Arbitration and insolvency: is there a ‘conflict’ and if so, how should it be resolved?

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Abstract:

The paper addresses the ‘points of interaction’ between arbitration and insolvency proceedings. These two legal institutions are in many ways conflicting, and their cross-border dimension adds to issues that legislators must resolve. The paper firstly summarises potential points of interaction based primarily on the comparative case law. The most important question is whether arbitration agreements concluded before the commencement of insolvency proceeding are binding on an insolvency practitioner, and if so, are there exceptions to it.. Secondly, the focus shifts onto the cross-border implication of such interactions. Thirdly, the paper suggests improvements of the legislation at the EU level and reflects on the current initiatives within the UNCITRAL Working Group addressing the conflict of laws issues in cross-border insolvency proceedings.

Keywords: arbitration; arbitration agreements; actio pauliana; anti-suit injunctions; jurisdiction; characterisation; lex loci arbitri; pending proceedings; vis attractiva concursus

A. Introduction

The interplay between arbitration and insolvency proceedings is often in the literature referred to as a ‘conflict’ between the two fields of law. Although they are procedures of different types, with distinct objectives and underlying purposes, they are not necessarily irreconcilable.[1] Yet the complexity of the intersection is evident, particularly considering that there are usually no express provisions either in insolvency or arbitration law on

1 As the author pointed out in earlier publications, e.g., Lazić (1999), pp. 381 ff.; Lazić, in Kröll/Mistelis/Perales Viscasillas/Rogers (eds.), 337 (337–363); Lazić, in Bamforth/Gandhi (eds.), 125 (125–147).

the effects on previously concluded arbitration agreements or pending proceedings. Besides, there are distinct legal consequences in different types of insolvency – liquidation and reorganisation, which in certain legal systems may reflect on the extent and the nature of intersection between the two fields of law.

Comparative research illustrates that in majority of jurisdictions it is suggested to analogously apply provisions relating to lawsuits.[2] Indeed, as a matter of principle, there is no reason why arbitration should be treated differently from litigation, considering that they both are legal proceedings for the settlement of the same or similar types of disputes. However, even though generally appropriate, a parallel with litigation does not necessarily accommodate all aspects and specificities of arbitration in the first place. Besides, the allocation of jurisdiction between the courts in case of intervening insolvency proceedings appears problematic, too. The CJEU case law in the last years[3] illustrates that there are serious difficulties in delineating the substantive scope of application between the Brussels I-bis and the EIR[4]. Consequently, a future legislative action at the EU level appears indispensable to remedy inconsistencies and shortcomings of the CJEU rulings in that respect.[5] Inevitably, the difficulties encountered have bearing on certain aspects of the relationship between arbitration and insolvency considering a widely accepted analogy with litigation.

Last, but not least, cross border elements add to the complexity of the interaction: the courts in various jurisdiction, as well as arbitrators, encountered difficulties when facing the question of which effects foreign insolvency proceedings should be given in arbitration and/or court proceedings related to arbitration. Even when the provisions on cross-border insolvency are in place, regrettably there are numerous problematic decisions which

2 See IBA Toolkit on Insolvency and Arbitration < https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

3 CJEU 6.2.2019 – case C-535/17, ECLI:EU:C:2019:96 – *NK v BNP Paribas Fortis NV*; CJEU, 10.3.2022 – case C-498/20, ECLI:EU:C:2022:173 – *ZK v BMA Braunschweigische Maschinenbaustalt AG*; CJEU 14.11.2024 – case C-394/22, ECLI:EU:C:2024:952 – *Oilchart International NV v O.W. Bunker Netherlands) BV, ING Bank NV*.

4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (OJ L 351/1, 20.12.2012) (hereinafter: Brussels I-bis Regulation).

5 For more particulars on this point, see Lazić, in *Revue de Droit Commercial Belge*, 2025, available on conflictoflaws.net <https://conflictoflaws.net/News/2025/08/2025-Note-rdc_tbh2025_2p308.pdf>.

increase the confusion and hinder the proper understanding of the complex interface between the two fields of law. Luckily, in the recent years there have been most useful initiatives and research projects in this area of law with the purpose of aiding arbitrators, judges and legal practitioners.[6]

This paper firstly summarises potential points of interaction based primarily on the comparative case law. Thereafter it focuses on cross-border implications. Thereby it gives suggestions for improvements of the legislation at the EU level and reflects on the current initiatives within the UNCITRAL Working Group addressing the conflict of law issues in cross-border insolvency proceedings.

B. Likely points of interaction – arbitration and insolvency taking place in the same jurisdiction

The most important question is whether arbitration agreements concluded before the commencement of insolvency proceeding are binding on an insolvency practitioner, and if so, are there exceptions to it.

I. Majority approach – continuous binding effect of pre-insolvency arbitration agreements

Comparative research illustrates that in the majority of jurisdictions pre-insolvency arbitration agreements are binding upon an insolvency practitioner. Thus, as a matter of principle in a great majority of jurisdictions, the commencement of insolvency proceeding does not render pre-petition arbitration agreements invalid. In some jurisdictions, notably in Canada[7] and the USA, enforceability of such agreements is in the discretion of the court, i.e., it is decided on a case-by-case basis. In the USA there is no Supreme Court decision, and the approaches are not identical in all Circuits. Yet it

6 See e.g., IBA Toolkit on Insolvency and Arbitration< https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>; Madaan/Campbell (eds.), 2022, passim; Bamforth/Kushal (eds), 2023, passim.

