AFFAKI

INSIGHT No. 14

March 2024

International Arbitration and Insolvency: A Redux

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The insolvency of a party in arbitral proceedings is certain to get the tribunal into uncharted waters. Because insolvency proceedings can undermine the integrity of the arbitral process, tribunals tend to resist deferring to the insolvency court, unless so required by mandatory rules or if the enforceability of the award hinges thereon. In this *Insight*, we draw from our experience in recent international cases and address key issues that fall to be considered by arbitral tribunals and parties alike when international arbitration and insolvency cross paths.

1. International arbitration and insolvency make for unusual bedfellows.[1] Arbitration is based on consent. Insolvency, in contrast, mandates a range of sweeping, compulsory measures by means of a centralised, transparent, and public process intended to maximise the value of the insolvent's estate.[2] Party autonomy is an essential feature of arbitration, where, in contrast to court litigation, the parties control the procedural tempo and the scope of the tribunal's jurisdiction. Insolvency, on the other hand, entails a stringent curtailment of the insolvent's freedom to conduct business in the ordinary course of matters, under the oversight of the court and until the insolvency's objectives (whether it be reorganisation or liquidation) are met.

2. Despite these structurally opposing premises,[3] both arbitration and insolvency possess the outward appearance of self-contained, autarchic processes. One rests on international law and the recognition of *pacta sunt servanda*, the other on domestic public policy considerations[4] projected internationally by the State "*within the territory of which (insolvency) proceedings are opened*".[5] At the intersection, many occasions for confrontation arise.

3. Instances of interference most commonly arise where a party to a pre-existing arbitration agreement (whether arbitration proceedings have already commenced or not) becomes subject to insolvency. In such circumstances, should arbitral proceedings be allowed to commence or to continue unabated, and under which constraints? Should the arbitration agreement be struck off altogether as invalid or deemed ineffective towards the insolvent party? The backdrop to, and *raison d'être* of these interrogations lie in the need to anticipate any knock-on effect of the insolvency on the enforcement of the award and annulment proceedings.

4. Given the broad variety of responses in national legislations,[6] the practical impact of insolvency on arbitral proceedings will significantly differ depending on the applicable law. This fragmentation has significant drawbacks and is only partially addressed by the adoption of international instruments such as the UNCITRAL Model Law on Insolvency (see below ¶ 19) or the EU Insolvency Regulation (see below ¶ 9), or guidance such as the IBA Toolkit on Insolvency and Arbitration. Moreover, uniform laws are of

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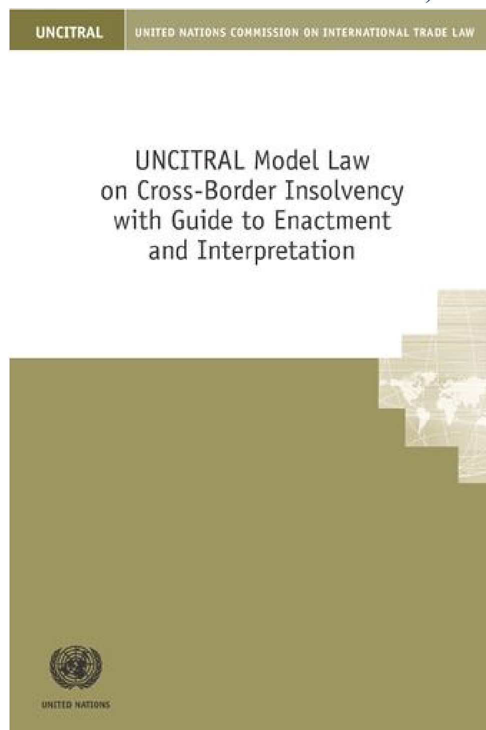
little use when a party from a non-contracting State is concerned. Therefore, solving instances of interference in an international setup often requires addressing determinative preliminary issues of conflicts of law.

5. For ease of presentation, this *Insight* has been subdivided into five sections: (I) conflict of laws, (II) moratorium, (III) arbitrability, (IV) capacity and (V) deference of arbitral tribunals to decisions issued by insolvency courts.

I. Conflict of Laws

6. The questions of whether and how pending arbitration proceedings should be allowed to continue against an insolvent party may give rise to a defence of non-arbitrability,[7] invalidity of the arbitration agreement or incapacity of the insolvent party to participate in the proceedings.



7. These issues depend primarily on the applicable law. Some disputes might be arbitrable in certain jurisdictions but not in others. Likewise, whether the insolvent parties may retain capacity to participate in proceedings under the oversight of court-appointed insolvency practitioners depends on the jurisdiction. This underscores the importance of identifying from the outset the law applicable to the effects of insolvency of a party on arbitral proceedings.

8. Absent agreement by the parties, arbitral tribunals enjoy a degree of latitude in the determination of the conflict of laws rules. Tribunals can apply the choice of law rules in force at the seat, including, where available, insolvency-specific conflict rules.

