

As canvassed above, both common law and civil jurisdictions share the view that due process requires an arbitrator to give notice to parties of adverse conclusions on determinative points they have not addressed or of which they have not been made aware. The precise notice requirements, as with many matters of procedural fairness, will turn on the circumstances of each case. Practicality and fairness should be the guiding principles in determining how to give sufficient notice and respect to the parties' right to a fair and full hearing.

5. Conclusion

Arbitral tribunals do and should have wide-ranging powers to determine relief, though these powers are exercised within the parameters set by the parties' claims and due process requirements. Ultimately, the extent to which an arbitrator or tribunal will exercise an authority to apply law to the facts independent of the parties' submissions depends on both practical and legal considerations, as well as the particular circumstances of each arbitration. The model of *iura novit curia* in international arbitration proposed emphasises flexibility and shared responsibility between parties and the arbitral tribunal. This reflects the importance that arbitral procedure remains adaptive. The core benefits of arbitration as a form of dispute resolution, namely finality, celerity and cost effectiveness, should, it is suggested, be promoted through the way in which the tribunal exercises its authority.

Insolvency and Arbitration: An Arbitral Tribunal's Perspective¹

Doug Jones*

1. Introduction

International arbitration and insolvency regulation are very different legal procedures, with each having its own distinct purpose, objectives and underlying policy.² It is often said that international arbitration and insolvency do not coexist easily.³ This difficult relationship is partly due to competing policy objectives.

In the case of insolvency regulation, these include the equality of creditors, centralisation of claims, rescue of the insolvent party, a high degree of state control, a transparent and accountable process, a co-ordinated distribution of assets and authority derived from statute. In the case of arbitration they include regulation, authority derived from the contractual relationship of the parties, party autonomy, certainty in commercial transactions, autonomy from the state and generally proceedings that are private and confidential.

The provisions typically found in insolvency regulations, requiring the exclusive jurisdiction of state courts (sometimes specific bankruptcy courts) and the mandatory stay of all other proceedings, generate obvious conflicts between arbitration and insolvency regulation.⁴ These types of insolvency provisions are meant to ensure the collective procedure guaranteeing equal treatment of all creditors and are often considered to be part of the national or even international public policy of a particular state.

International arbitration is based upon the ability of parties to confer jurisdiction to arbitrators to resolve their disputes. This jurisdiction is only meaningful if states recognise it and if it can be enforced through a state's judicial system. States retain the power to prohibit the resolution of certain categories of disputes outside their courts. Such categories of disputes are said to be not arbitrable and if an arbitration agreement is entered into to resolve such dispute, it will not be valid.

Arbitrability is a condition of validity of the arbitration agreement and, consequently, of the arbitral tribunal's jurisdiction.⁵ Insolvency regulation is one area where states may limit the arbitrability of certain categories of disputes. This paper considers the complex coexistence of international arbitration and insolvency from an arbitral tribunal's perspective;

¹ Paper presented to INSOL Asia Pacific Rim Region Annual Conference at the Shangri-La Hotel, Singapore, March 13–15, 2011.

* The author gratefully acknowledges the assistance provided in the preparation of this paper by Robert Kovacs, Lawyer, and Zara Shafuddin, Legal Assistant, both of Clayton Utz.

² The terminology in relation to insolvency is used differently in different countries. For this contribution the terms "insolvency" or "bankruptcy" are used in a generic sense to refer to liquidation, bankruptcy and reorganisation proceedings; "insolvent party" or "debtor" to refer to the party to the insolvency proceedings, the company in liquidation or under administration; "insolvency order" to refer to the court order or judgment opening the insolvency proceedings issued by the competent state courts—the "insolvency court"; and "trustee" to refer to the liquidator, administrator or receiver.

³ J. Rosell and H. Prager, "International Arbitration and Bankruptcy: United States, France and the ICC" (2001) 18(4) *Journal of International Arbitration* 417, 471. The United States Second Circuit Court of Appeals in *re United States Lines* 199 B.R. 465, 474–475 (S.D.N.Y. 1996) 120 S Ct 1532 (2000) at 28 stated: "[Arbitration and bankruptcy] ... presents a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."

⁴ The clearest case of a conflict between arbitration and insolvency exists when the execution of an award is at issue. The execution of an award in favour of one creditor would satisfy the claim of that creditor while simultaneously diminishing the value of the remaining estate and thereby other creditors' chances to receive full payment for outstanding debts.

⁵ B. Hanotiau, "What Law Governs the Issue of Arbitrability?" (1996) 12(4) *Arbitration International* 391.

specifically the arbitrability of disputes affected by the insolvency of a party. Given the breadth of the topic addressed, this contribution focuses primarily on the arbitrability of a dispute and the ramifications of when a party enters insolvency proceedings after arbitration proceedings have commenced.

Also, this paper examines the approach of a number of jurisdictions for dealing with these issues, and provides a case study of the recent *Elektrim v Vivendi*⁶ decisions which highlights the complex issues that may arise. Finally, there is a brief overview of some international instruments that may apply and considerations for arbitral tribunals to keep in mind with regard to the recognition and enforcement of an eventual award.

2. Arbitrability

Arbitrability concerns what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are excluded from arbitration proceedings. While the principle of party autonomy espouses the right of parties to submit any dispute to arbitration, national laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration. The term "arbitrability" is used here to mean the capability of a subject matter to be submitted to dispute resolution by way of arbitration, i.e. the subject matter or objective arbitrability (as opposed to the way that the term is used in the United States to cover the whole issue of a tribunal's jurisdiction).⁷

Whether and to what extent the public interest involved and the restrictions imposed by the national laws restrict the arbitrability of a dispute is a question to be determined by each national legislator. Neither the 1985 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) nor any other international instrument contains substantive rules on objective arbitrability. Such instruments always refer the question of arbitrability to the relevant national law.

Accordingly, it is generally acknowledged that countries are free to define the arbitrability of a dispute in accordance with their own public policy considerations.

Under the New York Convention, for example, the obligation in art.II to recognise and enforce arbitration agreements in writing only exists with respect to agreements concerning a "subject matter capable of settlement by arbitration". In respect of the pre-award (jurisdictional) stage, art.II(1) merely stipulates that arbitration agreements have to be recognised and that national courts have an international obligation to deny jurisdiction (and refer a matter to arbitration) under art.II(3) unless the dispute is not capable of settlement by arbitration. Article V(2)(a) provides that the obligation to recognise and enforce an award does not exist if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country".