7 E.g., *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (Supreme Court of Canada).

seems that the prevailing view is that the bankruptcy court has discretion at least with respect to the so-called 'core' bankruptcy matters'.[8]

Even where the binding nature of pre-petition arbitration agreements is accepted as a matter of principle, the provisions of the insolvency law may entail exceptions and impose limitations to this in comparative law widely accepted notion of continuous effectiveness of arbitration agreements. In this context, relevant may be the provisions on: 1) executory contracts, 2) avoidance powers of the insolvency practitioner in respect of the preferential legal acts of the debtor, 3) nature of claims arising in insolvency proceedings, which may have implications for competence of the courts in insolvency and competence of arbitrators, and 4) provisions on the automatic stay of pending legal proceedings and prevention of initiating individual actions of ordinary non-secured creditors. As already mentioned, an express reference on how these provisions impact on arbitration is very exceptional.[9]

Therefore, it may be questioned whether they are intended to influence arbitration, i.e., do they tend to impact on arbitral proceedings? As a matter of principle, from the point of view of insolvency law in pursuing its objectives and underlying purpose there is no reason to treat arbitration differently than other 'legal proceedings'. The effectiveness of the impact on arbitration is likely to be ensured in purely domestic cases and more generally when arbitration and/or court proceedings related to arbitration are taking place in the country where insolvency proceedings are opened.[10]

However, the effectiveness of the consequences of insolvency proceedings in lawsuits, arbitrations and court proceedings related to arbitration will depend as a matter of principle on whether and to what extent the ef-

8 This is not contradicted in the Report for the USA, see IBA Toolkit, Allan L. Gropper, Walsh, Th. W., National Report of the United States of America, <https://www.ibanet.org/MediaHandler?id=8A157F9D-7590-4CF4-B7F4-EB2CDDF3AA20>.

9 See e.g., Legislative history relating to Sect. 362 in the USA on extending the automatic stay to arbitration.

10 See e.g., case law in the US maintains the position on the discretion of their courts to stay the proceedings and refer the case to arbitration, also in international arbitration despite generally arbitration friendly framework. Yet an award rendered despite that no referral to arbitration had been granted may be accepted in insolvency proceedings, after all. See, US court decision in *Fotochrome, Inc. V. Copal., Ltd*, 517 F.2d 512 (2d Cir. 1975). In setting aside proceedings a likely ground is violation of due process or of public policy, see French law holding that French Insolvency law is a matter of both domestic and international public policy.

fects of foreign insolvency proceedings are recognised in these jurisdictions, as it will be detailed, *infra* under 'Cross border insolvency'.

II. Minority approach – invalidity of pre-insolvency arbitration agreements

It is very exceptional that insolvency law invalidates pre-bankruptcy arbitration agreements regardless of whether or not arbitration is already pending.[11] Such approach has always been very exceptional and often held inapplicable in cross border situations.[12] Its relevance has been further minimised in the view of deleting such provisions when revising insolvency laws, as it was the case in Poland, Portugal and Spain.

C. Points of interaction – Cross border insolvencies

Whether the consequences of opening insolvency proceeding will be effective in lawsuits abroad, it will depend on the law on cross border insolvency in the country in which such litigations are pending. In general, the extent of recognition of foreign insolvencies will also be relevant for the court proceedings related to arbitration, such as those deciding on the request to refer the dispute to arbitration, for setting aside or for enforcement of an arbitral award. In the latter two it will be decisive whether a violation of the recognised effects of a foreign insolvency proceeding would qualify as a reason for setting aside or refusing the recognition of an arbitral award.[13]

If there is no obligation following from a treaty or national law on cross border insolvency, it is likely that no effects will be given to foreign

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11 E.g., former law in Poland, Portugal and Spain.

12 E.g., decision of the Court of Appeal (*Audiencia Provincial*), Barcelona, 29 April 2009, no. 86/2009 (Section 15), available online at: www.aranzadi.es (JUR 2009\472969), holding that this provision did not apply to arbitrations taking place abroad. In the meantime, this provision has been removed when Spanish law on insolvency was revised. The same holds true for the Polish law and Article 142 of the former Polish Bankruptcy and Reorganisation Act (Prawo upadlosciowe i naprawcze) of 28. 02. 2003, Dz. U. No 60, Pos. 535, repealed by virtue of Article 428(80) of the Act 15. 05. 2015; Dz. U. Pos. 978.

13 See e.g., in the USA *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.

insolvency proceedings.[14] Accordingly, the effectiveness of insolvency law can be ensured only 1) if there are provisions on cross-border insolvency in place, and 2) if they are correctly applied. Examples of judgments that incorrectly applied provisions on cross border insolvency will be addressed in the following section.

Additionally, actions that may be available in certain jurisdictions could further undermine consequences of foreign insolvency proceeding. In particular anti-suit injunctions in support of arbitration are available in common law countries and can be issued to restrain an insolvency practitioner to pursue court proceedings. Thus, UK courts have been granting such injunctions against insolvency practitioners,[15] although in the past they refrained from doing so when insolvency was opened in an EU Member State.[16] This is because the CJEU in *West Tankers*[17] judgment held that such injunctions were incompatible with the relevant EU legislation. Since the UK is no longer bound by the CJEU case law, its courts are no longer restrained in granting anti-suit injunctions regarding actions before the courts in EU Member States.[18] Furthermore, the UK case law illustrates that their courts may issue anti-suit injunctions not only in support of arbitrations in the UK, but also to those taking place abroad.[19]

As far as arbitration is concerned, both pending ones and those to be initiated abroad, it is prudent to consider whether a violation of insolvency law may implicate 'enforceability' of the award. Recognition of effects foreign insolvency proceedings in the country of the seat may be relevant in the context of an action for setting aside of the award. As to its enforceability, an arbitral award may be filed as proof of claim within insolvency

14 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).

15 See e.g., *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company)*, [2020] EWHC 2483 (Comm).

16 See e.g., *Nori Holdings Ltd v Bank Otkritie Financial Corporation*, [2018] EWHC 1343 (Comm).

17 CJEU Judgment of 10 February 2009, Case C-185/07 *Allianz SpA/Generali Assicurazioni Generali SpA v. West Tankers, Inc.*, ECLI:EU:C:2009:69.

18 See e.g., *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) and *Ebury Partners Belgium SA/NV v Technical Touch BV* [2022] EWHC 2927 (Comm).

19 The judgment of the Court of Appeal (Nugee LJ, Snowden LJ and Falk LJ) of 11 October 2023 in *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144, <https://www.bailii.org/ew/cases/EWCA/Civ/2023/1144.html>. See Grusic, *passim*

proceedings (if still on time) or may be requested in other jurisdictions. In the latter case, a successful enforcement will again depend on the extent of recognition of foreign insolvency and 'qualification' of a potential violation as a reason for refusing enforcement. Potential grounds for setting aside and refusing enforcement include violations of due process and the public policy exception.