9. Within the European Union, Article 18 of EU Regulation No. 2015/848 on Insolvency Proceedings (recast) references the law of the Member State "*in which the arbitral tribunal has its seat*" as the exclusive law governing "*the effects of insolvency proceedings on ... pending arbitral proceedings concerning an asset or right which form part of a debtor's insolvency estate*".[8]

10. Where tribunals cannot (or decide not to) rely on the conflict of laws rule of the seat, for instance where the seat is a State where the international uniform law does not apply, the general view is to determine the arbitrability of a dispute by reference to the substantive rules of the law of the seat of the arbitration (*lex fori*).[9] The validity of arbitration agreements, unless underpinned by a substantive rule (*règle matérielle*) as in the French example,[10] is likewise usually governed by the law of the seat. This is the consequence of the fact that tribunals have to comply with mandatory provisions of the law of the seat.[11]

11. Another frequently raised defence relates to the insolvent party's capacity to participate in arbitral proceedings. A party's capacity is commonly determined by reference to the law of the place of incorporation (*lex societatis*)[12] which governs that party's capacity to participate in proceedings, including as concerns the standing of the court-appointed insolvency practitioner.[13] The law of the place of incorporation will usually coincide with the law governing the insolvency (*lex concursus*) of the party, which is the law of the place where the insolvency is open.[14]

12. Tribunals and parties concerned with prospects of enforcement and recognition of the award may also take account of the law(s) of the place(s) of possible enforcement and (if not already applied) the law of the insolvency.[15] This is especially relevant in circumstances where the relevant provisions of that law are deemed

internationally mandatory.[16]

13. The *Elektrim SA v. Vivendi Universal SA* saga illustrates the importance of the applicable law and how similar facts can lead to radically opposite results depending on the characterization of the issue and the law applied thereto.

14. A Polish Party (Elektrim S.A.) had been declared insolvent by the Polish Courts whilst involved in two separate arbitration proceedings, one seated in England and governed by the LCIA Arbitration Rules, the other seated in Switzerland and governed by the ICC Arbitration Rules. Both the English and Swiss Courts were seized with actions to set aside the awards respectively issued by each tribunal. Both the English and Swiss Courts had to determine whether the arbitral tribunal had erred in applying, or failing to apply, Polish Law[17] (law of the insolvency and law of incorporation of Elektrim) to the effect of the insolvency on the arbitration proceedings.

15. The crux of the matter was whether the arbitration could continue despite insolvency. The two arbitral tribunals, as well as the English Court of Appeal and the Swiss Federal Tribunal, reached different solutions.

16. The English Court of Appeal upheld the LCIA tribunal's decision to continue the proceedings against the insolvent party. The Court considered that the applicable rule of conflict of laws[18] pointed to English law as the law of the seat of arbitration.[19] Accordingly, the Polish legislation was disregarded, and Elektrim's continued participation in the arbitration affirmed.

17. On similar facts, the Swiss Federal Tribunal[20] reached the opposite conclusion and upheld the ICC tribunal's decision to discontinue arbitration proceedings against Elektrim. The Swiss Federal Tribunal concurred with the ICC tribunal that the relevant applicable rule of conflict of laws[21] pointed to Polish Law, as the law of the State under which the insolvent party was organised, and the law governing that party's legal capacity to act (*lex personae*). Accordingly, Elektrim no longer had the capacity to participate in the arbitration.

In summary, when arbitration and insolvency meet, the tribunal will turn to characterizing the issues at hand and identifying the law applicable to each.
This may include making a distributive application of different laws to different issues. Issues of arbitrability and validity of the arbitration agreement will usually be determined by reference to the law of the seat. Issues of capacity will usually be determined by reference to the law of the place of incorporation of the company or domicile of the natural person, which will often coincide with the law where the insolvency is open.
To cater for considerations of enforceability, the tribunal should have due regard to the law(s) of the place(s) of possible enforcement.

II. Moratorium – Can Arbitration Proceed against an Insolvent Party?

18. Looming over the arbitral proceedings is the question of whether to give effect to foreign[22] law provisions imposing a moratorium on proceedings involving the insolvent party, and therefore posing issues of arbitrability of the dispute or admissibility of the claim. The first question is whether the insolvency of a party constitutes a bar to the continuation (or commencement) of the arbitration by imposing a mandatory stay.

19. An attempt at harmonising national legislations in matters of recognition of foreign insolvency moratorium has been undertaken by the UNCITRAL in the Model Law on Cross-Border Insolvency (1997). Article 20.1 of the Model Law provides: "*Upon recognition of a foreign proceeding that is a foreign main proceeding, (a) Commencement or continuation of individual actions or individual proceedings [in the enacting State] concerning the debtor's assets, rights, obligations or liabilities is stayed;*"[23]. Although under the Model Law the effects of a foreign main proceedings are subject to prior recognition by the courts of the enacting State, a range of interim/ protective measures can be taken

whilst an application for recognition of a foreign proceeding is pending.[24] Thus, an arbitral tribunal seated in an enacting State could find itself in a position where it has to consider giving way to certain decisions of the foreign insolvency court which have entered, or could enter the legal order of the seat through a mechanism of official recognition.

