

The effects of insolvency on international arbitration proceedings

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Arbitration and Insolvency – Two Worlds Apart

Arbitration

- party autonomy / predictability
- dispute resolution in delocalized forum



Insolvency

- equal treatment of creditors
- centralization of claims / collective procedure
- (nuanced) territoriality

The Vivendi / Elektrim Case

- » Vivendi and others vs. Elektrim SA (Poland) and others: dispute regarding ownership rights in Polish telecom company
- » 2003/2006 initiation of arbitration proceedings in England (LCIA Rules) and Switzerland (ICC Rules)
- » August 2007: Elektrim SA is declared bankrupt in Warsaw pursuant to its own petition
- » Elektrim SA requests termination of arbitration proceedings based on Article 142 of the Polish Bankruptcy and Restructuring Law



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Article 142 of the Polish Bankruptcy and Restructuring Law...

Art. 142 PBR

"Any arbitration clause concluded by the bankrupt shall **lose its legal effects** as of the date bankruptcy is declared, and any pending **arbitration proceedings shall be discontinued**".

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...and How It Was Applied in the Vivendi Case

English Arbitral Tribunal

- Art. 142 analyzed under the European Insolvency Regulation (EIR)
- characterized as a procedural, not as a contractual issue
- application of English law pursuant to Art. 15 EIR

continuation of proceedings

Swiss Arbitral Tribunal

- EIR inapplicable, no directly relevant conflict rules
- characterized as a matter of legal capacity
- application of Art. 142 PBR pursuant to Art. 154 and 155 PILS

termination of proceedings

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» What rules govern conflicts between arbitration in one country and insolvency proceedings in another country?

» Can or should arbitration proceedings continue despite one party having become insolvent?

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Arbitrating Against Insolvent Parties in Domestic Settings

- » German and French law
 - arbitration may continue with modified request for relief, after the claim has been filed with the insolvency administrator or court
 - rights and remedies directly related to the insolvency (e.g. clawback actions) are not arbitrable
 - no decision on rank / no payment outside insolvency proceedings
- » English law: need to obtain leave from courts to start or continue any proceedings

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Arbitrating Against Insolvent Parties in Switzerland

- » no automatic invalidity of arbitration clauses, **but**
- » mandatory rules on jurisdiction for **claims concerning the composition of the estate**
 - actions targeted at payment out of the estate
 - actions targeted at the return of assets
 - clawback / avoidance actions
- » no automatic recognition of claims pending in arbitration by administrator → need to re-litigate

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Possible Coordination in International Cases (I)

- » Which mandatory rules for international arbitration?
- » Law of the seat of arbitration?
 - define mandatory standards through possibility of an appeal
 - but no direct guidelines for coordination with foreign insolvency proceedings
 - conflict rules re capacity, arbitrability, arbitration agreement (Swiss solution in Vivendi)?
 - domestic insolvency rules by analogy (English solution in Vivendi)?

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Possible Coordination in International Cases (II)

- » Direct application of the *lex concursus*?
 - Art. 142 PBR (discontinuation of proceedings) or Art. 487 Latvian CCP (loss of arbitrability) as exceptions
 - to be considered generally or only if they qualify as public policy rules?
 - stay of pending proceedings as (mandatory) concession to foreign insolvency

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Conclusion

- » no problems if an award can be obtained before the opening of insolvency
- » otherwise: disruptive effect; no clear guidelines for coordination
- » stay of arbitration proceedings as rule
- » continuation of arbitration, if enforcement (i) is possible under insolvency regime, or (ii) can be directed against third parties
- » ultimately enforcement options are decisive

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