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CHAPTER 18

CROSS-BORDER INSOLVENCY AND ARBITRATION

Which Consequences of Insolvency Proceedings should be given Effect in Arbitration?

1. INTRODUCTION

The Willem C. Vis Moot Court Competition has always been a generator of exciting topics. The subjects have been both challenging and inspiring not only to the moot court participants, but to every lawyer, legal practitioner and academic alike. Moot problems usually involve drawing and following delicate lines in applying the law. The analysis requires not only a substantial knowledge in the relevant fields of law, but also profound legal reasoning and astute consideration. The Willem C. Vis Moot could never have become such a source of inspiration and such a unique teaching tool without the devotion and scholarship of Prof. Eric Bergsten, to whom this article is dedicated with deep appreciation and gratitude.

A perfect example of the stimulating and inspiring nature of the moot problems is the one involving issues of cross-border insolvency in arbitration.[1] The interaction between these two fields of law used to be a rather neglected topic and the literature on the subject was fairly scarce. The moot problem, however, drew attention to the conflicting decisions in two jurisdictions[2] and triggered a

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[1] Sixteenth Moot Problem 2008-2009.

[2] The decision rendered in the first instance in England was issued on 2 October 2008, one day before the Moot Court Problem was published. The Swiss Supreme Court judgment was brought on 31 March 2009 only few days preceding the hearing of oral arguments of the Sixteenth Moot from 3 to 9 April 2009 in Vienna.

S. Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers (eds), Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, 337-362.

vivid discussion among both insolvency lawyers and arbitration specialists[3]. These decisions concern the dispute between a company subject to insolvency proceedings and its creditors.

They obviously evidence the fact that not only arbitrators, but also national courts have difficulties in defining the meaning and reach of the provisions on the recognition of foreign insolvencies. The arbitrators and courts in England and Switzerland reached opposing decisions. It is therefore interesting to see which of the two conflicting approaches provides useful answers and valuable guidelines for arbitrators and courts in future cases. The circumstances of the *Syska v. Vivendi*-case offer a unique opportunity to discuss the delicate issues on the interaction between arbitration and insolvency.

This article addresses not only the effects of insolvency in arbitral proceedings. It also provides suggestions as to how national courts should apply the law on cross-border insolvency. Thereby, the interpretation of the relevant provisions of the EC Regulation on insolvency proceedings[4] has been discussed in a greater detail.

2. DISPUTES BETWEEN *VIVENDI* AND *ELEKTRIM* – BACKGROUND FACTS

A Polish company Elektrim S.A. (hereinafter: Elektrim) entered into a number of agreements with, *inter alia*, Vivendi Universal S.A. (hereinafter: Vivendi S.A.) and Vivendi Telecom International S.A. (hereinafter: Vivendi Telecom). Elektrim at one time owned a substantial shareholding in a Polish mobile telephone company called PTC. It entered into an agreement known as the Third Investment Agreement with Vivendi S.A. and Vivendi Telecom. This was one

[3] See e.g., M. Robertson, 'Cross-border insolvency and international commercial arbitration: characterisation and choice of law issues in light of Elektrim S.A. v. Vivendi S.A. and analysis of the European insolvency regulation', *International Arbitration Law Review*, 12-6 (2009): 125-135; P.K. Wagner, 'When International Insolvency Meets International Arbitration', *Dispute Resolution International*, 3-1 (March 2009): 56-67; B. Domitille, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, eds C. Müler & A. Rigozzi, Schulthess, (Zürich-Basel-Geneva, 2009), 97-120; J. Sutcliffe & J. Rogers, 'Effects of Party Insolvency on Arbitration Proceedings Recent Decisions Give Pause for Thought in Testing Times', <http://fulbright .com/index.cfm?DETAIL+ves&FUSEACTION=publications>; D. Foster & S. Walsh, 'Effects of Insolvency on Arbitration Proceedings', *The European & Middle Eastern Arbitration Review* (2009).

[4] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings OJ 2000 L 160 p.1 (hereinafter: Insolvency Regulation).

among a series of agreements whereby Vivendi S.A. and Vivendi Telecom intended to acquire an interest in PTC. Article 5 of the Third Investment Agreement contained an arbitration agreement providing for arbitration in London under the 1998 LCIA Rules. The law which was applicable to the Third Investment Agreement was Polish law. Disputes arose between the parties so that Vivendi S.A. and Vivendi Telecom et al. commenced arbitration in London on 22 August 2003 as provided in the arbitration agreement. The claimants alleged that Elektrim had breached its obligation under the Third Investment Agreement by interfering with or failing to secure the interest which the claimants were supposed to obtain in PTC.

Another arbitral proceeding was initiated in Switzerland according to the ICC Rules by Vivendi S.A. and Vivendi Telecom *et al*. on 13 April 2006 against Elektrim *et al*. The dispute arose out of a 'Settlement Agreement' entered into between the parties on 29 March 2006. The Settlement Agreement contained the following arbitration clause:

> Any dispute, claim or controversy relating to, arising out of, or in connection with this Agreement, including any question regarding its formation, existence, validity, enforceability, performance, interpretation, breach, or termination, shall be finally resolved under the Rules of Arbitration of ICC by three arbitrators appointed in accordance with the said rules. None of the arbitrators shall be a German, French or Polish citizen. The language of the arbitral proceedings shall be English. The place of arbitration shall be Geneva, Switzerland.

Upon Elektrim's petition of 9 August 2007, the Warsaw District Court issued an order on 21 August 2007. Elektrim was thereby declared to be subject to insolvency proceedings, retaining its own management and the right to take any action within the ordinary course of business. By its decision of 5 February 2008 the Court revoked the decision on self-administration and appointed Jozef Syska, initially appointed as the Court Supervisor, as the administrator of Elektrim's assets.

Mr Syska objected to the jurisdiction of the arbitral tribunal in both the LCIA arbitration in London on 22 August 2007 and in the ICC arbitration in Geneva on 7 September 2007. He relied on Article 142 of the Polish Insolvency Act which implied the invalidity of an arbitration clause and the termination of pending arbitral proceedings as a consequence of commencing insolvency procedure. The provision of Article 142 reads as follows:

> 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.[5]

Arbitrators and the courts in the two jurisdictions reached divergent conclusions regarding the reach and meaning of this provision of the Polish insolvency law.

The Arbitral Tribunal in the LCIA proceedings in London rejected Elektrim's objections to its jurisdiction in its Interim Partial Award issued on 20 March 2008. On the merits, it declared in the same Interim Partial Award that Elektrim had breached the terms of the Third Investment Agreement (TIA), leaving the questions relating to a remedy for later consideration. An application to set the decision aside was issued on 16 April 2008 under Sect. 67 of the 1996 English Arbitration Act. In its judgment of 2 October 2008 Christopher Clark J., sitting in the Commercial Court,[6] rejected the application to set the Interim Partial Award aside. This decision was affirmed by the Court of Appeal judgment of 9 July 2009.[7] In the meantime, the arbitral tribunal in London issued a final award dated 12 February 2009 ordering Elektrim to pay substantial amounts of damages to, *inter alia*, Vivendi S.A. and Vivendi Telecom. In reaching their decisions the courts in both instances applied the Insolvency Regulation.