Likewise, the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law) does not contain any definition of which disputes are arbitral. Article 1(5) provides that it is not intended to affect other laws of the state that preclude certain disputes being submitted to arbitration. In implementing these Model Laws, national legislators are completely free to determine which disputes are arbitrable and which are not.

⁶ *Jozef Syska Acting as the Administrator of Elektrim SA v Vivendi SA* [2008] EWHC 2155 (Comm) and on appeal [2009] EWCA Civ 677.

⁷ Another category of arbitrability has been referred to as "subjective arbitrability" or "*ratione personae*", which concerns the types of individuals or entities that are considered able to submit their disputes to arbitration because of their status or function. This type of arbitrability is not considered here.

3. The Effect of Insolvency of a Party on Arbitral Proceedings

Applicable law and general principles

When insolvency affects arbitration, the critical question is whether the relevant insolvency law provisions (or decision of the state courts) are binding on the arbitration tribunal. Can the arbitral tribunal ignore the insolvency proceedings or should the arbitration be stayed or terminated? Is the arbitral tribunal bound by a mandatory stay provision in a bankruptcy court of a foreign jurisdiction or a court in the seat of arbitration? Should certain claims be ignored as non-arbitrable? When and who decides whether the arbitration proceedings should continue or the insolvency provisions (or court decision) be ignored—the arbitral tribunal or a court?⁸ Answers to these questions will ultimately be determined by a range of national laws that apply to the arbitral proceedings. Accordingly, answering these questions *in abstracto* is almost impossible given the variety of national laws (insolvency, arbitration and private international laws), the few international instruments available and resulting lack of uniform approach by state courts and arbitral tribunals.⁹ However, some general principles can be identified to help provide answers to these difficult issues.¹⁰

The answers to the above questions depend on the law that is applied to determine whether the dispute may be settled by arbitration and who applies this law—the arbitral tribunal or a state court. The law that is to be applied will be different depending on who determines this issue and at what stage of the arbitration proceedings.

The issue of arbitrability may arise at various points in the arbitral procedure, including:

- Before the arbitral tribunal which will decide on it itself, in accordance with the principle of *Kompetenz-Kompetenz*.
- A party which considers that the dispute is not arbitrable may submit it to state courts, which will have to decide upon the objection to the jurisdiction of the arbitral tribunal prior to any award being issued.
- The issue of arbitrability may be invoked by a party before a state court as a ground for a setting-aside procedure after an award has been issued.
- An objection to arbitrability may be raised by a party before a state court deciding on the recognition and enforcement of the award.
- The issue of the tribunal's jurisdiction may also arise before a bankruptcy court where the trustee tries to bring a claim against one of the creditors who then invokes the existence of the arbitration agreement as a bar to the proceedings.¹¹

Before an arbitral tribunal

Where a party to an arbitration proceeding argues that the dispute is not arbitrable due to the insolvency of another party, the general rule is that the arbitral tribunal should, in principle, decide the issue with reference to the law which is applicable in the seat of arbitration (the *lex arbitri*).¹² For example, arbitral tribunals will generally not declare that the dispute is arbitrable if this arbitrability is contrary to a rule of international public policy

⁸ For example, the issue of the tribunal's jurisdiction may arise before a bankruptcy court (where the trustee tries to bring a claim against a party who then invokes the existence of the arbitration agreement as a bar to the proceedings); before a national court (where an arbitration agreement is invalid and this invalidity is used as an argument to setting aside or refusing enforcement of an award); or before an arbitral tribunal (when deciding on its own jurisdiction).

⁹ B. Hanotiau, "What Law Governs the Issue of Arbitrability?" (1996) 12(4) *Arbitration International* 391.

¹⁰ B. Hanotiau, "What Law Governs the Issue of Arbitrability?" (1996) 12(4) *Arbitration International* 391.

¹¹ See *Hays & Co v Merrill Lynch, Pierce, Fenner & Smith, Inc* 855 F.2d 1149 (3rd Cir 1989).

¹² B. Hanotiau, "The Law Applicable by the Arbitrator in the Event of the Bankruptcy of One of the Parties to the Proceedings" (1996) 1 *International Business Law Journal* 29, 34; D. Baizcau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.100.

of the place of the seat of arbitration. In a number of cases arbitral tribunals have determined the arbitrability of a dispute on the basis of the provisions of the place of arbitration.¹³

An arbitral tribunal may also need to consider the following additional laws when determining arbitrability, namely the laws applicable to:

- the arbitration agreement;
- the merits (*lex causae* or *lex contractus*); and
- the place(s) of possible enforcement.

The question of whether arbitral tribunals should also take into account the rules of foreign public policy, especially those of the place of enforcement of the award, is still widely debated, and there is no definitive answer. It has been suggested that, at the very least, arbitral tribunals are under a moral obligation to ensure that the award they will render is effective, and consequently to prevent it from being refused recognition and enforcement.¹⁴ It may therefore be prudent for arbitral tribunals to take into account the law of the likely place of enforcement.¹⁵

Before a state court

Where a party to an arbitration proceeding considers that the dispute is not arbitrable due to the insolvency of another party, and thus submits its grievance to a state court in the country where the insolvency proceedings were initiated, the court will commonly apply its national insolvency law insofar as its provisions are mandatory and supersede the otherwise applicable provisions of the relevant arbitration law. If the insolvency proceedings are at the seat of arbitration, then, to the extent necessary and permitted by its national laws, the court will have the power to restrain the arbitral proceedings. If the insolvency proceedings are in a country other than the seat, then any orders of a foreign court do not necessarily paralyse the arbitral proceedings. When such questions arise before a court outside the country of insolvency, the application of the insolvency law depends on the relevant conflict of laws rules in that court. In general, courts will not apply the foreign insolvency law.¹⁶

Ultimately, the court of the seat of arbitration can set aside an award or a court at a place of enforcement can refuse enforcement of an award if, according to laws in the jurisdiction of the court, the dispute was not arbitrable.

The impact of the seat of arbitration

As mentioned above, an arbitral tribunal must seek to ensure that its award is valid in the seat of arbitration. Arbitral tribunals tend to consider themselves bound by insolvency law provisions essentially where: (a) the law of the seat recognises them as mandatory law and/or part of the international public policy of the seat; and (b) the insolvency order has been (or could be) recognised in the country of the seat.¹⁷

¹³ See the next section, on the impact of the seat of arbitration. See, e.g. ICC Case No.6162 of 1992, *Consultant v Egyptian Local Authority*, reported in (1992) XVII *Yearbook of Commercial Arbitration* 153; ICC Award No.4604 of 1985, reported in (1985) X *Yearbook of Commercial Arbitration* 973; Partial Award ICC Case No.8420 of 2000, reported in (2000) XX *Yearbook of Commercial Arbitration* 328 at 330 ff.