As a matter of principle, arbitrators are to abide by the rules chosen by the parties and mandatory provisions of *lex arbitri*, if any. The need to take into consideration the provisions of insolvency law may be derived from some requirements of arbitration law, such as due process. Thus, in order to comply with this requirement both parties must have the equal possibility to participate in the proceedings and present their submissions. It presumes that an insolvency practitioner must be given sufficient time to obtain all necessary approvals to participate in pending or to initiate new arbitrations.

Furthermore, arbitrators must validly establish jurisdiction. Provisions of insolvency law may vest jurisdiction over a wide range of related matters with the court opening the insolvency proceedings (*vis attractiva concursus*). As such, they may affect arbitrator's jurisdiction. At the same time, arbitrators are presumably expected to render an award 'enforceable in law. Accordingly, in order to comply with the requirements of arbitration law, certain legal consequences deriving out of *lex fori concursus* should be given effects in arbitration.

De lege ferenda, the provisions that entail invalidity of an arbitration agreement due to insolvency as such should not be given effect internationally, i.e., either in court or arbitration proceedings abroad. It is doubtful whether a provision of this kind genuinely serves the purposes and objectives of insolvency law. On the contrary, it may operate against interests of the insolvency estate and its creditors: both an insolvency practitioner 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.

I. Difficulties with 'characterisation' or 'qualification'

The interface between arbitral and insolvency is in cross-border situations further complicated by multiple factors. Foremostly, there are problems with 'characterisation' or 'qualification' – both in terms of insolvency law and of arbitration law. Particularly problematic appears the 'characterisation' of the consequences/implications of the commencement of insolvency proceedings in terms of arbitration law (e.g., capacity, subject-matter arbitrability, validity of pre-insolvency arbitration agreements), on the one hand, and the application of appropriate provisions of insolvency law on the other. Contradictory conclusions reached by the courts in Switzerland and the UK in the *Syska v Vivendi* case are illustrative.

The Swiss Supreme Court characterised it as a matter of capacity or 'subjective arbitrability'[20]. Generally, the expression 'subjective arbitrability' may refer to both the capacity to enter into arbitration agreements and the capacity to participate in arbitral proceedings. In the case at hand where arbitral proceedings were underway, it is clear that the issue of the capacity to enter into an arbitration agreement was of no consequence. Rather relevant were the provisions on the capacity to commence or participate in pending arbitral proceedings. Instead of relying on provisions on the role of an insolvency practitioner in pending and future legal proceedings, the Swiss Court erroneously applied the subsequently repealed provision of the Polish Insolvency Act invalidating all pre-insolvency arbitration agreements. Consequently, arbitral proceedings pending in Switzerland were definitely 'discontinued' due to intervening insolvency in Poland.

In contrast, the UK courts[21] held that insolvency proceeding in Poland had no relevance in arbitration taking place in London. Although the decision not to give effects to the provision of Polish law on invalidating pre-insolvency arbitration agreements was correct, the UK courts should have applied the provisions on the automatic stay contained in English insolvency laws as they were required under Article 15 EIR 2000 (current Article 18 EIR). This point will be elaborated in the following section.

Thus, the decisions with opposing results were reached in two jurisdictions, whilst in neither of them the provisions on cross border insolvency were correctly applied. This is a strong argument in favour of expressly providing which consequences of opening foreign insolvencies are to be given effects in the 'recognising' state. Thereby the questions of 'characterisation' and conflict of law rules in terms of arbitration law would be redundant.

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

21 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). 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. For an extensive commentary of the present author see Lazić, in Kröll/Mistelis/Perales Viscasillas/Rogers (eds.), 337 (337–363).

II. Nature of action[22]

Difficulties may also be encountered when it is to be determined which of action is pursued by an insolvency practitioner. In contrast to often varying views on the aspects of intersection between arbitration and insolvency, no controversies are encountered with respect to 'avoidance powers' – in civil law jurisdictions often referred to as 'insolvency *actio pauliana*'. It is almost undisputed that an insolvency practitioner cannot be bound by arbitration agreements contained in transactions entered by the debtor within certain period before the opening of insolvency proceeding.[23] The reasons for this unanimity in the comparative theory and practice are rather obvious. Most compelling is the fact that these are statutory causes of action: they are established by insolvency laws which also define the conditions under which certain transactions may be invalidated. Since they derive directly from insolvency laws and may be pursued solely within this context they qualify as true insolvency matters. Besides, they are not causes of actions that can belong to the debtor in the first place and accordingly cannot be those which are 'taken over' by an insolvency practitioner.

What appears problematic is that not all actions aimed at invalidating the debtor's pre-petition transactions are pursued in the exercise of 'avoidance powers' under insolvency law, even though they may be 'labelled' as such. In other words, an insolvency practitioner may establish the claim by relying on the 'insolvency *actio pauliana*' provisions, but the true cause of action is an alleged fraudulent act committed by the debtor's contracting partner. Since this is a true claim arising out of the contract which in the absence of insolvency proceedings can be pursued by the debtor, an insol-

22 Thise section is partially based on the research in an earlier publication, Lazić/Chauchan, in Madaan/Campbell (eds.), 65 (65–89).

23 E.g., in the USA – *Hays & Co. V. Merill Lynch...*, 885 F.2d 1149 (3d Cir. 1989 1153 (holding that '...the trustee's section 544(b) claims are not arbitrable under the arbitration clause, because they are not derivative of the debtor and the trustee is accordingly not bound by the Customer Agreement with respect to them'. (in Australia, *New Cap Reinsurance Corporation Limited v A E Grant & Ors, Lloyd's Syndicate No 991*, [2009] NSWSC 662; in Germany – BGH 17.10.1856, NJW 1956; in the Netherlands – *Rechtbank* Utrecht, 11 August 1993, excerpt in *TvA* 1 (1995), p. 37–37; in Singapore – 11 May 2011, *Larsen Oil and Gas Pte Ltd v Petropod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore**),** [2011] SGCA 21.

vency practitioner should be bound by an arbitration agreement contained in it.[24]