On the other hand, the arbitral tribunal in Switzerland, as well as the Swiss Supreme Court[8] in the same circumstances rendered decisions contrary to those taken by the arbitrators and the courts in England. They concluded that the opening of the insolvency proceedings in Poland resulted in the arbitrators lacking jurisdiction. They held that the relevant provision of the Polish law operated so as to invalidate the arbitration clause in already pending arbitral proceedings. Thereby, neither the arbitral tribunal nor the Swiss Supreme Court invoked the provisions of the Swiss law on cross-border insolvency. The line of

[5] Article 142 of the Polish Act of 28 February 2003 - Law on Insolvency and Restructuring relates to the declaration of bankruptcy proceedings with the option of concluding an arrangement. A corresponding provision in the context of declaration of bankruptcy with liquidation of the bankrupt's assets is found in Article 147. The wording of the provisions of Article 142 and 147 is identical.

[6] Judgment of Mr Justice Christopher Clarke in High Court of Justice, Queen's Bench Division, Commercial Court (hereinafter: Commercial Court), *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm) (2 October 2008).

[7] Court of Appeal (Civil Division) Judgment of 9 July 2009, *Syska v. Vivendi Universal SA et al* [2009] 28 EG 84, [2009] EWCA Civ 677.

[8] *Bundesgericht/Tribunal Fédéral* (T 1/2 4A_428/2008) 31 March 2009.

reasoning taken by the arbitrators and the courts in these two jurisdictions are briefly addressed.

2.1. Decisions in Switzerland

Upon an objection to the lack of jurisdiction due to insolvency proceedings in Poland, the arbitral tribunal in Switzerland rendered an interim award on 21 July 2008. It declared that arbitral proceedings had been terminated by the operation of Article142 of the Polish Insolvency Act. It held that this provision applied to all arbitral proceedings, including those before tribunals abroad and operated so as to exclude the jurisdiction of arbitrations involving insolvent Polish parties.

It should be noted that the tribunal held that the Polish Insolvency Act could not suspend proceedings before the Swiss courts or arbitral tribunals having their seat in Switzerland. Yet the arbitral tribunal held that the Polish Insolvency Act was to regulate the legal consequences of opening insolvency proceedings concerning a Polish legal person. It went on to conclude that the legal capacity to participate in legal proceedings such as arbitration was to be determined according to the general Swiss private international law rules. With respect to legal persons such capacity was regulated in Article 154 f of the Swiss Private International Law Act. Consequently, the 'continued capacity' of a party in arbitral proceedings was to be determined according to Polish law. By virtue of Article 142 a Polish legal person in insolvency lacks subjective arbitrability.

When deciding upon the action to set aside, the Swiss Supreme Court agreed with the legal reasoning of the arbitral tribunal. The Court raised the question of 'capacity' (*Fähigkeit*) to be a party in arbitral proceedings in the context of Article 190 par. 2(b) Private International Law Act. This provision relates to the reasons for the setting aside of the award. It concluded that such a preliminary question of substantive law was decisive for a decision on jurisdiction and was to be decided on the basis of foreign law. The Court stated that the Swiss statutory arbitration law contained in the Private International Law Act did contain an express provision on the capacity of a State to be a party in the proceedings in Article 177 par. 2, but that the Act was silent as far as the subjective arbitrability of a non-state party was concerned. The Court held that, consequently, the general principles of procedural law were to apply in that respect. It thereby invoked Article 33 f. of the Private International Law Act for natural persons and Articles 154, 155 para. C for legal persons. It concluded that the defendant was a legal person subject to Polish law. Consequently, legal capacity and thereby also

the capacity to be a party in arbitral proceedings were to be determined on the basis of Polish law (*lex fori concursus*).[9]

The Court agreed with the decision of the arbitral tribunal, which relied *inter alia* on the opinion of a Polish professor. According to the expert on Polish insolvency law, one of the defendants – Elektrim - had lost its capacity to be a party in arbitral proceedings by the commencement of the insolvency proceedings. In the view of the Court, Article 142 of the Polish Bankruptcy Act regulates a specific aspect of procedural capacity. By virtue of this provision a Polish party which has become subject to insolvency proceedings is deprived of subjective arbitrability in a pending arbitral proceeding. Therefore the arbitral tribunal, in the view of the Court, correctly declared itself incompetent.

Obviously both arbitrators as well as the Swiss Supreme Court qualified the relevant provision of Polish insolvency law as a matter of 'capacity' or subjective arbitrability. It is therefore interesting to look at the appropriateness of such a decision as a general approach to be taken in subsequent cases. Besides, it will be examined whether or not such provisions of insolvency law should be given effect 'abroad', i.e., outside the jurisdiction where insolvency proceedings are commenced.

2.2. Is it Generally Appropriate to Consider that a Provision Declaring an Arbitration Agreement Invalid After the Commencement of Insolvency Proceedings Affects 'Capacity' or 'Subjective Arbitrability'?

Before addressing the question of the 'characterisation' of provisions invalidating arbitration agreements in insolvency, it is interesting first to examine the purposes that such a regulation may intend to achieve.

Insolvency law may provide limitations on the rights of the debtor, his creditors and sometimes even third parties in order to efficiently pursue its basic principles. In more general terms, the underlying objectives can be seen in the maximisation of the assets of a debtor and their distribution in an orderly manner or the rehabilitation of a business in financial difficulties. Insolvency laws and national courts may use different ways to pursue these objectives and underlying purposes. Thus, they may also attempt to modify an absolute rule on the

[9] The court relied on Article 154 in connection with Article 155 sub. C of the Private International Law Act (*lex fori concursus*).

generally binding nature of pre-bankruptcy arbitration agreements or rather to adjust it to the particular nature of insolvency procedures.[10] The nature of a claim, a general fragility of the debtor's estate and the presence of other parties in the insolvency, on the one side, and the likely substantial costs of arbitration, on the other, are some of the factors that might influence the enforceability of arbitration agreements. Besides, in other circumstances outside insolvency the courts may also search for ways to modify the hard and fast rule on the binding nature of arbitration agreements.[11]

Yet provisions similar to Articles 142 and 147 of the Polish Insolvency Act are not frequently found in insolvency laws. This is not surprising, as it is indeed doubtful whether a provision of this kind genuinely serves the purposes and objectives of insolvency law. In particular, it is difficult to understand the *rationale* of a regulation whereby both a trustee and creditors are deprived of the possibility to opt for resolving a dispute by arbitration, even when the advantages of such a choice would be obvious. A clear example would be a situation where there is a claim on behalf of the estate against a third party. The relevant provision of Polish law renders an arbitration clause invalid *ex lege*. Consequently, it deprives the trustee of the right to pursue such a claim in

[10] See the abundant case law in the United States, applying various approaches when addressing the enforceability of arbitration agreement n bankruptcy, e.g., *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989); *In re FRG*, 115 B.R. 72 (E.D.Pa. 1990); *United States Lines, Inc. v. American Steamship Owners Mutual Protection Association Inc., (In re United States Lines, Inc)* 199 B.R. 465 (S.D.N.Y. 1996), 1997 US Distr. Lexis 1915 (S.D.N.Y. 1997); *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006); *In re S.W. Bach & Co.*, 2010 WL 810128, (Bankr. S.D.N.Y. Mar. 10, 2010). *In re D&B Swine Farms, Inc.*, 2010 WL 358493, at 4-6 (E.D.N.C. Jan. 23, 2010); *Moglia v. Public Employers Ins. Co.*, 547 F.3d 835, 837 (7th Cir. 2008); *In re Fleming Cos.*, 2007 WL 788921, (D. Del. Mar. 16, 2007).

