedings on current contracts to which the debtor is party;*
>
> *(f) The effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuit pending».*

Exceptions are set out in Articles 5 to 15. Their purpose is to protect the legitimate expectations of commercial parties and legal security in commercial transactions[49]. They provide, with respect to certain rights and obligations, for the specific law applicable[50]. One exception reiterated is that of the «lawsuit pending». Hence, Article 15 provides:

> *«The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending».*

The meaning and application of Article 15 is essential in the context of international arbitration and was addressed for the first time by an EU State court in the Vivendi/Elektrim case[51].

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however, the EC Regulation (at least Art. 4 to 15) is of a different nature in that it sets out conflict of laws rules rather than substantive law rules.

49 Preamble, para. 24.

50 These exceptions include third parties' rights *in rem* (Art. 5); creditor's right to set off against debtor's claim (Art. 6); reservation of title (Art. 7); contracts relating to immoveable property (Art. 8); employment contracts (Art. 10); rights of third party purchasers (Art. 14).

51 In the context of an application to set aside the award pursuant to s. 67 of the Arbitration Act 1996 (lack of jurisdiction).

The dispute was essentially between a French company, Vivendi, and a Polish company, Elektrim, over the ownership of shares in PTC, a large Polish mobile telecommunication company. The dispute resulted in several arbitral and judicial proceedings throughout Europe, including in England and in Switzerland. In 2003, Vivendi commenced an LCIA arbitration with a seat in London pursuant to the arbitration clause contained in a «Third Investment Agreement», on the basis of which Vivendi was to acquire an interest in PTC and which it alleged Elektrim had breached by interfering with or failing to secure such interest. The hearing on liability was scheduled for October 2007. On 21 August 2007, Elektrim was declared bankrupt by order of the Warsaw courts, on Elektrim's own petition. Elektrim alleged lack of jurisdiction of the arbitral tribunal on the basis of Article 142 of the Polish Insolvency and Reorganisation Law, which provides:

> *«Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued».*

In March 2008, the arbitral tribunal decided that English law governed the effect of the Polish insolvency order and that, pursuant to the English law, despite Elektrim's bankruptcy, the tribunal had jurisdiction to hear Vivendi's claim against Elektrim, and the arbitration was not otherwise affected by Polish insolvency law. The English High Court upheld the partial award and in a lengthy judgement clarified a number of points on the application of the EC Regulation in the presence of pending international arbitral proceedings[52].

In summary, the High Court confirmed that the terms «lawsuit pending» in Article 15 include pending arbitral proceedings, although not enforcement actions[53]. It also clarified that an arbitration agreement is a «current contract» governed by the insolvency law insofar as it relates to future, non pending, arbitral proceedings (Article 4.2(e)), but not insofar as it relates to existing, pending arbitral proceedings, in which case the «lawsuit pending» exception in Articles 4.2(f) and 15 applies[54]. It

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52 Vivendi appealed the decision but the appeal was dismissed: *Syska v Vivendi Universal SA* [2009] EWCA Civ 677.

53 *Syska v Vivendi Universal SA* [2008] EWHC 2155, para. 103. On the scope of Art. 15, see also VIRGOS/GARCIMARTIN, p. 77 and p. 142, and WAGNER (2008), pp. 156-160 and pp. 167-168.

54 Para. 100.

concluded accordingly that, as soon as arbitral proceedings are «pending»[55], all the questions affecting «whether arbitration shall remain pending», including the status of the arbitration agreement, ought to be determined by reference to Article 15, i.e. the law where such proceedings are pending; in the Vivendi/Elektrim case, English law[56].

However, certain issues remain open as to the application of Article 15, in particular, which law of the seat should be applied by the arbitral tribunal, not only to the validity of the arbitration agreement, but also to other issues of capacity, representation, procedure, or relief that may be granted? State courts and commentators remain divided on this issue: is it the insolvency law of the country of the seat, by analogy, including its mandatory and public policy provisions[57]? Is it the law of the country of the seat – including conflict of laws rules – insofar as it applies to international arbitration and foreign insolvency orders recognized in the country of the seat[58]? Is it simply the lex arbitri (which would leave a choice of law with respect to certain issues to the discretion of the arbitrators)?