It may appear even more difficult to distinguish a true nature of the claim when an insolvency practitioner files multiple actions in one proceeding – those that are 'inherited' from the debtor and those pursued in the exercise of the 'avoidance powers' under insolvency law. In such cases if the claim is dismissed under the insolvency law, so that transaction does not qualify as an avoidable transaction', the binding effect of an arbitration clause is to be upheld as a matter of principle.[25] Of course, the condition is always that the clause is otherwise valid and that the cause of actions does not have its source in the insolvency law.[26]

Regrettably, there are judgments that deviate from the practice in their own jurisdiction, as well as from undisputed widely accepted views in comparative theory and practice. The decision brought by the UK Hight Court in *Riverrock*[27] is such an example. In litigations in Russia and Cyprus, a bank pursued claims against Riverrock allegedly based on Russian insolvency law, but in fact they were claims to invalidate certain debtor's contracts because Riverrock had allegedly abused the contractual rights. The latter requested the UK court to issue anti-suit injunction to restrain foreign litigations and to refer the parties to arbitration in London as provided in the arbitration clause. In the first part of the reasoning the Hight Court properly doubted that the causes of action belonged to the administrator regardless of the fact that the claims were based on the Russian insolvency law.[28] Such conclusion is not surprising considering that the claims were not pursued by an insolvency practitioner (administrator) in the first place, but by a bank. Most importantly, it may be doubted whether a genuine insolvency proceeding was commenced in Russia.

24 For an appropriate assessment in that respect see, *Nori Holdings Ltd v Bank Otkritie Financial Corporation*, [2018] EWHC 1343. See also, IBA Toolkit on Insolvency and Arbitration, <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

25 How such claims are appropriately distinguished, see *Louis Dreyfus Company Suisse S.A. v International Bank of St. Petersburg* [2021] EWHC 1039 (Comm).

26 See, e.g., decision of the USA Bankruptcy Court in *Dunes Hotel Associates v. Hyatt Corp*., 194 B.R. 967 (Bankr. D.S.Car. 1995), holding that there is no reason to refuse arbitration when all the Bankruptcy Code claims were dismissed, if the arbitration agreement is otherwise enforceable.

27 *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company),* [2020] EWHC 2483 (Comm) judgment of 23 September 2020.

28 Id., paras 50–54.

However, the Court then regrettably qualified the causes of actions as genuine insolvency claims based on the avoidance powers which may be exercised solely by an administrator. Curiously enough, the High Court even made a parallel with English law, holding that under English law such avoidance claims would be a matter of insolvency law. But the Court held that it did not render the claim automatically non-arbitrable under English law as *lex arbitri* and as the law governing the arbitration agreement.[29] This is the most regrettable conclusion and an erroneous and misleading message to arbitration and insolvency specialists alike. The decision in the result is not incorrect, since the claim was clearly not pursued in the exercise of 'avoidance action' under insolvency law. However, the legal argumentation is truly detrimental. Hopefully, this will not be the view followed by the UK courts in a case where a true insolvency proceeding is opened abroad and a proper avoidance action is pursued.

Another example is the decision of the Court of Appeal for British Columbia in *Petrowest*.[30] It concerns another rather uncontroversial issue of the relevance of executory contracts for arbitration. These are debtor's pre-insolvency contracts which have not been fully performed by either party. It is a widely accepted view that the acceptance of the contract by an insolvency practitioner implies the acceptance of an arbitration clause contained therein. If the contract is rejected, the claim becomes a claim of an ordinary non-secured creditor which must be filed in insolvency. If such a claim is contested, there is a verification dispute. There is no uniform approach in comparative law on the arbitrability of verification disputes. As a matter of principle, the view on arbitrability of such disputes seems to prevail, but there may be the need to adjust the conduct of arbitration or a form of an award in some legal systems. In *Petrowest* the Court of Appeal surprisingly confirmed the decision of the first instance court holding an insolvency practitioner unbound by an arbitration clause in an executory contract which he had accepted. Curiously enough in reaching its decision the Court relied on the principle of separability of an arbitration clause. It is unusual indeed to invoke the principle of separability to invalidate an arbitration clause, the principle which serves as means of upholding its

29 Id., paras 74–79.
30 *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 (Court of Appeal for British Columbia).

validity in the first place. Luckily, the Canadian Supreme Court[31] rejected the reasoning on the doctrine of separability, holding that decision was to be made on a case-by-case basis depending on the specific facts at hand. The Court pointed out that a stay may be refused if enforcing an arbitration agreement prevents the orderly and efficient resolution of a dispute. Otherwise, arbitration agreements are enforceable even in the insolvency context. Thus, their enforceability and binding nature are in the discretion of the courts.

In conclusion, even though such exceptional judgments do not present the state of law in a particular jurisdiction or were subsequently overruled by their own courts in the last instance, they certainly further complicate the understanding of the interaction between insolvency and arbitration by both arbitrators and insolvency practitioners. It is hardly conceivable that the reasoning of the *Riverroc*k judgment on the allegedly binding nature in connection with 'insolvency *actio pauliana*' would have any relevance in future cases when insolvency proceedings are opened in the UK. It is to be hoped that the UK courts also will not follow the legal reasoning in in the *Riverrock* judgment in cases of genuine foreign insolvency proceedings. Given that England is a popular arbitration venue, and in light of the recent ruling of the UK courts accepting jurisdiction to issue anti-suit injunctions even if the seat is not in England, the UK courts are likely to encounter with increasing frequency the challenge of addressing the interplay between insolvency and arbitration. Most importantly, anti-suit injunctions issued by the UK courts in support of arbitration may affect proceedings before the courts of EU Member States brought by an insolvency practitioner.

III. Inconsistency in interpreting the interface between insolvency and arbitration in domestic and cross border situations

The judgment of the UK courts in *Syska v Vivendi* is an example of inconsistent treatment of domestic and foreign insolvency proceedings. It is clear that the automatic stay is ensured when corporate liquidation (winding up) and administration proceeding are opened in England.

31 *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (Supreme Court of Canada).

With respect to corporate liquidation or winding-up by the courts, Section 130(2) of the 1986 English Insolvency Act[32] is relevant. 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.'[33] However, the courts held that no such provision were to be found in English law.