¹⁴ B. Hanotiau, "The Law Applicable by the Arbitrator in the Event of the Bankruptcy of One of the Parties to the Proceedings" (1996) 1 *International Business Law Journal* 29, 33. Cf. D. Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.103 (suggesting that arbitral tribunals should not concern themselves with enforceability when deciding whether or not to apply insolvency law, unless guided by the parties).

¹⁵ Section 5 below elaborates on the impact of the law of the place of enforcement.

¹⁶ S. Kröll, "Arbitration and Insolvency Proceedings—Selected Problems" in L. Mistelis and J. Lew (eds), *Pervasive Problems in International Arbitration* (The Hague: Kluwer Law International, 2006), p.362.

¹⁷ D. Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.100; B. Hanotiau,

Some commentators consider that key provisions of insolvency law (in particular those aimed at guaranteeing the equal treatment of creditors and the proper administration of the insolvent party's estate by the trustee) are considered mandatory provisions of domestic law (*lois de police* or *lois d'application imperative*), and sometimes are part of the domestic and international public policy of the state.¹⁸

Since arbitral tribunals have no *lex fori*, it is suggested that they should not be concerned with the mandatory law provisions or the domestic public policy of the country of the seat. Such provisions should only be binding on the arbitral tribunal where they form part of the international public policy recognised by the law of the seat.¹⁹ Further, it has also been suggested that available arbitral case law shows that tribunals do consider whether the insolvency order was issued in or outside the country of the seat.²⁰

Arbitrability of specific types of insolvency provisions

As explained, whether a dispute is ultimately arbitrable is determined by the laws of the particular state where insolvency proceedings are commenced and the effect of these laws on the arbitrability of a dispute at the seat of arbitration. There are some general rules that are common to most insolvency laws that restrict the arbitrability of certain insolvency disputes.

"Core" insolvency matters are not arbitrable

The continuation of arbitration proceedings to which an insolvent debtor is a party may conflict with a number of features and provisions of applicable insolvency laws. Despite different terminology, "pure" or "*stricto sensu*" or "core" insolvency disputes consist of administrative matters pertaining to the insolvency proceedings themselves, such as the orders opening or closing insolvency proceedings, the appointment of the trustee or the actual distribution of assets. It has been argued that the purpose of such proceedings is not the settlement of disputes between the parties, but rather the collective execution or reorganisation of the debtor.²¹ Accordingly, it is almost undisputed that "core" bankruptcy issues are not arbitrable.²² The basic rule in most national systems is that in cases involving a *true* conflict between the insolvency provisions and arbitration, the former will prevail.

The general interests protected by insolvency law are considered to override the individual interests protected by arbitration.²³

"Mixed" insolvency matters may or may not be arbitrable

It has also been acknowledged that arbitrators have the power to decide on actions of a substantive nature, for example contract and tort actions that arose prior to the adjudication

"The Law Applicable by the Arbitrator in the Event of the Bankruptcy of One of the Parties to the Proceedings" (1996) 1 *International Business Law Journal* 29, 33.

¹⁸ D. Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.100.

¹⁹ D. Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.101.

²⁰ D. Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in C. Müller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2009* (Neuchâtel: Schulthess, 2009), p.103; S. Kröll,

"Arbitration and Insolvency Proceedings—Selected Problems" in L. Mistelis and J. Lew (eds), *Pervasive Problems in International Arbitration* (The Hague: Kluwer Law International, 2006), p.374.

²¹ S. Kröll, "Arbitration and Insolvency Proceedings—Selected Problems" in L. Mistelis and J. Lew (eds), *Pervasive Problems in International Arbitration* (The Hague: Kluwer Law International, 2006), p.358.

²² C. Liebscher, "Part II Substantive Rules on Arbitrability, Chapter 9 Insolvency and Arbitrability" in L. Mistelis and S. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (The Hague: Kluwer Law International, 2009), p.166.

²³ S. Kröll, "Arbitration and Insolvency Proceedings—Selected Problems" in L. Mistelis and J. Lew (eds), *Pervasive Problems in International Arbitration* (The Hague: Kluwer Law International, 2006), p.360.

of bankruptcy.²⁴ The position is less clear when arbitrators deal with actions of a mixed nature. Included in this category are actions where a creditor challenges the schedule of claims and actions where a third party creditor challenges the admission of another creditor into the schedule of claims. Also included in this category are actions to include or exclude assets from the estate.

A plethora of approaches

The question of what happens to ongoing international arbitration proceedings when a party has fallen insolvent is by no means easily answered. As discussed above, such an event raises a combination of conflict of law, insolvency law and arbitration law issues to which there is no uniform solution applicable. The effects of a party's insolvent status will vary from jurisdiction to jurisdiction. That being the case, the following paragraphs explore the various approaches adopted in different jurisdictions, canvassing the inherent complexities of grappling with this issue.

Australia

Under Australian law there is no clear answer as to what the consequences are for pending international arbitral proceedings when a party to such an arbitration has become insolvent. The only guidance is provided by the Corporations Act 2001 (Cth) insofar as the impact of administration and the winding-up (i.e. liquidation), whether on a compulsory or voluntary basis, of Australian companies on proceedings already under way.²⁵ Even then, whether the Act's provisions extend to international arbitral proceedings depends on: first, whether the operation of the relevant provisions of the Corporations Act 2001²⁶ extend to domestic arbitral proceedings in general; and secondly, if these provisions are applicable in the case of an international arbitration.

Administration: section 440D

"Section 440D—Stay of proceedings"

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
 - (a) with the administrator's written consent; or
 - (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
 - (a) a criminal proceeding; or
 - (b) a prescribed proceeding." (Emphasis added.)

In effect, this section provides an automatic stay against commencing or continuing proceedings against a company in administration. As the term "proceeding" is not explicitly defined within the Act, the application of this provision in relation to arbitral proceedings depends on whether such proceedings fall within the interpretation of "a proceeding in a court". To that end, the term "court" is defined in the Corporations Act s.58AA to mean any court. However, notwithstanding this definition clearly provided by s.58AA, Austin J.,

²⁴ G. Kaufmann-Kohler and L. Lévy, "Insolvency and International Arbitration" in H. Peter, N. Jeandin and J. Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (Zurich: Schulthess, 2006), p.262.

²⁵ These are all different insolvency regimes designed to protect creditors and, in particular, unsecured creditors, so that they may recover as much as possible from the division of the company's assets.