[11] For example, the courts in the Netherlands apply to arbitration agreements the general rule of contract law contained in Article 248 para. 2 of Book 6 of the Civil Code. It provides that the rule on the binding character of an obligation under the contract will not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and fairness. Thus, the *Kantonrechter Zierikzee* held it to be contrary to the criteria of reasonableness and fairness to hold a person of limited means bound by an arbitration clause. If the jurisdiction of the curt was to be denied, the claimant would be deprived of the right to pursue the claim. The claimant had filed the claim before the Court after having being informed that the arbitration institution would only deal with his claim after the deposit for costs had been paid. That amount, however, exceeded the amount of his claim. (*Kantonrechter Zierikzee,* 19 February 1988, *Tijdschrift voor arbitrage (TvA)* (1998) 147. Also, the reliance on the arbitration clause was held to be contrary to the criteria of reasonableness and fairness when the matters falling under the clause were closely connected with matters falling outside it. See, *Rechtbank Haarlem* of 11 May 1993*, Tijdschrift voor Arbitrage (TvA)* (1993) 238.

arbitration even though the creditors could benefit from the favourable enforcement regime of the 1958 New York Convention[12] if an award would be rendered in favour of the estate.

Another example can be found in the pending arbitrations either on behalf or against the estate. They are also terminated *ex lege* according to the relevant provision of Article 142. In general it is difficult to understand how the *ex lege* termination of an arbitration proceeding which is at an advanced stage may be beneficial for the estate and its creditors. It would be in the interest of both time and cost efficiency that the trustee and the creditors' committee and/or the court be given the opportunity to opt for the continuation of arbitration. This is particularly so if the dispute must anyway be resolved for the purposes of insolvency proceedings. For example, if a creditor's claim has been rejected in the verification procedure and must be settled for the purposes of insolvency. It is not obvious why it is necessarily more beneficial to initiate new litigation instead of continuing interrupted arbitral proceedings. More importantly, it seems to be difficult to explain why the trustee and creditors should *a priori* be deprived of the possibility to opt for continuing the arbitration if that appears more efficient. Thus, the motives of the Polish legislator and the purposes intended to be achieved are not easily discernible. Yet this provision regrettably has been retained in the relatively recently amended Polish Insolvency Act of 2009.

A provision with similar effect can be found in Spanish Bankruptcy Law,[13] but only with respect to domestic arbitrations. The provision of Article 52(1) of the Spanish Bankruptcy Act reads as follows:

> Arbitration proceedings
>
> (1) Arbitration agreements to which the debtor is a party shall not remain valid and effective while bankruptcy is open, save the provisions of international treaties.

Obviously, this provision is not even intended to be applied in connection with 'international' arbitration in Spain, either by the courts or arbitrators. Nor is it expected that this provision will be given effect in arbitral proceedings abroad involving a Spanish insolvent party. This reasoning has also been affirmed by the

[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations, *Treaty Series*, Vol. 330, p. 38 No. 4739 (1957) (hereinafter: 1958 New York Convention).

[13] Spanish Bankruptcy Law (*Ley Concursal*), Law no. 22 of 9 July 2003.

judiciary. Thus, in applying Article II(1) and (3) of the 1958 New York Convention, the Court of Appeal of Barcelona[14] confirmed that the litigation in Spain was to be stayed in favour of ICC arbitration in France.[15] Thus, it is clear that this provision is not considered to serve the main principles and objectives of the insolvency law in Spain.

Yet both the arbitral tribunal in Switzerland and the Swiss Supreme Court have given effect to such a provision, with no reference to the provisions of Swiss law on the recognition of foreign insolvency procedures. As indicated previously, it was held that the relevant provision of Polish insolvency law resulted in the 'incapacity' of an insolvent party to participate in arbitration proceedings.

However, it is dubious whether the provisions on 'incapacity' are appropriately applied in the context of arbitral proceedings, in particular pending arbitrations. It is true that under most insolvency laws, after the commencement of bankruptcy liquidation the debtor is deprived of the right to manage and to dispose of the estate. Consequently, he cannot effectively perform legal actions involving the estate. This dispossession also affects the right to defend or to institute legal proceedings against or on behalf of the estate. However, these rights are vested in the trustee or liquidator or administrator,[16] as the case may be in a particular legal system.[17] It is very surprising that neither the arbitral tribunal nor the Swiss Court invoked the relevant provisions relating to the powers of the trustee in insolvency proceedings. If the approach taken by the arbitrators and the Court in Switzerland is generally and always followed, the provisions on the role of the trustee or the administrator in insolvency proceedings would be meaningless. It would assume that no arbitral proceedings against or by the trustee can be conducted after the opening of the insolvency proceedings. This result would be surprising, considering that the trustee is normally authorised to bring and defend legal actions on behalf of the debtor.

[14] Court of Appeal (*Audiencia Provincial*), Barcelona, 29 April 2009, no. 86/2009 (Section 15), available online at: www.aranzadi.es (JUR 2009\472969).

[15] In determining the law applicable to arbitration agreements the Court relied on the 1961 European Convention and applied French law as the law of the country in which the award was to be made.

[16] See e.g., Partial Award in ICC Case 12907, April 2005, *ICC International Court of Arbitration Bulletin*, - Vol. 20/1 (2009), p. 98-105.

[17] The commencement of reorganisation proceedings does not necessarily have to imply the dispossession of the debtor in different legal systems.

It is not clear which approach would be taken by the Swiss courts in other circumstances of foreign insolvency, when there would be no provision corresponding to Article 142 of the Polish law. Indeed, it is questionable whether the legal reasoning applied therein is the one to be generally followed when dealing with the issue of the effects of insolvency proceedings in arbitration and outside the context of the relevant provision of the Polish law.

This is by no means to suggest that the arbitrators and the Swiss Supreme Court erred in giving effect to foreign insolvency proceedings. The question for discussion is rather which consequences of the commencement of insolvency proceedings should be given effect? It is debatable whether it is appropriate to directly apply all the provisions of foreign insolvency law with all the effects of the commencement of insolvency proceedings without relying on the relevant provision on cross-border insolvency. In general, it would be appropriate to give effect to the provisions which serve the purpose of protecting the basic principles of insolvency law. Provisions on the preclusion of individual actions by ordinary non-secured bankruptcy creditors, which will be addressed in more detail *infra*, may be mentioned as an example. The same is true for other provisions which serve the purpose of fundamental principles of insolvency law, such as the equal treatment of non-preferred creditors. In the present case, it would have been more appropriate to suspend arbitral proceedings until the creditors had filed their claims in verification proceedings. In doing so, such claims would first be dealt with in collective procedures according to the provisions of insolvency law. Only if they were contested in the verification procedure would there be a need to continue pending legal proceedings. This would genuinely serve the interests of the bankruptcy estate and the creditors alike. As already explained, it is doubtful whether the provisions similar to the relevant provision of Polish law in all circumstances serve the purpose of maximising the debtor's assets and consequently the interests of all the creditors.