More importantly, already in an earlier judgment,[34] the UK court had refused to apply the stay in litigation pending in the UK when insolvency was opened in Germany, despite Article 15 of 2000 EIR (current Art. 18 of the revised EIR). The latter provides for the applicability of *lex fori* to pending lawsuits so that in the case at hand the question was to be answered as a matter of English law. Just as under German law, the relevant provision of Article 130(2) of the 1986 English Insolvency Act provides that pending lawsuits are to be stayed. The Court held, however, that Article 130(2) of the 1986 Insolvency Act was inapplicable to foreign insolvency proceedings in the country of the debtor.[35] Such reasoning finds no support

32 Art. 130(2) provides that 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.

33 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.

34 *Mazur Media Ltd v. Mazur Media GmbH* (2005) 1 Lloyd's Rep. 41.

35 *Id.*, in paras 67 and 68 the Court reasoned 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.

in the text of Article 15, it contradicts the Virgos Schmidt Report[36] and deviates from decisions brought in other EU Member States.[37]

After the judgment in *Mazur Media*, has been issued, in an arbitration taking place in England, the arbitral tribunal continued stayed arbitral proceeding and noted 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] *fallimento* 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.'[38]

Thus, both in *Mazur Media* and *Syska*, the UK courts held that the automatic stay was inapplicable in case of foreign insolvency proceedings despite Article 15 EIR 2000 clearly providing otherwise. These judgments illustrate that the effects of foreign insolvency proceedings are not necessarily ensured even when the provisions on the recognition of foreign insolvencies are in place, such as those contained in the EIR. In other words, the purpose of the Insolvency Regulation may be circumvented by different interpretations in various Member States. In addition, it clearly illustrates that the approach taken in the Insolvency Regulation, in particular the dis-

36 Virgos/Schmit, which in paragraph 92(2) relating to the exceptions to the general rule on conflicts of law in Article 4, 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).

37 See e.g., decisions brought by 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. The latter held that 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*. See also, Moss/Fletcher/Isaacs, 302 para 8.249.

38 ICC arbitration 12421, Final Award in case no. 12421/MS of 2005, excerpt in XXXIII *Yearbook Commercial Arbitration* (2008) 102–117.

tinction between pending and non-pending proceedings, seriously affects the uniformity of its application in different Member States.

As it will be explained *infra*, under 'EU – revising the EIR', the Regulation needs to be revised so as to clarify the extent of jurisdiction under Article 6, to alter the current provision of Article 18 and to address in a more precise manner the effects and impact of insolvency proceedings on arbitration.

D. Suggestions for improvements – general remarks

General remarks on the relevance of laws on cross border insolvency and some propositions for improvements as a matter of principle are followed by remarks on the need to revise the EIR and by comments on the initiative within the UNCITRAL Working Group V on applicable law in insolvency proceedings.

The states are generally encouraged to enact laws on recognition of foreign insolvencies. It would enhance cooperation at the international level in improving the efficiency of insolvency proceedings, in preventing individual actions and enforcements of creditors. On a proper application of the EIR one should expect that the courts in EU Member States would decline the enforcement of the award by applying the Insolvency Regulation. However, 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. It is therefore crucial that such legislation is in place based either on an 'international' legal instrument or on a national law.

Indeed, when drafting such legislation, the states may opt for implementing the provision of UNCITRAL Model Law on Cross Border Insolvency (MLCBI). In general, it is more efficient to provide direct solutions whenever possible, rather than using a conflict of law method. Article 20 of UNCITRAL Model Law can be mentioned as an example. Differently from the approach used in Article 18 EIR, it provides for an automatic stay of all legal proceedings against a debtor in insolvency. The stay is meant for both pending proceedings and those to be initiated and applies to arbitral proceedings, as well.[39]

In general, the 'automatic stay' of legal actions for payment against the insolvency estate – the actions of ordinary, non-secured, non-preferred creditors, is provided in national insolvency laws almost without exception.[40] Since it appears the least controversial in comparative insolvency laws it is more efficient to provide for a stay directly in an international legal instrument rather than using a conflict of law rule. On the one hand, the latter is essentially irrelevant considering that identical or substantially similar consequences in this respect are provided in majority of national laws. Nevertheless, it may appear inefficient as failing to serve its purpose, either by an incorrect application of foreign insolvency law (in the case if the *lex fori concursus* governs) or an omission to apply corresponding provisions of domestic law if the *lex fori processus* governs. The UK case law presents a clear illustration of inefficiency of the conflicts of law rule provided in the EIR.

However, even though the 'direct method' employed in Article 20 MLCBI is generally preferred approach, MLCBI does not deal with all issues of private international law. For this reason, UNCITRAL put the topic 'Applicable law in insolvency proceedings' on its agenda and has been discussing the text within the Working group V on Insolvency. The most recent proposals brought up at the sixty sixth session 12–16 May 2025 will be addressed *infra*, under 'UNCITRAL Working Group V on applicable law to insolvency proceedings'.

39 Article 20. Reads: 'Effects of recognition of a foreign main proceeding
Upon recognition of a foreign proceeding that is a foreign main proceeding:
Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed
Execution against the debtor's assets is stayed; and
The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.' On difficulties that may be encountered to enforce the automatic stay, see note 145 of the Guide to Enactment.

40 See both National Reports and the consolidated Report on IBA Toolkit on Insolvency and Arbitration <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

I. EU – revising the EIR

Even though such a direct approach may be preferred as a matter of principle, the views may differ on whether it would be acceptable to the EU legislator when revising Article 18 EIR. In other words, it may be questioned whether such a way can be aligned with the conflict of laws approach used in other provisions on the applicable law.

Even if this method is not considered as the preferred way to proceed, the current provision of Article 18 should be revised, nevertheless. The examples in the UK case law illustrate that the present reference to *lex fori* raises doubts on an analogous application in case of foreign insolvency proceedings. In order to ensure the effectiveness of the recognition of insolvency proceedings in all EU Member States, the applicability of *lex fori concursus* should be provided also regarding the impact on pending lawsuits and arbitrations. Thus, it will align the applicability of the same law (*lex fori concursus*) to pending and future legal proceedings. Further it will be the same law governing the role, position and authorities of insolvency practitioners to take over pending legal proceedings and to initiate or defend new ones. Since these provisions are inextricably linked, the current split between *lex fori concursus* and *lex fori* in the EIR is inappropriate. This is also appropriate in terms of ensuring compliance with the due process requirement both in litigation and arbitration, as an insolvency practitioner will have to comply with the provisions of *lex fori concursus* with respect to his or her duties and obligations. Consequently, the exception provided under Article 18 for pending lawsuits and arbitrations should be omitted, so that all legal proceedings would be governed by *lex fori concursus* under Article 7.