²⁶ Corporations Act 2001 ss.440D, 467(7), 471B and 500(2).

when specifically considering "proceeding[s] in a court", held in *Brian Rochford Ltd (Administrator Appointed) v Textile Clothing and Footwear Union of NSW*²⁷ (Rochford):

"[T]hat the definition of 'court' in s 58AA does not apply to the words 'a proceeding in a court against a company' in s 440D. It follows that the words 'proceedings in a court' in section 440D have their general, undefined meaning."

Austin J. further provided guidance to determine whether appearing before a particular body, such as a tribunal in this case, is a "proceeding in a court".²⁸ First, there are no conclusive, generally applicable criteria for classifying a body as a court. Secondly, the answer in each case depends on the particular statutory question to be decided. Finally, the answer is to be supplied in the light of a close consideration of the statutory constitution and functions of the body in question.

With this judgment in mind, the only preceding case on point is *Auburn Council v Austin Australia Pty Ltd (Administrators Appointed)*²⁹ (*Auburn Council*). In this case, the court was required to decide whether a domestic commercial arbitration under the Commercial Arbitration Act 1984 (NSW)³⁰ was automatically stayed under the Corporations Act s.440D. Bergin J. approved of Austin J.'s findings in *Rochford* and, after close consideration of the statutory constitution and functions of an arbitral tribunal under the auspices of the Commercial Arbitration Act, concluded that such arbitral proceedings are not "proceedings in a court" for the purposes of s.440D.

Consequently, an arbitration under the Commercial Arbitration Act of any state or territory will not be automatically stayed on the appointment of an administrator and no leave of the court is required to commence or continue arbitral proceedings against a company in administration.³¹

Winding-up proceedings: section 471B

"Section 471B—Stay of proceedings and suspension of enforcement process"

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

- (a) a proceeding in a court against the company or in relation to property of the company; or
- (b) enforcement process in relation to such property; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes." (Emphasis added.)

As in the administration regime under s.440D, the determinative factor as to whether an automatic stay applies under s.471B on arbitral proceedings against a company being wound up in insolvency is again if such proceedings fall within the term "a proceeding in a court". As the relevant terminology is identical to that of s.440D, the findings in *Auburn Council* extend to proceedings in question under s.471B.³² Therefore, an arbitration under the Commercial Arbitration Act of any state or territory will not be automatically stayed under s.471B on the appointment of a liquidator and no leave of the court is required to commence or continue arbitral proceedings against a company in liquidation.³³

²⁷ (1999) 17 A.C.L.C. 152 at 162.

²⁸ *Rochford* (1999) 17 A.C.L.C. 152 at 163.

²⁹ (2004) 22 A.C.L.C. 766.

³⁰ This Act governed domestic commercial arbitrations in the state of New South Wales and is identical in substance to equivalent Acts in all other states and territories.

³¹ P. Blaxill, "The impact of administration and liquidation on domestic and international arbitrations under the Corporations Act 2001" (2005) 16 A.D.R.J. 124, 130.

³² P. Blaxill, "The impact of administration and liquidation on domestic and international arbitrations under the Corporations Act 2001" (2005) 16 A.D.R.J. 124, 125 and 128.

³³ P. Blaxill, "The impact of administration and liquidation on domestic and international arbitrations under the Corporations Act 2001" (2005) 16 A.D.R.J. 124, 130.

Creditors' voluntary winding-up: section 500(2)**"Section 500—Execution and civil proceedings"**

- ...
- (2) After the passing of the resolution for voluntary winding up, no *action or other civil proceeding* is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes." (Emphasis added.)

This section only applies to a creditors' voluntary winding-up of a company and is enlivened after the passing of a resolution to wind up the company under the Corporations Act s.497. As for its effect on arbitral proceedings, the answer rests on whether such proceedings fall within the category of an "action or other civil proceedings".

It comes as no surprise that the Act defines neither of the terms "action" or "civil proceedings". Accordingly, one must turn to the case law. An instructive case is *Alliance Petroleum Australia (NL) v Australia Gaslight Company*³⁴ (*Alliance Petroleum*). In this case the question arose as to whether the arbitration in question was a "civil proceeding" within the meaning of the Service and Execution of Process Act 1901 (Cth). The majority of the Full Court of the Supreme Court of South Australia held that an arbitration did fall within the definition of "civil proceedings". King C.J. provided the leading judgment, noting that:

"Arbitration is a regular procedure recognised by statute for the resolution of legal claims, differences or disputes between parties.

Rules of law are prescribed by statute for the conduct of arbitrations. Statutory powers are conferred on arbitrators. The jurisdiction of the Courts is invoked in aid of the arbitration procedure ... The procedure results in an award which is enforceable at law. Arbitration is clearly recognised by the statute as a method of resolving legal disputes alternative to litigation in the Courts. I think that in the ordinary use of language such a procedure would be included in the description 'civil proceedings'."³⁵

King C.J. concluded that:

"If the question is one which may be lawfully submitted to arbitration, it seems to me that the arbitration must be a civil proceeding irrespective of the nature of the question."³⁶

King C.J.'s judgment in *Alliance Petroleum* was subsequently cited with approval in *Re Vassal Pty Ltd*,³⁷ which held that the term "civil proceedings" in the Companies Code (Qld) s.371(2) included arbitral proceedings under the Arbitration Act 1973 (Qld). Moreover, *Re Vassal* remains cited as an authority for the proposition that arbitral proceedings are automatically stayed under the Corporations Act s.500(2) when the defendant company goes into liquidation and is voluntarily wound up.³⁸

Application to stay proceedings prior to a winding-up order being made: section 467(7)**"Section 467—Court's powers on hearing application"**

- (7) At any time after the filing of a winding up application and before a winding up order has been made, the company or any creditor or contributory may,

³⁴ (1983) 70 F.L.R. 404.

³⁵ *Alliance Petroleum* (1983) 70 F.L.R. 404 at 423.

³⁶ *Alliance Petroleum* (1983) 70 F.L.R. 404 at 423.

³⁷ (1983) 8 A.C.L.R. 683.

³⁸ B. McPherson, *The Law of Company Liquidation*, 4th edn (Sydney: LBC Information Services, 1999), p.246.

where *any action or other civil proceeding* against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit." (Emphasis added.)