3. DECISIONS IN ENGLAND

The arbitrators and the courts in England took a very different view of the meaning and reach of the relevant provisions of Polish insolvency law. As mentioned previously, the arbitral tribunal rejected the objections to its jurisdiction and declared that Elektrim had breached the terms of the Agreement. In its final award, the tribunal ordered Elektrim to pay damages. In the action for setting aside, Mr Justice Christopher Clarke sitting in the Commercial Court held that there were no reasons to set the award aside. This decision was upheld by the

Court of Appeal. In deciding upon the action for setting aside, both Courts interpreted the relevant provisions of the Insolvency Regulation.

Considering that the courts in England followed a different legal reasoning than the court in Switzerland it is interesting to examine whether or not this is the approach that should be taken in resolving future cases. In order to do so, the relevant provisions of the Insolvency Regulation are addressed first. Thereafter, the content of English law on the pending legal proceedings after the commencement of insolvency is dealt with. In particular, it is examined how the English courts proceed when insolvency proceedings are opened in England & Wales. Thereby the nature of the claim by the creditors in the present case will be particularly taken into consideration.

3.1. Reasoning of the Courts in Applying the Insolvency Regulation

The Insolvency Regulation is in force in all EU Member States except Denmark. According to Recital 23, the Insolvency Regulation 'should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law.' Thus, the law of the Member State where insolvency proceedings are opened (*lex concursus*) is applicable to all the effects of the insolvency proceedings,[18] except for the exemptions mentioned in Articles 5 to 15. Some of these exceptions operate so as to limit the effect to the *lex concursus* (Arts. 5-7).[19] Others provide that certain legal relationships are governed by a law other than the *lex concursus* (Arts. 8-15).

The decisions of the English Courts not to set the award aside involved an interpretation of Articles 4.2(e), 4.2(f) and 15 of the Insolvency Regulation. The provision of Article 4 paragraph 2 states that the conditions for opening insolvency proceedings, their conduct and closure will be determined by the law of the State where the insolvency proceedings are opened. The same provision contains a non-exclusive list of issues that are governed by the *lex concursus*. Thus, it will determine, *inter alia*, the effects of insolvency proceedings on the debtor's current contracts[20] and on 'proceedings brought by individual creditors,

[18] Art. 4 para. 1 InsR.
[19] Arts. 5-7, providing that certain rights shall not be affected by the commencement of insolvency proceedings in a Member State.
[20] Art. 4 para. (e) InsR.

with the exception of lawsuits pending'.[21] The reasoning of the Commercial Court, as well as of the Court of Appeal concerning these provisions is briefly addressed.

In Mr Justice Christopher Clarke's judgment the Commercial Court perceived the problem as 'a potential conflict between Article 4.2(e) and Articles 4.2(f) and 15 if the application of the law of the State of the opening would bring the proceedings to a close because the arbitration agreement would cease to be effective, whereas the application of the law of the State in which the lawsuit is pending would not have that effect.'[22] In the view of Judge Clarke, Article 4.2(e) was not applicable considering that in the present case arbitral proceedings were pending.

The Court of Appeal addressed the question whether a possible discontinuance was to be decided by reference to Article 4 or 15. In Lord Justice Longmore's judgment it was held that Article 15 'is a relevant and appropriate Article'.[23] The reasoning can be summarised as follows: considering that arbitral proceedings were pending at the moment of opening the insolvency proceedings, Article 15 was relevant, which is one of the exceptions to the application of the *lex concursus* as provided in Article 4(2)(f). It provides for the application of the law of the country where proceedings are pending, thus English law. The Court of Appeal held, *inter alia*, that 'an existing arbitration is a pending lawsuit within the meaning of Article 15 and Article 4(2)(f)'.[24]

The part of the Court of Appeal's interpretation concerning the application of Articles 4 and 15 can be mentioned with approval. It rejected the decision at first instance which characterised the dispute in terms of a conflict between the provisions of Article 4 and 15 and held as follows:

> Each article has its own sphere of operation and once it is clear that there is a "lawsuit pending" the question whether that lawsuit should continue or be discontinued by reasons of the insolvency is to be determined "solely" by English law as "the law of the Member State in which that lawsuit is pending."[25]

[21] Art. 4 para. 2 (f) InsR
[22] *Syska v Vivendi*, Commercial Court, p. 11, para. 80.
[23] *Syska v. Vivendi*, Court of Appeal, para. 18.
[24] *Id.*, para. 33.
[25] *Id.*, para. 18.

According to Lord Justice Longmore, 'the question whether pending lawsuits should be continued or discontinued in the light of insolvency is to be determined by the law of the State in which those proceedings are pending'.[26] Thus, the relevant provision of Polish insolvency law was not given effect because, in the view of the Court, it was English law and not Polish law that governed the issue of pending legal proceedings. Considering that English law does not provide for discontinuance, the arbitral tribunal, in the view of the Court, had properly decided on its jurisdiction. Consequently, the application for setting aside should be dismissed and the decision of the Commercial Court was upheld.

Does the legal reasoning of the Court of Appeal present useful guidelines which are to be followed in the interpretation of the Insolvency Regulation in the context of pending arbitrations?

The reasoning of the Court of Appeal on the applicability of Articles 15 and 4(2)(f) and consequently English law as the *lex fori processus*[27] is to be met with approval. It was also correctly concluded that English law obviously did not provide for the 'discontinuance' of legal proceedings. However, it is not easily discernible from the decisions what English law *does* provide for with respect to pending legal proceedings. Neither is it clear how the relevant provisions were applied in the present case. It is therefore interesting to examine what English law provides on that issue and whether the English Courts properly applied the relevant provisions of English insolvency law.

3.2. Preclusion of Individual Actions (Claims of 'Ordinary' Bankruptcy Creditors)

The claims of Vivendi S.A. and Vivendi Telecom in arbitration are, from the point of view of insolvency law, claims for payment against the bankruptcy estate. Such actions aimed at obtaining payments are normally precluded from continuation or commencement after bankruptcy liquidation is opened. Any claim by an unsecured bankruptcy creditor for payment against the estate may only be pursued by filing in bankruptcy.[28] The same is true for all executions against the debtor.

[26] *Id.*, para. 24.

[27] *Cf.*, decisions of the Austrian Supreme Court of 17 March 2005 - 8 Ob 131/04d, 24 January 2006 - 10 Ob 80/05w and 23 February 2006, 9 Ob 135/04z.