The UK case law illustrates difficulties that may be encountered by national courts when they are required to analogously apply the provisions of domestic law on the impact on the pending legal proceedings. The purpose of the Regulation may be undermined, if the *lex fori processus* does not provide for a stay in reorganisation proceedings, whilst the stay is imposed under *lex fori concursus*. Accordingly, the stay would not be granted even though the insolvency proceeding does fall within the scope of Regulation and is properly listed in Annex A.

In essence, the distinction between the *lex fori concursus* and the *lex fori processus* in relation to both pending and prospective legal proceedings makes little, if any, practical difference. This is because the principle that ordinary, non-secured creditors are precluded from pursuing individual actions is widely accepted across the Member States, at least in the context of liquidation proceedings. The Court of Justice of the European Union (CJEU) has emphasised that this acceptance follows 'from the principles common to the procedural laws of the Member States'.[41] Accordingly, in practice, a stay is highly likely to be granted under both the *lex concursus* and the *lex fori processus*. Nevertheless, the existence of either a direct rule providing for an automatic stay or a rule expressly mandating the application of the *lex fori concursus* would remove any doubt for the court of the Member State in which litigation or arbitration is pending as to whether a stay should be granted. In other words, such courts would be spared the difficulties faced by the UK courts in assessing whether the provisions of their own national insolvency law apply in cases involving foreign insolvency proceedings.

In addition to Article 18, the rule on jurisdiction in Article 6 needs revising. The current most confusing and inconsistent state of law created by the CJEU jurisprudence urges for legislative action, as the present author explained in her previous publications.[42] In particular, the CJEU case law inappropriately deals with the interaction between the Brussels Ibis and Insolvency Regulation, i.e., with respect to the extent of the 'insolvency exception' under Article 1(2)(b) of the Brussels Ibis Regulation. Perhaps some detrimental consequences of the CJEU rulings could be remedied when revising the Brussels Ibis Regulation, most likely in the Recitals. However, since the main source of the current confusion lies in the interpretation and application of the vague notions referred to in Article 6 of the EIR 2015, revising Article 6 appears indispensable. Although the revision is crucial with respect to litigations and consequently delineating the scope of application between the EIR and Brussels Ibis, it does have bearing on arbitrations, as well. If a certain action is characterised as a matter of insolvency law, so as to be 'attracted' by the jurisdiction of a court where insolvency proceeding is opened (*vis attractiva concursus*), it may be a point worth considering in arbitration, too. Namely, it may primarily have relevance regarding the

41 First Chamber in C-294/02 of 17 March 2005 (*Commission of the EC v AMI Semiconductor Belgium BVBA et al.*).

42 On the analysis of the CJEU in that respect see Lazić/Mankowski, p. 41, paras 1.117 – 1.120 and p. 133–134, paras. 2.177 – 2.181. The comment of the most recent CJEU ruling on the interaction between the Brussels Ibis and Insolvency Regulations see, Lazić, in *Revue de Droit Commercial Belge*, 2025, available on conflictoflaws.net (https://conflictoflaws.net/News/2025/08/2025-Note-rdc_tbh2025_2p308.pdf).

subject-matter arbitrability and consequently may have impact on the jurisdiction of arbitrators.[43] Even if there is no substantial relevance for the arbitrators' jurisdiction, insolvency law may influence the manner in which an arbitral proceeding is to be conducted or the form in which an arbitral award is to be rendered.[44]

Last but not least, the complex interaction between insolvency and arbitration is not resolved by mere reference to pending arbitrations, as has been discussed in the first parts of this contribution. Indeed, it may be difficult to include all aspects in the normative part of the Insolvency Regulation. Yet it may be appropriate to provide useful guidance in the Recitals so as to address most likely points of interaction and to clarify at least those points with respect to which there are no substantial differences in the laws of the EU Member States. The necessity of such clarifications would be enhanced if the current dichotomy between pending and non-pending legal proceedings would be retained in Article 18. The disadvantages of the applicability of *lex fori processus* will be detailed *infra*, under 'UNCITRAL Working Group V on applicable law to insolvency proceedings.'

II. Cross-border insolvency – possible/future EU legislation on insolvency proceedings in non-EU states

If from the constitutional point of view the EU legislator is entitled to adopt legislation with respect to effects with non-EU countries, a similar line

43 In case of in case of a broad *vis attractiva concursus* and/or an approach based on the discretion of the insolvency court to refer a dispute to arbitration such as in the USA (at least for 'core' maters) and Canada. On the state of law in the USA, see IBA Toolkit on Insolvency and Arbitration, Allan L. Gropper, Walsh, Th. W., National Report of the United States of America, p. 8 <https://www.ibanet.org/MediaHandler?id=8A157F9D-7590-4CF4-B7F4-EB2CDDF3AA20>; for Canada, a discretionary power of the court having jurisdiction in insolvency was confirmed by the Canadian Supreme Court *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41 (Supreme Court of Canada).

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.*); *Cour d'appel de Paris*, 27 Febr. 1992, *Rev. Arb.* (1992), p. 590 – *Sohm*); *Cour de cassation*, First Civil Chamber, 6 May 2009, no. 509, available online at <www.courdecassation.fr>.

of reasoning should be followed when dealing with the interface between arbitration and insolvency.

III. UNCITRAL Working Group V on applicable law to insolvency proceedings

UNCITRAL has been discussing a detailed regulatory framework on the applicable law in insolvency, which would cover a wide range of issues. The present contribution will address the 'Applicable law in insolvency proceedings Note by the Secretariat' of the Sixty-sixth session held in New York, 12–16 May 2025 – A/CN.9/WG.V/WP.202[45] and the Report of Working Group V (Insolvency Law) on the work of its sixty-sixth session (New York, 12–16 May 2025) – A/CN.9/1203,[46] with no reference to earlier drafts.