Whilst no solution is entirely satisfactory[59], an answer favouring the application by analogy of the insolvency law of the State where the

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55 Which varies among States.

56 Para. 101: «I see no reason why it does not also apply to provide that the law of the State in which the arbitration is pending shall determine all questions which affect whether the arbitration shall remain pending, including any question as to whether the effect of the insolvency is to annul the arbitration agreement, or the reference contract, and hence the reference». This was specifically confirmed on appeal by Patten LJ, para. 33.

57 In the context of pending judicial proceedings, this was the approach taken by the Austrian courts which applied Austrian insolvency law to insolvency proceedings filed in Germany which were held to be similar to a certain kind of insolvency proceedings under Austrian law: 9 Ob 135/04z, Austrian Supreme Court, 23 February 2005, cited in MARSHALL, p. 109 N 2.078/1; see also 8 Ob 131/04d, Austrian Supreme Court, 17 March 2005.

58 In another case of pending judicial proceedings, in England, with insolvency proceedings filed in Germany, the English High Court held that it should apply English insolvency law but that (1) the legal regime of winding-up contained in the Act could not be applied by analogy to foreign proceedings and that (2) the English Insolvency Act 1986 did not provide for a stay of proceedings in England where insolvency proceedings had been filed abroad: *Mazur Media Ltd & Anor v Mazur Media GmbH & Ors* [2004] EWHC 1566 (7 July 2004).

59 Authors also appear to be divided insofar as the issue of stay of the pending judicial proceedings is concerned: see *e.g.* HAß/HUBER/GRUBER/HEIDERHOFF, p. 159 («*Art. 15 EuInsVO [enthält] eine*

proceedings are pending would appear difficult to justify in the case of international arbitral proceedings, absent any other connecting factor to the country of the seat. Accordingly, for instance, when dealing with the issue of stay of the arbitration, the solution should - under most arbitration laws - be left to the discretion of the tribunal, taking into account only those matters of international public policy imposed by the law of the seat (which should generally not include matters of public policy under the «foreign» insolvency law)[60]. The approach may have to differ if other issues affected by the insolvency law.

III. The Impact of the Issue: Capacity and Due Process affected by the Insolvency Law

Regardless of the link between the seat of the arbitration and the insolvency proceedings, insolvency law provisions may impact on certain specific issues and thereby become applicable to the arbitral tribunal. This is the case for the «substantive» issue of capacity to arbitrate and the «procedural» issue of due process. These issues may obviously affect the award not only in annulment proceedings[61], but also at the enforcement stage[62].

A. When insolvency law affects the legal capacity of the insolvent party

The legal capacity of the insolvent party to enter into an arbitration agreement or to remain party to an existing arbitration agreement[63] may in some instances be governed by the insolvency law. This proposition however raises difficult issues. First, the definition of «capacity» does not

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Sonderanknüpfung») in favour of applying the insolvency law of the country where the judicial proceedings are pending; *contra* MOSS/FLETCHER/ISAACS, p. 193 (it will be a matter for each law to determine whether a stay should be granted, depending on the nature of the insolvency proceedings filed abroad and giving due respect to the principle of judicial assistance).

60 See note 33 above.

61 *E.g.* in Switzerland, Art. 190(b) and 190(d) PILS.

62 Art. V(1)(a) and V(1)(b) NYC. See also Section IV below.

63 POUDRET/BESSON, pp. 232-233 N 270-271.

appear to be universally established[64]. Secondly, the legal regime attached to the issue of capacity is governed by each country's private international law, although the law applicable is generally the law of the place of incorporation, of the seat («Sitz», «siège social»), of the main place of business, or of the domicile[65].

Outside the context of enforcement, few arbitration laws address the issue of capacity specifically. Arbitral tribunals, applying the relevant conflict of laws rules or choice of law method, will usually be called upon to consider the issue of capacity according to the personal law of the party concerned[66], including in insolvency matters[67]. On that basis, where the insolvency proceedings have been filed at the place of incorporation or seat of the insolvent party, the substantive law applicable to the insolvent party's capacity to arbitrate may well include provisions of insolvency law to the extent that they deal with such issue.