[28] For more details on the principle of the preclusion of individual actions by creditors in Dutch, English, French, German and United States law see V. Lazić, 'Arbitration and Insolvency

The purpose is to prevent the depletion of the debtor's assets and to ensure orderly payment to creditors. All ordinary unsecured, non-preferred creditors are paid *pro rata*, in accordance with the principle of the equal treatment of creditors – *par conditio creditorum* or *paritas creditorum*. The main purpose is that claims of ordinary, non-secured, non-preferred creditors are treated in one collective procedure. These claims and how they are dealt with are the very essence of bankruptcy liquidation and they may be considered as typical bankruptcy issues. An ordinary creditor is precluded from commencing any other proceedings outside the bankruptcy liquidation. Their claims will be dealt with in the collective procedure in accordance with the provisions of insolvency law. Any proceedings that are pending at the time of commencing the bankruptcy action will be suspended. Insolvency laws normally provide for their continuation.

This principle has been accepted in many statutes on insolvency. Thus, in the United States, Section 362 of the Bankruptcy Code provides for an automatic stay of, *inter alia*, the commencement or continuation of any action or proceedings against the debtor and the estate that was or could have been commenced before filing a petition for relief. After filing a petition for relief in bankruptcy proceedings, almost all claims against a debtor or the estate are prevented from being executed and prosecuted. The only exceptions are those actions expressly exempted under Section 362(b) of the Bankruptcy Code. All claims against a debtor or the estate are to be filed before the court having jurisdiction in bankruptcy cases. The automatic stay is one of the fundamental protections given to a debtor and the estate by the bankruptcy laws. It operates as protection for creditors as well, providing for their equal treatment in an orderly manner.[29]

Similarly, under French law all means of executing the claims against real estate and movable assets are suspended or precluded, as well as legal actions for payment against the debtor.[30] This provision is considered to be a part of public policy (*ordre public),* national as well as international. Similar provisions can be

Proceedings: Claims of Ordinary Bankruptcy Creditors', *Electronic Journal of Comparative Law* (December 1999): 1-29 and V. Lazić, *Insolvency Proceedings and Commercial Arbitration*, International Arbitration Law Library, Kluwer Law International (1999) Chapter VI, pp. 235-276.

[29] H.Rep. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 25.

[30] According to Art. L622-21 para. 2 *Code de Commerce*, the decision to open the insolvency proceeding interrupts or prevents any legal action on behalf of all creditors whose claims are aimed at condemning the debtor to pay a sum of money or a resolution of a contract for failure to pay a sum of money.

found in statutory laws on insolvency in other jurisdictions, for example in Austria,[31] Belgium,[32] Germany,[33] Italy,[34] and the Netherlands.[35]

The principle of the preclusion of individual action by creditors is also incorporated in the 1986 English Insolvency Act with respect to corporate liquidation or winding-up by the courts, as well as in the case of administration proceedings. With respect to the corporate wining-up by the courts, Section 130(2) of the 1986 English Insolvency Act is relevant. It provides that after a winding-up order has been made

> no action or proceedings shall be proceeded with or commenced against the company or its property except by the leave of the court and subject to such terms as the court may impose.

Also in administration, 'no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company and its property except with the leave of the court and subject to such terms as aforesaid.'[36] There is no automatic stay of pending proceedings in the case of a creditor's voluntary winding-up[37] and in the case of the bankruptcy of an individual.[38] In the latter case, however, the court may order a stay of 'any action, execution or other legal process' at any time during the bankruptcy proceedings.[39] Besides, after the bankruptcy order has been issued, no creditor may commence any legal proceedings in respect of any debt provable in

[31] Under Austrian law, Paragraph 6(1) of the *Konkursordnung* (Austrian Insolvency Code, RGBl. No 337/1914), actions to enforce claims against assets forming part of the insolvency estate cannot be brought or continued once insolvency proceedings have been commenced.

[32] Art. 63bis, relating to suspension of pending lawsuits of the Belgian Bankruptcy Act (*Faillissementswet*).

[33] Art. 87 *Insolvenzordnung*.

[34] Art. 52 of the Italian Bankruptcy Law.

[35] Art. 26 of the Dutch Bankruptcy Act (*Faillissementswet*). According to this provision, after the declaration of bankruptcy, any claim against the debtor for payment out of the estate can only be asserted in the verification procedure.

[36] Art. 10 of the 1986 Insolvency Act. See also Sect. 43(6) of the 2002 Enterprise Act, stating that

> no legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or properties of the company except (a) with the consent of the administrator, or (b) with the permission of the Court.

[37] Sect. 112 of the Insolvency Act.

[38] Sect. 285(2) of the Insolvency Act.

[39] Sect. 285(1) of the Insolvency Act.

bankruptcy unless with the leave of the court and on such terms as the court determines.[40]

Also the European Court of Justice obviously attaches great importance to this principle as is illustrated in its judgment of 17 March 2005.[41] It stated, *inter alia*, that

> [i]t follows from the principles common to the procedural laws of the Member States, … that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings….

Taking into consideration the purpose which is intended to be achieved, there is no reason not to apply these provisions with respect to arbitration. In some jurisdictions this follows either from the express provisions of the law or legislative history or from the relevant case law. In the United States it is clear that Section 362 on an automatic stay also applies to arbitration. From the legislative history of the US Bankruptcy Code it follows that '[a]ll proceedings are stayed, including arbitration…', '…all proceedings even if they are not before governmental tribunals.'[42]

French arbitration law contains an express provision on the interruption of arbitral proceedings in Article 1465 of the Code of Civil Procedure. It incorporates Article 369 according to which arbitral proceedings are interrupted when reorganisation or bankruptcy liquidation has been opened. Moreover, in France certain principles and provisions of insolvency law have been considered to be part of domestic and international public policy, the violation of which presents a reason for the setting aside of an arbitral award.[43] Such principles are, *inter alia*, the principle of the preclusion of individual actions, provisions on the

[40] Sect. 285(3) of the Insolvency Act.

[41] First Chamber in C-294/02 of 17 March 2005 (*Commission of the EC v AMI Semiconductor Belgium BVBA et al*.). See in Germany, decisions of the Supreme Court of 29 January 2009 (BGH, *Beschluss von* 29.1.2009 – III ZB 88/07, *Neue Juristische Wochenschrift (NJW)* 2009, 1747) and of 30 October 2008 (BGH *Beschluss von* 30.10.2008 – III ZB 17/08, *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 2008, 768), both decisions referring to domestic public policy and the principle of equal treatment of creditors as a part of it.

[42] 11 U.S.C.A Sect. 362, H.Rept.No. 95-595 to accompany H.R. 8200, 95th Cong, 1st Sess. (1977) p. 25. Also, the AAA has expressed its readiness to hold in abeyance an arbitration to which a bankrupt is a party.

[43] The reasons for setting aside are listed in Arts. 1484, 1504 and 1502 of the Code of Civil Procedure.

dispossession of the debtor, the interruption of proceedings and the principle of equality among creditors.[44] Arbitrators are only allowed to determine the amount and to state that it would be declared against the estate pursuant to the provisions of insolvency law.[45] This was confirmed in a more recent decision of the *Cour de Cassation*[46] in which the enforcement of the award was denied as it violated French international public policy.