The draft legislation provides for *lex fori concursus* as the main law governing all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects, whereby an extensive non-exclusive list of topics has been proposed. It is to be met by approval that the same law is to govern '(d) Protection and preservation of the insolvency estate, including application of a stay of proceedings, and, if a stay of proceedings applies, its scope, duration, modification and termination.'[47] In the Draft Commentary it clarifies that the stay includes arbitration in a very similar wording as used in the Guide to Enactment of the MLCBI on the note to Article 20.[48] Besides, there is a reference to arbitration agreements under 'h) treatment of contracts…'.[49] However, it appears that the views were divided on whether such an express reference to arbitration agreement should be kept, which was to be further discussed within the Working group.[50]

The current wording under (d) and clarifications that it also applies to arbitration should be maintained. Regrettably, however, it appears that

45 Report on the Sixty-sixth session New York, 12–16 May 2025 A/CN.9/WG.V/WP.202 (hereinafter: Secretariat Note A/CN.9/WG.V/WP.202) <https://docs.un.org/en/A/CN.9/WG.V/WP.202>.

46 Report of Working Group V (Insolvency Law) on the work of its sixty-sixth session (New York, 12–16 May 2025) (hereinafter: Working Group Report A/CN.9/1203) <https://docs.un.org/en/A/CN.9/1203>.

47 Secretariat Note A/CN.9/WG.V/WP.202, p. 13.

48 *Ibid.*, pp. 16–17.

49 Comments under points 18 and 19 on p. 19.

50 Ibid., footnotes 79 and 80.

proposals were put forward to treat arbitration differently from litigations. The following provision was suggested:

> 'Notwithstanding paragraph XX of the legislative provision, the effects of the opening of insolvency proceedings on pending arbitral proceedings shall be governed by the *lex loci arbitri*, provided that such law does not substantially disadvantage when compared with the *lex fori concursus* as regards:
>
> (i) A temporary stay of the pending arbitral proceedings for a reasonable period of time; and
> (ii) The right of the insolvency practitioner to intervene and to be heard in the pending arbitral proceedings.'

In the view of the present author, providing for a stay expressly as is done in Article 20 MLCBI should be preferred over a conflict of laws rule. Thereby, the consistency amongst UNCITRAL legislative texts would be ensured. If a conflict of laws rule is chosen, it should certainly be *lex fori concursus*.

It is essential to maintain the same 'treatment' of litigation and arbitration. First of all, this is the approach accepted in the wide majority of legal systems to provide for the stay of all legal proceedings, including arbitration. Moreover, there are usually no express provisions on the effects of insolvency on arbitration: in majority of legal systems the interface is perceived thought an analogous application of provisions of insolvency law that relate to court proceedings. Accepting a different 'treatment' as suggested in the above-mentioned proposal would not be in line with such a majority view.

As a matter of principle, providing for *lex fori processus* for pending litigations and arbitrations as is the case under EIR is an artificial divide between pending and new proceedings. As already mentioned, the stay of individual actions of creditors extends to both, i.e., it prevents both their commencement and continuation. It is not easy to explain the rationale behind applying the provisions on the effects of insolvency law of the country in which no insolvency proceedings are opened. The only explicable reason could be to refer to the provisions of the stay contained in the law of civil procedure, i.e., it is self-explanatory that the courts would apply in that respect their own procedural law. However, this has little connection with giving effects to insolvency proceedings: an acceptance of the effects of foreign insolvency proceedings by no means alters the obligation of the courts to apply their own procedural rules when giving the effects to foreign insolvency proceedings. In other words, the stay is the effect and when recognising it the court would apply national procedural rules.

However, this line of argumentation does not necessarily apply to arbitration, as arbitrators do not apply procedural rules of the country of the seat other than those relating to arbitration. Indeed, the provisions on arbitration may be contained in a Code of Civil Procedure, but other provisions are unrelated to arbitration and accordingly inapplicable in arbitration, including those on stay and continuation of litigations.

The wording *lex loci arbitri* in the above-mentioned proposal is most unfortunate, indeed. First of all, lex *arbitr*i points to the relevant law on arbitration in a particular legal system. As a matter of principle, these provisions seldom if ever mention insolvency. An example can be found in French Law on Arbitration. The provision applicable to domestic arbitration refers to certain provisions of the Code of Civil Procedure which impose a stay in case of the commencement of insolvency proceedings. However, this provision is inapplicable in the context of 'international' arbitration. Consequently, a reference to '*lex arbitri*' would result in a legal gap, as provisions on insolvency are usually not found in any arbitration law. In that respect the wording used in EIR is more appropriate as it refers to the 'law' of the country in which proceedings are pending since it includes the provisions of insolvency law. As such, it is broader than the wording '*lex arbitri*'.

Finally, it may be questioned why the expression '*lex <u>loci</u> arbitri*' is used instead of '*lex arbitri*'. Pointing to the 'seat' is unnecessary considering that majority of the laws on arbitration follow the so-called 'territoriality approach', i.e. provide for its applicability in principle when the seat is in that country, with some notable exceptions, such as the provisions on the enforcement of arbitral awards. It is true that there are examples of arbitration laws that accept two criteria to determine its applicability – seat and the 'applicable law' criteria.[51] Considering that they are so exceptional and that there is no relevance of the 'applicable law' criterion in this context, there is no need to distinguish it, if this is the rationale behind the use of the wording '*lex loci arbitri*.'

51 See e.g., Article 47 of the Tunisian Arbitration Act ('…the provisions of this law apply only if the place of arbitration is in the territory of Tunisia, or only if either the parties or the arbitral tribunal have chosen these provisions); see also, Article 1 of the Egyptian Arbitration Act; Chapter 684 of the 2005 Florida Arbitration Law. French New Code of Civil Procedure in Art. 1505 provides for the assistance of the President of the *Tribunal de grande instance* of Paris not only when the seat is in France.

The preference for a 'direct' approach in regulating the interface should be reiterated. Even if it may appear difficult to address this issue in the normative part, it would be desirable if the commentary to the text would provide some clarity at least where there are no substantial differences between legal systems. In addition to the stay of individual actions of creditors, a similar uniformity of approaches can be observed with respect to the avoidance powers of an insolvency practitioner to invalidate certain detrimental transactions entered by the debtor during certain period before opening of insolvency proceedings. Such actions are in civil law jurisdiction often referred to as insolvency *actio pauliana*. Even though the terminology varies amongst different legal systems, as well as the periods of time prescribed, it is held almost without exception that pre-insolvency agreements cannot bind a liquidator or a trustee when pursuing such actions. It would be most useful for the judiciary and legal practitioners to make this transparent in any regulation addressing the interface between arbitration and insolvency proceedings.

