



## Arbitration and insolvency

Applicable law and general issues  
in light of the *Vivendi* decisions

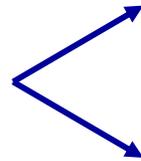
**Domitille Baizeau**

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ASA Groupe Genevois 18 June 2009

# TERMINOLOGY USED

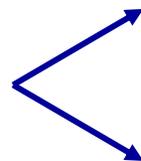
**Insolvency**



Liquidation, bankruptcy (voluntary or compulsory)

Re-organisation proceedings  
(*i.e.* legal insolvency)

**Insolvent party**



Debtor, party subject to insolvency proceedings

*i.e.* company in liquidation, under administration, or personal bankrupt (as Claimant or Respondent)

**Trustee**



Liquidator, administrator, receiver

# POSSIBLE SCENARIOS

- Claimant and Respondent **parties to an arbitration agreement**
- Claimant or Respondent **subject to insolvency proceedings**

At different points in time “X”



# WHY MAY INSOLVENCY INTERFERE WITH ARBITRATION ?

## Different policy objectives

- Insolvency: equality of creditors (centralised claims), rescue of creditor, state control
- Arbitration: party autonomy, upholding arbitration agreement, certainty of transactions

## Leading to specific solutions

- Substantive and procedural provisions of insolvency law
  - which may impact on arbitration agreement and/or arbitral proceedings
- Arbitral Tribunal has no *lex fori* and applies different national laws
  - Not necessarily insolvency law

# HOW MAY INSOLVENCY INTERFERE WITH ARBITRATION ? (1)

## Potential impact of insolvency law

### ... on arbitration agreement

- Arbitration agreement entered into by insolvent party without approval of all creditors and/or insolvency courts
- Arbitration agreement “null and void” *ipso facto* upon opening of insolvency under insolvency law
- Trustee “opts out” of arbitration agreement with approval of insolvency courts
- Arbitration agreement voidable transaction and set aside by insolvency courts

# HOW MAY INSOLVENCY INTERFERE WITH ARBITRATION? (2)

## ... on arbitral proceedings

- No “authority” of insolvent party to commence / continue arbitration under insolvency law
- Insolvency courts issue “anti-arbitration injunction”
- Insolvent party requires stay of arbitration
- Trustee asks for time to review file / file submissions or wants to appoint new arbitrator
- Insolvent party cannot pay advance on costs
- Non-insolvent party applies for security for costs

# HOW MAY INSOLVENCY INTERFERE WITH ARBITRATION? (3)

## ... on underlying claim

- Non-insolvent party's monetary claim not arbitrable under insolvency law

## ... on arbitral award

- Order for payment of money against insolvent party prohibited under insolvency law
- Award against defaulting insolvent party not enforceable in insolvency
- Award contested by other creditors
- Claim not registered in the insolvency proceedings

# HOW TO RECONCILE INSOLVENCY AND ARBITRATION?

## No obvious solutions because:

- Few international instruments
  - EC Regulation 1346/2000
  - NY Convention: limited solutions
- Variety of insolvency and arbitration laws
- Variety of rules on conflict of laws
- No uniform approach by state courts
- No uniform approach by arbitrators

## Key issue:

- **which law applies to the particular issue?**

# THE VIVENDI / ELEKTRIM SCENARIO (1)

## Basic facts

- Dispute essentially between French company, Vivendi Universal SA (**Vivendi**) v Polish company, Elektrim SA (**Elektrim**)
- Dispute over ownership of shares in PTC, a large Polish mobile telecommunication company
- Several arbitral and court proceedings in various jurisdictions

# THE VIVENDI / ELEKTRIM SCENARIO (2)

## Facts in English case

- Third Investment Agreement pursuant to which Vivendi was to acquire an interest in PTC, allegedly breached by Elektrim by interfering with, or failing to secure, such interest
- Arbitration clause: LCIA Arbitration, London
- Arbitration commenced in Aug 2003 (liability hearing fixed in Oct 2007).