The English case law illustrates that the relevant provisions on the preclusion of individual actions by creditors also apply to arbitration. In relation to a company in administration, the Court of Appeal considered 'other proceedings' to include arbitration.[47]

3.3. Effectiveness of the Preclusion of Individual Actions Internationally

The comparative view illustrates that the preclusion of individual actions is an important principle of insolvency law which is accepted in many jurisdictions, including under English law. It is to be expected that it will be effective if arbitration is taking place in the country where the insolvency proceedings are commenced. In most general terms, it is probable that they would be effective if the courts of that country would subsequently exercise any control over the award that may be available under the relevant arbitration law. The most likely remedies would thereby be the setting aside of the award or the refusal of enforcement should this principle be violated. Considering that these provisions reflect the basic principles of insolvency law, a contravening arbitral award may be considered to be contrary to public policy.

However, the effectiveness of this principle outside the jurisdiction where the insolvency proceedings have been opened is not necessarily guaranteed. Thus, these provisions are sometimes disregarded by the arbitrators. The liquidation

[44] E.g., *Cour de cassation* (1re Ch. civ.), 8 March 1988, *Rev. Arb.* (1989), p. 473-474 (*Thinet*); *Cour d'appel de Paris*, 16 February 1989, *Rev. Arb.* (1989), p. 711 (*Almira Films*); *Cour de cassation*, 4 February 1992, *Rev. Arb.* (1992), p. 663 (*SARET*); *Cour de cassation (Ch. Com.),* 2 June 2004, *Soc. Gaussin et autres c/ soc. Alstom Power Turbomachines, Rev. Arb.* 2004, no. 3, pp. 593 *et seq*.)

[45] E.g., *Cour d'appel de Paris*, 27 Febr. 1992, *Rev. Arb.* (1992), p. 590 - *Sohm*).

[46] *Cour de cassation*, First Civil Chamber, 6 May 2009, no. 509, available online at <www.courdecassation.fr>

[47] *Re Paramount Airways Ltd* [1992] Ch 160, revsd [1992] 3 All ER 1, CA per Browne-Wilkinson VC. See also, P.R. Wood, *Principles of International Insolvency 2nd ed.* (London: Sweet & Maxwell, 2007) paras 9-055 and 9-056.

proceedings of the defendant are thereby ignored and arbitral proceedings are continued, without taking the relevant provisions of the insolvency law into consideration.[48]

In general, it may be expected that in the absence of the recognition of foreign insolvency proceedings, these provisions will probably be ineffective.[49] Conversely, the recognition of foreign insolvency proceedings is expected to result in giving effect to the staying provisions in the recognising jurisdiction.[50]

The same line of reasoning follows from note 145 of the Guide to Enactment to the UNCITRAL Model Law on Cross Border Insolvency. It relates to Article 20 which defines the consequences of the recognition of a foreign insolvency proceeding and provides for a stay of individual actions as one such consequence. Note 145 provides, *inter alia*, as follows:

> …article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g., limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the [1958 New York Convention]. However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might

[48] E.g., ICC award No. 4415 in: S. Jarvin & Y. Derains (eds.), *Collection of ICC Arbitral Awards 1974-1985* (Kluwer 1990); ICC awards NO. 6057 and 7502 in: S. Jarvin, Y. Derain, J-J. Arnaldez, D. Hascher (eds.), *Collection of ICC Arbitral Awards 1991-1995*, (Kluwer, 1997); Final Award in ICC Case 12993, January 2005, *ICC International Court of Arbitration Bulletin,* Vol. 20/1 (2009) pp. 105-107. Final Award in ICC Case 10515, June 2002, *ICC International Court of Arbitration Bulletin*, Vol. 20/1 (2009) pp. 74-76; Interim Award in ICC case 10507, July 2002, *ICC International Court of Arbitration Bulletin*, Vol. 20/1 (2009) pp. 71-74.

[49] E.g., *Cour d'appel de Paris*, (1re Ch.C.) 12 January 1993 - *Norbert Beyrard* (holding, inter alia, that the order opening bankruptcy proceedings abroad cannot have any effect in the absence of *exequatur* and that, accordingly, the arbitrators were not required to stay the arbitral proceedings). Cf., the US court decision in *Fotochrome, Inc. V. Copal., Ltd*, 517 F.2d 512 (2d Cir. 1975).

[50] See e.g., the case law in the US on Sect. 304 - *Victrix S.S. Co. V. Salen Dry Cargo A.B*., 825 F.2d 709 (2d Cir. 1987); *Allstate Insurance Co. V. C.J. Hughes et al*., (S.D.N.Y. 1994) 174 B.R. 884; *Cunard S.S. Co. V. Salen Reefer Services A.B.,* 773 F/2d 458; *In re Bird*, 229 B.R. 90, 94 (Bankr. S.D.N.Y. 1999) *In re MM.G. LLC,* 256 B.R. 544; *Vesta Fire Ins. Corp. V. New Cap Reinsurance Corp. Ltd*, 238 F.3d 186 (2d Cir. 2001); see also the arbitral award of 2 March 1978 (excerpt in *Yearbook Commercial Arbitration* 1980, p. 143 (relying on the Belgian-Dutch Treaty of 1925)).

> not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example if arbitration does not take place in the enacting State and perhaps also not in the State of the main proceedings, it may be difficult to enforce the stay of the arbitral proceedings.

One would expect that the staying provisions would be effective when there is an instrument on cross-border insolvencies such as the Insolvency Regulation. Yet, the decisions of the English Commercial Court and the Court of Appeal illustrate that the principle of the preclusion of individual actions by creditors may be disregarded by arbitrators and consequently also by national courts even if there is an international instrument on the recognition of foreign insolvency proceedings. Such a result was certainly not intended to be achieved by an instrument unifying the conflict of law rules in insolvency. It is therefore interesting to examine whether the proper application of the Insolvency Regulation ensures that a stay is respected. In that context it will be scrutinised whether the English courts properly applied the Regulation and their own law.

(a) Stay of Individual Actions by Creditors – Which Law Applies under the Insolvency Regulation?

The English courts took the decision within the discussion of the provisions of Articles 4 and 15 of the Insolvency Regulation. It may be true that it is not always an easy matter to determine the reach of these two provisions. Nor is the approach adopted in the Regulation free from criticism. In particular, the use of a conflict of laws method, as well as the distinction between pending actions and those to be initiated are unnecessary complications. It would have been more appropriate for the EC legislator to have opted for a less complex regulation such as the one contained in the UNCITRAL Model Law on Cross-border Insolvency. The relevant provision of Article 20 states as follows:

> (1) Upon recognition of a foreign proceeding that is a foreign main proceeding:
>
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) Executions against the debtor's assets are stayed;
>
> (c) The right to transfer, encumber, or otherwise dispose of any assets is suspended.