20. Whilst most national insolvency laws provide for an automatic stay of proceedings when a party is declared insolvent, the objectives pursued by the stay, its duration and revocation differ between jurisdictions. Ultimately, the impact of foreign provisions on the arbitral proceeding will depend on the tribunal's decision to give effect to them.

21. In Italy for instance, the opening of insolvency proceedings automatically interrupts pending legal proceedings against the debtor.[25] No enforcement or conservative measures can be initiated or continued in relation to assets comprised in the insolvency estate.[26] All claims seeking a declaration that the insolvent party owes a debt are within the exclusive jurisdiction of the insolvency court.[27]

22. A different approach is found in France. A court decision declaring the insolvency of a party has the effect of interrupting or prohibiting all legal proceedings – including arbitration – brought by creditors against that party.[28] Once the creditor has asserted a claim ("*declaration de créance*") before the insolvency court with jurisdiction, proceedings may be resumed, but only to a limited extent.[29] An arbitral tribunal has jurisdiction to quantify the damages owed by an insolvent debtor,[30] but it cannot order that debtor to pay.[31] This allows the award creditor to participate in the distribution of the insolvency estate, a centralised and coordinated legal process conducted before the insolvency court.

23. In England, upon entering administration, no legal proceedings may be commenced or continued against the company or its property except with the consent of the administrator or with leave of the court.[32] The same applies to compulsory liquidation.[33] Mandatory stay is therefore a matter of discretion resting on a balancing exercise between competing interests of creditors, and ultimately predicated on whether allowing arbitration to continue would likely impede the furtherance of the goals of the insolvency.[34]

24. A more liberal approach can be found in Germany and Switzerland. Both jurisdictions are underpinned by statutory provisions[35] to the effect that economic interests and financial interests are, in principle, arbitrable, notwithstanding the insolvency of a party. Accordingly, German courts generally allow arbitration to continue with the involvement of the trustee in bankruptcy.[36] Swiss courts show a similar reluctance to stay foreign litigation or arbitration proceedings in favour of insolvency proceedings.[37]

In summary, upon the opening of the insolvency, the law of the insolvency is expected to make inroads into pending arbitral proceedings by triggering, at least, a stay.
Under the law of the insolvency, arbitration may be continued depending on the degree of trust placed in the arbitral process in the relevant jurisdiction and how the collective interests of creditors fit within that process.
In practice however, any effect of the insolvency on the arbitration will ultimately depend on the tribunal's decision to comply with foreign insolvency provisions and decisions, or those of the seat. The tribunal's deference is discussed at Section V below.

III. Arbitrability: Can an Arbitrator Rule on Insolvency-Related Matters?

25. A conceptually related question is

whether insolvency proceedings affect the scope of arbitrability. In other words, can arbitral tribunals rule on insolvency-related matters?

26. The position of the United States provides an illustration of the jurisdictional intricacies originating from what has been referred to as the "*conflict of near polar extremes*" between bankruptcy policy and arbitration policy.[38] In the United States, the guiding principle on arbitrability lies in the distinction between "core" and "non-core" (or "mixed") bankruptcy proceedings.[39] Whereas the latter are available for adjudication by arbitration, the former are generally regarded as non-arbitrable given their effect on the bankruptcy estate.

27. The threshold for a bankruptcy proceeding to be regarded as "core" is not only functional (*i.e.*, those proceedings which turn on fundamental functions traditionally falling within the purview of national courts); it can also be quantitative, with significant claims against the debtor being considered "core" (and non-arbitrable) merely given their sheer impact on the bankruptcy estate.[40]

28. A distinction of a similar nature can be found in other countries. In France, for example, domestic courts have exclusive jurisdiction to rule on the insolvent status of a party[41] and on "core" actions (such as those taken by the liquidator on behalf of the creditors of the estate).[42]

29. In Germany, insolvency law does not follow the rule of an absolute attractive force of the insolvency proceeding (*vis attractiva concursus*) and the insolvency court have no all-encompassing exclusive jurisdiction on insolvency-related disputes. Whilst insolvency proceedings *strictu sensu* are not arbitrable, a range of disputes arising in connection with the insolvency are.[43]

In summary, the categorization of an action as "core" or "non-core" will, in some jurisdictions, contribute to isolating disputes that can be referred to arbitration from those which cannot.
In addition to taking account of the law of the seat, identifying "core" non-arbitrable issues under the law of the insolvency will assist the tribunal and the parties in securing an enforceable award.

IV. Capacity – How Can an Insolvent Party Participate in Arbitration?

30. Under most national insolvency laws, the insolvent party retains the legal capacity to arbitrate, either directly or through an insolvency practitioner.[44] Indeed, administrators, receivers, or trustees are generally empowered to "stand in the shoes" of the debtor and take part in arbitration proceedings either on its behalf, or in furtherance of the creditors' interest. The trustee's involvement is a means to address issues of capacity or representation under the relevant law and has often been welcomed by arbitral tribunals.