# THE VIVENDI / ELEKTRIM SCENARIO (3)

## Facts in Swiss case

- Alleged breach by Elektrim of an (unsigned) “Settlement Agreement” entered into in Mar 2006
- Arbitration clause: ICC Geneva
- Arbitration commenced in Apr 2006
- Hearing on liability scheduled after Aug 2007

# THE VIVENDI / ELEKTRIM SCENARIO (4)

## Bankruptcy of Elektrim

- 21 Aug 2007: bankruptcy of Elektrim
  - By order of the Warsaw court
  - On Elektrim's own petition
  - Elektrim's management retained control over assets and conduct of its affairs under supervision
- 22 Aug 2007: LCIA Tribunal informed
- 5 Sept 2007: ICC Tribunal informed
- Feb 2008: revocation of Elektrim's self administration status by Warsaw court

# THE VIVENDI / ELEKTRIM SCENARIO (5)

## Elektrim's plea

- Elektrim argues lack of jurisdiction of arbitral tribunal in both cases
- Elektrim relies on Art. 142 of the Polish Bankruptcy and Reorganisation Law:

*“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”*

# THE VIVENDI / ELEKTRIM DECISIONS (1)

- **March 2008 LCIA arbitration partial award**
  - English law governs effects of Polish bankruptcy order
  - Tribunal has jurisdiction
- **July 2008 ICC Arbitration partial award**
  - Polish law governs effect of Polish bankruptcy order
  - Tribunal does not have jurisdiction
- **October 2008 English High Court decision**
  - Partial award upheld
- **March 2009 Federal Supreme Court decision**
  - Partial award upheld

# THE VIVENDI / ELEKTRIM DECISIONS (2)

## Issues

- Effect on pending arbitration in London and in Geneva if a party enters into insolvency in Poland?
- Depends on **which law governs the impact of insolvency on the arbitration**: Polish law or English/Swiss law?
- **English case**: turned on interpretation of EC Regulation
- **Swiss case**: turned on characterisation of effect of Polish law

# THE VIVENDI / ELEKTRIM English decision (1)

## Key principles of EC Regulation

- Ensure effective and efficient management of insolvency proceedings within internal market (no forum shopping)
- Universality: automatic recognition and effect of insolvency proceedings in an EU member state [Poland] in all other EU member states [including England] (Preamble para 22 & Art. 16 and 17)
- Application of [Polish] insolvency law to such effects (Preamble para 23 & Art. 4)

# THE VIVENDI / ELEKTRIM English decision (2)

## Relevant provisions of EC Regulation

- Art. 4.1:

*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 [Poland]*

- Art. 4.2:

*[Polish law] shall determine in particular:*

*(e) The effects of insolvency proceedings on **current contracts** to which the debtor [Elektrim] is party*

*(f) The effects of the insolvency proceedings on proceedings brought by individual creditors [Vivendi], with the exception of **lawsuits pending***

# THE VIVENDI / ELEKTRIM English decision (3)

## Relevant provisions of EC Regulation

- Exceptions so as to protect legitimate expectations and certainty of transactions (Preamble para 24)
- Conflict of laws rules set out in Art. 5 to 15
- Art. 15:

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

**Issue: how to reconcile Art. 4.2(e) with 4.2(f) & 15?**

# THE VIVENDI / ELEKTRIM English decision (4)

## Decision

- Is the reference to arbitration a “lawsuit pending”?
  - Yes
  - Covers all types of action, but not execution
  - Covers arbitration as well as court proceedings
- Is the arbitration agreement a “current contract”?
  - Yes, insofar as it relates to any future, *i.e.* non pending, proceedings (4.2(e))
  - But no, insofar as it relates to pending arbitrations (4.2(f) & 15)
- All questions affecting “whether arbitration shall remain pending”, incl. status of arbitration agreement, to be determined by reference to Art. 15
- English law applies