In practice, this is rarely an issue because it appears that, under most insolvency laws, the insolvent party does retain the legal capacity to arbitrate, even if only through the trustee. Where it does not, however, at least two difficulties arise: (a) the identification of the relevant conflict of laws rules (or choice of law method) applicable to the international arbitral tribunal; and (b) the characterisation of a particular provision as one affecting – or not – the legal capacity of a party to arbitrate.

These questions are illustrated by the Swiss chapter of the Vivendi/Elektrim case. In the ICC arbitration seated in Switzerland, which was commenced in April 2006, and concerned additional parties, Vivendi alleged a breach by Elektrim of an (unsigned) settlement agreement. Elektrim, which had been declared bankrupt in August 2007, argued that pursuant to Article 142 of the Polish insolvency law, it (whether directly or through its trustee) had lost its legal capacity to arbitrate[68]. The arbitral

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64 It is sometimes distinguished from or addressed with the concept of «standing», *i.e.* the party's right to act in legal proceedings or enforce a claim.

65 LEW/MISTELIS/KRÖLL, p. 117 N 6-50 to 6-51; POUDRET/BESSON, pp. 232-233 N 270-271.

66 *Ibid.* For a discussion on which conflict of laws rules, if any, the arbitral tribunal should apply see *e.g.* FOUCHARD/GAILLARD/GOLDMAN, p. 245 N 460 *et seq*.

67 MANTILLA-SERRANO, p. 64, commenting on arbitral practice.

68 An argument that was apparently not raised in the English arbitration or annulment proceedings. It is also noteworthy that in February 2008, af-

tribunal decided that Polish law governed the effect of the Polish insolvency order on Elektrim's capacity to be a party to the arbitration, that pursuant to Polish insolvency law, Elektrim had indeed lost its legal capacity to be a party to the arbitration, and that consequently it had no jurisdiction vis-à-vis Elektrim.

The ICC award was upheld by the Swiss Supreme Court[69]. In brief, the Court held that the issue before the tribunal was that of Elektrim's legal capacity to be party to an arbitration; that Swiss arbitration law (Chapter 12 PILS) deals with issue of capacity of State entities (Art. 177)[70], but is silent with respect to the legal capacity of private entities; that the issue of their capacity therefore ought to be determined by applying Swiss private international law[71], which here leads to the application of Polish law since Elektrim is a Polish corporation. The Court concluded that Art. 142 of Polish insolvency law had removed the legal capacity of Elektrim to be a party to arbitration so that the Tribunal had no jurisdiction.

The choice of law approach adopted by the arbitral tribunal and the Swiss courts in order to determine the law applicable to the issue of capacity of Elektrim, absent any specific provision in Chapter 12 PILS, may be debated from a doctrinal point of view[72]. What is perhaps more problematic in this case is the characterisation of Article 142 of the Polish insolvency law as a provision affecting the legal capacity of both Elektrim

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ter the hearing on jurisdiction in the English LCIA arbitration, Elektrim's initial self-administration status was revoked by the Warsaw courts.

69 DTF 4A_428/2008 of 31 March 2009 (unpublished).

70 Art. 177 PILS provides: «A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement», translation by Blessing/Briner/Karrer.

71 Art. 154 PILS (law applicable to companies) and Art. 155(c) PILS (capacity of companies).

72 It is the approach recommended by some Swiss scholars (cited by the Supreme Court), *e.g.* POUDRET/BESSON, pp. 232-233 N 270-271; but the same result can be reached by reference to Art. 187(1) PILS («The Arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection») as the closest connection test should lead to the application of the law of the place of incorporation: BERGER/KELLERHALS, p. 115 N 328. For a commentary of the Swiss Supreme Court decision, see also NAEGLI.

and its trustee to be party to the arbitration[73]. One of Vivendi's key arguments, heavily debated before the tribunal and the Supreme Court, was indeed that Elektrim had not lost its legal capacity as a matter of Polish law since it was entitled to commence new arbitral proceedings with the consent of the creditors' assembly, that the issue was one of legal succession and validity of the arbitration agreement ratione personae, which should be addressed by reference to Swiss arbitration law i.e. pursuant to Article 178(2) PILS[74].