This provision clearly defines what consequences foreign insolvency proceedings will have in the recognising jurisdiction. No distinction is thereby made between the pending and non-pending actions of creditors and no conflict of law method has been provided for. Instead, all actions concerning the debtor's estate will be dealt with in accordance with the relevant provision in Article 20. It is a far more appropriate approach than a conflict of law method employed in the Insolvency Regulation and the distinction which is made between pending proceedings and those to be initiated.[51]

Yet in the circumstances of the present case it seems clear that if the *lex fori processus* provides for a stay, the proceedings are to be stayed. At least it follows from the provisions of Article 4(2)(f) and Article 15: the *lex concursus*, i.e., Polish law, applies to actions to be instituted and the *lex fori processus*, i.e., English law, applies to pending proceedings. A stay of legal proceedings follows from the relevant provisions of the 1986 English Insolvency Act. The automatic stay of all proceedings against a debtor in liquidation and in administration includes pending arbitrations.

(b) Interpretation of the Staying Provisions under the 1986 Insolvency Act by the English Courts

Neither the Commercial Court nor the Court of Appeal applied the provision of Article 130 of the Insolvency Act or the corresponding provisions on a stay in administration. The English Court of Appeal did mention the provision of Article 130(2) and Schedule B1, paragraph 43 of the 1986 Insolvency Act, but did not apply them in the present case. Neither did the Court apply a corresponding provision on staying legal actions in the case of commencing an administration procedure. The reasons for not applying this provision are not easily discernible in the decision itself. There is no indication that the insolvency proceedings in Poland were not comparable with either the winding-up by the court or the administration procedure under English law. The line of reasoning in paragraphs 30 and 31 of the judgment does not offer an obvious answer. Yet it seems that the view is taken that such provisions would only apply if the *lex concursus* is also the law which is applicable to the arbitration, but this is by no means certain.[52]

[51] For more details on the distinction between new lawsuits and pending lawsuits, see M. Virgos & F. Garciman, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International, 2004), 77 para 121(ii) and (iii).

[52] Court of Appeal in *Syska v. Vivendi Universal SA* et al. para. 33, stating as follows:

Even though it cannot be concluded with any certainty from the text of the decisions, it is possible that the two Courts relied on the conclusions in the judgement of Lawrence Collins J. in *Mazur Media Ltd v. Mazur Media GmbH*.[53] It also relates to the interpretation of the relevant provisions of the Insolvency Regulation. The Court dealt with the question whether English court proceedings were to be stayed following insolvency proceedings in the country of the debtor, which was Germany. Pending lawsuits were to be stayed under German insolvency law. The same is true according to the relevant provision of Article 130(2) of the 1986 English Insolvency Act. In relying on Article 15 of the Insolvency Regulation it was assumed that the question was to be answered as a matter of English law. The Court held, however, that Article 130(2) of the 1986 Insolvency Act was not to be applied in the case of foreign insolvency proceedings, reasoning, *inter alia*, as follows:

> (67) Accordingly section 130(2) can apply in the case of the winding up in England of a foreign company, but I am satisfied that there is no basis for an argument that section 130(2) can apply to a foreign insolvency proceeding.
>
> (68) It is clear from its context that section 130(2) does not apply to foreign insolvency and section 221(1) does not extend it to foreign insolvency proceedings. Nor is there any basis for any argument that it could apply by analogy. Nor do I see any element of discrimination. The effect of Article 4(2)(e) and Article 15 of the Insolvency Regulation is to leave the question whether there should be a stay to the English court in the circumstances in which they apply.[54]

The Court further stated that it had 'an inherent discretion' to stay proceedings whenever such a stay would be needed to prevent injustice and 'where to do so is not inconsistent with the Brussels or Lugano Conventions.'[55] The Commercial Court in *Syska v. Vivendi* did refer to the *MazurMedia* judgment,[56] without addressing the question of the applicability of the provisions on staying proceedings.

> Assuming that the relevant provision of the *lex concursus* does apply to arbitration proceedings, there will be nothing in a law of that kind which would take the case outside Article 4(2)(f). In case of pending proceedings Article 15 would therefore apply.

53 *Mazur Media Ltd v. Mazur Media GmbH* (2005) 1 Lloyd's Rep. 41.
54 *Id*. paras. 67 and 68.
55 *Id*. para. 69.
56 *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm) (2 October 2008) para. 62.

The reasoning in the *Mazur Media* judgement in the interpretation of the Regulation and the applicability of the relevant provisions of Article 130(2) seems to find no support in the text of the Regulation. Moreover, it is an obvious contradiction to the interpretation of Article 15 in the Virgos-Schmit Report.[57] In paragraph 92(2) relating to the exceptions to the general rule on conflicts of law in Article 4, the Report provides, *inter alia*, as follows:

> In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening …, but by the law of the State concerned … In such cases, *the effects to be given to the proceedings opened in other Contracting States are the same effects attributed to a domestic proceeding of equivalent nature* (liquidation, composition, or reorganization proceedings) *by the law of the State concerned* …' (emphasis added)

It is clear that the stay under Section 130(2) is an effect attributed to a domestic proceeding in England and, accordingly, is to be given to the proceedings opened in another Member State. The judgment in *Mazur Media* contravenes not only the Virgos-Schmit Report, but deviates from the understanding of this provision by the courts in other Member States, notably in Austria.[58] According to the interpretation given by the Austrian courts, if a stay is imposed by the *lex fori processus* the proceedings would be stayed even if this does not follow from the *lex concursus*.[59] Besides, the practical importance of the distinction may be minimal, considering that there is a wide acceptance of the principle of the preclusion of individual actions by creditors in the Member States. As already mentioned, the European Court of Justice emphasised that its acceptance follows 'from the principles common to the procedural laws of the Member States'. Accordingly, it is likely that in practice a stay would be provided under both the *lex concursus* and the *lex fori processus*.

The judgment in *Mazur Media* would probably come as a surprise to many. It is obvious that the arbitrators were surprised, as well as the parties and their legal

[57] M. Virgos & E. Schmit, Report on the Convention on Insolvency Proceedings, 6500/1/96, REV 1 DRS 8 (CFC) (hereinafter: Virgos/-Schmit Report).

[58] Decisions of the Austrian Supreme Court of 17 March 2005 - 8 Ob 131/04d, 24 January 2006 - 10 Ob 80/05w and 23 February 2006, 9 Ob 135/04z.

[59] 23 February 2006, 9 Ob 135/04z. See also, G. Moss, I.F. Fletcher, S. Isaacs, *The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide 2nd edition* (Oxford University Press, 2009), 302 para 8.249.

counsel alike in the ICC arbitration 12421.[60] During arbitral proceedings according to the ICC Rules in London, the Respondent became subject to liquidation proceedings in Italy. Referring to Articles 4(2)(f) and 15 of the Insolvency Regulation, the legal counsel for the Claimant argued that the effects of the liquidation in Italy (*fallimento*) on arbitration were to be determined by English and not by Italian law. Considering that under English law, by virtue of Section 130(2) of the 1986 Insolvency Act, proceedings against a company in liquidation were to be automatically stayed, unless the court gives permission for them to be continued, 'solicitors for [Claimant] were … willing to accept that the arbitration should not proceed so far as their client's claim was concerned.'[61] As a result of the decision in *Mazur Media*, holding that Section 130(2) had no application to foreign insolvency proceedings, the Claimant indeed changed its line of argumentation. It submitted that the arbitrators had no power to stay arbitration proceedings. The arbitral tribunal was left with no choice but to continue the proceedings. It obviously decided to do so reluctantly and stated, *inter alia*, as follows:

> We have decided that we should accept these submissions made on behalf of the [Claimant] but not without hesitation. The position is paradoxical: if a winding-up order had been made against [Respondent] in England (which could, of course, have been done, notwithstanding that it is not an English company) the effect of Sect. 130(2) would have been to stay the arbitration, assuming it were held to constitute an "action or proceedings" within the meaning of that statutory provision. (…) If the arbitration had been proceeding in Italy the effect of [Respondent's] *faillimeto* would, again, have been to stay the arbitral proceedings … But because the arbitration is English and the winding-up order Italian there is to be no stay.