As explained *supra*, problems may be encountered when an insolvency practitioner 'combines' in one and the same action the claims based on detrimental actions of the debtor provided under insolvency law with allegations of fraud committed by a debtor's contractual party. Cleary the latter should be distinguished from 'insolvency *actio pauliana*' proper when assessing the binding nature of arbitration agreements. Since these are the claims based on pre-insolvency contractual obligations of the debtor, an arbitration clause contained therein binds an insolvency practitioner. Thus, when such 'combined' claims are submitted in arbitration or are put forward in court proceedings related to arbitration they should be distinguished and separated from insolvency *actio pauliana* proper. Thereby the binding effect is to be maintained with respect to the former and denied as to the latter.

In a similar vein, a direct regulation on the executory contracts may prove useful: firstly, an arbitration agreement when no arbitration is pending cannot be considered as an executory contract, and secondly acceptance of the main contract entails acceptance of the arbitration clause. Rejection of the main contract results in a claim for damages which has to be filed in the insolvency proceeding – if the claim is contested, it results in a verification dispute. The binding nature of arbitration agreements in such disputes should be governed by *lex fori concursus*.

E. Conclusions

Generally complex matters pertaining to the interaction between insolvency and arbitration are even more complicated in cross-border situations. Particular problems may be encountered in connection with characterisation both in terms of insolvency and arbitration law. The conflict of law rules in arbitration are of no assistance if the insolvency proceeding is opened in a country the law of which is not applicable according to the conflict of law rules in the country in which arbitration or court proceedings related to arbitration are taking place, e.g., if the law applicable to 'objective arbitrability' or 'validity of an arbitration agreement' point to a different legal system. In addition, there may be double standards used by the judiciary when facing the intervening insolvency in domestic and in cross-border cases.

It is essential that regulating cross border insolvency becomes part of the legislative framework in many jurisdictions so that the effects of true foreign insolvency proceedings are recognised. This is an important aspect not only within the intersection between arbitration and insolvency, but more generally with the view of enhancing cooperation in cross border insolvencies.

Implementation of the MLCBI may resolve a number of issues, in particular the suspension of individual actions under Article 20. Yet, a more comprehensive legal framework containing a complete set of rules is needed, which would include specific issues and cover various points of interaction between arbitration and insolvency. Moreover, even when there is legislation on cross-border insolvency in place, the recognition of the effects abroad is not necessarily ensured. The decisions of the UK courts illustrate the need to revise EIR. In particular Article 18 is to be omitted so that there will be no division between pending and future legal proceedings. Accordingly, the effects of both should be governed by the *lex fori concursus*.

The best approach would be to employ a 'direct method' without using conflict of law rules, as has been done in Article 20 MLCBI. The fact that there are no substantial divergencies amongst national laws with respect to certain points of interaction (e.g., a non-binding nature of pre-insolvency arbitration agreements concerning avoidance transactions, the principle of preclusion of individual actions of non-secured creditors, as well as similarities in many respects regarding the executory contracts) may facilitate the negotiations and drafting process within the UNCITRAL Working Group on the applicable law in insolvency. This would be most efficient way to proceed. Should that appear unacceptable considering that the conflict of laws approach is the method generally used, the provisions on both pending legal proceedings and those to be initiated are to be governed by *lex for concursus*. Indeed, the same provision should apply to arbitral proceedings: an express reference to this effect is preferred either in the normative part or in the commentary, just as it has been done in the MLCBI. Any other solution would be inconsistent with the MLCBI and would therefore be likely to undermine adherence to the future UNCITRAL legislation by those States that have implemented the MLCBI.

Bibliography

Bamforth/Kushal (eds), Arbitration and Insolvency, Cheltenham/Northampton, 2023

Grusic, Are English Courts Becoming the World's Arbitral Policeman?, in EAPIL blog, 24 October 2023 <https://eapil.org/2023/10/24/are-english-courts-becoming-the-worlds-arbitral-policeman/>

Lazić, 'Note on CJEU Judgment C-394/22 Oilchart International NV v O.W. Bunker Nederland BV, ING Bank NV', in Revue de Droit Commercial Belge, 2025, available on conflictoflaws.net <https://conflictoflaws.net/News/2025/08/2025-Note-rdc_tbh2025_2p308.pdf>.

Lazić, Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should be Given Effect in Arbitration?, in Kröll/Mistelis/Perales Viscasillas/Rogers (eds.), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Liber Amicorum Eric Bergsten, The Hague/London/Boston, 2011, 337.

Lazić, Insolvency Proceedings and Commercial Arbitration, The Hague/London/Boston, 1999, pp. 381

Lazić, Issues Arising from Party Insolvency during the course of Ongoing Arbitral Proceedings: International Perspectives' in Bamforth/Gandhi (eds.), Arbitration and Insolvency, Cheltenham/Northampton, 2024

Lazić/ Chauchan, On (Non) Binding Nature of Pre-insolvency Arbitration Agreements When Avoiding an Underlying Transaction, Executory Contracts, and Anti-suit Injunctions in Support of Arbitration Against Foreign Insolvency Debtors: News from England and Canada, in Madaan/Campbell (eds.), Crossroads of Insolvency and Arbitration, Comparative Law Yearbook of International Business, Special Issue, Alphen an den Rijn, 2022

Lazić/Mankowski, Brussels I-bis Regulation – Interpretation and Implementation, Cheltenham/Northampton, 2023.

Madaan, I. and Campbell, Ch. (eds.), Crossroads of Insolvency and Arbitration, Comparative Law Yearbook of International Business, Special Issue, The Hague/London/Boston, 2022

Moss/Fletcher/Isaacs, The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide, 2nd edition, Oxford, 2009

Virgos/Schmit, Report on the Convention on Insolvency Proceedings, 6500/1/96, REV 1 DRS 8 (CFC)