31. In ICC case No. FA-20226-043,[45] the question of the capacity of an insolvent State-owned company arose. The tribunal, seated in Switzerland, applied its own conflict of laws rules and found that the party's capacity had to be examined in the light of "*the law of the state under which* [it was] *organised*".[46] That law, as the tribunal found, provided that the insolvent party remained capable of administering and disposing of its assets, subject to receiving assistance by the creditor's representatives. Thus, that party's standing in the arbitral proceedings was preserved through the participation of a trustee.

32. Similarly, in ICC case No. 7337, the tribunal stated that the legal capacity of a party is determined by the law of its domicile. Applying that law, it held that the insolvency trustee had standing to participate in the proceedings, given that the trustee had assumed the debtor's rights and obligations by virtue of legal universal succession.[47]

33. The situation is slightly more nuanced in investment arbitration. In *AS PNB Banka and others v. Republic of Latvia*, the tribunal recognised the standing of insolvency practitioners to act on behalf of the insolvent party provided there is no conflict of interest between the practitioner and the respondent State.[48] A somewhat contrasting conclusion was reached in

Blue Bank International & Trust v. *Venezuela*.[49] In that case, the tribunal dismissed the case for want of jurisdiction *ratione personae* on the grounds that the claimant was acting in its capacity as trustee, rather than as an investor asserting claims in connection with an investment personally made.

In summary, arbitral tribunals will attempt to secure the participation of the insolvent party in the arbitral proceedings, including through the insolvency practitioner, provided that the requirements for representation or vesting of the debtor's interests in the insolvency practitioner are met.

V. Deference of Arbitral Tribunals to Decisions Rendered by Foreign Insolvency Courts

34. A growing consensus in scholarship, upheld by a growing number of courts, consider that international arbitral tribunals have no *forum*. Therefore, they are not bound by the law in force, or the court decisions rendered at the seat of the arbitration as national courts would be. *A fortiori*, they are not bound by foreign laws and judicial decisions rendered by courts outside the seat.

35. That notwithstanding, cross-border insolvency may present arbitral tribunals with the dilemma of what, if any, deference should be given to decisions emanating from foreign insolvency courts in circumstances where the relevant local laws are often of a public policy nature, and thus may have an impact on the annulment / enforcement of the award. For instance, an award disregarding the principles of equal treatment between creditors and of stay of proceedings against insolvent persons may breach the international public policy of France and therefore could not be enforced in France, regardless of where the seat of the arbitration may be.[50]

36. In practice, arbitral tribunals proceed on a case-by-case basis. At one end of the spectrum, tribunals have disregarded foreign insolvency altogether for want of extraterritorial reach of the foreign insolvency into the country of the seat of the arbitral proceedings.[51] For instance, in a 1991 ICC award, a Damascus-seated tribunal refused to recognise the effects of the insolvency of the French claimant, holding that the effects of the insolvency were limited to France.[52]

37. Some tribunals adopt a middle ground and defer the decision on cross-border insolvency recognition to the competent national court at the seat (through exequatur), with formal recognition of the decision leading to recognition in the arbitral proceedings. In addition to considerations of deference, considerations of procedural fairness are also relevant.[53]

38. At the other end of the spectrum, arbitral tribunals apply and recognise foreign insolvency rules as a set of mandatory rules. In a 2001 ICC award, a Geneva-seated tribunal held that arbitrators should take into account international public policy rules of France, regardless of the country of the seat of the arbitration.[54]

39. In practice however, tribunals are generally reluctant to bow to the foreign insolvency of one of the parties, unless there is compelling evidence that the law applicable to that party prohibits continued participation in arbitral proceedings and that such law should be recognised and given effect to by the tribunal.[55]

In summary, a tribunal will determine whether to give effect to a foreign insolvency decision on a case-by-case basis.
The tribunal will balance the integrity of the arbitral process, which may stand undermined by the recognition of the insolvency decision, against the risks of any award being set aside for breach of imperative provisions in force at the seat.

Conclusion

40. The complexity of the matter reflects the inconsistency of national legislations and, with some regional exceptions, the lack of an international framework addressing the interaction between international arbitration and insolvency. The segregation of the arbitral process

from the domestic jurisdictional systems and the subsequent difficulties in establishing a coherent and traceable *corpus* of arbitral precedents also play a role.

41. Nevertheless, a blueprint methodology for arbitral tribunal and parties to cope with these issues has surfaced. This predominately involves arbitral tribunals:

(1) Where relevant, determining issues arising out of the insolvency of a party (*e.g.*, arbitrability, capacity, validity of the arbitration agreement) by reference to the relevant applicable laws;
(2) Attempting to ensure the participation of the insolvent party either directly or through the involvement of a court-appointed administrator;
(3) Determining the content of the law of the insolvency and establishing what deference to give to a provision or a court decision discontinuing of suspending the arbitral proceeding;
(4) Ensuring that the award(s) complie(s) with internationally mandatory provisions;
(5) Determining the content of the law(s) of the potential place(s) of enforcement of the award(s) with a view to ensuring that any award complies with internationally mandatory provisions in force therein.