The difference in result between the Swiss and the English courts in the Vivendi/Elektrim dispute does of course show the importance of the choice of the seat of the arbitration. On a more substantial level, however, it illustrates the importance of the characterisation of the issue when insolvency meets arbitration. In the English case, the EC Regulation imposed a choice of law on the arbitral tribunal, so that no difficulty arose in this respect. In addition, Elektrim did not raise any issue of legal capacity so that the issue was not addressed by the tribunal or by the High Court. Had it been, and had it been accepted that Elektrim's capacity was really at issue, the tribunal seated in England applying the English Arbitration Act, may have also been required to also apply the law of the place of incorporation of Elektrim – i.e. Polish law, including Polish

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73 The Supreme Court held *inter alia* «[a]ccording to the reasoning of the Arbitral Tribunal, which relied among other things on the expert opinions of Polish law professors, Respondent 6 lost its capacity to be a party to an arbitration when the bankruptcy proceedings began. According to Art. 142 of the Polish Bankruptcy Law, which governs a particular aspect of capacity to be a party to legal proceedings, a Polish bankrupt therefore would lose its capacity to act as a party in a pending arbitral proceeding. There are no apparent grounds to doubt this interpretation of the law. The Petitioners were unable to establish that Polish law should be interpreted differently» (Cons. 3.3.; free translation from German). However, by decision of the Supreme Court, the judgement (which was rendered by a majority of three against two after an oral hearing) has not been published, which strongly suggests that it is not intended to be relied upon as a precedent or «*décision de principe*» outside the very specific - if not unique - context of Polish insolvency law.

74 Art. 178(2) PILS provides: «*An arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law*». This point was argued successfully in ICC interim award No. 7337 of 1996, in Yearbook Comm. Arb'n XXIV (1999), pp. 149-161. See also Lévy, p. 26. Swiss law (withtout and exclusion of conflict of laws rules) also governed the merits of the dispute.

insolvency law – to decide the issue[75], which would have led to the same result as in the Swiss proceedings.

In any event, the provision of Polish insolvency law, as it is drafted, is apparently rather unique at least within the EU[76]. Certain insolvency laws are more restrictive than others when it comes to arbitration, but they do not appear to affect issues of capacity, but rather issues of validity of the arbitration agreement and stay which, in a similar context to that of the Vivendi/Elektrim case, could be addressed under the relevant lex arbitri.

B. Where insolvency law guarantees due process

A number of insolvency law provisions are «procedural» by nature, in particular with regards to the stay of pending proceedings involving the insolvent party. They are designed to ensure that the trustee, as the new representative of the insolvent party, is given proper notice of the arbitral proceedings, is provided with an opportunity to participate in the proceedings, and even appoint a new arbitrator[77]. Compliance with such insolvency law provisions may therefore be required to ensure that there has been proper notice of the arbitral proceedings to the right party representative, that both parties are heard, and generally that due process has been followed. Conversely, non-compliance with such provisions can expose the award to sanction by both the annulment courts[78] and the enforcement courts[79]. This is so even if the insolvency proceedings were commenced outside the country of the seat of the arbitration and even if

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75 See above Section II.C regarding the uncertainty as to which law of the seat should apply pursuant to Art. 15. The English Arbitration Act 1996 is silent on the issue of capacity but under English private international law, it is governed essentially by the law of the place of incorporation: DICEY/MORRIS/COLLINS, *The Conflict of Laws*, Vol. II, London, 2006, p. 1345 N 30R-020, Rule 162(1).

76 Elektrim itself asserted this before the High Court: para. 96. See also WAGNER (2008), p. 135.

77 As decided *e.g.* in Germany: *Kammergericht* Berlin, 11 August 2004 (23 Sch. 11/03), SchiedsVZ (2005), p. 100, where the courts invalidated the appointment of the arbitrator by the insolvent banks; see also KRÖLL (2006), p. 372 N 18-48.

78 *E.g.* Art. 190(2)(d) PILS; S. 68(2)(g) Arbitration Act 1996; Art. 1484(4) French Code of Civil Procedure.