As with the application of the Corporations Act s.500(2), the determinative factor for whether this section applies to arbitral proceedings in general rests upon the interpretation of "any action or other civil proceedings". The same considerations and judicial interpretations derived from *Alliance Petroleum* and *Re Vassal* equally apply to s.467(7). The only difference is that, unlike any of the other provisions of the Corporations Act discussed above, s.467(7) when invoked does not grant an automatic stay on arbitral proceedings. Instead, an application to stay such proceedings needs to be made to the court by the company itself, a creditor of the company or a contributory. Only once an application under s.467(7) is made and approved may arbitral proceedings specified in the application be stayed.

International arbitration Building upon the discussion of whether the above-mentioned provisions of the Corporations Act apply to domestic arbitral proceedings in general, whether these provisions are applicable in the context of an international arbitration depends on several factors. First, the sections apply only to the liquidation or administration of a party *defending* a claim. Secondly, the defending party must be an *incorporated* company in Australia.³⁹ Finally, the seat of arbitration and governing law of the international arbitration are of relevance but can prove to raise complex questions beyond the scope of this paper.

Simply put, after fulfilling the first two requirements, an international arbitration taking place outside Australia and governed by a law other than Australian law will not be subject to any of the above-mentioned provisions of the Corporations Act.⁴⁰ On that logic, if such an arbitration were instead governed by Australian law the provisions would indeed appear applicable.⁴¹

The clearest case is where an international arbitration is seated in Australia with an Australian defendant. In such circumstances the relevant provisions of the Corporations Act would apply to the international arbitral proceedings to the same extent as they apply to domestic commercial arbitrations discussed above. Therefore, there would be no automatic stay against such an international arbitration where the defendant company appoints an administrator (s.440D) or there is a court-appointed liquidator (s.471B). However, there would be an automatic stay if the defendant's creditors voluntarily wind up the company (s.500(2)) or upon a s.467(7) application being granted to stay proceedings.⁴²

Also relevant to dealing with cross-border insolvency and international arbitration issues in Australia is the Cross-Border Insolvency Act 2008 (Cth). This Act adopts the UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law) which provides a legislative framework for co-operation and co-ordination between courts and practitioners of different jurisdictions.

Of particular interest to this paper is the operation of the Model Law art.20 (discussed below), which provides that upon the recognition of foreign insolvency proceedings, the "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed".

³⁹ Pursuant to the Corporations Act 2001 (Cth) s.119A.

⁴⁰ See, for example, *United States Surgical Corporation v Ballabil Pty Ltd* (1986) 4 A.C.L.C. 639.

⁴¹ P. Blaxill, "The impact of administration and liquidation on domestic and international arbitrations under the Corporations Act 2001" (2005) 16 A.D.R.J. 124, 132.

⁴² P. Blaxill, "The impact of administration and liquidation on domestic and international arbitrations under the Corporations Act 2001" (2005) 16 A.D.R.J. 124, 133.

England

Similar to the Australian approach, under English law the effects of a local entity's insolvency on arbitral proceedings depends largely on which subsequent insolvency procedure is undertaken, namely compulsory liquidation or administration. The Insolvency Act 1986 and other related English legislation deal with such issues. However, where the insolvent party is a foreign entity that either has a presence in the United Kingdom or is involved in proceedings therein, the European Community Regulation on Insolvency Proceedings (EC Regulation)⁴³ or the Model Law may also come into play.

For the purposes of this paper, the following discussion focuses on the effects of insolvency on pending arbitral proceedings where the seat is located within England.

Insolvency Act 1986 (UK) Once an entity subject to the English jurisdiction enters either compulsory liquidation or administration, any pending proceedings against that entity are automatically stayed. Importantly, it is commonly accepted that such a stay of "proceedings" or "legal process" extends to arbitral proceedings.

Where a company has entered administration, the stay on proceedings applies from the earlier of: the making of an application for an administration order; the filing of a notice of intention to appoint an administrator; or the appointment of the administrator. Only with the consent of the administrator (if already appointed) or the permission of the court may pending proceedings against the entity in administration be continued.⁴⁴ Whether an administrator or court will grant such permission is subject to the guidelines outlined in *Re Atlantic Computer Systems*,⁴⁵ which in essence provide that courts and administrators must balance the competing legitimate interests of the applicant and those of other creditors.

In the case of compulsory liquidation, the stay applies from the making of the winding-up order and prevents both the commencement and continuation of proceedings against the company or its property without leave from the court.⁴⁶ The court when considering whether to grant leave will apply similar reasoning to that in *Re Atlantic Computer Systems* and will ultimately aim to do what is "right and fair in all the circumstances".⁴⁷

Model Law and EC Regulation If a party is subject to insolvency proceedings in a foreign jurisdiction, the automatic stays pursuant to the Insolvency Act do not apply against that entity in England. In such circumstances, the Model Law⁴⁸ and the EC Regulation provide support and will be discussed in further detail below in section 4.

Elektrim v Vivendi A helpful illustration of what happens to a pending arbitration in England when one party falls subject to foreign insolvency proceedings is the case of *Elektrim v Vivendi*.⁴⁹ This case is discussed in further detail below.

United States of America

Under the US Bankruptcy Code any ongoing proceedings, including arbitral proceedings, brought against an insolvent party will be automatically stayed unless a party to the proceedings can contest the stay "for cause".⁵⁰ The courts when considering whether such

⁴³ Council Regulation 1346/2000 of May 29, 2000.

⁴⁴ Insolvency Act 1986 Sch.B1 para.43(6).

⁴⁵ [1992] All E.R. 476.

⁴⁶ Insolvency Act 1986 s.130(2).

⁴⁷ *New Cap Reinsurance Corporation Ltd v HHH Casualty & General Insurance Ltd* [2002] EWCA Civ 300.

⁴⁸ Adopted in the United Kingdom under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

⁴⁹ *Jozef Syska Acting as the Administrator of Elektrim SA v Vivendi SA* [2008] EWHC 2155 (Comm) and on appeal [2009] EWCA Civ 677.

⁵⁰ US Bankruptcy Code s.362.

cause exists to allow pending proceedings to continue will consider the following factors⁵¹: (a) issues of economy and expedience; (b) whether there is any connection or interference between those proceedings and the bankruptcy proceedings; and (c) whether litigation in another forum would prejudice the rights of other creditors.⁵² Also relevant are the implications of the Model Law art.20, which the United States adopted in 2005.