42. The integrity of the arbitral process and the interests of the parties underpinning it should not be diminished without compelling reasons.

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[1] This *Insight* was prepared in conjunction with Georges Affaki's participation as speaker in the Riyadh International Disputes Week, 3-7 March 2024.
[2] J. Sutcliffe, J. Rogers, 'Effects of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times', Chartered Institute of Arbitrators, (2010) 76 Arbitration, p. 278.
[3] For an alternative take on this antinomy, see Massimo Benedettelli, 'Chapter 1: International Arbitration and Italian Law', in Massimo Benedettelli, International Arbitration in Italy (Kluwer Law International 2020), p. 27, ¶ 1.69 ("Against this background, the private-public interests divide that once characterized insolvency and arbitration become blurred. Rather, the two instruments should be put on an 'equal footing', meaning that one should try to achieve the highest possible level of coordination between them by looking at the different functions and interests they are supposed to fulfil and achieving a proper balance between party autonomy and State regulation in both fields.").
[4] For instance, the requirement of a stay of proceedings (including arbitration) involving an insolvent party has been recognized as a principle of both domestic and international public policy in France. An award ordering the payment of damages by an insolvent party could be considered in breach of this policy, see the French Court of Cassation's ruling of 6 May 2009, No. 08-10.281 ("Attendu que (…) le principe de suspension des poursuites individuelles en matière de faillite est à la fois d'ordre public interne et international;") / (Considering that (…) the principle of stay of individual proceedings in matters of insolvency has been recognized as a principle of public and international policy alike) (freely translated).
[5] Defined as the "State of the opening of proceedings" in Article 7 of EU Regulation No. 2015/848 on Insolvency Proceedings (recast).
[6] Not all national laws analyse the imbrication of the insolvency of a party to an arbitration agreement under the same legal categories. For instance, in some jurisdictions, this question is treated as an issue of validity and enforceability of the arbitration agreement or capacity of that party, whilst in other jurisdictions, emphasis is placed on non-arbitrability. See G. B. Born, 'Chapter 6: Nonarbitrability and International Arbitration Agreements (updated August 2022)', ¶ 6.04[F] [1-3] in Gary B. Born, International Commercial Arbitration (Third Edition), Kluwer Law International 2021.
[7] "Arbitrability" is a multi-faceted term. For the purposes of the topic discussed in this *Insight*, arbitrability refers to the possibility for parties to arbitrate certain classes of disputes as opposed to other categories of disputes which can only be adjudicated by the Courts.
[8] Art. 7 EU Regulation No. 2015/848 sets out a separate rule of conflict of law, which applies to the determination of the effects of insolvency proceedings on prospective proceedings, *i.e.*, proceedings not already commenced at the date of the opening of insolvency proceedings ("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 … In particular, it shall determine the following: (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits;").
[9] D. Jones, 'Insolvency and arbitration and arbitral tribunal's perspective', Chartered Institute of Arbitrators, Arbitration, Issue 2, 2012, pp. 125-126; B. Hanotiau, 'The Law Applicable by the Arbitrator in the Event of the Bankruptcy of One of the Parties to the Proceedings' (1996) International Business Law Journal No. 1, pp. 29-34; D. Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law' in C. Miller and A. Rigozzi (eds), New

Developments in International Commercial Arbitration 2009 (Neuchatel: Schulthess, 2009), pp. 99-100.

[10] French Court of Cassation, Judgment dated 28 September 2022, No. 20-20.260 ("En vertu d'une règle matérielle du droit de l'arbitrage international, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique, à moins que les parties aient expressément soumis la validité et les effets de la convention d'arbitrage elle-même à une telle loi") / (In accordance with a substantive rule of international arbitration law, the arbitration clause is legally independent of the main contract that contains it directly or by reference. Its existence and effectiveness are evaluated, subject to mandatory rules of French law and international public policy, based on the common intention of the parties, without the need to refer to a state law, unless the parties have expressly submitted the validity and effects of the arbitration agreement itself to such a law.) (freely translated).

[11] S. Vorburger (ed), 'Chapter 4: Recognition of Insolvencies by Arbitral Tribunals', in S. Vorburger, 'International Arbitration and Cross-Border Insolvency: Comparative Perspectives', International Arbitration Law Library, Volume 31 (© Kluwer Law International; Kluwer Law International 2014), ¶ 184 in relation to arbitrability, ¶ 387 in relation to validity of the arbitration agreement.

[12] An alternative view particularly relevant to civil law jurisdiction is that the capacity should be governed by the law of the party's primary place of business, see S. Vorburger, *op. cit.*, ¶ 494, p. 161.

