Arbitration and insolvency
Issues of Applicable Law
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*
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?
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?
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
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

Domitille Baizeau

LALIVE

dbaizeau@lalive.ch