Although it may appear at first that the position in the United States is far more settled than the Australian and English approach, that is far from true. In fact, it is a serious problem that arbitral tribunals seated outside the United States may not give effect to a stay order entered by a US bankruptcy court. Even within US borders, whether a stay is enforceable is a tricky matter. It largely depends on whether a US bankruptcy court considers the relevant arbitration agreement valid. This in turn rests on whether the arbitration is a "core" or "non-core" proceeding, the distinction between which in the American context is "horribly murky" and has consequently given rise to inconsistent case law in this area.⁵³

However, one of the leading approaches describes "core" proceedings as those that are central to resolving a bankruptcy case and are generally considered non-arbitrable.⁵⁴ They thereby render any relevant arbitration agreement invalid and a stay against pending proceedings granted under the Bankruptcy Code unenforceable. A non-exhaustive list of core proceedings may be found in the Bankruptcy Code,⁵⁵ and, as discussed in *Re United States Lines Inc*,⁵⁶ may include substantial claims affecting the value of the bankrupt estate. "Non-core" proceedings are considered to be anything other than a "core" proceeding and are simply related to the bankruptcy proceeding. For example, if a debtor were to sue a non-bankrupt party to a pre-insolvency contract for a pre-insolvency breach, this would be a non-core proceeding.⁵⁷

These non-core proceedings are generally considered arbitrable, thus the related arbitration agreement would be deemed valid. In turn, a stay granted under the Bankruptcy Code against pending proceedings arising out of the valid arbitration agreement would be enforceable. This is the approach adopted in most US jurisdictions, which generally tend to hold that bankruptcy courts must enforce valid arbitration agreements with respect to non-core claims.⁵⁸

France

The position under French law is similar to the English and US approach insofar as the French Code of Commerce grants an automatic stay over any proceeding, including arbitrations, when a party becomes insolvent.⁵⁹ The French courts however, take their approach one step further by clearly recognising as a principle of both domestic and international public policy that the requirement for a stay of proceedings "takes precedence

⁵¹ J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 10.

⁵² *Sonnax Industries Inc v Tri Component Prods Corp (In re Sonnax Industries Inc)*, 907 F.2d 1280, 1286 (2d Cir. 1990).

⁵³ J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 12; E. Sussman and O. Tonga, "Arbitration Agreements and Bankruptcy: Which Law Trumps When?" (2009) 2(2, Fall) *New York Dispute Resolution Lawyer* 38, 39, quoting J.C. Matson, "Running Circles Around Marathon: The Effects of Accounts Receivable as Core or Non-core Proceedings in Article III Courts" (2004) 20 *Emory Bankr. Dev. J.* 451.

⁵⁴ J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 11; E. Sussman and O. Tonga, "Arbitration Agreements and Bankruptcy: Which Law Trumps When?" (2009) 2(2, Fall) *New York Dispute Resolution Lawyer* 38, 39.

⁵⁵ US Bankruptcy Code s.157, 28 USC.

⁵⁶ 197 F.3d 631, 640 (2d Cir. 1999).

⁵⁷ *Northern Pipeline Construction Co v Marathon Pipeline Co*, 458 US 50 (1982).

⁵⁸ For further discussion on competing approaches see J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management*; E. Sussman and O. Tonga, "Arbitration Agreements and Bankruptcy: Which Law Trumps When?" (2009) 2(2, Fall) *New York Dispute Resolution Lawyer* 38.

⁵⁹ French Code of Commerce L. 621-40.

even where an arbitration taking place in France is not subject to French law".⁶⁰ It is important to note, however, that pending arbitral proceedings may only be stayed under the French Code of Commerce until a creditor files a declaration of claim, at which point the arbitral proceedings will be resumed.⁶¹ Once they are resumed, the arbitral tribunal may only render a decision deciding the amounts owed by the insolvent party.⁶² The arbitral tribunal cannot order the bankrupt party to actually pay any amount. Moreover, failure to respect these principles will give cause for French courts to set aside or refuse recognition and enforcement of any eventual arbitral award.

Germany

If a party to an arbitral proceeding becomes insolvent, the German Code of Civil Procedure will render an automatic stay upon such proceedings. This ensures that the insolvent party is substituted in the pending proceedings by its trustee and affords the trustee sufficient time to prepare its case.⁶³ Moreover, if insolvency proceedings have been instigated in Germany against a party in a foreign arbitration, pursuant to the EC Regulation, the arbitral tribunal, regardless of its location, must recognise these proceedings. If it fails to do so, the arbitral tribunal risks contravening German public policy, thus jeopardising the enforceability of an eventual arbitral award in Germany.

Switzerland

Unlike the European jurisdictions discussed above, under Swiss law there is no mandatory stay of arbitral proceedings when a party becomes insolvent. The Swiss Private International Law Act neither mentions the possibility of suspending such proceedings, nor excludes it.⁶⁴

The paramount objective of the Swiss for arbitration as a dispute resolution forum is to foster an expeditious resolution of a dispute and not to keep it in abeyance.⁶⁵ That being so, it is unlikely that a stay against pending proceedings would ever be mandated, unless it is imposed by public policy, by the principles to provide equal treatment of the parties or their right to be heard.⁶⁶ In such a case however, as with the German position, adequate time will be permitted for any requisite trustee to be substituted in place of the insolvent party and to afford the trustee sufficient preparation time.⁶⁷

The Swiss position is discussed further in the following paragraph in light of the infamous *Elektrim v Vivendi* case.

Elektrim v Vivendi: A tale of two jurisdictions

An excellent example to illustrate the innate complexities of trying to identify the proper law to determine the effect of insolvency proceedings upon an ongoing arbitration is the decisions in *Elektrim v Vivendi*.⁶⁸ In these decisions, England and Switzerland seized the

⁶⁰ *Almira Films*, Cass. Civ. Ire, Feb. 4, 1991, 44 Bull. Civ. 1, No.28 as discussed in J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 13.

⁶¹ French Code of Commerce L. 621-41.

⁶² *Jean X. v International Company for Commercial Exchanges (Income)* May 6, 2009, Case No.08-10281. For further discussion of this case see J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 14.

⁶³ J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 15.

⁶⁴ L. Levy, "Insolvency in Arbitration (Swiss Law)" (2005) 8(1) *International Arbitration Law Review* 23, 30.

⁶⁵ L. Levy, "Insolvency in Arbitration (Swiss Law)" (2005) 8(1) *International Arbitration Law Review* 23, 30.

⁶⁶ L. Levy, "Insolvency in Arbitration (Swiss Law)" (2005) 8(1) *International Arbitration Law Review* 23, 30.

⁶⁷ L. Levy, "Insolvency in Arbitration (Swiss Law)" (2005) 8(1) *International Arbitration Law Review* 23, 30; J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 16.