The decision of the English Court in *Mazur Media* illustrates that the purpose of the Insolvency Regulation may be circumvented by different interpretations in various Member States. It clearly illustrates that the approach taken in the Insolvency Regulation, in particular the distinction between pending and non-pending proceedings, seriously affects the uniformity of its application in different Member States.

[60] Final Award in case no. 12421/MS of 2005, excerpt in XXXIII *Yearbook Commercial Arbitration* (2008) 102-117.

[61] *Id*., p. 107, para [10].

As already stated, it is not clear whether the English Courts in *Syska v. Vivendi* found the legal basis for their decision in the *Mazur Media* judgment. In any case, the decisions of the English courts would have been different if they had applied the relevant provisions of English law on the suspension of the individual actions of creditors such as Sect. 130(2) or Schedule B1. They would have concluded that arbitral proceedings should have been suspended until the claim would be filed in insolvency proceedings, by virtue of this provision.

One would expect that the English courts, as well as the courts in other Member States of the EU, would decline the enforcement of the award by applying the Insolvency Regulation if the damages awarded would be requested in England. However, Elektrim's creditors may attempt to enforce the award on the basis of the 1958 New York Convention in jurisdictions outside the EU. Whether or not they would be successful, depends on the law on cross-border insolvency in the country where the enforcement of the award is sought.

The decisions brought in various jurisdictions in this case have been rather peculiar. The same is true with respect to the decision of the Warsaw Court of Appeal[62] which granted leave to enforce the award rendered in England even though it is not clear whether this is a final decision on the matter. It may come as a great surprise to other creditors of Elektrim who complied with the stay requirement and were not permitted to pursue their actions so as to furnish proof of their claims in insolvency proceedings. It seems to be a rather encouraging message to any creditor in insolvency proceedings opened in Poland to disregard the principle of the preclusion of individual actions.[63] In contrast to this, the French Supreme Court in its recent judgment sent a rather discouraging message: an award of a condemnatory nature will not be recognised even if a creditor expressly states that it only intends to use it as proof of claim in verification and clearly declares that it will not attempt to otherwise enforce it.[64]

[62] Court of Appeals, Warsaw, 16 November 2009, commentary by F. De Ly, Kroniek Internationale arbitrage, *Tijdschrift voor arbitrage (TvA)* (2010) 43.

[63] Staying provisions were contained in Arts. 140 and 145-146 of the 2003 Polish Insolvency Act, which was in force at the time when arbitral proceedings were continued in England,

[64] *Cour de Cassation*, First Civil Chamber, *Mandataires Judiciaires Associés, as liquidators of Jean Lion et Comp SA v. INCOM*E, 6 May 2009, no. 509, available online at www.courdecassation.fr. The German Supreme Court was less stringent and accepted a condemnatory award as proof of claim in insolvency proceedings. It held that the award was to be interpreted as merely determining the existence of the claim and its amount for the purposes of insolvency proceedings. However, it should be emphasised that the creditor did file its claim in the insolvency procedure and that it was clear to all the parties that the award was to be used

Although, at first glance, it may seem a rather stringent approach, in certain circumstances a number of arguments may be raised in support of such a decision. As already mentioned, a creditor in whose favour such a condemnatory award has been made may attempt to enforce it outside the insolvency proceedings in any jurisdiction where a debtor has its assets, to the detriment of other creditors. It should be emphasised that for the purposes of the enforcement it may be more favourable to have an arbitral award than a court judgment, due to the enforcement regime under the 1958 New York Convention. With the exception of the Brussels I Regulation which is applicable among the EU Member States, there is no treaty for the recognition of foreign judgments. Accordingly, in the terms of the enforcement outside of insolvency, a creditor that has obtained an arbitral award may be much better off than a creditor having obtained a judgment in its favour.

Besides, the principle of the equal treatment of creditors may be considered to have been violated, as the other creditors were not given the opportunity to obtain proof of their claims due to the stay proceedings. Accordingly, the creditor's claim that ignored the stay may have a better position in the verification, considering that there is proof of such a claim. Finally, the purpose of the preclusion of individual actions by creditors is to ensure that the claims of all non-secured creditors are first dealt with within the verification procedure. Only if a claim has been contested in verification would there be the need to initiate or continue arbitral proceedings. Accordingly, a creditor that has not filed its claim in insolvency may have incurred unnecessary costs by continuing or commencing arbitration. Namely, its claim could have been accepted in the verification procedure so that there would have been no dispute to be resolved for the purposes of the insolvency proceedings. Indeed, it is detrimental to the estate and consequently to the interests of all creditors to incur such costs unnecessarily.

4. CONCLUSION

The contradictory results reached in the two jurisdictions analysed illustrate the complexity of the questions on interaction between insolvency and arbitration, in particular in an international context. In general, it can be said that neither of the decisions gives appropriate answers and useful guidelines for future cases. Had the arbitrators and the courts in both jurisdictions given effect to the principle of

for the purposes of insolvency proceedings. BGB Beschl. 29.1.2009 – III ZB 88/07, 24 *Neue Juristische Wohenschrift (NJW*) (2009) 1747. S Kröll, 'Germany: infringements of insolvency law as grounds to resist enforcement', *International Arbitration Law Review* 12(3) (2009): N38-41.

the preclusion of individual actions by creditors, they would have reached the same conclusion. Arbitral proceedings would have been suspended until the claim was filed for verification in bankruptcy liquidation. Only if it was contested would there be the need to commence or continue legal proceedings such as arbitration. There would have been no diverging decisions and they would serve the interest of the insolvent debtor and its creditors.

In more general terms, it can be said that the effects of insolvency proceedings should be recognised outside the jurisdiction where such proceedings are opened and respected by arbitrators, when they are of such a nature that serve the purposes and objectives of the insolvency laws which are generally accepted. The principles of the preclusion of individual actions and of the equal treatment of non-secured creditors may be mentioned as examples. The same is true with respect to other principles intended to maximise assets and to distribute the estate in an orderly fashion or to reorganise a business, as the case may be.

In any case, at least the effects accepted in domestic insolvency proceedings should be valid with respect to foreign insolvency proceedings as well.

Besides, reasons of fair trial and due process may be implicated should arbitral proceedings be instituted or continued in violation of the relevant insolvency laws. This is particularly so considering that the decisions on the commencement or continuation of legal actions may be subject to approval by the courts having jurisdiction in insolvency and may require the involvement of other creditors.