# THE VIVENDI / ELEKTRIM English decision (5)

## Some questions & comments

- Which law of the seat applies under Article 15? (different approaches; Austria/UK)
- Which provisions of English law would apply if issue framed as one of legal capacity (as an issue affecting “whether arbitration shall remain pending”)?
- What if the seat had been in Poland and the insolvency in England?
- What if the arbitration agreement had been governed by Polish law? (para. 76 of decision)

# THE VIVENDI / ELEKTRIM Swiss decision (1)

## Key principles

- Underlying premise: only issue is Elektrim's capacity to be party to an arbitration
- PIL Act deals with issue of capacity of state entities parties to arbitration (Art. 177), but silent for private entities
- Issue of legal capacity of private entities to be party to arbitration determined through general Swiss conflict of laws rules:
  - Art. 154 PIL Act (law applicable companies) and 155(c) PIL Act (capacity of companies) apply
  - Art 178(2) PIL Act (validity of arbitration agreement) does not apply

# THE VIVENDI / ELEKTRIM Swiss decision (2)

## In this instance

- Elektrim is a Polish corporation: Polish law applies – Polish law also corresponds to insolvency law
- Art. 142 of Polish insolvency law removed legal capacity of Elektrim to be a party to arbitration
- No reason to doubt statements and legal interpretation of Art. 142 by Arbitral Tribunal based on opinions of Polish law professors (para 3.3 of decision)

# THE VIVENDI / ELEKTRIM Swiss decision (3)

## Some questions & comments

- Difficult case: oral hearing, majority 3 to 2
- Can the characterisation of the effects of Art. 142 on Elektrim's capacity be questioned? (see paras. 3.1 and 3.3)
- Is the decision bad for arbitration in Switzerland?
  - Are parties likely to file for bankruptcy when seat of arbitration is in Switzerland to avoid liability?
  - Are parties likely to avoid Switzerland as a seat of arbitration?

# CONCLUSIONS ON APPLICABLE LAW (1)

## Provisions of insolvency law applicable:

- If mandatory or part of public policy of law of the seat:
  - Insolvency in country of the seat?
  - Insolvency and seat in EU (EC Regulation) with exceptions, including pending arbitration (Art. 15)
  - Judgement of insolvency recognised in country of the seat?
- If issue legal capacity (governed by relevant insolvency law)?  
With exception outside EU?
- To satisfy due process and notice requirements (Trustee)

**If non compliance:**

**risk of annulment and/or unenforceable award**

# CONCLUSIONS ON APPLICABLE LAW (2)

## Provisions of insolvency law taken into account:

- If law of the (possible) place of enforcement
- Not binding but may be requested by non-insolvency party

## Solutions adopted in practice by arbitral tribunals depend on:

- Characterisation of issues
- Applicable law
- Parties' good faith and requirements

# CHECK LIST

## For arbitrators

- Pause to consider impact of insolvency
- Assess what insolvency law really provides
  
- Check authority
- Notify Trustee
- Identify potential issues
  - Applicable law(s)
  - Validity of arbitration agreement
  - Procedural issues for both parties
  - Costs
  
- Even if insolvency law not binding, assess
  - Parties' good faith
  - Parties' interests
  - Parties' requirements
  - Impact on enforcement

# CHECK LIST

## Counsel for the non-insolvent party

### Impact of insolvency on:

#### ■ Arbitration

- Authority of insolvent party
- Capacity
- Validity of arbitration agreement

#### ■ Creditor's claim

- Enforcement issues
- Advantage of insolvency proceedings
- Procedural requirements



### Steps required in arbitration?

- Stay
- New relief
- Security for costs

# **CHECK LIST**

## **Counsel for the insolvent party**

- **Power of representation**
- **Legal costs covered**
- **Impact of insolvency on arbitration:**
  - Authority to start / continue
  - Capacity
  - Validity of arbitration agreement
- **New arbitration**
  - Advance on costs
- **Pending arbitration**
  - Notification
  - Stay
  - Composition of Tribunal
  - Time to file new submissions