⁶⁸ *Jozef Syska Acting as the Administrator of Elektrim SA v Vivendi SA* [2008] EWHC 2155 (Comm) and on appeal [2009] EWCA Civ 677.

opportunity to form a view on this interesting conundrum and their opposing outcomes emphasise the need to give timely consideration to this issue.

Background

By way of introduction, Elektrim is a Polish company and was previously the owner of a substantial shareholding in PTC, a large Polish mobile telephone company. Vivendi is a French company that entered into a contract with Elektrim known as a Third Investment Agreement (TIA). The TIA contained an arbitration agreement providing for disputes to be resolved by the London Court of International Arbitration (LCIA) in London. Moreover, the arbitration agreement itself was governed by English law, despite the remainder of the TIA being governed by Polish law.

In August 2003, a dispute between Elektrim and Vivendi arose under the TIA and Vivendi commenced arbitration proceedings with the LCIA. In summary, Vivendi claimed that Elektrim had breached its contractual obligations under the TIA by interfering with, or failing to secure, the interest in PTC that Vivendi was intended to obtain. In 2006, Vivendi commenced a second arbitration against Elektrim in relation to a purported settlement agreement between the parties. This second arbitration was conducted under the arbitration rules of the International Chamber of Commerce (ICC) and was seated in Geneva.

The English decisions

In early 2007, the LCIA tribunal which comprised of Dr Wolfgang Peter (Chairman), Alan Redfern and Professor Jerzy Rajska scheduled a hearing on liability issues for October 15–19 that year. However, on August 2, 2007, Elektrim was declared bankrupt by an order of the Warsaw District Court, and thus became a "bankrupt" for the purposes of the Polish Bankruptcy and Reorganisation Law (Polish Insolvency Law) that provides:

"Article 142

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."⁶⁹

Elektrim asserted that because of its own bankruptcy, and as a matter of Polish bankruptcy law, the arbitration agreement contained in the TIA had been terminated, thereby revoking the tribunal's jurisdiction to determine the dispute. However, despite Elektrim's objections, the previously scheduled October hearing in London went ahead, and the LCIA tribunal heard from both parties on this jurisdictional challenge and on the substantive issues of liability.

The LCIA tribunal subsequently rendered an interim award accepting jurisdiction over the dispute and ruling in Vivendi's favour on the merits. Elektrim then challenged this award under the (English) Arbitration Act 1996 s.67 on the grounds that the tribunal had been stripped of its substantive jurisdiction over the dispute due to Elektrim's bankruptcy. The primary issue concerned the interpretation of the phrase "lawsuit pending" within the EC Regulation arts 4.2(f) and 15, which are directly applicable in the United Kingdom.

These provisions state:

"Article 4—Law applicable

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

⁶⁹ Polish Insolvency Law art.142.

territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

- ...
 (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
 (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of *lawsuits pending*." (Emphasis added.)

"Article 15—Effects of insolvency proceedings on lawsuits pending"

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that *lawsuit is pending*." (Emphasis added.)

Pursuant to these principles, Elektrim argued that the phrase "lawsuit pending" was limited to execution proceedings against a debtor's assets in which the assistance of a court was required, and that it could not extend to arbitration proceedings as arbitration was not a form of execution. The High Court held (later confirmed by the Court of Appeal) that the phrase "lawsuit pending" was sufficiently wide as to include a reference to arbitration for the purposes of arts 4.2(f) and 15. That being the case, the English courts rejected Elektrim's argument and declined to set aside or vary the LCIA tribunal's award.

The significance of these decisions is the English courts' confirmation that where an entity was subject to Polish insolvency proceedings but was involved in an arbitration in London prior to those insolvency proceedings being commenced, it was the law of England (the law of the seat) that would determine the effect of the insolvency proceedings on the pending arbitration. The court further held that there was nothing in English domestic law that would prevent the arbitration from continuing, notwithstanding the Polish insolvency proceedings. To the contrary, if the arbitration proceedings had not been commenced prior to the insolvency proceedings, Polish insolvency law would determine the effect of the insolvency proceedings on whether any future arbitration could be commenced and any stay of proceedings under Polish law would have effect in England.⁷⁰

The Swiss decisions

In the second arbitration seated in Geneva, Vivendi contended that the law of the arbitral seat should determine whether the tribunal retained jurisdiction over the dispute, regardless of Elektrim's state of bankruptcy. However, as Switzerland is not a member of the European Community, Vivendi was unable to rely on the EC Regulation as it had under the English decisions. Accordingly, the primary issue for the ICC tribunal was to determine whether Elektrim had the capacity to be a party to the arbitral proceedings once it had become bankrupt in light of the Polish Insolvency Law art.142.⁷¹

After hearing the parties on this matter, the ICC tribunal rendered an interim award clarifying that the purpose of art.142 is to deprive arbitral tribunals of jurisdiction over

⁷⁰ For further discussion on the English decisions see: G. Naegeli, "Chapter III: The Award and the Courts—Bankruptcy and Arbitration—What Should Prevail? The Impact of Bankruptcy on Pending Arbitration Proceedings" in C. Klausegger, P. Klein et al. (eds), *Austrian Arbitration Yearbook 2010* (Stämpfli and Manz: C.H. Beck, 2010), pp.193–207; H. Dundas, "Arbitration and Insolvency: Which Prevails? Syska v Vivendi" (2009) 75(4) *Arbitration* 550–554; J. Hargrove, "Arbitration and Insolvency: English and Swiss Perspectives" (2009) 75(1) *Arbitration* 47–55; I. Fletcher, "Josef Syska, as Administrator of Elektrim SA v Vivendi Universal SA: the EU Insolvency Regulation and Pending Arbitration Proceedings—the Court of Appeal Ruling on Article 15" (2009) 22(10) *Insolvency Intelligence* 155–157.

⁷¹ See excerpt from art.142 provided above.

bankrupt Polish parties. Moreover, the tribunal held that the capacity of a party to act in a Swiss arbitration is governed by the general conflict of law rules of the Swiss Private International Law Act.