79 Article V(b) NYC.

the arbitral tribunal was not bound in any other way to apply the insolvency law.[80]

Whilst there does not appear to be any case law directly on point, in practice, it can be expected that the issue will very much depend on (a) timing – i.e. at which stage in the arbitration the insolvency proceedings are filed and the stay required; (b) the steps already taken by the insolvent party before the insolvency proceedings were commenced to present its case and defend its position; and (c) generally the good faith of the requesting party.

Where, for instance, insolvency proceedings were filed against one of the parties after completion of the arbitration, before the final award was rendered, but just after the tribunal had submitted the draft award to the ICC Court for review, an arbitral tribunal (rightly) refused to re-open the proceedings[81]. It is doubtful that the award could have successfully been challenged. The same would apply if the tribunal were to find that the insolvency order itself had been issued in breach of due process[82].

Finally, the award should only be exposed to annulment (or a refusal of enforcement) if the party relying on the violation of due process complained about it during the arbitral proceedings, at the time of the violation[83].

IV. The Impact of the Likely Place of Enforcement

Aside from the risk of annulment of the award, when insolvency meets arbitration, another risk for the claimant or counter-claimant is obviously

80 See *e.g.* BROWN-BERSET/LÉVY, p. 676.

81 MANTILLA-SERRANO, pp. 60-61, citing an unpublished ICC Award.

82 See Section II.B above, in particular notes 37 and 38.

83 This is the case in Switzerland: Supreme Court, 10 September 2001, DTF 127 III 576 and 8 April 2009, 4A_69/2009. The same principle was recently reminded by the French courts in the insolvency context: the liquidator who had been informed about the arbitral proceedings conducted in London and of the tribunal's proposal to decide the dispute without a hearing, was not entitled to rely on a violation of the «*principe du contradictoire*» (principle of French international public policy) to resist enforcement of the award: *Cour de cassation*, 6 May 2009, *SELAFA MJA v. société International Company For Commercial Exchanges Income*.

that of the non-recognition or non-enforceability of the award in the country where the insolvency proceedings were commenced, pursuant to Article V NYC, including for invalidity of the arbitration agreement[84] and incapacity (1.a), lack of proper notice or inability to present one's case (1.b), award set aside in the country of the seat (1.e), non-arbitrability of the dispute (2.a), and award contrary to public policy (2.b)[85].

Whilst arbitral tribunals strive to render enforceable awards, it is generally accepted that they are not bound to apply the mandatory provisions of the possible, or even likely, place(s) of enforcement[86]. Their prime duty is to render an award that will not be annulled by the courts of the seat of the arbitration. Nonetheless, in practice, arbitral tribunals endeavour to render enforceable awards and often take into account the law of the likely place of enforcement when the matter is specifically addressed by the parties, including in the context of insolvency[87].

What appears to be, and should be, essential is the bona fide position adopted by the claimant, be it the insolvent or the non-insolvent party. There are indeed many instances where it is the claimant (or counter-claimant) which requests that the arbitral tribunal ignores the insolvency law even if this may jeopardize enforcement in the country where the insolvency order was issued. This is the claimant's prerogative; it may

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84 Pursuant to Art. II(3) NYC, the member States to the Convention must recognize the validity of arbitration agreements if they fulfil the formal requirements of the Convention. In principle, the opening of insolvency proceedings should not render the arbitration agreement «null and void, inoperative or incapable of being performed». But see *contra* the (criticized) decision of the German Federal Supreme Court 14 September 2000, BGHZ 145, 116 in which it held that the impecuniosity of one party rendered the arbitration agreement «incapable of being performed», discussed *e.g.* in WAGNER (2008), p. 130. In Switzerland, there is a specific statutory provision to that effect for domestic arbitration (Article 30(2) of the Inter-Cantonal Concordat) and some scholars argue that the same result could be reached with respect to international arbitration, in particular if there is a clear abuse of the situation of insolvency by non-insolvent party: *e.g.* LÉVY, pp. 24-25.

85 For a discussion on the extent to which *annulment* may jeopardize enforcement see POUDRET/BESSON, pp. 845-85 N 921-930, and MOURRE (2008), pp. 263-298, commenting on the *Putrabali* and *Termo Rio* cases.

