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

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".
…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 a contractual issue
- application of English law pursuant to Art.15 EIR

**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

continuation of proceedings

termination of proceedings

» 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?
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

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
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)?

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
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