[13] F. Van de Ven, 'Chapter 3: Insolvency in Arbitration: International Aspects', in Fabian van de Ven, 'Insolvency in Commercial Arbitration: A German and International Perspective', (Kluwer Law International 2023), ¶ 4.4, p. 235.

[14] D. Draguiev, 'The Effect of Insolvency on Pending International Arbitration: What Is and What Should Not Be', Journal of International Arbitration, Vol. 32, Issue 5, 2015, 3.1[b], p. 523; S. Vorburger, *op. cit.*, ¶ 494, p. 161.

[15] G. Born, *op. cit.*, ¶ 6.04[F] [6].

[16] S. Vorburger, *op. cit.*, ¶ 511, p. 167.

[17] The now-defunct Art. 142 of the Polish Bankruptcy and Reorganisation Law stated ("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.").

[18] Art. 4.2(f) and Art. 15 of EU Insolvency Regulation No. 1346/2000.

[19] *Elektrim SA v. Vivendi Universal SA* [2009] EWCA Civ 677: ("…it is apparent that both the Official Report and the leading text book on the Regulation support the view that, for good reason, the question whether pending lawsuits should be continued or discontinued in the light of insolvency is to be determined by the law of the State in which those proceedings are pending. … it is clear that the majority of the arbitrators came to the correct conclusion and the judge was correct to decline to set aside their Award. I would dismiss this appeal.").

[20] Decision 4A_428/2008 dated 31 March 2009 ("…the general basic principle of procedure applies, according to which the standing to participate in proceedings depends on the preliminary issue – under material law - of legal capacity ... This is determined according to the status of the person or legal entity, i.e. based on the applicable law according to … Art. 154, 155 (c) PILA (for legal entities) … The Respondent is incorporated as a common stock corporation under Polish law (Spólka Akcyjna). The legal capacity and thus its standing as a party in international arbitral proceedings is assessed based on Art. 154 in connection with Art. 155 (c) PILA and therefore according to Polish law … According to the findings of the Arbitral Tribunal, which refer, inter alia, to the expert opinions of Polish law professors, Respondent 6, when bankrupt, lost the standing to participate in arbitral proceedings as a party. … The Arbitral Tribunal therefore rightly denied jurisdiction in this case with respect to Respondent 6.").

[21] Articles 154 and 155(c) of the Swiss Private International Law.

[22] When the insolvency order has been issued in the country of the seat of the arbitration, the tribunal will usually give effect to provisions of the insolvency law, in order to avoid breaching seat policies which may led to the annulment of the award. See D. Baizeau, *op. cit*., pp. 100-101.

[23] ¶ 180 of the "Guide to Enactment and interpretation" of the Model Law clarifies that the stay should also apply to arbitration proceedings seated in the enacting State ("(Subparagraph 1 (a), by not distinguishing between various kinds of individual action, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings.").

[24] Art. 19 of the UNCITRAL Model Law on Cross-Border Insolvency (1997) ("1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: (a) Staying execution against the debtor's assets; (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; (c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.").

