



# Arbitration and insolvency

## Issues of Applicable Law

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NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL  
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# INTRODUCTION: Issue (1)

- **Scenario:** insolvency after start of arbitration
- Risk of **interference with arbitration** in several ways
- Different **policy objectives**
- Arbitral tribunals have **no *lex fori***
- Arbitral tribunals **apply different laws**

## **Issue:**

Are insolvency law provisions binding on arbitral tribunals?

# INTRODUCTION: Issues (2)

- No easy answer
- Different approaches possible
- **Scope of discussion:**
  1. Impact of the seat of the arbitration
  2. Impact of the issue: capacity and due process
  3. Impact of the likely place of enforcement
- Outside scope: insolvency law part of *lex causae*

# IMPACT OF THE SEAT OF THE ARBITRATION: insolvency in the country of the seat (1)

- Concern: risk of annulment
- Key provisions of insolvency law as **mandatory law** / part of **public policy**
- **Not an issue** for arbitral tribunals (no *lex fori*)  
**unless:**
  - Provisions part of the **international public policy** as recognized by the Courts of seat
  - Provisions go to **due process**
  - Ultimately depends on *lex arbitri*

# IMPACT OF THE SEAT OF THE ARBITRATION: insolvency in the country of the seat (2)

## Reasoning in arbitral case law: Insolvency law

- *applied* because insolvency proceedings in country of seat  
(e.g. monetary award, France)
- *ignored* because insolvency proceedings in another country  
(e.g. stay, several countries)
- *ignored* because insolvency proceedings filed to disrupt arbitration

# IMPACT OF THE SEAT OF THE ARBITRATION: insolvency in the country of the seat (3)

## Judicial approach:

Annulment / **breach of public policy**

- Stay of arbitration until lodging of claim and notification to trustee (France, Italy, Germany?)
- Stay of arbitration for monetary claims till verification process completed in insolvency proceedings (Netherlands)
- Prohibition of monetary award (France)

In **Switzerland?**

# IMPACT OF THE SEAT OF THE ARBITRATION: Recognition of insolvency order at the seat (1)

- Concern: risk of annulment
- Generally, **no automatic recognition** of “foreign” insolvency orders
- Recognition **not an issue** for arbitral tribunals (no *lex fori*) **unless**:
  - Insolvency law of the seat applies *and* provisions part of the **international public policy** as recognized by the Courts of seat
  - Provisions go to due process
  - Ultimately depends on *lex arbitri*

# IMPACT OF THE SEAT OF THE ARBITRATION: Recognition of insolvency order at the seat (2)

## Reasoning in arbitral case law:

### Insolvency law

- *ignored* because insolvency order not recognized in country of seat
- *ignored* because insolvency order not *capable* of being recognized in country of seat (abuse of right)

## Judicial approach:

### Insolvency law

- *ignored* because insolvency order not capable of being recognized at the seat



# IMPACT OF THE SEAT OF THE ARBITRATION: Seat and insolvency in the EU (1)

- **EC Reg 1346/2000** on Cross Border Insolvency
- Key provisions:
  - Universality
  - Automatic recognition and effect of insolvency order
  - Conflict of laws rules → application of “original” insolvency law to such effect
  - With exceptions, incl. arbitration pending application of law where arbitration pending (Vivendi/Elektrim)

# IMPACT OF THE SEAT OF THE ARBITRATION: Seat and insolvency in the EU (2)

- Concern: risk of annulment
- Seat in EU: two **issues**:
  1. **Arbitral tribunals bound** by EC Reg?
    - EC Reg: mostly conflict of laws rules
    - Vivendi/Elektrim: yes (challenge to jurisdiction)
  2. **Which law** of place where arbitration pending applies?
    - Insolvency law of country of seat?
    - *Lex arbitri* alone?

# IMPACT OF THE ISSUE: Capacity (1)

- Concern: risk of annulment / no enforcement if **lack of capacity**
- Issues:
  - Not universal concept of capacity
  - Tends to be governed by law of place of incorporation, seat, main place of business, or domicile
  - Insolvency law may impact on capacity to enter or remain party to arbitration agreement
- **Issue for arbitral tribunals** even if no *lex fori*

# IMPACT OF THE ISSUE: Capacity (2)

Illustration: **Vivendi – Elektrim** decisions

- Polish insolvency law affecting “**capacity**” of Elektrim:
  - CH: yes
  - EN: not argued
- Which **choice of law method** should be applied?
  - CH: Swiss PIL (PIL Act) → Polish law
  - EN: method in EC Reg → English law
- Result:
  - CH: no jurisdiction
  - EN: jurisdiction

What if had been an issue of capacity?

# IMPACT OF THE ISSUE: due process

- Concern: risk of annulment / no enforcement if **breach of due process**
- Provisions of insolvency law may guarantee:
  - Proper notice
  - Opportunity for trustee to present case
- **Issue for arbitral tribunal** but depends on:
  - Timing
  - Good faith of insolvent party
  - *Lex arbitri* & approach of Courts

# IMPACT OF THE PLACE OF ENFORCEMENT

- Concern: risk of **non-enforcement** in country where **insolvency order issued**
- **Not an issue** for arbitral tribunals
  - But depends on plea and *bona fide* of parties
- No uniformity in **judicial approach** (e.g. public policy)
  - Depends on *bona fide* of party seeking enforcement

# CONCLUSION

## Not easy to reconcile insolvency and arbitration:

- Tribunal has no *lex fori*
- Usually depends on *lex arbitri* and scope of public policy - no uniform approach
- Not always detailed applicable law analysis by arbitral tribunals
- Pragmatic approach: pause and consider issues

**THANK YOU**

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