



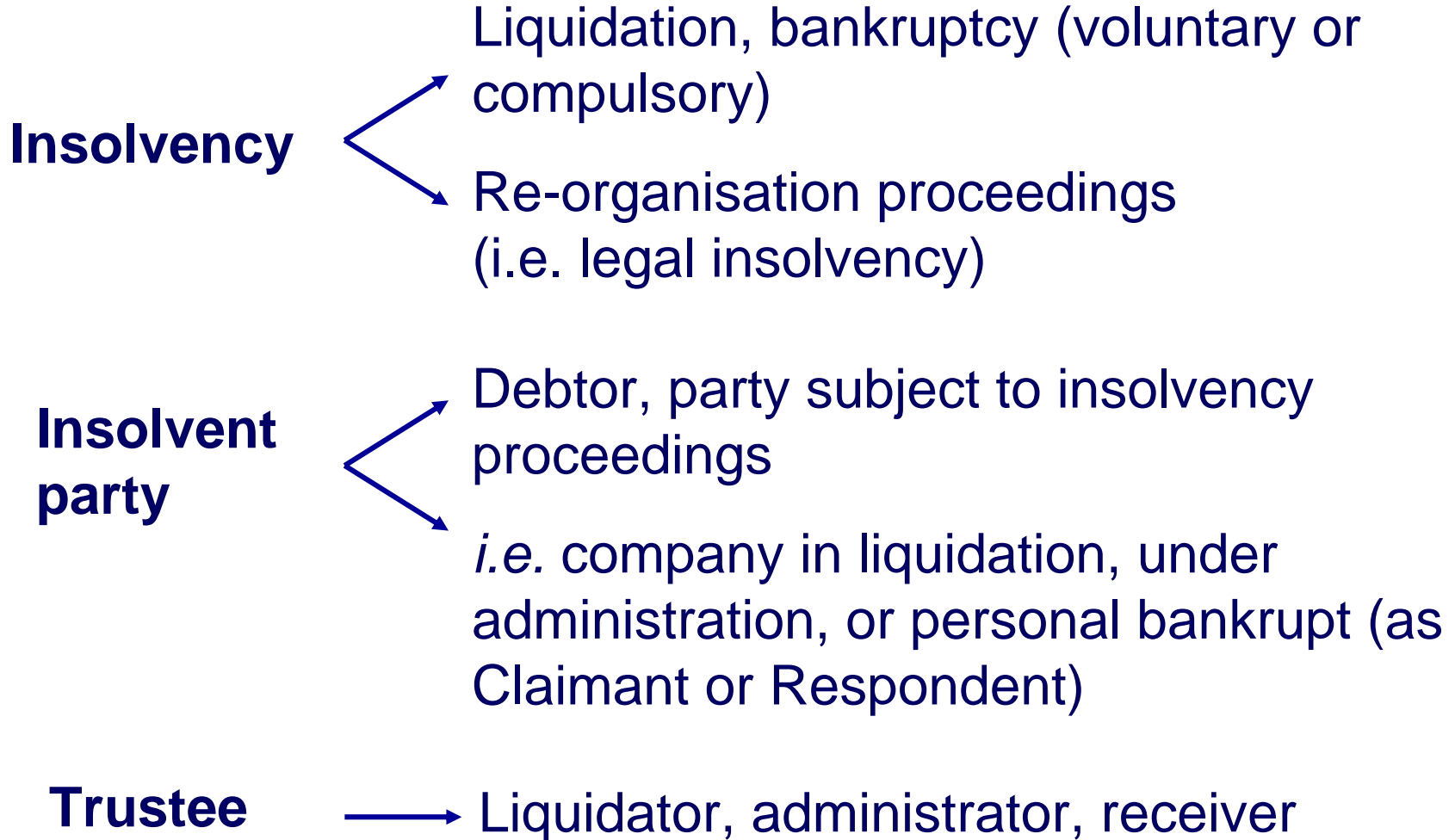
INSOLVENCY ISSUES IN ARBITRATION IN A CROSS BORDER CONTEXT

INTRODUCTION TO THE ISSUES

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TERMINOLOGY USED



SCENARIOS

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

At different points in time “X”