86 *E.g.* FOUCHARD/GAILLARD/GOLDMAN, p. 646 N 1195; POUDRET/BESSON, p. 118 N 147. This is so even in arbitral proceedings subject to the ICC Rules, Art. 35 of which provides that the arbitral tribunal «shall make every effort to make sure that the Award is enforceable at law».

87 See *e.g.* ICC Interim Award No. 6697 of 1990, *Casa v. Cambior*, Rev. Arb. 1992, pp. 142-143.

wish to obtain a decision on liability for insurance purposes or in order to obtain relief from a third party, or it may indeed hope (depending on timing) to be able to enforce the award elsewhere – and not necessarily wish to plead this point in the arbitration. Another fairly common scenario is that of the claimant itself being subject to insolvency proceedings which – it argues – were improperly filed against it.

Arguably, therefore, arbitral tribunals should not concern themselves with enforceability when deciding whether or not to apply insolvency law, unless guided by the parties.

This is all the more so than, under the New York Convention, the enforcement courts have discretion; they «may» refuse recognition and enforcement, but will not necessarily do so, in particular where the courts are minded to promote and support international arbitration. There is no uniformity among state court decisions on this point, including in the context of insolvency proceedings.

Hence, the U.S. Courts have allowed the enforcement of an arbitral award rendered in Japan despite the arbitral tribunal's refusal to stay the arbitration following the opening of insolvency proceedings in the U.S.[88]. Conversely, the French courts have refused the enforcement of an award rendered in London against a party to insolvency proceedings in France, in one instance where the arbitral tribunal had refused to stay the arbitration[89], and in another where the tribunal had rendered an award ordering the payment of money against the insolvent party[90].

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88 U.S. Court of Appeals 2nd Cir, 29 May 1975, and U.S. District Court, Eastern District, New York, 4 June 1974, *Copal v. Fotochrome*, in Yearbook of Comm. Arb'n, vol. I (1976) at 202 (debtor filing for bankruptcy just before final hearing, apparently in an attempt to avoid liability). *Contra*: U.S. Court of Appeals 2nd Cir, 1987, *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709: where the creditor had ignored Swedish insolvency law and not filed any claim in the Swedish insolvency proceedings; enforcement of a London award rejected in the U.S. after recognition of the Swedish insolvency proceedings in the U.S. («a New York court [could] extend comity to the Swedish Bankruptcy proceeding and exercise its discretion under N.Y.Civ.Prac.L. & R. 5304(b)(4) to deny enforcement of the London judgment as conflicting with New York's public policy of deferring to foreign bankruptcy proceedings»). See also LAZIC (1999), N 4.2.

89 *Tribunal de grande instance de Paris, Société Intertradex France v société Romanian Shipping Company*, 2 February 1996, Rev. Arb. 1998, pp. 577-578.

90 *Cour de cassation*, 6 May 2009, *SELAFA MJA v. Société International Company For Commercial Exchanges Income*.

V. Conclusion

Whilst the international arbitration tribunal has no lex fori, whether or not insolvency law provisions should apply to, or will in any event affect, a particular substantive or procedural issue in the arbitration will depend largely on the law of the country of the seat of the arbitration, and specifically what are considered matters of public policy. Insolvency proceedings commenced in the country of the seat do not – and should not – necessarily paralyse the arbitration, but the commencement of insolvency proceedings does call for a pause to determine the potential issues, procedural and substantive, and to determine which law should be applied to resolve them.

Beyond strict issues of applicable law, cross border insolvency also raises a range of practical issues which, regardless of any question of mandatory law applicable to the arbitrator for fear of seeing the award challenged, or not enforced, should not be ignored by arbitral tribunals, by the non-insolvent party or indeed by the insolvent party. In practice, the approach adopted by arbitral tribunals may not always contain as rigorous an analysis on the applicable law as could perhaps be hoped, but it usually demonstrates a great deal of pragmatism in taking into account the parties' respective good faith and requirements in order to find a solution that will allow the arbitrator to comply with the lex arbitri and solve the parties' dispute on the merits.

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