[25] Art. 143(3) of the Italian Codice della crisi d'impresa e dell'insolvenza (Insolvency Code).
[26] Art. 150 of the Italian Insolvency Code.
[27] Art. 32(1) of the Italian Insolvency Code.
[28] Art. L. 622-21 of the French Commercial Code.
[29] Art. L. 622-22 of the French Commercial Code.
[30] If a party raises before the French insolvency Court a jurisdictional objection based on the existence of an arbitration agreement, that Court must give effect to the arbitration agreement and decline to exercise its jurisdiction so that the claim can be adjudicated by an arbitral tribunal, see French Court of Cassation, Judgment of 2 June 2004, No. 02-18.700.
[31] French Court of Cassation, Judgment of 4 February 1992, No. 90-12.569.
[32] Insolvency Act 1986, Schedule B1, ¶ 43(6).
[33] Insolvency Act 1986, Section 130(2)-(3).
[34] J. Sutcliffe, J. Rogers, *op. cit.,* p. 279.
[35] Section 1030(1) of the German Civil Procedure Code "*Any claim involving property rights* ("vermögensrechtlicher Anspruch") *may become the subject matter of an arbitration agreement*", English translation available on Code of Civil Procedure (gesetze-im-internet.de); Art. 177(1) of the Swiss Federal Act on Private International Law: "*Any claim involving an economic interest may be submitted to arbitration*", SR 291 - Federal Act on Private International La... | Fedlex (admin.ch).
[36] Stefan M. Kröll, 'Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration – Effects of Party Insolvency on Arbitral Proceedings in Germany', in Patricia Nacimiento, Stefan M. Kröll, et al. (eds), 'Arbitration in Germany: The Model Law in Practice' (Second Edition), 2nd edition (© Kluwer Law International 2015), ¶ 76-77 ("the opening of the insolvency proceedings in Germany does not affect the jurisdiction of the arbitral tribunal. The arbitration agreement remains valid for the disputes covered and cannot be avoided by the insolvency administrator …. The commencement of insolvency proceedings does not lead to the termination of the pending arbitral proceedings. The opening of insolvency proceedings … In most cases … leads to a change of the parties of the arbitration, requires usually a temporary stay of the arbitral proceedings to allow the insolvency administrator to take the necessary decisions, requires the parties to file their claims with the insolvency administrator and may also affect the composition of the tribunal"); See also J. Sutcliffe, J. Rogers, *op. cit*., p. 283; G. Born, *op. cit.*, ¶ 6.04[F] [1-3] and footnote 337.
[37] A pertinent illustration of the Swiss position can be found in the Swiss Federal Tribunal decision dated 1 March 2021 No. 5A_910/2019. See A. George and J. Haesler, 'Bankruptcy of party in ongoing arbitration does not affect enforceability of award (Swiss Supreme Court)', Practical Law Arbitration, Legal update: case report, Published on 18-May-2021.
[38] *Société Nationale Algérienne v. Distrigas Corp.,* 80 B.R. 606 (Bankr. D. Mass. 1987) ("The statutory interaction inherent in the current dispute presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution.").
[39] An often-cited decision attempting to draw a definition between "core" and "non-core" insolvency proceedings is *United States Lines Inc, Re* 197 F.3d 631 (2d Cir. 1999) ("Therefore, under *Marathon*, whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization. The latter inquiry hinges on "the nature of the proceeding." …. Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings, … or (2) the proceedings directly affect a core bankruptcy function…").
[40] S. M. Kröll, 'Arbitration and Insolvency Proceedings', in Mistelis and Lew, 'Pervasive Problems in International Arbitration', 2006, ¶¶ 18-25.
[41] Art. R662-3 of the French Commercial Code ("… le tribunal saisi d'une procédure de sauvegarde, de redressement judiciaire ou de liquidation judiciaire connaît de tout ce qui concerne la sauvegarde, le redressement et la liquidation judiciaires, l'action en responsabilité pour insuffisance d'actif, la faillite personnelle ou l'interdiction prévue à l'article L. 653-8 …") / (…The court seized with a safeguard, judicial recovery, or judicial liquidation proceeding has jurisdiction over all matters related to safeguard, recovery, and judicial liquidation, the action for liability due to insufficient assets, personal bankruptcy, or the prohibition provided for in Article L. 653-8…) (freely translated).
[42] French Court of Cassation, Judgment of 17 November 2015, No. 14-16.012 ("Mais attendu que le liquidateur qui demande … la nullité d'un acte sur le fondement des dispositions de l'article L. 632-1, I, 2° du code de commerce ne se substitue pas au débiteur dessaisi pour agir en son nom mais exerce une action au nom et dans l'intérêt collectif des créanciers de sorte qu'une clause compromissoire stipulée à l'acte litigieux est manifestement inapplicable au litige ; …") / (Considering that the liquidator, who requests … the nullity of an act based on the provisions of Article L. 632-1, I, 2° of the Commercial Code, does not replace the divested debtor to act on its behalf, but exercises an action in the name and in the collective interest of the creditors, so that an arbitration clause stipulated in the disputed act is evidently inapplicable to the dispute …) (freely translated).
[43] These include disputes that originate from facts or rights and obligations pre-dating the opening of the insolvency, and claims which have their origin in facts or legal actions taken by the debtor or the insolvency administrator after the insolvency proceedings have been initiated, see S. Kröll, 'Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration – Effects of Party Insolvency on Arbitral Proceedings in Germany', *op. cit.*, ¶¶ 28-29, 33-37.
[44] D. Baizeau, *op. cit*., p. 113.
[45] Reported in H. Barbier, A. Fessas, 'Arbitrage international – Chronique des sentences arbitrales', JDI n° 4, 2022, ¶¶ 47-64 (" La question de savoir si la (Société étatique) a gardé sa personnalité juridique doit être examinée à la lumière du droit de l'État en vertu duquel la (Société étatique) est organisée (art. 154 LDIP) à savoir le droit (de l'État africain) lequel est aussi le plus proche de la situation (art. 187 al. 1 LDIP). Or, rien n'indique qu'en

droit (de l'État africain), la mise en redressement d'une société ait pour effet de lui faire perdre son statut de personne juridique.") / (The question of whether the (State-owned Company) has retained its legal personality must be examined in light of the law of the State under which the (State-owned Company) is organized (Art. 154 LDIP), namely the law of (African State), which is also closest to the situation (Art. 187 para. 1 LDIP). However, there is no indication that under the law of (African State), the reorganization of a company has the effect of causing it to lose its legal personality.) (freely translated).

[46] Art. 154 of the Swiss Federal Act on Private International Law.