WHY DOES INSOLVENCY INTERFERE WITH ARBITRATION ? (1)

Different policy objectives:

Insolvency

- Equality of creditors:
 - Centralization of claims
 - Prohibition of individual claims
- Rescue of insolvent party
- State control

Arbitration

- Upholding arbitration agreement
- Certainty in commercial transactions

WHY DOES INSOLVENCY INTERFERE WITH ARBITRATION ? (2)

Insolvency law (*lex concursus*) substantive and procedural provisions:

- Rights and obligations of insolvent party/trustee
- Notification, filing and verification of claims
- Identification of assets
- Enforcement of securities
- Priority amongst creditors
- Fate of fraudulent transactions
- Fate of pending legal (including arbitral) proceedings



Impact on arbitration agreement and arbitral proceedings

WHY DOES INSOLVENCY INTERFERE WITH ARBITRATION ? (3)

Arbitral Tribunal applies different national laws:

- Law of contract (dispute on merits as to performance and breach of contract)
- Personal law of the parties (legal capacity, authority?)
- Law of seat of arbitration
- Law of arbitration agreement
- (Possibly) law of (potential) place of enforcement



Where does insolvency law fit in?

HOW DOES 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
- Arbitration agreement null and void *ipso facto* upon opening of insolvency
- Trustee opts out of arbitration agreement with approval of insolvency courts
- Arbitration agreement “inoperative” or “incapable of being performed” because no funds to arbitrate
- Arbitration agreement voidable and set aside by insolvency courts

HOW DOES INSOLVENCY INTERFERE WITH ARBITRATION? (2)

... on arbitral procedure

- No authority of insolvent party to commence / continue arbitration
- 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 DOES INSOLVENCY INTERFERE WITH ARBITRATION? (3)

... on underlying claim

- Non-insolvent party's monetary claim not arbitrable
- Order for payment of money against insolvent party prohibited

... on arbitral award

- Award against defaulting insolvent party
- Award contested by other creditors
- Claim not registered in the insolvency

HOW TO RECONCILE INSOLVENCY AND ARBITRATION? (1)

No obvious solutions because:

- Few international instruments
 - EC Regulation 1346/2000
 - Nordic Bankruptcy Convention
- Variety of national laws
 - Insolvency (UNCITRAL Model Law)
 - Arbitration
 - Private international law
- No uniform approach by state court
- No uniform approach by arbitrators

HOW TO RECONCILE INSOLVENCY AND ARBITRATION? (2)

Solutions adopted depend on:

- Characterisation of the issues
- Which law applies to the Arbitral Tribunal
- Parties' good faith and requirements



**In practice,
in most cases arbitration can proceed
but a pause is required**

WHICH LAW APPLIES? (1)

Insolvency law will apply:

- 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) except when arbitration pending?
 - Judgement of insolvency recognised in country of the seat?
- If issue legal capacity?
- To satisfy due process and notice requirements

If non compliance



annulment and/or unenforceable award



WHICH LAW APPLIES? (2)

Insolvency law may apply:

- If law of the (possible) place of enforcement
- Not binding
- But should not be ignored
 - Duty to render an enforceable award?
 - Duty of professional diligence

if non compliance
↓
unenforceable award



CHECK LIST

For arbitrators

- **Pause to consider impact of insolvency**
 - **Assess what insolvency law really provides**
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- Check authority
 - Notify Trustee
 - Identify potential issues
 - Applicable law(s)
 - Validity of arbitration agreement
 - Procedural issues for both parties
 - 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
- Advantage of insolvency proceedings
- Procedural requirements



- **Steps required in arbitration**

- New relief
- Stay
- 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

THANK YOU

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