These rules provide that companies are governed by the law of the state under which they are organised, which in turn "shall govern in particular: ... (c) the legal capacity and the capacity to act".⁷² That being so, the ICC tribunal, and subsequently the Swiss Supreme Court,⁷³ applied the Polish Insolvency Law art.142, which revoked Elektrim's capacity to participate in the arbitration. Under this approach, once Elektrim had fallen bankrupt, any arbitration clauses concluded by it lost their legal effect and any pending arbitration, such as the Geneva proceedings in question, were discontinued.⁷⁴

4. International Conventions and Regulations

European Community Regulation on Insolvency Proceedings

The EC Regulation provides much-needed certainty to investors in the European commercial sector by establishing a uniform insolvency framework for all EU Member States, except Denmark.⁷⁵ Importantly, it recognises that between the EU Member States there are a myriad of differing approaches and substantive laws dealing with insolvency issues. The regulation provides a regime relating to the commencement of insolvency proceedings whereby "main" insolvency proceedings are to be opened and conducted in the Member State where the debtor has "the centre of his main interest".⁷⁶

Meanwhile, secondary proceedings may also be commenced and run in parallel to the "main" proceedings in the Member State where the debtor has an "establishment".⁷⁷

Of particular relevance to this paper, the EC Regulation provides mandatory choice of law rules which dictate that the law of the Member State, in which insolvency proceedings have been opened, will be applicable when determining the effects of insolvency on pending arbitral proceedings.⁷⁸ This provides much-needed clarification as to consequences for ongoing proceedings where a party has become insolvent as demonstrated in the *Elektrim v Vivendi* English decisions.⁷⁹

UNCITRAL Model Law on Cross-Border Insolvency

Adopted by UNCITRAL on May 30, 1997, this Model Law is designed to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one state or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place.

⁷² Swiss Private International Law Act arts 154 and 155(c).

⁷³ Decision 4A_428/2008 dated March 31, 2009.

⁷⁴ J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 28. For further discussion on the Swiss decisions see G. Naegeli, "Chapter III: The Award and the Courts—Bankruptcy and Arbitration—What Should Prevail? The Impact of Bankruptcy on Pending Arbitration Proceedings" in C. Klausegger, P. Klein et al. (eds), *Austrian Arbitration Yearbook 2010* (Stämpfli and Manz: C.H. Beck, 2010), pp.193–207; H. Dundas, "Arbitration and Insolvency: Which Prevails? Syska v Vivendi" (2009) 75(4) *Arbitration* 550–554; J. Hargrove, "Arbitration and Insolvency: English and Swiss Perspectives" (2009) 75(1) *Arbitration* 47–55; I. Fletcher, "Josef Syska, as Administrator of Elektrim SA v Vivendi Universal SA: the EU Insolvency Regulation and Pending Arbitration Proceedings—the Court of Appeal Ruling on Article 15" (2009) 22(10) *Insolvency Intelligence* 155–157.

⁷⁵ R. Lechner, "Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings" (2002) 19(3) *Arizona Journal of International and Comparative Law* 975, 979.

⁷⁶ Council Regulation 1346/2000 Preamble para.(12).

⁷⁷ Council Regulation 1346/2000 Preamble para.(12).

⁷⁸ Council Regulation 1346/2000 art.4.

⁷⁹ Discussed above.

Importantly, the Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways, including:

- foreign assistance for an insolvency proceeding taking place in the enacting state;
- foreign representative's access to courts of the enacting state;
- recognition of foreign proceedings;
- cross-border co-operation; and
- co-ordination of concurrent proceedings.

The Model Law art.20 is particularly important when considering the possible consequences on pending arbitral proceedings as it provides that upon the recognition of foreign insolvency proceedings, the "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed".⁸⁰ Although not explicitly stated within the article, this provision extends to arbitral proceedings as UNCITRAL does not distinguish between various kinds of "individual proceedings".⁸¹

5. Enforcement Considerations

As mentioned above, if an arbitral tribunal ignores an insolvency provision that is a mandatory law or international public policy of the seat of arbitration, there is a risk of the annulment of the award. There is also a risk of the non-recognition or non-enforceability of the award in the country where the insolvency proceedings were commenced, pursuant to the New York Convention art.V. Under the New York Convention, the enforcement courts have complete discretion; they "may" refuse recognition and enforcement, but will not necessarily do so, in particular where the courts are minded to promote and support international arbitration.

While arbitral tribunals strive to render enforceable awards, it is generally accepted that they are not bound to apply the mandatory provisions of the possible, or even likely, place(s) of enforcement. The prime duty of the arbitral tribunal is to render an award that the courts of the seat of the arbitration will not annul. Nonetheless, in practice, arbitral tribunals endeavour to render enforceable awards and often take into account the law of the likely place of enforcement when the parties specifically address the matter.

However, in some instances, the enforceability of an award is not the principal goal of a party to arbitration proceedings. There are instances where the claimant (or counterclaimant) requests that the arbitral tribunal ignore a mandatory insolvency provision or order even if this may jeopardise enforcement in the country where the insolvency provision or order applies. The claimant may wish to obtain a decision on liability for insurance purposes or in order to obtain relief from a third party, or it may hope to be able to enforce the award elsewhere.

6. Conclusion

As the foregoing discussion has outlined, there is no globally settled approach to dealing with insolvent parties after arbitral proceedings have commenced. If arbitrators and practitioners should learn anything from the *Elektrim v Vivendi* example, it is that they need to be alert to the implications of a party's bankruptcy upon an ongoing arbitration. As demonstrated above, the effect of a party's insolvency on pending arbitrations can vary

⁸⁰ UNCITRAL Model Law on Cross-Border Insolvency 1997 art.20.1(a).

⁸¹ *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency 1997* [1997] XXVIII UNCITRAL Y.B., U.N. Doc. A/CN.9/442, para.145, available at: <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [Accessed February 16, 2012].

significantly depending upon the applicable laws, which vary between jurisdictions and in most instances can be difficult to identify.

It is suggested that parties need to carefully consider any potential jurisdictional issues which may arise when concluding arbitration agreements. Particularly in light of the global financial crisis and its ongoing ramifications in the United States and Europe, parties should closely examine⁸²:

- the laws of the state in which insolvency proceedings may potentially be commenced;
- the laws of the seat of the arbitration; and
- any other laws likely to be applied by the tribunal (for example, the EC Regulation and Model Law).

Having regard to these suggestions, parties may better minimise the risk of an arbitral tribunal being confronted with the conundrum of dealing with an insolvent party.

Finally, the principle of equality of creditors in most insolvency laws may limit the type of award that arbitral tribunals can issue if they are allowed to proceed with an arbitration despite a party's insolvency. Arbitral tribunals may be restricted from ordering a party to pay a sum of money or a set-off as this could violate the order of creditors under the relevant insolvency law, as is the case in France. When making an award in an insolvency context, arbitral tribunals should limit themselves to issuing declaratory awards, rather than ordering payment. Such an award could then be used by a party as evidence in the relevant insolvency proceedings.

⁸² J. Sutcliffe and J. Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times" (2010) (February) *Transnational Dispute Management* 29.