[47] Interim Award in ICC Case No. 7337 in Albert Jan van den Berg (ed), ICCA Yearbook Commercial Arbitration 1999, Volume 24 (Kluwer Law International; ICCA & Kluwer Law International 1999), pp. 149 – 161 ("The legal capacity of a party is determined according to the law at its place of domicile, which in regard to defendant no. 1 [the receiver representing the bankruptcy estate] is Swedish law … Although an arbitration may be pursued against the debtor, the bankruptcy estate is the proper party to all post-bankruptcy legal proceedings as it has assumed, by universal succession, all rights and obligations of the debtor.").

[48] *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB 17/47, Decision dated 16 June 2020 on the Proposals to Disqualify James Spigelman, Peter Tomka and John M. Townsed, ¶ 43 ("Having considered the submissions made by [the insolvency administrator] …, and having regard to the following considerations: … [the insolvency administrator] has authority to represent the Bank, subject to allegations of a conflict of interest or other disentitling circumstances…. Accordingly, the Tribunal orders as follows: a. The Tribunal recognises [the insolvency administrator] as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal questions… d. The Tribunal accepts that both [the insolvency administrator], in the exercise of his statutory powers, and the former Directors or the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the Respondent's jurisdictional challenge on the Bifurcated Issue.").

[49] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award dated 26 April 2017, ¶ 163 ("Blue Bank exercises the function of a trustee – a sui generis legal construct – and as such it acts in its own name but on behalf of the trust in furtherance of certain third party interests … As trustee, Blue Bank does not own the assets, but simply manages and administers them for a particular purpose … It follows that, by acting in its capacity as trustee, the Claimant cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from the investment.").

[50] French Court of Cassation, Judgment dated 8 February 2023, No. 21-15.771, concerning the enforcement of an award rendered in Geneva ("Après avoir constaté que la demande reconventionnelle en paiement de sa créance avait été formulée par la société Mirato devant l'arbitre après le jugement d'ouverture du redressement judiciaire de la société débitrice, et qu'aux termes de sa sentence rendue le 17 septembre 2018, l'arbitre avait condamné [la société débitrice] au paiement de diverses sommes au profit de la société Mirato, l'arrêt en déduit à bon droit que l'ordonnance accordant l'exequatur d'une telle sentence, au mépris du principe d'égalité des créanciers et d'arrêt des poursuites individuelles, ne pouvait être revêtue de l'exequatur sans méconnaître l'ordre public international.") / (After noting that the counterclaim for payment had been made by Mirato before the arbitrator after the judgment opening the judicial reorganization of the debtor company, and that, according to its award rendered on September 17, 2018, the arbitrator had ordered the debtor company to pay various sums to the benefit of Mirato, the judgment rightly concludes that the order granting exequatur to such an award, in disregard of the principle of equality among creditors and the suspension of individual proceedings, could not be granted exequatur without violating international public policy.) (freely translated).

[51] F. Van de Ven, *op. cit.*, ¶ 4.5, p. 240.

[52] ICC Award No. 6057 (1991), Journal du Droit International (JDI), 1993, p. 1016 ("[the tribunal's] mission … is not to be affected by a Court's decision rendered subsequently in France, which without more, is not intended to produce effects in Syria.").

[53] Fernando Mantilla-Serrano, 'Chapter 8: Arbitration and Insolvency: Important Aspects for Tribunals to Consider', in W Michael Reisman and Nigel Blackaby (eds), Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez, (Kluwer Law International 2023), ¶ II.B.3, p. 154.

[54] ICC Award No. 9163 (2001), Rev. Arb. 2003, p. 230, ¶ 29 ("le Tribunal arbitral est tenu de respecter les règles de police qui se veulent directement et impérativement applicables à la situation litigieuse, lorsqu'elles sont édictées par la loi d'un Etat dont l'application en l'espèce est à la fois légitime, en raison des buts qu'elle poursuit et des intérêts qu'elle protège, et conforme à l'attente des parties. Il en est ainsi des dispositions de la loi française de 1985 sur l'arrêt des poursuites individuelles, non seulement parce que … le droit français est applicable au fond du litige, mais aussi … parce qu'elles doivent s'appliquer à la partie qui, établie en France, est soumise à une procédure de redressement judiciaire qui y a été régulièrement ouverte devant un tribunal français … Peu importent le lieu de l'arbitrage et la loi applicable au fond du litige ou à la procédure arbitrale.") / (The arbitral tribunal is obligated to comply with the mandatory rules of public policy that are intended to be directly and imperatively applicable to the dispute, when they are enacted by the law of a State whose application is legitimate in the specific case due to the goals it pursues and the interests it protects, and is in line with the parties' expectations. This applies to the provisions of the French law of 1985 on the suspension of individual proceedings, not only because … French law is applicable to the substance of the dispute but also … because they must be applied to the party established in France that is subject to insolvency proceedings regularly initiated there before a French court … Regardless of the seat of the arbitration and the law applicable to the substance of the dispute or the arbitral procedure...) (freely translated).

[55] G. Born., *op. cit.*, ¶ 6.04[F] [5].

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